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Brendan S. Crowley

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# RESOLVING THE CHIEF ILLINIWEK DEBATE: NAVIGATING THE GRAY AREA BETWEEN COURTS OF LAW AND THE COURT OF PUBLIC OPINION

*Brendan S. Crowley\**

## INTRODUCTION

“It has ever been the way of the white men in relation to the Indian, first, to sentimentalize him as a monster until he has been killed off, and second to sentimentalize him in retrospect as the noble savage.”

-- James Gray, “The Illinois”, 1940

In recent years, American colleges and universities have become increasingly cognizant of the debate surrounding Indian mascots.<sup>1</sup> Since Stanford University changed its name from “Indians” to “Cardinal” in the 1970s, sixteen other institutions have changed mascots that offended or inaccurately depicted Native Americans.<sup>2</sup> These universities have consciously and freely decided to eliminate Indian mascots. Others, like the Florida State University Seminoles, have created an Indian mascot in collaboration with the tribe upon whom their mascot is based. Still others, like the University of Illinois, University of North Dakota, and San Diego State University, have steadfastly refused to cave to political pressures and remove their controversial mascots.

This article will focus primarily on the debate surrounding Chief Illiniwek at the University of Illinois (“University”). From humble beginnings amidst the best of intentions, Chief Illiniwek has become perhaps the most controversial mascot in all of American sports. Part I of this article will trace the history of the Illinois tribes, the evolution of Chief Illiniwek, and the debate that has been raging on the Illinois campus since 1989.

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\* J.D. Candidate, DePaul University College of Law, 2005; B.S. Psychology, University of Illinois, 2000.

<sup>1</sup> Jeff Dolley, *The Four R's: Use of Indian Mascots in Educational Facilities*, 32 J.L. & EDUC. 21, n.6 (2003). In an article discussing issues of Indian mascots, the author inquired as to the proper usage of the terms “Native American” and “Indian”. The American Indian Law Review considered the use of “Indian” to be appropriate in the context of Mr. Dolley’s article. Typically, “Native American” is used as a noun. “Indian” is used as an adjective. This article bears upon similar issues and will follow the same course as the Dolley article. Thus, mascots will be referred to as “Indian”, while references to individuals or groups of people will be as “Native Americans”.

<sup>2</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/VII.html](http://www.uiuc.edu/dialogue/report_files/VII.html) (last visited Jan. 24, 2004). The list of schools includes Dartmouth College (“Indians” to “Big Green”), the University of Oklahoma (retired “Little Red” mascot), and Miami of Ohio (“Redskins” to “Redhawks”).

Part II of this article will analyze *Crue v. Aiken*, in which the University went to great lengths to prohibit anti-Chief speech during National Collegiate Athletic Association (“NCAA”) recruitment periods. *Crue* sheds light on the need for clarity in NCAA rules. This is particularly true in regard to their extremely limited application to students and faculty, as well as to a limited group of individuals otherwise subject to the NCAA rules. Part II also shows that the First Amendment is not a panacea. While free speech was preserved to protect the interests at stake in *Crue v. Aiken*, it cannot also be employed to eradicate Indian mascots. An analysis of the “pedagogical concern doctrine” will indicate that some extensions of First Amendment doctrine are simply not worth their attendant costs to freedom of speech. As a result, the eradication of Indian mascots must take place under the sweeping power of the NCAA, or in the court of public opinion.

Trademark law, once a stranger to the Indian mascot issue, enjoyed a brief stay as savior for those opposed to Indian mascots. Part III will analyze the impact of the *Harjo III* decision on efforts to combat Indian mascots by way of trademark cancellation suits.<sup>3</sup> The *Harjo* Court ultimately reversed factual findings of the Trademark Trial and Appeals Board (“TTAB”), which led to a reversal of cancellation of trademarks owned by the National Football League’s (“NFL”) Washington Redskins. Though the case of Chief Illiniwek may be distinguishable in some aspects, defenses utilized in *Harjo III* make it highly unlikely that trademarks for organizations with Indian mascots will be cancelled in the future. Thus, First Amendment and trademark claims by opponents of Indian mascots may not be successful in a court of law.

Despite the shortcomings of adversarial legal proceedings, trademark law may still provide a means by which Indian mascots may be recast in a positive light and inure to the benefit of both their supporters and opponents. Part IV will apply the work of Professor Gavin

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<sup>3</sup> *Pro-Football, Inc. v. Harjo*, 284 F.Supp.2d 96 (D.C. Cir. 2003).

Clarkson to the Chief Illiniwek debate. It is hoped that application of the Clarkson study will affect a compromise in what has proven to be a protracted and highly divisive dispute. Creating value by collaborating on newly developed trademark images could serve as a catalyst to bridge the conceptual gap between perceptions of Native Americans and the reality of who Native Americans are. These trademarked images will become tangible assets, weapons of mass education that could bring an end to a debate that threatens to bring disrepute to some of our nation's finest universities.

## I. HISTORY OF THE CHIEF ILLINIWEK DEBATE

### *A. Birth of a Controversial Figure*

As a starting point, it is essential to explore the history of the Illini tribe, the evolution of Chief Illiniwek, and the controversy surrounding use of the Chief Illiniwek mascot. The Illini tribes were a loosely affiliated group of tribes bound by their common language, Algonquin.<sup>4</sup> The boundaries of the area in which the Illini tribes lived were the Ohio River to the south, the modern Illinois-Wisconsin border to the north, the Wabash River to the east, and just across the Mississippi into eastern Iowa to the west.<sup>5</sup> The Illini tribes subsisted on hunting, fishing, gathering, and farming.<sup>6</sup> After initial contact with European explorers in the late 17<sup>th</sup> century, a substantial portion of the tribal membership was lost to disease and intertribal warfare, largely at the hands of the Dakota Sioux and Iroquois tribes.<sup>7</sup> These attacks were followed by a migration of the Illini tribes to

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<sup>4</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/III.html](http://www.uiuc.edu/dialogue/report_files/III.html) (last visited Jan. 24, 2004). These tribes included, but were not limited to, the Peoria, Tamaroa, Metchigamea, Kaskaskia, and Cahokia.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

the Illinois River Valley, where they developed an alliance with the French and the Americans.<sup>8</sup> This alliance proved disastrous, as the French ceded their territories to the British after the Revolution and the Americans failed to protect the Illini when attacked by British-supported groups.<sup>9</sup>

The United States adopted a policy of removal for Indian tribes in the early nineteenth century, which resulted in the forced relocation of tribes situated east of the Mississippi River.<sup>10</sup> Starting in the 1830s, the Illini were forced west of the Mississippi River to Missouri, then to Kansas, and finally to Oklahoma, where the Illini still reside, united today as the Peoria tribe.<sup>11</sup>

In 1926, nearly a century after the removal of the Peoria tribe from the Illinois River Valley, the assistant band director at the University of Illinois proposed the idea of having an Indian dance at halftime of the upcoming Illinois-Pennsylvania football game.<sup>12</sup> An Illinois student with an interest in Indian folklore named Lester Leutwiler was selected to perform in his homemade costume of turkey feathers that featured a war bonnet.<sup>13</sup> The name “Illiniwek” was selected contemporaneously to the creation of the dance by Illinois football coach Bob Zuppke.<sup>14</sup>

In the late 1920s, the University of Illinois adopted a new Chief Illiniwek costume. A student named A. Webber Borchers visited a reservation inhabited by the Dakota Sioux, the former enemy of the Illini tribes, in South Dakota. The purpose of the trip was to collaborate on a design for the costume.<sup>15</sup> Borchers sought out the Sioux tribe primarily because their dramatic war bonnets

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<sup>8</sup> *Id.*

<sup>9</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/III.html](http://www.uiuc.edu/dialogue/report_files/III.html) (last visited Jan. 24, 2004).

<sup>10</sup> *Id.*

<sup>11</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/III.html](http://www.uiuc.edu/dialogue/report_files/III.html) (last visited Jan. 24, 2004), *supra* note 5. It should be noted that a small number of Tamaroa and Metchigamea are still located in the Illinois River Valley region. Roughly 0.2% of Illinois residents identify themselves as American Indian, with no reference to tribal ancestry. The number of Native American students at the University of Illinois is also roughly 0.2% of the student population.

<sup>12</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/IV.html](http://www.uiuc.edu/dialogue/report_files/IV.html) (last visited Jan. 24, 2004).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* “Illiniwek” is a word taken from the Algonquin language that refers to the complete human being. “Illiniwek” is one who is composed of strength, agility, intellect, and human spirit.

<sup>15</sup> *Id.*

possessed flair uncharacteristic of the Indians indigenous to Illinois.<sup>16</sup> The costume created by Borchers and the Sioux Indians was presented in New York at the Illinois-Army game in 1930; it has endured several modifications since that time, but is still in use at all Illinois home football and men's basketball games.<sup>17</sup>

The dance performed by Chief Illiniwek is part of a performance known to students and alumni as the "Three In One".<sup>18</sup> According to a recent alumnus who portrayed Chief Illiniwek, the style of dance used in halftime performances is known as "fancy dancing".<sup>19</sup> This style of dance was created as a means of entertaining tourists that visited reservations in the 1920s and was utilized to present non-ceremonial features of tribal culture.<sup>20</sup> Fancy dancing is characterized by the use of colorful costumes and is a considerably faster style of dance than traditional Indian dances. It is often performed without the aid of choreography and may include the use of back flips and splits.<sup>21</sup> The type of fancy dancing employed by Chief Illiniwek in the "Three In One" is a derivative of modern fancy dancing that employs a double step, very intricate footwork, and spinning movements.<sup>22</sup>

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<sup>16</sup> *Id.* Borchers was also concerned about the costume because the men of the Illini tribes shaved the sides of their heads, leaving only a "scalplock" on top. Borchers was afraid that students portraying Chief Illiniwek wouldn't want to wear their hair in such a fashion. It is worth noting that, at the end of his visit to the Sioux reservation, Borchers was inducted as an honorary member of the tribe.

<sup>17</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/IV.html](http://www.uiuc.edu/dialogue/report_files/IV.html) (last visited Jan. 24, 2004).

<sup>18</sup> *Id.* The "Three In One" consists of three songs. The first is called "Pride of the Illini" and is performed while the Marching Illini band marches toward the north end zone in an "I" formation. This song carries a traditional marching beat. Chief Illiniwek then weaves his way through the band and emerges at midfield as the band spreads out into an "I-L-L-I-N-I" formation and performs his dance to the tune of the second song, "March of the Illini", which carries a tom-tom beat. At the conclusion of the dance, the Chief stands at midfield with his arms folded across his chest as the fans sing "Hail to the Orange", the university alma mater. At the conclusion of "Hail to the Orange", Chief Illiniwek exits the field with the band as "March of the Illini" is being played.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Fancy dancing competitions are fairly common and often present the opportunity for dancers to win cash prizes.

<sup>22</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/IV.html](http://www.uiuc.edu/dialogue/report_files/IV.html) (last visited Jan. 24, 2004).

In addition to occupying a space at the heart of University of Illinois sporting events, the likeness of Chief Illiniwek and other Indian themes have held a prominent place on campus. Before the controversy surrounding Chief Illiniwek's continuation became a campus mainstay in the late 1980s, the use of the Chief and Indian themes were common in honorary societies and on officially licensed merchandise.<sup>23</sup> As a result of the ongoing debate about the propriety of Chief Illiniwek, his presence within the University community has been gradually reduced, though by no means eliminated.

