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THE CHIRICAHUA APACHES AND THE ASSIMILATION MOVEMENT, 1865-1886: A HISTORICAL EXAMINATION

*John W. Ragsdale Jr.**

Table of Contents

I. Introduction	291
II. The Roots of the Assimilation Movement	293
III. Early Encounters Between the Chiricahua and the United States . . .	300
IV. The Peace Policy as an Alternative to Extermination	306
V. The Concentration Movement	313
VI. The Breakouts	320
A. Victorio	321
B. Depredation Law	324
C. Sanctuary	327
D. Cibecue	330
E. Interlude	335
F. Crook	337
G. New Beginnings of Assimilation at Turkey Creek	342
VII. Final Breakouts and Surrenders	346
VIII. Conclusion: Some Reflections on the Laws of War and Assimilation	355

I. Introduction

Prior to the assimilation movement, the Chiricahua Apache Indians had built no stone temples, no multi-story apartments, no irrigation systems and no ceremonial highways. They traveled light and migrated with the game and the seasons. They lived in wickiups, dome-shaped homes made of thatch and

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poles,¹ covered with cloth or skin – quickly built and easily left behind.² As Geronimo stated, “once [we] moved about like the wind.”³

This lightness of touch on the land spoke of ability, grace, and imagination. Their traditional way of life emphasized the people’s intelligence, knowledge in the arts of fighting and survival, resourcefulness and striking fitness. Contemporary white observers described the Chiricahua with awe and admiration, transcendent of ethnic and cultural bias. Britton Davis, who fought with Crook and supervised the Chiricahua at Turkey Creek on the San Carlos Reservation in 1884, wrote that the Apache were perfect athletes, comparing them to deer in ability to move and muscle tone.⁴

They were beyond formidable as fighters. In small, cohesive groups, moving swiftly and silently, striking hard without warning, and finally vanishing, they bedeviled military forces hundreds of times their size. Rarely killed or captured, General Crook once said, “the Apaches are the shrewdest and best fighters in the world.”⁵

Their ferocity and efficiency as warriors were balanced by an intense devotion to family and tribe, an almost puritanical morality and a deep spirituality.⁶ Even under the force of superior numbers and technology, they maintained a belief in themselves as ascendant beings.⁷

Assimilation is about one people bludgeoning another people in an attempt at forcing submission. But it is also a story of passion, resistance, resilience, and resurrection. It is a vivid microcosm for social, political, economic and legal choices, mistakes and consequences. This is the record of the attempts to subdue, transform and assimilate the Chiricahua Apache. But, first, we will trace generally the nature and course of the American Indian assimilation movement.

1. Morris E. Opler, *Chiricahua Apache*, in 10 HANDBOOK OF THE NORTH AMERICAN INDIAN: SOUTHWEST 401 (Alfonso Ortiz ed. 1983) [hereinafter *Chiricahua Apache*].

2. MORRIS EDWARD OPLER, AN APACHE LIFE-WAY: THE ECONOMIC, SOCIAL, AND RELIGIOUS INSTITUTIONS OF THE CHIRICAHUA INDIANS 385-86 (University of Nebraska Press 1996) (1941).

3. See BRITTON DAVIS, THE TRUTH ABOUT GERONIMO 210 (University of Nebraska Press 1976) (1929); see also DAVID ROBERTS, ONCE THEY MOVED LIKE THE WIND 272 (1993).

4. See DAVIS, *supra* note 3, at 80.

5. George Crook, *Apache Affairs: An Interview with General Crook*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, at 396, 402 (Peter Cozzens ed., 2001) [hereinafter *Crook, Interview*].

6. See GERONIMO, HIS OWN STORY (AS TOLD TO S.M. BARRETT) 58-71 (Frederick Turner ed., 1996) [hereinafter *GERONIMO*]; EVE BALL, INDEH: AN APACHE ODYSSEY 56-65 (University of Oklahoma Press 1988) (1980) [hereinafter *INDEH*].

7. *Id.*; see also JASON BETZINEZ, I FOUGHT WITH GERONIMO 6, 10 (1987).