### *B. Calling for the Removal of Chief Illiniwek*

Public disapproval of Chief Illiniwek seems to have first appeared on the University of Illinois campus in 1975, when Citizens for the American Indian Movement ("AIM") protested that the mascot degraded Indians and exhibited the ignorance of the white race.<sup>24</sup> AIM criticized Chief Illiniwek and his halftime performances as an inauthentic amalgamation of different tribal cultures. AIM wrote, "The Indians within the Illinois area are of a different tribal culture. The idea of symbols from several different tribes mashed together angers Indians. They do not want their individual tribal customs combined and distorted, but want their traditions to remain separate and unique."<sup>25</sup> As will be discussed below, the notion of tribal sovereignty and lack of authenticity of Chief Illiniwek are recurring problems raised in the ongoing debate. These themes occupy the position of both a source of the debate and an integral piece of a possible solution.

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<sup>23</sup> *Id.* *The Chief Illiniwek Dialogue Report* cites several examples. Donations to the Fighting Illini Scholarship Fund are broken into divisions named the Tomahawk Club, Brave Club, Warrior Club, Chief Club, or Tribal Council (in ascending order of donation amount). Aside from standard fare like clothing and school supplies, the Chief logo was also once common on items such as toilet paper, boxer shorts, and silk panties. Additionally, an outside company produced commemorative beer brewed in honor of the 1983 Rose Bowl team that featured the Chief Illiniwek likeness on the can.

<sup>24</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/V.html](http://www.uiuc.edu/dialogue/report_files/V.html) (last visited Jan. 24, 2004).

<sup>25</sup> *Id.* The quote excerpted is taken from the 1975 "Illio", the student yearbook of the University of Illinois.

In 1989, Charlene Teters, an Illinois student and member of the Spokane Tribe, began a campus-wide movement in protest of Chief Illiniwek that has carried on to this day.<sup>26</sup> At the time, not all Native American groups shared Teters' views. For example, in 1995 the Peoria tribe approved use of the Chief Illiniwek mascot. As the last surviving descendants of the Illini tribes, the Peoria tribe issued the following statement: “. . .We're proud that the University of Illinois is the major institution in the state, a seat of learning, and they are drawing on that background of our having been there. And what more honor could they pay us.”<sup>27</sup> The Peoria Tribe also indicated that the views expressed by protesters on campus did not necessarily reflect those of the Peoria Tribe. The Peoria felt that its opinion on the matter should carry greater weight because it was that of the last remnants of the Illini tribes.<sup>28</sup>

However, by 2000, the Peoria Tribe had changed its opinion and passed a resolution requesting that the University of Illinois end its use of Chief Illiniwek.<sup>29</sup> Additionally, a group of Native American students from the University filed a series of complaints with the U.S. Department of Education, Office for Civil Rights (“OCR”). These students alleged that the presence of Chief Illiniwek and the “Fighting Illini” name gave rise to a hostile learning environment for Native Americans, which in turn constituted discrimination in violation of Title VI of the Civil Rights Act of 1964.<sup>30</sup> Despite these allegations, the OCR found that “offensiveness” of the mascot and team

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<sup>26</sup> *Id.* While the focus of Teters' protests is Chief Illiniwek, her group has also sought to eliminate other collegiate and professional sports mascots, logos, and names that reference Indian symbols or people.

<sup>27</sup> *Id.*

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

<sup>29</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/V.html](http://www.uiuc.edu/dialogue/report_files/V.html) (last visited Jan. 24, 2004). See Peoria Tribe of Indians of Oklahoma, Resolution R-04-04-04-00-C, available at <http://aistm.org/2000peoria.htm> (last visited February 26, 2004). The resolution of the Peoria Tribe passed by a narrow 3-2 margin. The Peoria Tribe stated that “the image portrayed by Chief Illiniwek does not accurately represent or honor the heritage of the Peoria Tribe of Indians of Oklahoma and is a degrading racial stereotype that reflects negatively on all American Indian people.”

<sup>30</sup> *Id.* See 42 U.S.C. § 2000d, *et. seq.*



name, standing alone, was deemed insufficient to give rise to a “hostile learning environment” under Title VI.<sup>31</sup>

In the late 1990s, the Illinois legislature became involved in the debate. In 1996, former governor Jim Edgar signed a bill introduced by University alumnus Rick Winkel in which the Illinois General Assembly declared that Chief Illiniwek *may* remain the symbol of the University (emphasis added).<sup>32</sup> In 1997, the anti-Chief movement produced a documentary film entitled “In Whose Honor?” directed by University alumnus and journalism professor Jay Rosenstein.<sup>33</sup> Following the release of the film, members of the faculty and their respective departments voted by a wide margin to call for the end of Chief Illiniwek.<sup>34</sup>

The University Board or Trustees (“BOT”) remained firmly in Chief Illiniwek’s corner despite a student body that was beginning to show a heightened level of anti-Chief sentiment. By 1991, the University’s Student Government Association (“SGA”) had passed a resolution declaring the Chief Illiniwek performance discriminatory, made a call to eliminate the mascot, and asked for an apology to be made to Native Americans.<sup>35</sup> Despite the shifting position of the SGA, the BOT handed down a resolution in 1990 to retain Chief Illiniwek, which passed by a 6-1 vote.<sup>36</sup> Absent a ruling from a court forcing removal of the Chief Illiniwek logo, the BOT will ultimately decide the fate of Chief Illiniwek. Fifteen years after the first Charlene Teters-led protests, the BOT has

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<sup>31</sup> *Id.* The OCR issued a report to the University in November of 1995, which stated that a finding of a “hostile learning environment” on the basis of offensiveness alone would implicate First Amendment concerns.

<sup>32</sup> *Id.* The bill is codified at 110 ILL. COMP. STAT. 305/1f. Winkel’s first proposal included the word “shall” instead of “may,” but Edgar amended the bill before signing it due to his belief that any change to the mascot was the province of the University Board of Trustees.

<sup>33</sup> *Id.* The film, broadcast on PBS, elicited several points from the anti-Chief camp. Among them was the fact that fellow Big Ten schools Iowa, Minnesota, and Wisconsin had passed resolutions refusing to schedule teams with Indian logos except to comply with Big Ten requirements.

<sup>34</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/V.html](http://www.uiuc.edu/dialogue/report_files/V.html) (last visited Jan. 24, 2004).

<sup>35</sup> *Id.*

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

refused to eliminate Chief Illiniwek.<sup>37</sup> To date, resolutions for a BOT vote to retire Chief Illiniwek have been withdrawn for lack of support.<sup>38</sup> Put succinctly, all attempts to eliminate Chief Illiniwek or to strike a compromise have failed.<sup>39</sup>

Finally, an independent report by the North Central Association (“NCA”) summarized the inconsistencies between University policy and practice as it relates to Chief Illiniwek and its attendant issues, such as discrimination.<sup>40</sup> The NCA report elicited four main findings: First, the use of Chief Illiniwek is an educational issue. Second, no end to the Chief Illiniwek controversy is in sight. Third, the University does not appear to be addressing the issue in a manner consistent with some of the policies and principles of its Board, its strategic plan, or the NCA. Finally, it is the responsibility of the leadership of the University to create the environment that will allow for resolution of the controversy in a manner consistent with the principles of the NCA and goals of the University.<sup>41</sup> Most notably, the NCA report points out how specific written policies of the University are either ignored or given mere lip service in order to preserve Chief Illiniwek.<sup>42</sup> The

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<sup>37</sup> Anne Gleason and Mary Tallon, *Chief Vote Tabled*, DAILY ILLINI, Nov. 14, 2003, available at [http://www.dailyillini.com/nov03/nov14/news/stories/news\\_story01.shtml](http://www.dailyillini.com/nov03/nov14/news/stories/news_story01.shtml) (last visited Feb. 16, 2004). In November of 2003, University of Illinois trustee Frances Carroll withdrew her resolution to eliminate Chief Illiniwek for fear that she had not mustered enough support from her fellow trustees. The decisive Board of Trustees vote has been postponed until July of 2004.

<sup>38</sup> Dave Newbart, *U. of I. Trustee Withdraws Bid to Ax Illiniwek*, CHICAGO SUN-TIMES, February 26, 2004, at 12. Trustee Frances Carroll, citing a clear lack of consensus, removed her resolution to retire Chief Illiniwek from the agenda of the March, 2004 meeting of the University BOT. Carroll further opined that the resignation of Chancellor Mary Cantor, who has also sought to retire Chief Illiniwek, was due largely to the heated debate surrounding the mascot. As of late February 2004, a resolution on Chief Illiniwek has been postponed indefinitely.

<sup>39</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/X.html](http://www.uiuc.edu/dialogue/report_files/X.html) (last visited Jan. 24, 2004).

<sup>40</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/VI.html](http://www.uiuc.edu/dialogue/report_files/VI.html) (last visited Jan. 24, 2004).

The NCA is an accreditation body that conducts reviews of colleges and universities on a periodic (usually every 10 years) basis. The report of the NCA noted that choice of mascot is not a per se accreditation issue, but could become one if adverse effects on the university’s educational mission are shown. *The Chief Illiniwek Dialogue Report* was a result of the unfavorable findings of the NCA.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* An excerpt from the University’s strategic plan, “A Framework for the Future” reads, “. . . Diversity may challenge accepted wisdom, and may lead to the re-examination of long-held values. Such debates are welcome on this campus, for they are valuable features of intellectual life. We are committed to conducting them in ways that promote and preserve freedom and civility of action and speech . . .”

NCA was most troubled that refusal to address the issue head-on was present in the midst of clear findings that the educational mission of the University was being compromised.<sup>43</sup>

The issues posed by the presence of an Indian mascot are vast. The landscape is further marred by perception on both sides of the dispute that its outcome is purely distributive in nature. The highly polarized nature of the Chief Illiniwek debate has made it a win-or-lose proposition since the beginning. Groups of Native Americans, now including the Peoria Tribe, want the Chief to be eliminated. The University wants to keep Chief Illiniwek without making concessions, such as the creation of endowed chairs in Indian studies. Such an approach fails to seek out opportunities for mutual gain. Neither side is trying to create value. To the contrary, the recent case of *Crue v. Aiken* illustrates just how far some are willing to go to preserve Chief Illiniwek at the expense of civil rights. *Crue* provides a compelling example of how universities, their cash-cow athletic departments, regulatory bodies like the National Collegiate Athletic Association (“NCAA”), and Native American groups need to come together to resolve issues spawned by the presence of Indian mascots.

## II. *CRUE V. AIKEN*, THE NCAA RECRUITING RULES, AND THE FIRST AMENDMENT

### *A. Overview of Crue v. Aiken*

In *Crue v. Aiken*, plaintiffs, a group of University of Illinois students and faculty opposed to Chief Illiniwek, brought suit against Michael Aiken, the former chancellor of the University, in an Illinois federal district court. The suit alleged an impermissible prior restraint of speech in violation

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<sup>43</sup> *Id.* The NCA’s finding of disruption to educational goals was based upon interviews with relevant faculty and department heads within the university. Though such findings are difficult to arrive at empirically and are susceptible to criticism as being the result of self-serving statements, it was clear to the NCA that there is a common perception of Chief Illiniwek’s negative impact and that expression of faculty concern has consistently been met with evasive action from the BOT.

of the First Amendment.<sup>44</sup> In February of 2001, plaintiffs expressed interest in contacting prospective student-athletes to provide information and share their concern over the Chief Illiniwek controversy. Chancellor Aiken, fearful that such communications could violate recruiting guidelines of the NCAA and lead to the imposition of sanctions, sent an email to faculty, students, and administrators forbidding communication with prospective student-athletes without consent of the Director of Athletics. The District Court for the Central District of Illinois soon issued a temporary restraining order. Following the order, Aiken sent an email notifying the University community that express authorization was no longer necessary, but nonetheless urging compliance with NCAA rules.