II. Roots of the Assimilation Movement

When Europeans first entered the Americas and encountered the subsistence economies⁸ of the native people, they were faced with a conundrum: could the resources and lands of the inhabitants be taken by force, or must they be procured by negotiation and purchase? Some invaders, most notably the Spanish, were inclined toward military seizure.⁹ But conquest was not always possible, practicable or morally acceptable.¹⁰ The tribes' numbers and strength often precluded immediate subjugation even if the taking could be partially justified by self-serving assertions of racial or cultural superiority, economic determinism or God's manifest will.¹¹

The early English settlers in North America bided their time, and secured their footholds primarily with negotiation and purchase.¹² Though forceful dispossession was certainly not unknown,¹³ treaties of peace and cession became the predominant method of land acquisition.¹⁴ Such legal niceties proved cumbersome and irritating, however, when the white population grew to the point that unilateral decision-making was possible. Yet the settlers and the emergent new nation were bound by the precedent of treaty-making as well as by the documents themselves. An expedient compromise emerged as the whites began increasingly to manipulate both the formative process of the agreements and the interpretation. Treaties often became masks for duress, misrepresentation and unconscionability.¹⁵

8. See DONALD HUGHES, *AMERICAN INDIAN ECOLOGY* 1-9 (1983).

9. DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA* 57 (1992). Pathogens often did the work of forceable conquest. See DAVID E. STANNARD, *AMERICAN HOLOCAUST* 81 (1992).

10. Franciscus de Victoria, a Spanish scholar developed a theory of international law in the 1500s, under which the native inhabitants of the Americas possessed natural legal rights to land, by virtue of their status as free, rational people. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 96-97 (1990).

11. DAVID E. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 55 (5th ed. 2005) [hereinafter *FEDERAL INDIAN LAW*].

12. *Id.* at 57.

13. See, e.g., KIM ISAAC EISLER, *REVENGE OF THE PEQUOTS* 31-36 (2001).

14. FELIX COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 52-55 (Rennard Strickland et al. eds., 1982) [hereinafter *COHEN*].

15. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 *CAL. L. REV.* 601, 608-19 (1975).

Following the War of 1812 and the final departure of the Indians' English allies, the negotiating process became even more one-sided.¹⁶ Treaties securing the homeland reserves of the eastern and southern tribes were revisited and redrawn, pursuant to the authority of the grimly - named Indian Removal Act.¹⁷ The new agreements were signed under pressure and the tribes were forcefully escorted on long, tragic marches across the Mississippi into the nether regions beyond Arkansas, Missouri and Iowa.¹⁸ Despite the displacement of the tribes by the removal treaties, their sovereignty – the ability to make laws and live under them¹⁹ - was never explicitly denied by the dominant federal government.²⁰ Missionaries and churches did make modest inroads on Indian religion and culture,²¹ but, prior to the Civil War, the United States adopted no general laws aimed at transforming the internal dynamics of tribal society. Retained sovereignty did not, however, assure the permanence of the new existence on the edge of the Great Plains. Indeed, the promises of continuity made in the removal treaties were to last less than two decades for many tribes.

The 1840s ushered in sweeping jurisdictional changes for the United States with the additions of Texas, the Mexican cession and the Oregon Territory.²² The Indian frontier formed by relocation, once considered land beyond the pale of white desire or necessity, now lay squarely in the middle of the sprawling, gangly, bicoastal nation. The lure of gold, water, timber, forage and land itself drew the settlers west – and into the wall of legal restraint. It proved to be a temporary inconvenience.

The federal government decided on another round of removal treaties with the barely-settled tribes. In the mid-1850s, the peripatetic Commissioner of Indian Affairs, George Manypenny, negotiated treaties of cession and removal up and down the Indian frontier, under which most tribal peoples surrendered their prairie domains and departed for the Oklahoma Territory.²³ With the

16. *Id.* at 608-09.

17. Ch. 148, 4 Stat. 411 (1830).

18. COHEN, *supra* note 14, at 83-92.

19. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

20. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

21. FRANCIS PAUL PRUCHA, *THE GREAT FATHER* 284-92 (1984).

22. GEORGE CAMERON COGGINS, CHARLES F. WILKINSON & JOHN P. LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 37-40 (5th ed. 2002).

23. GEORGE W. MANYPENNY, *OUR INDIAN WARDS* 111-33 (Robert Clarke & Co. 1880).

exception of some greatly constricted reservations and individual allotments,²⁴ the mid-continental Indian presence had been eliminated.

The flood west accelerated until roughly 1860 when the edgy young nation turned in on itself over slavery and economics issues. Civilian movement and the military presence in the west and Southwest declined with the onset of the Civil War. The Federal legislative will to power, however, was on the rise. Liberated by Southern secession from the knife-edge politics of accommodating and confining slavery, the Northern Congress quickly passed laws designed to open the west and aid the movement and economic interests of the mobile, yeoman citizenry.²⁵ The Homestead Act of 1862, the Pacific Railroad Grant of 1862, the Mining Acts of 1866, 1870, and 1872, and the Desert Land Act of 1877,²⁶ together with the common law development of the prior appropriation of water rights²⁷ were an invitation for the American pioneers to enter the vast western public domain on a search for land, resources and wealth. Backed by these acts and doctrines, the pioneers were not to be deemed mere trespassers on the public domain, but were instead to be considered legal entrants whose license and bare possession could ripen into title.²⁸ These acts and doctrines also guaranteed white contact and conflict with the resident Indian tribes whose aboriginal possession had neither been extinguished by the sovereign,²⁹ nor recognized by treaty or statute.³⁰ In fact,

24. *Id.*; see also John Ragsdale, *The Dispossession of the Kansas Shawnee*, 58 UMKC L. REV. 209, 239-54 (1989-1990).

25. See PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 393-94 (1968).

26. RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 142-47 (1991).

27. See *Cal. Oregon Power Co. v. Portland Beaver Cement Co.*, 295 U.S. 142, 153-58 (1935).

28. See *Mining Co. v. Boggs*, 70 U.S. 304, 307 (1865); *Bufford v. Houtz*, 133 U.S. 320, 328-29 (1890).

29. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 587 (1823) (holding that only the United States, as a dominant sovereign, could extinguish the Indian aboriginal title, and that extinguishment must be done explicitly, by treaty or conquest).

30. Recognition of Indian title by treaty or statute transforms the Indian aboriginal title into property protected by the Fifth Amendment. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955). If aboriginal title is taken by the United States, there is no obligation to pay just compensation. *Id.* at 284-85. Only the dominant sovereign can take either recognized or unrecognized title. In another sense, only the United States can extinguish Indian title. See *Johnson v. McIntosh*, 21 U.S. at 585.

The United States passed a Non Intercourse Act in 1790, currently embodied in 25 U.S.C. § 177, under which no transfers of Indian property to state, local or private interests are permitted without the express authorization of the United States Congress. Encroachment by local and private interest often occurred, however, and it remained until late in the twentieth

these dispositional laws may have assured that conflict with recognized Indian title was inevitable as well.³¹

In the aftermath of the Civil War, President Ulysses S. Grant, along with religious reformers, sought a peaceful resolution to the mounting tensions between the subsistence economics of the western Indians and the burgeoning flood of white gain-seekers. Concentration of the tribes on reservations created by treaty, statute or executive order, rather than attempts at extermination or genocide,³² was to be the centerpiece of his post-war peace policy.³³

Peace did not necessarily imply undisturbed tribal sovereignty or economy. Indeed, in 1871, Congress passed a law, which disclaimed tribes as sovereigns with whom treaties would thereafter be made.³⁴ The federal government would, henceforth, deal with tribes by formal, bicameral statutes.

The impact of this change was not immediately felt by the western tribes, as statutes, like treaties, were preceded by negotiated agreements in the field. The demise of formal treaty-making was, however, a prelude to the assimilation movement. The Act's literal denigration of tribal sovereignty, together with a Supreme Court invitation to congressional reform appended to the Crow Dog case,³⁵ paved the way to the Major Crimes Act of 1885.³⁶ This act asserted a federal criminal jurisdiction over a variety of intra-tribal crimes

century for many tribes to secure any redress. *See* Alabama-Coushatta Tribe of Texas v. United States, No. 3-83, 2000 WL 1013532 (Fed. Cl. 2000). Some tribes never secured relief for such encroachments or failed to secure the relief desired which was return of the land. *See* United States v. Dann, 470 U.S. 39 (1985).