<sup>45</sup>

On cross-motions for summary judgment, the Court found for plaintiffs and issued a declaratory judgment that held Aiken's "pre-clearance directive" to be an impermissible prior restraint of speech under the First Amendment as applied to students.<sup>46</sup> The Court relied upon a prior restraint analysis announced by the Supreme Court in *Cantwell v. Connecticut*, whose four elements are: (1) pre-communication application to a decision maker (2) who has authority to review proposed communication and (3) must approve of the request with some affirmative action; such approval must not be (4) a matter of routine, but rather entail "appraisal of facts, the exercise of judgment, and the formulation of an opinion" by the decision maker.<sup>47</sup>

In great length, the Court pointed out how eminently unpersuasive the arguments of the University were. The restraint was viewed as impermissibly content-based. The Court rejected the University's argument that the pre-clearance directive was a reasonable time, place, and manner restriction. It was clear to the Court that the implied message of the directive was to express dismay

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<sup>44</sup> *Crue v. Aiken*, 204 F.Supp.2d 1130 (C.D. Ill. 2002), *aff'd*, 370 F.3d 668 (7th Cir. 2004).

<sup>45</sup> *Id.* at 1134-1137. The email from Aiken read, in part: ". . . the NCAA regulates the timing, nature, and frequency of contacts between any University employee and prospective athletes. . . No contacts are permitted with prospective student athletes, including high school and junior college students, by University students, employees or others associated with the University without express authorization of the Director of Athletics or his designee."

<sup>46</sup> *Id.* at 1142.

<sup>47</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940).

over the preeminence of the Chief Illiniwek debate on campus, particularly in regard to the anti-Chief contingent.<sup>48</sup> The effect of the restraint was the chilling of speech otherwise protected by the First Amendment. Further, the application of the directive to students was impermissibly overbroad, as the NCAA recruiting rules apply to students only when students are “representatives of the institution’s athletics interests’ *for the purpose of securing the prospect’s enrollment and ultimate participation in the institution’s inter-collegiate athletics program* (emphasis added).”<sup>49</sup> The Court failed to see how such a rule could apply to student plaintiffs subject to the pre-clearance directive, as none of them fit the definition of a “representative of the institution’s athletic interests” under NCAA Bylaw 13.02.12. The plain language of the rule suggests its applicability to *recruitment*, not situations in which a student is trying to *dissuade* a prospective student-athlete from attending the University.<sup>50</sup> It is clear under this rule that any portions applicable to University students were inapplicable in *Crue v. Aiken* because the coaching staff or a representative of athletic interests did not direct or finance communications by faculty and students opposed to Chief Illiniwek.<sup>51</sup> To further undermine the University’s claim, the Court reviewed the deposition of an NCAA compliance officer, who stated that situations in which a student was a “representative of an institution’s athletics interest” were indeed rare. Thus, the student or faculty member issuing the communication and the prospective student-athlete would be immune from NCAA punishment.<sup>52</sup> The University itself could also not be

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<sup>48</sup> *Crue v. Aiken*, 204 F.Supp.2d 1130, 1139 (C.D. Ill. 2002), *aff’d*, 370 F.3d 668 (7th Cir. 2004).

<sup>49</sup> *Id.* at 1140, quoting NCAA Bylaw 13.02.11, available at <http://www.ncaa.org> (last visited February 28, 2004).

<sup>50</sup> *Id.* at 1141, citing NCAA Bylaw 13.02.12, available at <http://www.ncaa.org> (last visited February 28, 2004), which reads as follows:

“A ‘representative of the institution’s athletic interests’ is an individual, independent agency, corporate entity (e.g., apparel or equipment manufacturer) or other organization who is known (or who should have been known) by a member of the institution’s executive or athletics administration to: (a) Have participated in or to be a member or an agency or organization promoting the institution’s inter-collegiate athletics program; (b) Have made financial contributions to the athletics department or to an athletics booster organization of that institution; (c) *Be assisting or to have been requesting (by the athletics department staff) to assist in the recruitment of prospects;* (d) Be assisting or to have assisted in providing benefits to enrolled student-athletes or their families; or (e) Have been involved otherwise in promoting the institution’s athletics program.” (emphasis added).

<sup>51</sup> *Id.* at 1142, quoting NCAA Bylaw 13.1.3.5.2., available at <http://www.ncaa.org> (last visited February 28, 2004).

<sup>52</sup> *Id.* at 1142.

punished if it took steps to correct any illegal communications upon learning of them. Most importantly, neither Aiken nor any other official contacted the NCAA to seek an advisory opinion prior to the issuance of the pre-clearance directive.<sup>53</sup>

In terms of application of the directive to faculty members, the Court undertook a different analysis. As a threshold issue, the court determined that the Chief Illiniwek debate was clearly a matter of public concern.<sup>54</sup> Speech by faculty members of a state university that bears on a matter of public concern is necessarily analyzed under the doctrine of *Pickering v. Board of Education*.<sup>55</sup> Under *Pickering*, courts must balance the (1) interest of an employee, as a citizen, commenting upon matters of public concern, and (2) interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>56</sup> However, because the pre-clearance directive imposed a prior restraint on speech, the more restrictive standard of *United States v. NTEU* applied.<sup>57</sup> Under this standard, the University bore the burden of showing that the interests of potential audiences and past, present, and future employees in a broad range of present and future expression are outweighed by the expression's 'necessary impact on the actual operation' of the University.<sup>58</sup> The Court held that the interest in NCAA compliance, protection of the University's athletic mission, or protection of educational and privacy interests of prospective student-athletes were insufficient to justify restraint of faculty speech concerning Chief Illiniwek.<sup>59</sup> The *Crue* Court also categorically rejected the possibility that NCAA recruiting rules applied with equal force to

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<sup>53</sup> *Crue v. Aiken*, 204 F.Supp.2d 1130, 1142 (C.D. Ill. 2002), *aff'd*, 370 F.3d 668 (7th Cir. 2004).

<sup>54</sup> *See Crue*, 204 F.Supp.2d at 1143. In *United States v. NTEU*, 513 U.S. 454, 466 (1995), the Supreme Court distinguished between matters of private concern and matters of public concern, largely defining "matter of public concern" by exclusion: ". . . private speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing special burden of justification on the government employer."

<sup>55</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>56</sup> *Id.* at 568.

<sup>57</sup> *Crue v. Aiken*, 204 F.Supp.2d 1130, 1142 (C.D. Ill. 2002), *aff'd*, 370 F.3d 668 (7th Cir. 2004), *citing* *United States v. NTEU*, 513 U.S. 454 (1995).

<sup>58</sup> *Crue v. Aiken*, 204 F.Supp 1130, 1143 (C.D. Ill. 2002), *aff'd*, 370 F.3d 668 (7th Cir. 2004), *citing* *United States v. NTEU*, 513 U.S. 454, 468 (1995).

<sup>59</sup> *Id.* at 1143.

University faculty engaged in dissuading prospective student athletes from attending Illinois. The NCAA simply never considered the application of its recruiting guidelines to a factual situation like the one presented at Illinois. The conduct of faculty in regard to prospective student-athletes was neither “representative” of athletic interests nor “recruiting”.<sup>60</sup> The NCAA asserted that the intent of the rules and their interpretation was meant to protect the privacy interests of prospective student-athletes. This argument was refuted by the fact that no evidence of undue pressure to prospective student-athletes was shown.<sup>61</sup>

Finally, the *NTEU* standard required the University to “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way”.<sup>62</sup> This standard, as is true with virtually all cases of prior restraint, is difficult to satisfy.<sup>63</sup> The University failed to carry their burden, and the Court refused to discard First Amendment rights in order to satisfy the rules and regulations of a private organization that the University voluntarily joined. Similarly, the University could not delegate to the NCAA its duty to ensure that NCAA regulations were necessarily co-extensive with the First Amendment. The Court wrote that “. . .the corresponding duties resulting from the University’s voluntary decision to be a

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<sup>60</sup> *Id.* at 1143-1144. In a written opinion and affidavit from an NCAA official, the NCAA asserted that their recruiting rules swept so broadly as to encompass the situation presented by the pre-clearance directive. Aside from a contrary finding based upon the plain language of the rules, the Court also found that no proof had been offered to show the faculty members’ status as “representative of athletics interests”.

<sup>61</sup> *Id.* at 1145. For a thorough analysis of privacy concerns pertaining to student-athletes, see Michael K. McChrystal, *Privacy in Sports: Recent Developments in the Federal Courts*, 12 MARQ. SPORTS L.J. 397 (2001). The McChrystal article cites *Crue v. Aiken*, 137 F. Supp. 2d. 1076 (C.D. Ill. 2001), in which student plaintiffs were granted a temporary restraining order (“TRO”). The case discussed in this article deals with a subsequent plaintiff’s motion for summary judgment.

<sup>62</sup> *Id.* at 1145, quoting *Harman v. City of New York*, 140 F.3d 111, 121 (2d Cir. 1998).

<sup>63</sup> *Id.* at 1140, citing *CBS v. Davis*, 510 U.S. 1315 (1994). The Supreme Court wrote that, in terms of upholding prior restraints, “Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this ‘most extraordinary remedy’ only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.” In light of this declaration from the Supreme Court, it hardly seems plausible that speech related to a University’s choice of mascot could ever be the basis for a valid prior restraint.

member of the NCAA cannot mean that the University has a right or obligation to check the First Amendment rights of its students and faculty at the property line of the campus.”<sup>64</sup>

In a recent appellate decision, the Court of Appeals for the Seventh Circuit affirmed the District Court decision in *Crue v. Aiken*, holding that Chancellor Aiken’s pre-clearance directive imposed a prior restraint upon speech of faculty members.<sup>65</sup> Over arguments by the University that the *Pickering* test should apply, the Court instead relied upon the *NTEU* standard, noting that “*Pickering* applies to speech which has already taken place, for which the public employer seeks to punish the speaker. *NTEU* applies when a prior restraint is placed on employee speech.”<sup>66</sup> In applying the multifactor *NTEU* test, as the District Court did, the Court of Appeals determined that the interest of faculty members in discussing a clear matter of public concern outweighed the interests of the University in complying with NCAA recruiting rules.<sup>67</sup> The arguments of the University were severely undermined when plaintiff faculty members offered proof that the NCAA indicated to them that letters sent to prospective student-athletes regarding the Chief Illiniwek debate would not run afoul of the recruiting rules.<sup>68</sup> Based upon the evidence presented, the Court of Appeals affirmed the District Court’s finding that the pre-clearance directive infringed upon the plaintiffs’ free speech rights.<sup>69</sup>

#### B. *What Can the NCAA Do to Address the Issue of Indian Mascots?*

As an initial matter, it should be noted that the NCAA has stepped forward to clarify its position on Indian mascots generally. The NCAA has voiced its opposition to Indian mascots after

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<sup>64</sup> *Id.* at 1146.

<sup>65</sup> *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004).

<sup>66</sup> *Crue*, 370 F.3d at 678.