31. Miners sought gold in the Black Hills recognized as Sioux property under the Treaty of Fort Laramie. *See* Treaty of Fort Laramie, U.S.- Tribes of Sioux Indians, Apr. 29, 1868, 15 Stat 635; *see* DEE BROWN, THE AMERICAN WEST 132-39 (1995) [hereinafter THE AMERICAN WEST]. The United States ultimately took the Black Hills from the Sioux, and the Supreme Court held, over a century later, that the United States owed them just compensation. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

32. *See* HELEN HUNT JACKSON, A CENTURY OF DISHONOR 298-335 (University of Oklahoma Press 1995) (1885).

33. PRUCHA, *supra* note 21, at 479-83.

34. The Indian Appropriation Act of 1871 provided: "Hereinafter, no Indian nation or tribe within the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." Indian Appropriation Act of 1871, ch. 120, 16 Stat. 544, 566.

35. *Ex parte* Kan-Gi-Shun-Ca (Crow Dog), 109 U.S. 556 (1883). The case upheld tribal sovereignty against an attempt by the federal government to assert criminal jurisdiction over an intratribal killing. The Court noted in closing: "To justify such a departure . . . requires a clear express of the intention of congress . . ." *Id.* at 572.

36. 18 U.S.C. § 1153 (2000).

and in essence pierced tribes' sovereign veil.³⁷ The act was sustained in *United States v. Kagama* under the theory that the tribes were the wards of the United States and that the government as guardian was possessed of an implied constitutional authority to forcefully remold its wayward and benighted charges.³⁸

The assimilation movement, destined to hold sway for half a century, was designed to shatter the sovereign tribal shell, retrofit the unbuffered individuals for life and competition in a free market economy and shoehorn them into the American mainstream.³⁹ More particularly, the movement strove to break the tribes' collective hold on land and culture, to end the nomadic, space-consuming lifestyle of hunting and gathering, and replace it with an agrarian economy, individualized land holding and Christian values.⁴⁰

The motives behind assimilation ranged from the sublime to the cynical. Some cultural determinists believed that American Indian tribes were inexorably vanishing, and that individualism was inevitably to be dominant.⁴¹ Christian proselytizers felt that traditional religion, along with tribal government and collective economy should be replaced by the ideal of individualized salvation.⁴² Conservative economists hoped that the nations' social welfare burden would be eased by the Indians' agrarian self-sufficiency.⁴³ But, overarchingly, assimilation was motivated by relentless land hunger. It was reasoned that an end to extravagant collectivism and the freedom of the hunt, and the installation of intensive, individualized agrarianism would free up millions of acres for white appropriation.⁴⁴ The conviction, widespread if understated, was that whites could better use the timber, water, soil and minerals and therefore, they were entitled to do so.⁴⁵

37. Sidney L. Haring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 230 (1990).

38. 118 U.S. 375, 383-84 (1886).

39. John W. Ragsdale Jr., *The Movement to Assimilate the American Indians: A Jurisprudential Study*, 57 UMKC L. REV. 399, 402 (1989).

40. FRANCIS PAUL PRUCHA, *THE INDIANS IN AMERICAN SOCIETY* 23-24 (1985).

41. BRIAN W. DIPPIC, *THE VANISHING AMERICAN* 122-38 (1982).

42. PRUCHA, *supra* note 21, at 620-23.

43. *History of the Allotment Policy: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 2d Sess. pt. 9 (1934) (statement of Delos S. Otis), *quoted in* FEDERAL INDIAN LAW, *supra* note 11, at 168.

44. *The Purposes and Operation of the Wheeler-Howard Indian Rights Bill: Hearing on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73 Cong. 2d. Sess. (1934) (statement of John Collier), *quoted in* FEDERAL INDIAN LAW, *supra* note 11, at 171-72.

45. PRUCHA, *supra* note 21, at 651-52.

The tools of assimilation were varied in nature and application. In the early stages of assimilation, the government strove to concentrate and confine the tribes on reservations.⁴⁶ Government rations and agricultural indoctrination would then bridge the economic gap between hunting and gathering and a future of agrarian self-sufficiency.⁴⁷ A re-education in the language and beliefs of Christian America, centered on the children, was intended to eradicate tribal culture at its roots.⁴⁸ Strict prohibitions on cultural and religious practices – plural marriages, dances and ceremonies – were applied without regard to the free exercise of religion and sometimes with deadly force.⁴⁹ The master stroke, however, “the mighty pulverizing engine for breaking up the tribal mass”,⁵⁰ was allotment of land in severalty.

Under the Dawes Act of 1887,⁵¹ the federal government embraced a policy of individualizing the tribal land holdings into discrete titles and amounts paralleling those of the federal homestead laws operating on the public domain.⁵² The “excess” lands of the reservation; those remaining after the individuals received their plots, were to be returned to the public domain and sold to non-Indians for the tribes’ benefit.⁵³ The individualized holdings were touted as more protectible under state laws, more conducive to competitive agriculture and more compatible with economic individualism.⁵⁴ The tribal hold on land would be broken, tribal power over its people weakened and not incidentally, vast amounts of unallotted reservation land would be available for non-Indian entrants.⁵⁵

It is true that allotment freed up millions of acres for whites and greatly depowered many tribes.⁵⁶ But it is also true that the cost included a checkered, fractionated land pattern that was almost impossible to farm,⁵⁷ a crushing

46. *Id.* at 481-82.

47. *Id.*

48. FEDERAL INDIAN LAW, *supra* note 11, at 185.

49. *Id.*

50. Merrill Gates, *Addresses at the Lake Mohunk Conferences*, in AMERICANIZING THE AMERICAN INDIAN 342 (Francis Prucha ed., 1978).

51. Dawes Act of 1887, ch. 105, 119 Stat. 388, 391.

52. FEDERAL INDIAN LAW, *supra* note 11, at 173.

53. COHEN, *supra* note 14, at 131.

54. *Id.* at 132.

55. Ragsdale, *supra* note 39, at 413.

56. STEPHEN CORNELL, THE RETURN OF THE NATIVE 56-57 (1988).

57. COHEN, *supra* note 14, at 137. The federal government has tried to stem the fractionation that follows generations of interstate succession. See Indian Land Consolidation Act of 1882, 25 U.S.C. §§ 2201-2211 (2000). There are Fifth Amendment problems with compulsory consolidation and escheatment. See *Babbitt v. Youpee*, 519 U.S. 234 (1997).

administrative burden on the federal government,⁵⁸ an entrenchment of Indian poverty⁵⁹ not to mention a jurisdictional nightmare. Indeed, since allotment formally ended with the Indian Reorganization Act of 1934,⁶⁰ the course of tribal self-determination has been in large part the ongoing attempts to consolidate and reconstitute the tribal land base, to overcome the jurisdictional complexities and to recapture the sovereign initiative over individual and tribal interests held in federal trust,⁶¹ or repurchased within the boundaries of former tribal reservation lands.⁶²

The winds of assimilation that blew through the United States between the late 1860s and 1934 were strongest in the center of the country where land was fertile, where white desire was highest, and where the Indian tribes, already weakened by repeated assaults and displacements, were most vulnerable. Assimilationist sentiment also reached the mountains and deserts of the Southwest. The impacts were, however, delayed and disrupted by the rugged land, the arid climate and the irreducible human spirit. The attempts at confinement, economic transformation and cultural reform provoked a dramatic resistance, especially on the part of the Chiricahua.

This work will, in two articles, trace the history of the Chiricahua people and their intersection with the American Indian law and the policy of assimilation. The first article will examine the impacts of assimilation on the tribe's native Southwestern homeland. It will deal with the early attempts at reservation, confinement and economic transformation. It will discuss the manipulation of law and property, resistance, escape and the massive military response. It will conclude with the surrender of the insurgents, the removal of the tribe and the imprisonment in Florida.

The second article will deal with the harsh, repressive measures employed in the attempts at reeducating and remolding the captive people, the precipitous decline in health and spirit and the revival in Oklahoma. It will also focus on the return of the majority to the Southwest, the legal efforts to exact at least a modicum of monetary compensation, the revitalization of tribal

58. Since Indians didn't farm their allotments, they leased them with the Department of the Interior maintaining the rentals in Indian money accounts. Much of the money was mismanaged and unaccounted for. *See* Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

59. *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 301-18 (1970).