<sup>67</sup> *Crue*, 370 F.3d at 680.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*



an eighteen-month study by the NCAA into issues surrounding such mascots.<sup>70</sup> The ruling in *Crue v. Aiken*, however, suggests several shortcomings of the current NCAA recruiting rules. The first dichotomy that needs clarification is positive recruitment/dissuasion by students and faculty on one hand and “representatives of athletics interests” on the other. The logical starting point is a declaration from the NCAA that matters unrelated to the positive recruitment of prospective student-athletes will be afforded full First Amendment protection when the message is delivered from students or faculty who do not otherwise qualify as “representatives of athletics interests.” Existing rules should remain applicable to coaches, boosters, and other representatives of athletic interests, particularly in situations where such figures would use the presence of racist mascots or other matters tangentially related to athletics to engage in “negative recruiting.”<sup>71</sup> Clear delineation of who is and is not subject to the panoply of NCAA regulations is a step towards preventing future infringements of the rights of those not subject to the rules. NCAA rules that are coextensive with First Amendment doctrine, as applied to faculty and students who are not “representatives of athletics interests”, meet another important goal. Such rules place emphasis upon the *student* in “student-athlete.” In other words, permitting contacts by students and faculty not subject to NCAA rules preserves the long-held notion of American colleges and universities as the quintessential “marketplace of ideas.”<sup>72</sup> Regardless of one’s ultimate position on Chief Illiniwek or any other

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<sup>70</sup> Gary T. Brown, *MOIC Report Challenges Institutions to Conduct Review of Mascot Choice*, NCAA News, October 14, 2002, available at <http://www.ncaa.org/news/2002/20021014/awide/3921n08.html> (last visited March 1, 2004). The NCAA Minority Opportunities and Interests Committee (“MOIC”) suggested that NCAA member institutions conduct reviews to determine if their choice of mascot offends any of their constituents. Reviews would include the athletic department, faculty and staff, individuals from the community, student-athletes, conference members, and local Native American tribes or community members. Under the terms of the proposal, elements of mascots that fail to comply with NCAA guidelines on cultural diversity, gender equity, sportsmanship, ethical conduct, and non-discrimination would need to be eliminated. Nevertheless, it is also worth noting that the proposal would allow continuation of Indian mascots that are developed through collaboration with and upon approval from members of the tribe depicted.

<sup>71</sup> For example, consider a professor from a Big Ten school who sends a general letter to prospective student-athletes discussing Indian mascot controversies like Chief Illiniwek or Chief Osceola at Florida State University. In such a situation, it is possible to construe such communication as not just dissuading attendance at Illinois or Florida State, but even *persuading* attendance at the school the professor is affiliated with.

<sup>72</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Indian mascot, communications regarding a controversial mascot indicate to the prospective student-athlete that a university is a unique forum for the expression and exchange of ideas, not just a place to play sports for four years.

Under the current NCAA recruiting rules, it is seemingly impossible for a “representative of athletics interests” to relinquish its representative status.<sup>73</sup> On one hand, this rule makes perfect sense. The absence of such a rule would inevitably lead to abuse by boosters and other representatives who “withdraw” as such. Withdrawal of boosters from “representative” status would provide carte blanche to make recruiting contacts outside the confines of NCAA regulation. History has indicated that potential for abuse leads to actual abuse in the highly competitive world of college athletics.<sup>74</sup>

However, consider the following hypothetical. Big State University changes its team name from the “Wildcats” to the “Braves.” People who are both “representatives of athletics interests” and opposed to Indian mascots could not speak out against the perceived negative impact of the mascot unless they uprooted themselves and found a coaching job at another school. This choice carries the attendant risk that a coach’s reputation will be tarnished. Many, particularly in the media, may feel that his opposition is directed at his former employer and not their mascot. The solution is incomplete if the coach stays as well. One failure to land a desired recruit could be attributed to the notion that the coach probably disclosed his views regarding the

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<sup>73</sup> See NCAA Bylaw 13.02.11.1, Representatives of Athletics Interests, *available at* <http://www.ncaa.org> (last visited March 1, 2004). “Once an individual, independent agency, corporate entity or other organization is identified as such a representative, the person, independent agency, corporate entity or other organization retains that identity indefinitely.”

<sup>74</sup> WATTERSON, JOHN SAYLE, COLLEGE FOOTBALL: HISTORY, SPECTACLE, CONTROVERSY (The Johns Hopkins University Press, 2000). Watterson’s book chronicles a long history of scandal in college football, including illegal recruiting practices. Notable examples include a host of illicit payments to student-athletes in the former Pacific Coast Conference (now Pac-10) in the 1950s, falsification of transcripts of junior college transfers to meet eligibility requirements, and the first and only imposition of the “death penalty” against Southern Methodist University in the 1980s, which terminated their football program for two years.

mascot. For this coach, even when contacts are permitted within the NCAA rules, it's doubtful that the coaching staff would allow that coach to communicate with prospective student-athletes.

While it is unlikely in an era of political correctness that a university would terminate an innocuous mascot in favor of a potentially controversial one, the NCAA rules still need a mechanism for withdrawal of "representative status." Consider an assistant football coach who comes to the University of Illinois from another university. Upon his arrival at Illinois, he attends a banquet and meets a professor who is opposed to Chief Illiniwek. After a lengthy discussion with the professor, the new assistant coach is convinced that Chief Illiniwek is detrimental to the mission of the University and its athletic program. Like our hypothetical coach at Big State University, the assistant coach at Illinois is also precluded from discussing Chief Illiniwek with *any* recruits. Again, this is due to the prohibition against contacts from "representatives of athletics interests" during no-contact periods in the recruiting season. Further, if the assistant coach's opposition to Chief Illiniwek becomes known, a head coach is unlikely to send the anti-Chief assistant on recruiting trips for fear that he'll discuss the issue with prospective student-athletes.

Any NCAA rule that would allow for withdrawal of "representative" status is not without its costs. As discussed above, a rule that freely allows for withdrawal from representative status would be ripe for abuse. Considering the high stakes in college sports like football or men's basketball, it is unlikely that the NCAA would allow a flexible withdrawal rule. Additionally, there are enforcement concerns. It may not be feasible to impose a self-reporting mechanism upon universities. A university has little incentive to implicate their former boosters or coaches in the absence of a penalty for failure to do so. Conversely, the rule that imposes sanctions for failure to report would force a university to prove what they *didn't* know in order to preserve the incentive structure of the rule. This is a difficult burden to bear. Further, monitoring costs would be an unnecessary burden. Many athletic department budgets are strained without having to monitor former representatives of

athletics interests. A large number of universities *lose* money pursuing athletic glory.<sup>75</sup> Thus, the creation of an enforceable rule that is cost-effective is unlikely. If, as the *Crue* Court indicated, Chief Illiniwek is merely “tangentially related” to athletics, how do we empower a representative of athletics interests to discuss opposition to a racist mascot without detriment to his professional reputation?<sup>76</sup> The answer may lie with a clear concern of the University of Illinois in *Crue v. Aiken*: institutional control.

University athletic departments like that at Illinois are deeply concerned that a barrage of communications to prospective student-athletes will evince a lack of institutional control. Perception of chaos could impair the chances of luring a recruit to the university. The issue could be resolved by “drawing the sting” in the form of an acknowledgment of the controversy surrounding a school’s mascot. Such communication could be coordinated between the athletic department and campus groups or faculty opposed to the mascot. Collaboration may reduce the sheer volume of literature sent to prospective student-athletes by creating one publication to present both sides of an important issue within the university community. This ameliorates the harshness of prohibiting a “representative of athletics interests” opposed to a racist mascot from having meaningful dialogue with a potential student-athlete by allowing him to participate in the creation of the anti-mascot portion of the acknowledgement. The publication could also present the debate as an issue facing the university and not just its athletic department. Instead of avoiding the issue, it shows the prospective student-athlete that the university is not only committed to providing an opportunity to excel as an athlete, but also exposure to a diversity of people, thoughts, and opinion.

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<sup>75</sup> Mary Jo Sylwester and Tom Witosky, *Athletic Spending Grows as Academic Funds Dry Up*, USA Today, February 18, 2004, available at [http://www.usatoday.com/sports/college/2003-12-23-ncaa-athlete-welfare-side\\_x.htm](http://www.usatoday.com/sports/college/2003-12-23-ncaa-athlete-welfare-side_x.htm) (last visited March 3, 2004). Of all Division 1-A (the highest division) schools that participate in football, forty percent reported an operating profit in 2001. When figures are adjusted by eliminating state and school subsidies, only six percent of the one hundred seventeen 1-A schools made a profit.

<sup>76</sup> *Crue v. Aiken*, 204 F.Supp.2d 1130, 1144 (C.D. Ill. 2002), *aff’d*, 370 F.3d 668 (7th Cir. 2004).

Another point that certainly requires empirical study is the correlation between the presence of a racist mascot and a prospective student-athlete's decision to attend the school. Some groups may be more or less susceptible to the communications of students and faculty who oppose mascots like Chief Illiniwek.<sup>77</sup> Research in this area, to the extent it could generate empirically valid results, may show just how relevant Indian mascots are.<sup>78</sup> If a school's choice of mascot is not generally important to a student-athlete, such research may serve to direct the energies of university administrators away from thwarting free speech under the auspice of protecting student-athletes' privacy. However, it is clear that a considerable portion of the current student and faculty body, as well as members of the public, are adamantly opposed to Chief Illiniwek. Consequently, such research could cause the University to focus more energy on resolution of issues attendant to the controversy, like collaboration with Indian tribes to create mutually agreeable mascots and imagery.

Though the NCAA recruiting rules were shown to have some shortcomings in *Crue v. Aiken*, initiatives by the NCAA to address Indian mascots have been aggressive. By forcing member institutions to either "eliminate or collaborate", the NCAA would send a powerful message. In an era where intercollegiate athletics are highly publicized and scrutinized, universities may need to succumb to public outcry, whether it is in the form of pleas for removal of a controversial coach, booster, or mascot. It is unlikely that those universities embroiled in controversy would seek to exit

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<sup>77</sup> Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT'L & COMP. L. 393 (2003). The Clarkson study shows that Native American mascots are pervasive in American sports. An overwhelming percentage of mascots are racial in nature; in other words, they aren't specific to any one tribe. Examples include the Cleveland Indians, Atlanta Braves, and Washington Redskins. A miniscule percentage of mascots are tribal in nature, i.e., identified with a particular tribe. Examples include teams with names like Choctaws, Seminoles, or Apaches. Tribal mascots are more favorable, as they reflect a Native American desire for tribal sovereignty. Racial mascots are highly disfavored. It appears that Chief Illiniwek is a hybrid. Illiniwek is nominally tribal. His presentation is racial, an amalgamation of images and dances uncharacteristic of the former Illini tribes. Based upon the Clarkson study, as a general hypothesis it would seem that Native Americans would be more influenced by a school's choice of a Native American mascot. However, data on how (or if) the presence of a racial or tribal mascot affects the college choice of a student-athlete is currently unavailable. Valuable research would study this phenomenon across ethnic and socio-economic groups.

<sup>78</sup> See PENGUIN DICTIONARY OF PSYCHOLOGY 782 (Arthur S. Reber & Emily Reber, eds., Penguin Putnam Press 3d. ed. 2001)(1985). "Empirical validity" is defined as "validity of a test as determined by empirical means; the degree to which a test actually works with real cases in a real sample of individual subjects."

the NCAA.<sup>79</sup> These institutions stand to lose a great deal by breaking away from the NCAA. Loss of revenue from ticket sales, television contracts, merchandise, championship tournaments, and bowl games would give member institutions ample incentive to play by the NCAA's rules. Further, most of the schools currently embroiled in controversy over their choice of mascot have enjoyed recent athletic success.<sup>80</sup> Economic factors alone may be sufficient to force a school to change its mascot. Despite this, schools may still wage battle against the NCAA. As is evidenced by the Chief Illiniwek debate and the prior restraints issued in *Crue v. Aiken*, the presence of mascots based upon Indian images has given rise to heated debate on several college campuses.<sup>81</sup> The discussion will now focus on the effectiveness of various legal remedies that may be applied to reach a compromise in the Chief Illiniwek dispute.

## II. THE FIRST AMENDMENT FUELS DISCOURSE, BUT DOESN'T SOLVE THE PROBLEM

While the First Amendment intervened to protect the speech of students and faculty in *Crue v. Aiken*, it is unlikely to be the catalyst that ends Indian mascots. Further, possible applications of First Amendment doctrine may raise additional concerns if used to correct problems related to racist

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<sup>79</sup> See *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/VII.html](http://www.uiuc.edu/dialogue/report_files/VII.html) (last visited Jan. 24, 2004). The Dialogue Report cites seventeen colleges and universities that have eliminated Indian Mascots. Currently, four controversial Indian mascots remain. These are Chief Illiniwek at the University of Illinois, Monty Montezuma at San Diego State University (whose teams are called the 'Aztecs'), the North Dakota Fighting Sioux, and Chief Osceola of the Florida State Seminoles. Each mascot has been the source of controversy. Only Chief Osceola at Florida State has tribal support. The Seminole Tribe of Florida has collaborated with Florida State University. Thus, under the proposed NCAA rule changes, see *supra* note 64, only Florida State would be able to retain its mascot in current form.

<sup>80</sup> As of the time of publication, the University of Illinois had just claimed its fourth Big Ten Conference men's basketball championship in the past seven years. Additionally, the Illinois men's tennis team won the 2003 indoor and outdoor national championships and won the Big Ten football championship in 2001. The University of North Dakota has won seven NCAA Division 1-A ice hockey championships and one NCAA Division 1-AA football championship. Florida State University has won two Division 1-A football national championships. See <http://www.fightingillini.com> (last visited March 3, 2004); <http://www.seminoles.com> (last visited March 3 2004); <http://www.fightingsioux.com> (last visited March 3, 2004).

<sup>81</sup> See *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/VII.html](http://www.uiuc.edu/dialogue/report_files/VII.html) (last visited Jan. 24, 2004).

mascots. In order to appreciate the insufficiency of First Amendment relief in terms of the racist mascot, an overview of the broad speech protection afforded to speakers in colleges and universities is appropriate.

Dating back nearly half a century, American courts have recognized the importance of expansive First Amendment protection in the university context. In *Sweezy v. State of N.H. by Wyman*, the Supreme Court noted that “teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>82</sup>

Courts often apply forum analysis to First Amendment expressive activity within educational settings.<sup>83</sup> Forum analysis serves as a judicial guide when a party is denied access to government property for the purpose of expressive activity. Thus, forum analysis is typically applied to First Amendment claims in the context of state universities.<sup>84</sup>

The Supreme Court has recognized three types of forums: public forums, limited public forums, and non-public forums.<sup>85</sup> A public forum is a place that has “by long tradition. . . been devoted to assembly and debate”; streets and parks are common examples.<sup>86</sup> Content-based restrictions of speech in a public forum must be narrowly tailored to meet a compelling state interest.<sup>87</sup> Restrictions that are “narrowly tailored” restrict no more speech than is necessary to achieve a compelling state interest.<sup>88</sup>

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<sup>82</sup> *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957).

<sup>83</sup> *Kincaid v. Gibson*, 236 F.3d 342, 347 (6th Cir. 2001), *citing* *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

<sup>84</sup> *Id.* At 347.

<sup>85</sup> *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>86</sup> *Id.* at 46.

<sup>87</sup> *Id.*

<sup>88</sup> *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

As a subset of public forums, courts recognize limited public forums. These exist where the government has affirmatively opened property to the public as a place for expressive activity.<sup>89</sup> As long as the government maintains a limited public forum, it is governed by the same constitutional principles as a traditional public forum. Thus, any content-based restrictions must be narrowly tailored to meet a compelling state interest.<sup>90</sup>

Non-public forums are those that the government has not opened for public discourse. In a non-public forum, the state may reserve the forum for its intended purpose, subject only to reasonable “time, place, and manner” restrictions.<sup>91</sup> Further, suppression of speech in non-public forums is invalid if it draws distinctions based upon viewpoint.<sup>92</sup>

In the context of colleges and universities, the Supreme Court has recognized that “the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”<sup>93</sup> However, creation of a public forum requires an intentional government act that opens a non-traditional forum for public discourse.<sup>94</sup> Thus, “inaction or . . . permitting limited discourse” is insufficient to show the creation of a public or limited public forum.<sup>95</sup> The Supreme Court in *Cornelius v. NAACP Legal Defense & Education Fund* developed a balancing test to assess government intent to create a limited public forum.<sup>96</sup> Courts look to (1) the policy and practice of the government, (2) the nature of the property, and (3) its compatibility with expressive activity.<sup>97</sup> This analysis has been applied in subsequent cases.<sup>98</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Widmar v. Vincent*, 454 U.S. 263, 268, n. 5 (1981).

<sup>94</sup> *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 802 (1985)

<sup>95</sup> *Id.* at 802.

<sup>96</sup> *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985).

<sup>97</sup> *Id.* at 803.

<sup>98</sup> *See Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001)



In the case of the University of Illinois and Chief Illiniwek, the *Cornelius* test is easily satisfied. First, the University has both a written policy and practice of allowing open debate regarding Chief Illiniwek.<sup>99</sup> In addition, the University allowed a series of panel discussions and open debates in order to complete the *Chief Illiniwek Dialogue Report*.<sup>100</sup> Under the second prong of the *Cornelius* test, the nature of the property is uniquely suitable for speech, as the campus of a university contains classrooms, residence halls, and student centers devoted to the exchange of information. The third prong of *Cornelius* is also met. The structure of the University itself and the bringing together of thousands of students and faculty clearly evince a compatibility with expressive activity. The policy, practice, nature, and compatibility with expression inherent in the University clearly make it an open forum. As an open forum, the University is an area free for debate. Infringement of debate, like the prior restraint in *Crue v. Aiken*, is clearly impermissible in all but the most exceptional circumstances. Given the broad protection afforded speech of college students, how could the First Amendment possibly foreclose the right of a university to adopt or maintain an Indian mascot?

First Amendment arguments by those who oppose Indian mascots may focus on the “pedagogical concerns” doctrine.<sup>101</sup> This doctrine was handed down in the seminal Supreme Court case of *Hazelwood School District v. Kuhlmeier*.

*Hazelwood School District v. Kuhlmeier* involved a high school principal who acted as advisor to a journalism class that published the school newspaper.<sup>102</sup> Two pages in the newspaper discussed divorce and teen pregnancy as experienced by students at the school. The principal, fearing that the material was inappropriate for some of the school’s younger students, omitted the pages from the

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<sup>99</sup> See *supra* note 39.

<sup>100</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/introduction.html](http://www.uiuc.edu/dialogue/report_files/introduction.html) (last visited Jan. 24, 2004).

<sup>101</sup> Dolley, *supra* note 1, at 32-33. The Dolley article discusses Indian mascots and the pedagogical concerns doctrine in the context of secondary schools, not universities. The article summarizes arguments that may be advanced by both supporters and opponents of Indian mascots.

<sup>102</sup> 484 U.S. 260 (1988).

final publication.<sup>103</sup> The District Court denied injunctive relief for the students. The Court of Appeals for the Eighth Circuit reversed, finding that the school newspaper was a limited public forum and that the actions of the principal were not narrowly tailored to meet a compelling state interest.<sup>104</sup> The Supreme Court reversed the Court of Appeals, finding that the policy and practice of the school indicated intent to maintain a non-public forum.

The Court, in finding for the school district, seemed to defer to petitioner's assertions that, despite the nature of the property and its compatibility with expressive activity under *Cornelius*, the school district never intended to create a public forum.<sup>105</sup> Thus, the petitioner school district viewed intent as the dispositive factor under *Cornelius*. The Court deferred to the three-part concern of the petitioners: the 'public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need to dissociate itself from student expression.'<sup>106</sup> As a result, the Court deferred to the school district's claim that it never intended a public forum and held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>107</sup> The Court, in a footnote by Justice White, specifically reserved the question of whether the doctrine had any place in the context of colleges and universities.<sup>108</sup> Sixteen years after *Hazelwood*, that question has not reached the Supreme Court.

During the 1986 term, the Supreme Court decided a case which, coupled with *Hazelwood*, provides the basis for the argument that the First Amendment may effectively eliminate racist mascots. In *Bethel School District v. Fraser*, a high school student gave a sexually suggestive speech in

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<sup>103</sup> *Id.* at 263.

<sup>104</sup> *Id.* at 264-265.

<sup>105</sup> See Brief for Petitioners, 1987 WL 864174.

<sup>106</sup> *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 282-283 (Brennan, J.,dissenting)

<sup>107</sup> *Id.* at 273.

<sup>108</sup> *Id.* at 273 n.7.

support of a student government candidate.<sup>109</sup> The speech caused a strong reaction by the student body and the student, Fraser, was suspended for violation of the school's anti-obscenity policy.<sup>110</sup> Fraser brought suit in federal District Court, where it was held that the suspension violated Fraser's rights under the First Amendment. The Court of Appeals for the Ninth Circuit affirmed. The Supreme Court reversed the ruling of the Court of Appeals, holding that the school was within its power in prohibiting and punishing lewd speech.<sup>111</sup> The Supreme Court announced a balancing test that measures "undoubted freedom to advocate unpopular and controversial views in schools and classrooms" versus a societal interest "in teaching students the boundaries of socially appropriate behavior."<sup>112</sup> Thus, the need to shield high school students from certain expression and to teach appropriate behavior carried the day while freedom of speech was compromised.

Extension of the pedagogical concern doctrine into the foray of racist mascots has to rest on two equally shaky premises. First, it assumes that the presence of a racist mascot creates a disruption that would justify the suppression of speech, ostensibly in the form of the mascot itself. Second, it presumes that the doctrine even applies in the university context. In regard to the first premise, *Tinker v. Des Moines Independent School District* is instructive.<sup>113</sup>

In *Tinker*, high school students wore black armbands to school as a show of protest against the Vietnam War. The school then implemented a policy of suspending students who refused to remove their armbands. When the Tinker siblings refused to remove their armbands, they were

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<sup>109</sup> *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

<sup>110</sup> *Id.* at 687 (Brennan, J., concurring). The content of Fraser's speech was: "I know a man who is firm – he's firm in his pants, he's firm in his shirt, his character is firm – but most...of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds. Jeff is a man who will go to the very end – even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president – he'll never come between you and the best our high school can be."

<sup>111</sup> *Id.* at 678.

<sup>112</sup> *Id.* at 681.

<sup>113</sup> *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

suspended until they agreed to return without them.<sup>114</sup> The Supreme Court ruled that the suspensions violated the students' First Amendment rights. In so holding, the Court recognized a need to balance First Amendment freedoms and the need of public school officials to “prescribe and control conduct in the schools.”<sup>115</sup> The line of demarcation for regulating speech was deemed to be the point at which student speech “would substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>116</sup>

While the subsequent holding in *Fraser* may have blurred *Tinker's* definition of “substantial interference”, a clear distinction exists in the Chief Illiniwek case. Here, *Tinker* should be decisive. This is because speech about Indian mascots, or the fact of a university speaking through its choice of mascot, is political speech. *Fraser* involved what was arguably obscenity, which will not receive the same level of constitutional protection as political speech.<sup>117</sup> *Hazelwood* involved topics that are arguably sensitive for younger high school students.<sup>118</sup> The factual predicates used to justify the rulings in both *Fraser* and *Hazelwood* would seem to be inapposite in a case brought to challenge Chief Illiniwek on the basis of pedagogical concerns. Opponents of an Indian mascot may thus have a difficult hill to climb in order to prove that a university's choice of mascot meets the standard set forth in *Tinker*.

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<sup>114</sup> *Id.* at 504.

<sup>115</sup> *Id.* at 507.

<sup>116</sup> *Id.* at 509.

<sup>117</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.3.4 (2d. ed. 2001). Professor Chemerinsky discusses arguments for and against government restriction of racist speech. Racist speech is the closest parallel to situations involving Indian mascots. As an initial matter, speech related to a mascot or choice of mascot would have to qualify as racist speech. If this threshold were met, those who are opposed to racist speech would argue that such speech perpetuates exclusion of minority groups (in this case Native Americans). Opponents of racist speech restrictions would argue that attempts to define such speech are unconstitutionally vague or overbroad.

<sup>118</sup> *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

In terms of applicability of the pedagogical concerns doctrine to colleges and universities, the case of *Kincaid v. Gibson* is instructive.<sup>119</sup> In *Kincaid*, a college dean refused to distribute copies of the Kentucky State University yearbook, the *Thoroughbred*. The dean voiced her dissatisfaction with the yearbook's appearance and content. The student editors of the yearbook brought suit against the dean in federal District Court, where refusal to distribute the yearbooks was viewed through the prism of *Hazelwood*.<sup>120</sup> After the dean prevailed in the District Court, the Court of Appeals for the Sixth Circuit, sitting en banc, reversed and found *Hazelwood* inapplicable due to college students being "young adults. . . less impressionable than younger students."<sup>121</sup> The Court also noted another distinction vis-à-vis *Hazelwood*: while the high school students in *Hazelwood* were part of a journalism class, the yearbook editors were not. Thus, maturity and curricular distinctions counseled against adoption of *Hazelwood* in the context of colleges and universities.

In relation to the Chief Illiniwek debate, pedagogical concern arguments from the anti-Chief camp would assert that the presence of an allegedly racist mascot should be prohibited on the basis that it is "reasonably related to legitimate pedagogical concerns".<sup>122</sup> The concern here, per the opponents of Chief Illiniwek, is that the mere presence of the mascot undermines the educational mission of the University. Such an argument is unprecedented and ultimately ill advised.

Aside from the refusal of lower courts to extend "pedagogical concerns" to colleges and universities, the history of censorship that followed the *Hazelwood* decision provides a strong normative basis for denying extension of the pedagogical concern doctrine.<sup>123</sup> It can hardly be

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<sup>119</sup> *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*). See also *Lueth v. St. Clair Cmty. Coll.*, 732 F. Supp. 1410 (E.D. Mich. 1990) (refusing to extend *Hazelwood* to advertisements of a college newspaper).

<sup>120</sup> *Kincaid v. Gibson*, 191 F.3d 719, *rev'd on reh'g*, 236 F.3d 342 (6th Cir. 2001) (*en banc*).

<sup>121</sup> *Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir. 2001) (*en banc*), *citing* *Widmar v. Vincent*, 454 U.S. 263, 274 n. 14 (1981).

<sup>122</sup> *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>123</sup> It is also worth noting the attempted censorship of the college press that preceded *Hazelwood*. Cases that preceded *Hazelwood* likewise refused to censor speech of the college press. See *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975) (abundant grammatical errors were insufficient to show disruption to order of the university and its educational mission and justify removal of student editors of a college newspaper); See also *Antonelli v. Hammond*,

argued that removal of a racist mascot on First Amendment grounds is worth its attendant costs. For example, from 1988, the year of the *Hazelwood* decision, to 1996, reported incidents of censorship in high school publications rose over one hundred percent.<sup>124</sup> The threat of censorship alone may act to chill vital political speech before it occurs. Even if Indian mascots could be eliminated via the pedagogical concern doctrine, the accompanying opportunity presented for censorship of campus speech, press, and other media forms may be too great a cost to bear.

In addition, there is ultimately a loser in a First Amendment dispute. In the context of Chief Illiniwek, both pro-Chief and anti-Chief groups run the risk of having their viewpoint foreclosed from public discourse upon a showing of significant interference with the university's educational mission. Healthy, albeit divisive, debate on a matter of public concern could hardly be said to meet the standard of *Hazelwood* if a court were inclined to make this dubious doctrinal extension.

First Amendment remedies are thus incomplete. It is uncertain which free speech doctrines, if any, apply to Indian mascots. Further, a court order declaring that either a mascot or its opposition interferes with educational objectives would do nothing to eliminate divisiveness. The campus is left with one group in possession of a court order that it may use to silence the opposition. This outcome hardly seems consistent with First Amendment principles. Eliminating Indian mascots on First Amendment pedagogical concern grounds would violate the maxim that freedom of speech often entails tolerating the intolerance of others. Consequently, other remedies must be explored in order to remedy the Chief Illiniwek problem.

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308 F.Supp. 1329 (D.Mass.1970); *Troy St. Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968) (suspension of student newspaper editor on the basis of content violates the First Amendment); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973).

<sup>124</sup> Mark J. Fiore, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1965 (2002).

### III. TRADEMARK REMEDIES

#### *A. Has Harjo III Eliminated Trademark Remedies for Opponents of Indian Mascots?*

For a time, it appeared that trademark remedies could eradicate the debate surrounding Indian mascots. In *Harjo v. Pro-Football, Inc.* (“*Harjo II*”), a three-judge panel of the Trademark Trial and Appeal Board (“TTAB”) ruled that seven trademarks held by the Washington Redskins of the National Football League were a violation of section 2(a) of the Lanham Act.<sup>125</sup> Section 2(a) prevents registration of trademarks depicting “immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons. . . beliefs. . . or bring them into contempt, or disrepute.”<sup>126</sup> Petitioners, a group of Native Americans opposed to the use of the term “Redskin”, presented an array of evidence to prove a violation of the Lanham Act. Among the evidence presented was historical analysis of the term “redskin”, expert testimony from social scientists claiming that the term “redskin” is a racial slur that serves to perpetuate racial stereotypes, and a linguistics expert who testified that the term “redskin” evinces violence, savagery, and oppression.<sup>127</sup> Respondent Pro-Football, Inc. contended that “redskin” is a neutral term and that its modern usage is almost exclusively in connection with the professional football team.<sup>128</sup> This evidence was supported by testimony of linguistics experts who asserted that the term “redskin” was a neutral reference to Native Americans.<sup>129</sup> The *Harjo II* Court then applied the evidence to determine if the trademarks of the Washington Redskins were “scandalous, disparaging, contemptuous, and disreputable” under section 2(a) of the Lanham Act. The Court analyzed each

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<sup>125</sup> 1999 WL 375907 (Trademark Tr. & App. Bd. 1999), *overruled by* Pro-Football, Inc. v. Harjo, 284 F.Supp.2d 96 (D.C. Cir. 2003). What is commonly referred to as “*Harjo I*” was a 1994 pretrial order that rejected several constitutional defenses raised by Pro-Football, Inc. See 1994 WL 262249 (Trademark Tr. & App. Bd. 1994).

<sup>126</sup> 15 U.S.C.A. § 1052(a)

<sup>127</sup> 1999 WL 375907.

<sup>128</sup> *Id.* at 27-29.

<sup>129</sup> *Id.* at 27.

element of 2(a) at length. First, they determined that “redskin” carried a derogatory connotation of Native Americans and was perceived as disparaging by Native Americans.<sup>130</sup> As such, the trademarks would not be subject to federal protection under the Lanham Act. However, the Court refused to find that the trademarks were so “shocking to the sense of truth” to a substantial composite of the general public in light of contemporary attitudes. Thus, the term “redskin” did not rise to the level of “scandalous” under the Lanham Act.<sup>131</sup> Upon cancellation of the federally registered trademarks of the Washington Redskins, Pro-Football, Inc. appealed to the United States District Court for the District of Columbia.<sup>132</sup>

The decision in *Harjo II* gave rise to jubilation amongst opponents of Indian mascots. In the weeks that followed the decision, several other professional teams were targeted for suit. Among those targeted were the Atlanta Braves and Cleveland Indians of Major League Baseball.<sup>133</sup> In the meantime, the Washington Redskins continued to use their logo on merchandise and in connection with their football team. In 2003, the U.S. District Court for the District of Columbia reversed the decision of the TTAB, sounding what could be the death knell for trademark remedies in the movement to eliminate Indian mascots.<sup>134</sup>

On cross-motions for summary judgment, the Court in *Harjo III* held that the TTAB’s factual finding of disparagement was not supported by substantial evidence and was otherwise

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<sup>130</sup> *Id.* at 48.

<sup>131</sup> *Id.* at 47-48, citing *In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 1371 (Fed.Cir. 1994).

<sup>132</sup> See Brooke A. Masters, *Creative Legal Tactics Used Against Teams With Indian-Themed Names*, HOUS. CHRON. (Apr. 11, 1999), available at 1999 WL 3983597.

It should be noted that any economic harm to the Washington Redskins resulting from the cancellation of a trademark may be minimal. The National Football League pools all revenues from the sale of licensed goods and then splits them among their thirty-two franchises. At the time of the *Harjo II* decision, the sale of Redskins merchandise ranked fifteenth among all National Football league franchises. After the league takes a share of such revenues, each franchise only sees about \$5 million per year. In addition, the Redskins would still enjoy limited protection under state and federal trademark law.

<sup>133</sup> *Id.*

<sup>134</sup> *Pro Football, Inc. v. Harjo*, 284 F.Supp.2d 96 (D.C. Cir. 2003).



barred by the equitable doctrine of laches.<sup>135</sup> The Court was careful to note that it was reversing the cancellation of the Washington Redskins' trademarks due solely to the insufficiency of the evidence and rejection of defenses in *Harjo II*.<sup>136</sup> The Court decided the motions before it, refusing to “venture into this thicket of public policy” surrounding Indian mascots.<sup>137</sup>

The standard of review applied to the TTAB's factual finding of disparagement was the “substantial evidence” standard.<sup>138</sup> This standard dictates that a court of review must ask whether a “reasonable mind might accept” an evidentiary record as “adequate to support a conclusion.”<sup>139</sup> Evidence adduced must be “more than a mere scintilla.”<sup>140</sup> Further, substantial evidence review “involves examination of the record as a whole, taking into account evidence that both justifies and detracts from an agency's decision.”<sup>141</sup>

Applying the substantial evidence standard to the factual findings of the TTAB, the *Harjo III* Court found that “the TTAB's finding of disparagement is supported by inferential fact-based judgments, unsubstantiated with concrete evidentiary proof.”<sup>142</sup> In particular, the Court attacked the TTAB's reliance upon expert linguists and survey data to conclude that the use of “redskins” may disparage Native Americans. The Court cited a litany of deficiencies with the testimony of expert linguists, deficiencies also cited by the TTAB in *Harjo II*.<sup>143</sup> The Court found that, because all of the

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<sup>135</sup> *Id.* at 99.

<sup>136</sup> *Id.* The Court refused to consider arguments from Pro-Football, Inc. that (1) Section 2(a) of the Lanham Act unconstitutionally impinges upon First Amendment speech rights and (2) contravenes Fifth Amendment due process rights. Because the evidence before the TTAB was insufficient and the defense of laches should've been made available to Pro-Football, Inc., the *Harjo III* court did not reach the constitutional claims.

<sup>137</sup> *Id.*

<sup>138</sup> 5 U.S.C. § 706. Under this standard, a court will reverse the TTAB's findings of fact only if they are “unsupported by substantial evidence”. It should also be noted that 2(a)'s “may disparage” language is determined by a preponderance of the evidence. *See Harjo*, 284 F.Supp.2d at 122.

<sup>139</sup> *Harjo*, 284 F.Supp.2d at 115-116, *quoting* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

<sup>140</sup> *Id.* at 116, *citing* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

<sup>141</sup> *Id.*, *quoting* In re Gartside, 203 F.3d 1305, 1312 (D.C. Cir. 2000).

<sup>142</sup> *Id.* at 102.

<sup>143</sup> *Id.* at 108. The TTAB found, *inter alia*, that ‘redskin’ refers to Native Americans, from the 1960s to the present, ‘redskins’ has dropped out of most spoken and written language as a reference to Native Americans (substituted by

trademarks at issue had been registered since the 1960s and the term “redskin” had not been used in a derogatory fashion in that time period, it was shown with substantial evidence that the word “redskin” “may disparage” under section 2(a) of the Lanham Act.<sup>144</sup>

However, in order to make a final determination of disparagement, the TTAB had to consider whether the trademark may “dishonor by comparison with what is inferior, slight, deprecate, degrade, or affect or injure by unjust comparison.”<sup>145</sup> This consideration involves looking “not to American society as a whole...but to the views of the referenced group.”<sup>146</sup> In making this finding, the TTAB relied upon survey data that the reviewing District Court found wholly unpersuasive. Though the survey, completed by Dr. Ivan Ross, purported to show the sentiments of a representative sample of Native Americans, subsequent expert testimony revealed methodological flaws.<sup>147</sup> Based upon perceived shortcomings in survey questions and sampling procedures, the *Harjo III* Court concluded that the TTAB findings neither proved nor disproved that the marks at issue “may disparage” Native Americans during the relevant time frame and in the context of Pro-Football’s entertainment services.<sup>148</sup> Since the survey did not focus on attitudes during the relevant time period and in the relevant context, the survey was dismissed as a

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phrases ‘Native American’, ‘American Indian’, and ‘Indian’), and that from the 1960s to present the word ‘redskin’ most often appears as a reference to the Washington Redskins football team.

<sup>144</sup> Pro-Football, Inc. v. Harjo, 284 F.Supp.2d 96, 145 (D.C. Cir. 2003). *See also* 15 U.S.C.A. § 1052(a). For a history of the trademarks at issue, *see Harjo*, 284 F.Supp.2d at 104-10.

<sup>145</sup> Harjo v. Pro-Football, Inc., 1999 WL 375907 at 35, *rev’d on other grounds by* Pro-Football, Inc. v. Harjo, 284 F.Supp.2d 96 (D.C. Cir. 2003).

<sup>146</sup> *Id.*

<sup>147</sup> Harjo, 284 F.Supp.2d 96, 110 (D.C. Cir. 2003). The flaws cited were “(1) the questions in the survey were leading and not neutral; (2) the lists of words referring to Native Americans contained an insufficient number of terms; (3) in using the term “offensive” in its questions, the survey did not illicit the necessary information for a determination under section 2(a); (4) asking questions about what others think leads to ambiguous results.” Further, the sampling procedure was highly criticized on the grounds that (1) the Native American sample was too geographically limited to be representative; (2) the method for ascertaining whether a participant is a Native American was flawed; and (3) the “birthday sample” method used by Dr. Ross violated the randomness of the survey. For more on the “birthday sample” method *see Harjo*, 284 F.Supp.2d 96, 110 n.14.

<sup>148</sup> *Id.* at 127. Recall that the relevant time period for the trademarks is from 1966 to 1990, the times in which the trademarks were registered.

methodologically flawed picture of current attitudes.<sup>149</sup> Finally, counsel for respondents suggested at oral arguments that the survey results could be extrapolated to the Native American population at large, even in light of attacks on the methodology by Pro-Football, Inc.<sup>150</sup> The Court noted that “[l]eft completely unexplained, the Court cannot accept that the Ross Survey is a sufficient proxy for the views of Native Americans as a whole.”<sup>151</sup> Thus, the dubious extrapolation of survey results to Native Americans on the whole precluded a finding that the use of “redskin” “may disparage” Native Americans. The Court reversed the ruling of the TTAB, noting that “the TTAB reached its decision...inferentially, by piecing together bits of limited, undisputed evidence from the record.”<sup>152</sup>

Additionally, the *Harjo III* Court dismissed the case under the equitable doctrine of laches, which “bars relief to those who delay the assertion of their claims for an unreasonable time” and which is “founded on the notion that equity aids the vigilant and not those who slumber on their rights”.<sup>153</sup> While respondents argued laches could not be available in cases involving public interests, petitioner Pro-Football, Inc. argued that the availability of laches is determined based on the facts

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<sup>149</sup> *Id.* at 119.

<sup>150</sup> *Id.* at 121. The exchange between counsel and the Court is, in part, as follows:

“THE COURT: I’m trying to figure out where you came from 36 percent out of the survey to 700 and 800,000.

MR. LINDSAY: Well, that’s just plain arithmetic.

THE COURT: I know. But what does it represent? I understand you did the arithmetic. But what I’m saying is, aren’t you – you’re extrapolating that if 36 percent of the group of the survey felt this way, you then applied 36 percent to the whole population that are Native Americans. Is that accurate?

MR. LINDSAY: Yes.”

<sup>151</sup> *Id.* at 120.

<sup>152</sup> *Id.* at 128. The Court in *Harjo III* felt that the findings of the TTAB were predicated on three erroneous assumptions. These were: (1) equating the views of the general public with those of Native Americans; (2) the unfounded conclusion that “redskin”, as used from 1960 to the present, carries a pejorative connotation; (3) the finding that “redskin” carries a pejorative connotation in connection with the Washington Redskins football franchise. It should also be noted that the Court requires a more careful analysis when significant goodwill is at stake (i.e., when a football team has built an identity around its trademark), though this by no means requires a standard of proof beyond “substantial evidence” by a preponderance of the evidence. *See Id.* at 123.

<sup>153</sup> *Id.* at 136, quoting *NAACP v. NAACP Legal Defense & Educational Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985); *See also Id.* at 136-137. The elements of a laches defense are (1) a substantial delay by a plaintiff prior to filing suit; (2) a plaintiff’s awareness that the disputed trademark was being infringed; and (3) a reliance interest resulting from the defendant’s continued development of goodwill during this period of delay. The Court in *Harjo III* modified this test given the odd circumstances of the case. The second prong was modified to reflect Native Americans’ awareness of the trademarks during the delay. The third prong was modified to measure Pro-Football Inc.’s reliance interest as the trademark holder.

and circumstances of each case.<sup>154</sup> In applying the elements of a laches defense, the court found that respondents had made a substantial delay in bringing suit, despite having notice of petitioner Pro-Football's six federally registered trademarks. Constructive notice was provided on twelve occasions, when each of the six marks was published for comment and later for registration.<sup>155</sup> Respondents attempted to distinguish their case from typical trademark laches defenses, arguing that they were not competing trademark claimants and should not be charged with constructive notice. The Court was not persuaded by this argument, noting that a "party's poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights."<sup>156</sup> The Court also found that the third element of laches, prejudice to the defendant, was satisfied.<sup>157</sup> Since use of federal trademark laws by respondents could impact petitioner Pro-Football, Inc. just as much as use by a market competitor, the Court reasoned that respondents should be held to the same standard. As a result, respondents in *Harjo III* became victims of their own ignorance.<sup>158</sup>

The case of Chief Illiniwek is distinguishable from *Harjo III* in several respects. Despite the bases for distinction, it appears that a trademark remedy of the form sought in *Harjo III* would be incomplete and perhaps barred by a laches defense. In favor of those opposed to Chief Illiniwek and the use of the name "Fighting Illini", proof of disparagement would not encounter the same methodological pitfalls that plagued the respondents in *Harjo III*.<sup>159</sup> First, the relevant population is easier to identify and survey. The relevant population is arguably those Native Americans who

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<sup>154</sup> *Id.* at 137. The Court found that unavailability of laches in all matters of public interest would give respondents a limitless argument and substantially erode laches defenses.

<sup>155</sup> *Id.* at 140.

<sup>156</sup> *Id.* at 141, quoting *Leggett v. Standard Oil Co.*, 149 U.S. 287, 294 (1893).

<sup>157</sup> *Id.* at 143, citing *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 821 (7th Cir. 1999). The *Hot Wax* decision defines "economic prejudice", which Pro-Football alleged in their laches defense. Economic prejudice arises from investment in and development of a trademark. Continued commercial use and promotion over a prolonged period adds weight to the evidence of prejudice. Theoretically, prejudice is the equivalent of investment funds that could've been used elsewhere had suit been brought sooner.

<sup>158</sup> *Id.* at 141.

<sup>159</sup> *Harjo v. Pro-Football, Inc.*, 1999 WL 375907 at 35, *rev'd on other grounds by Pro-Football, Inc. v. Harjo*, 284 F.Supp.2d 96 (D.C. Cir. 2003).

descend directly from the Illini tribes. This includes the Peoria Tribe of Oklahoma, Tamaroa, Metchigamea, Kaskaskia, and Cahokia.<sup>160</sup> These groups are easier to isolate geographically, and a current survey designer could look to the shortcomings of the Harjo survey to create questions that elicited attitudes in the relevant time period (since trademarks bearing the likeness of Chief Illiniwek were registered) and in the relevant context (in connection with the University of Illinois). Results of a carefully crafted survey could then be extrapolated to the relevant population to determine if use of Chief Illiniwek or the Fighting Illini team name “may disparage” under section 2(a) of the Lanham Act.<sup>161</sup> The argument for disparagement may be easier to make in the case of the University of Illinois, as the term “fighting” may lend itself to a pejorative connotation based upon savagery and violence.

In favor of those who support Chief Illiniwek and the use of the Fighting Illini name, any trademark remedy would not eliminate student-performed dancing at halftime of men’s basketball and football games. Trademark remedies would extend only to merchandise made by the University of Illinois bearing Chief Illiniwek’s likeness and to goods licensed by the University. Performances could go on and would be protected by under the First Amendment unless the Peoria Tribe of Oklahoma and the University agreed to end them completely.

Laches defenses may also be highly effective in the case of Chief Illiniwek. A recent search of the electronic database of the United States Patent and Trademark Office (“USPTO”) revealed that the “Fighting Illini” trademark for goods and services is still in effect and was registered in March of 1999.<sup>162</sup> Any lawsuit instituted today would be five years after the registration of the “Fighting Illini” trademark. Such a delay is longer than two of the delays for filing cancellation suits

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<sup>160</sup> *Chief Illiniwek Dialogue Report*, [http://www.uiuc.edu/dialogue/report\\_files/III.html](http://www.uiuc.edu/dialogue/report_files/III.html) (last visited Jan. 24, 2004), *supra* note 3.

<sup>161</sup> 15 U.S.C.A. § 1052(a).

<sup>162</sup> Electronic searches of the USPTO database may be conducted by visiting <http://www.uspto.org> (last visited March 2, 2004).

against trademarks in *Harjo III*.<sup>163</sup> Moreover, the factual similarities between the Chief Illiniwek case and *Harjo III* are striking. Both cases involve a long-standing mascot who is closely identified with high-revenue athletics. Establishment of significant economic goodwill would likely lead a court considering the suit to grant the University use of a laches defense. The specter of actual and speculative losses, largely in the form of diminished alumni donations, may allow a laches defense despite lack of knowledge of legal rights by members of the Peoria Tribe or other tribes descended from the Illini tribes.

Even if the University of Illinois lost federal trademark protection due to a successful cancellation suit, extortion arguments expressed in the University of Illinois' *Chief Illiniwek Dialogue Report* suggest that losses may be acceptable to the University.<sup>164</sup> In short, the University may keep Chief Illiniwek and the Fighting Illini man while allowing its trademark rights to diminish because such a loss would pale in comparison to expected losses from eliminating the mascot and name entirely. Given the unlikely failure of a laches defense, Chief Illiniwek may survive.

### B. *The Clarkson Study*

Despite the holding in *Harjo III* and the pall it casts upon those seeking legal relief to eradicate Indian mascots, a recent study suggests that collaborative efforts based upon trademark law may be able to effect a compromise in debates similar to the one surrounding Chief Illiniwek.<sup>165</sup> The study, presented by Professor Gavin Clarkson, is rooted primarily in trademark law. Clarkson's

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<sup>163</sup> *Harjo*, 284 F.Supp2d at 104-107. *Harjo I* was filed in 1992 and pretrial orders were issued in 1994. The last trademark at issue was registered in 1990. The Court in *Harjo III* subjected this last trademark to the laches defense.

<sup>164</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/VIII.html](http://www.uiuc.edu/dialogue/report_files/VIII.html) (last visited Jan. 24, 2004). In the report, one professor at the University was quoted as saying “[b]oth sides are resorting to extortion; alumni supporters who say they will not contribute if the Chief goes; and opponents who will boycott the University if he stays.”

<sup>165</sup> Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 *Cardozo J. Int'l & Comp. L.* 393 (2003).

rationale “balances the desire to eliminate racial mascots with a sense of respect for tribal sovereignty and the rights of a tribe to license that identity where they, as the owner of a collective political identity, deem it culturally appropriate.”<sup>166</sup> To Professor Clarkson, it is important to break Indian mascots into two groups: tribal and racial mascots. The former are favored, the latter are disfavored.<sup>167</sup> Thus, instead of seeking a universal ban against the use of Indian mascots, an exception should be carved “where a tribe might view its identity as a resource and seek to license that resource to an educational institution where it felt it was culturally appropriate to do so.”<sup>168</sup> Under this proposal, tribal leaders would collaborate with educators to create an image that is suitable to the tribe. As a result, it is hoped that an emphasis on tribal identity and sovereignty emerges. Perception of tribes as unique entities is a catalyst to breaking down common misperceptions of Native Americans that have developed in part from portrayals of inauthentic Indian mascots. In discussing his proposal, Professor Clarkson notes that “[s]uch a permission structure would ensure that the use of tribal identity would in fact be both honorable and educational.”<sup>169</sup> Clarkson also notes:

“Thus, the use of Indian mascots could be changed from a system of denigration to one of tribal evangelism. The tribe would be leveraging an asset that the dominant society finds valuable, the notion of “Indianness”, to further an understanding of the tribe as the tribe would prefer itself to be understood.”<sup>170</sup>

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<sup>166</sup> *Id.* at 394.

<sup>167</sup> Clarkson, *supra* note 71, at 399-401.

<sup>168</sup> Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT’L & COMP. L. 393, 400 (2003). *See also Id.* at 407; Tribal entities are permitted to register their official insignia as trademarks. This is because “Native American tribes are not foreign nations, states, or municipalities. Rather, Indian tribes have a unique status as domestic dependent nations under the protection of the United States.”

<sup>169</sup> *Id.* at 402. Professor Clarkson offers the Aquinnah Band of Wampanoags as an example. The tribe, in conjunction with a land settlement with the Commonwealth of Massachusetts, negotiated that its tribal history be taught in the public schools. As part of the curriculum, children visit the Wampanoag reservation. Professor Clarkson points out that this exposure not only introduces children to elements of tribal culture, but shows them how tribes maintain their identity in a 21<sup>st</sup> century context.

<sup>170</sup> *Id.* at 404.

#### IV. CRAFTING A VALUABLE RESOLUTION

In light of the shortcomings of both First Amendment claims and attempts to cancel federally registered trademarks, the Clarkson study suggests a fertile middle ground that may be the ideal paradigm for resolution of the Chief Illiniwek debate. By working together with the Peoria Tribe and other direct descendants of the Illini tribes, the University of Illinois could arrive at a mutually beneficial compromise. Suggestions have been offered and success stories exist, but to date nothing has been done.<sup>171</sup> This is partly attributable to the parties to the dispute being unaware of their proper places in the creation of a solution. Consideration of each relevant party's role is in order.

First, the NCAA occupies a central and powerful role in the dispute over Chief Illiniwek. Having already adopted a policy of disfavoring Indian mascots, the NCAA has the ability to apply pressure to its member institutions. After the Supreme Court's ruling in *NCAA v. Tarkanian*, it is unlikely that imposition of disciplinary sanctions against a member university will be construed as state action.<sup>172</sup> Thus, any mandate from the NCAA that Indian mascots must be eliminated may be complied with. However, the NCAA has not taken such a firm stance, opting rather to give member institutions the opportunity to conduct internal reviews in the hopes that universities will reach an independent determination to do away with Indian mascots. Additionally, in light of *Crue v. Aiken*, the NCAA is unlikely to try to subject those who are not "representatives of athletics

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<sup>171</sup> See *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/VII.html](http://www.uiuc.edu/dialogue/report_files/VII.html) (last visited Jan. 24, 2004). The report details the success story of Florida State University, which has consulted with the Seminole Tribe of Florida since 1975 to create Osceola, the school's mascot. This includes the creation of scholarships and active Seminole involvement on campus. National Native American groups (non-Seminole) are given sufficient space outside the Florida State football stadium to protest on game days.

<sup>172</sup> *Tarkanian*, 488 U.S. 179 (1988). The Court in *Tarkanian* noted that promulgation of NCAA rules is the result of combined input from the organization's member institutions. As such, acts of enforcement against member institutions or coaches are not state action. State universities, who are state actors, do not delegate power to the NCAA, despite the fact that NCAA power is so vast that member institutions have no choice but to comply with NCAA demands.



interests” to its panoply of recruiting rules. This enforcement policy, preferably embodied in a formal amendment to its recruiting rules, would serve to promote healthy discourse in the ongoing debate over Chief Illiniwek.

Despite the power held by the NCAA, a more effective resolution lies with the primary parties to the dispute. The critical roles are those played by the University of Illinois, the Peoria Tribe, and Native Americans generally. If the University desires to go on depicting itself in the form of its tribal predecessors, both sides need to be able to come to the table and create a mutually agreeable image of “Illiniwek”. In the language of negotiation scholar Robert Mnookin, the parties need to manage the tension between creating and distributing value.<sup>173</sup> To date, the Chief Illiniwek debate has been wholly distributive. The University wants to keep Chief Illiniwek and maintain the status quo. Opponents of the Chief Illiniwek want him banished forever. Very little has been done to create value in the form of sharing information and making trades.<sup>174</sup> The *Chief Illiniwek Dialogue Report* cited attempts to fashion an agreeable image of Illiniwek while creating a Native American studies program at the University.<sup>175</sup> To date, the University has balked at the creation of a Native American studies program with endowed chairs and tenured professors. Such a plan is viewed as highly cost-prohibitive, largely due to fears that student demand for the program would be minimal.<sup>176</sup> In 2000, a member of the American Indian Arbitration Institute suggested that revenues from Chief Illiniwek merchandise could be used to create such a program. Shortly after this proposal was

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<sup>173</sup> ROBERT H. MNOOKIN, et al., BEYONDWINNING: NEGOTIATING to CREATE VALUE IN DEALS AND DISPUTES 42-43 (2000).

<sup>174</sup> *Id.* at 9. Disclosure of information between parties encourages trading. The realization that one party wants something that the other places little value on will lead them to exchange that item for something the other side has that they value. Consider a common example offered in class discussions by DePaul College of Law professor Kathryn Dutenhaver. A and B, two siblings, are fighting over an orange. Neither side discloses to one another the utility that the orange holds for them. After a lengthy argument, the siblings slice the orange in half. Sibling A wanted the peel; sibling B wanted the fruit. Half of the peel and half of the fruit end up in the garbage can because neither sibling disclosed to the other why they wanted the orange. While the situation with Chief Illiniwek is not so simple, the fact remains that discourse between the University and the Peoria Tribe has been minimal.

<sup>175</sup> *The Chief Illiniwek Dialogue Report*, available at [http://www.uiuc.edu/dialogue/report\\_files/X.html](http://www.uiuc.edu/dialogue/report_files/X.html) (last visited Jan. 24, 2004).

<sup>176</sup> *Id.*

made, an anti-Chief audience member approached the man and informed him that compromise was out of the question.<sup>177</sup> Professor John Lynn of the University of Illinois history department, a contributor to the Dialogue Report, noted that:

“Native American advocates at the forefront seem unwilling to accept any other option but eradication. Of course, all can agree on one point if nothing else; this should be a question of what is right, not of what is expedient. But how is the ‘right’ best achieved, and who gains if Illiniwek vanishes like the tribes of Illinois?”<sup>178</sup>

The concerns of Professor Lynn have fallen on deaf ears for three years. At the time of the *Chief Illiniwek Dialogue Report*, it was unclear who could emerge to advocate the Native American perspective in a negotiation.<sup>179</sup> However, the Clarkson paradigm suggests a simple answer. The representative who should negotiate the image of Illiniwek is the Peoria Tribe of Oklahoma, the remaining descendants of the Illini tribes. In addition, descendants of the other Illini tribes should be invited to participate. By including only this group, proper respect may be paid to important elements of tribal identity and sovereignty.

The Peoria Tribe and the University could then take steps to create an authentic Illiniwek image, bridging the divide between modern day Illinois and its rich past. The resulting image could then be registered as a federally protected trademark. Revenue from officially licensed goods could be used to support both a Native American studies program and the university’s athletic department.<sup>180</sup> In the meantime, Native Americans not members of the Peoria Tribe could be utilized to help implement such educational programs. However, these Native American groups should not be included in designing a more accurate mascot for the University; such an approach would overlook the need to celebrate tribal sovereignty that is central to Clarkson’s model. Despite

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> The author is not familiar with the University’s financial outlook. Establishing a Native American studies program would likely require help from alumni donations. Professor Lynn has suggested that Native American scholarships be created, promoting Native American presence on campus. He also suggested that one of these scholars could be used to portray a revamped Illiniwek molded in a more accurate image.

the enormous efforts of concerned groups to bring problems concerning Indian mascots to the fore, the Peoria Tribe must be handed the torch and trusted to take it from here. Ultimately, in the words of Professor Lynn, “[t]he Illiniwek that has been may well be dead or dying; however, the Illiniwek that could be promises to be healthy and long-lived, able to strengthen the unity and enrich the memories of generations of students to come.”<sup>181</sup>

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<sup>181</sup> *Id.*