60. Ch. 14, 48 Stat. 984 (codified as amended at 25 U.S.C.A. §§ 461-479 (West 2004)).

61. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 81-119 (1987).

62. *But see* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005). The Supreme Court held that tribal purchase of former reservation land did not displace local taxing or regulatory jurisdiction. Such displacement would require the use of 25 U.S.C. § 465 to place the tribal holdings in trust.

government and sovereignty and the lives of some of the particular people who played on this singular stage of American life, history, law and morality.

III. Early Encounters Between the Chiricahua and the United States

The traditional Chiricahua never were a unified tribe, at least in the popular American conception. The United States has often sought to define or designate tribes for its own political or administrative convenience – lumping together unrelated groups⁶³ or artificially dividing ethnological wholes.⁶⁴ The Chiricahua were loosely divided into three major bands,⁶⁵ which in turn were composed of relatively autonomous sub-groups. The Eastern Band of the Chiricahua, sometimes called the Chihenne, the Mimbrenos or the Warm Spring Apache, localized in the Black Mountain region of Southwestern New Mexico, near the Canada Alamosa River.⁶⁶ The Central Band of the Chiricahua, or Chokonen centered in the Dragoon, Chiricahua and Dos Cabezas Mountains of Southeast Arizona and the Southern Band, the Nednhi or “Enemy People” lived in the Sierra Madre Mountains of Northern Chihuahua and Sonora of old Mexico.⁶⁷

The Chiricahua traditionally grew melons, corn, pumpkins and beans as supplements to their wild harvest,⁶⁸ but these crops declined in significance as raiding increased on the domestic stock of the ranching and farming communities of northern Mexico.⁶⁹ Theft of cattle and horses and the inevitable confrontations with their owners, led to a deeply entrenched enmity between Mexicans and Apaches. The Mexican-Apache history featured repeated cycles of false entreaties of peace, treachery, murder, enslavement and violent revenge.⁷⁰ A dark hatred for Mexicans existed which transcended and outlasted any hostility felt for the Americans, as reflected in Geronimo’s sentiments.⁷¹

63. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938). The Court held that it was a taking of an undivided one-half interest in the Shoshone’s recognized property interest when the United States placed an unrelated tribe, the Arapaho, on their treaty-based reservation.

64. See John W. Ragsdale, Jr. *Individual Aboriginal Rights*, 9 MICH. J. RACE & LAW 323, 338-39 (2004).

65. See *Chiricahua Apache*, *supra* note 1, at 401.

66. OPLER, *supra* note 2, at 1-4.

67. *Id.*

68. *Id.* at 413.

69. EDWARD H. SPICER, *CYCLES OF CONQUEST* 546-48 (1976); DONALD E. WORCESTER, *THE APACHES* 8 (1979).

70. See BETZINEZ, *supra* note 7, at 3-17; see GERONIMO, *supra* note 6, at 92-110.

71. Geronimo spoke late in his life about killing Mexican citizens, and expressed a deeply

In the retaliatory encounters with the Mexicans, the Chiricahua perfected guerilla tactics that became their military hallmark. They usually operated in small, independent units, avoiding direct, head-on confrontation if possible, and would strike quickly and efficiently from cover, and then would melt away.⁷² They were said to have speed and mobility along with superb physical fitness, a vast array of survival skills and combat prowess with gun, bow, knife and lance, carefully honed since early childhood.⁷³ An Apache warrior could cover up to seventy-five miles in a day over rough terrain on foot⁷⁴ and even further on horseback. Apache raiders once traveled 3000 miles in two months time – an average of fifty miles a day.⁷⁵ They pushed the horses to failure, would kill them (sometimes eat them), steal more and keep moving.⁷⁶ If a pursuing enemy got too close or struck suddenly, the Apache would scatter, confound their pursuers with multiple indeterminate choices and rendezvous at a prearranged distant point.⁷⁷ These tactics enabled Chiricahua warriors to control the variables of armed encounter and wage war against numerically superior forces for nearly twenty-five years with relatively minimal casualties to the fighting men.⁷⁸

Apache children were taught how to endure pain and how to inflict it.⁷⁹ Torture by the Apache could be creatively gruesome and egregious examples were a major reason for the Apaches' almost irredeemable reputation among whites.⁸⁰ Scholars and informants often stress, however, that the motivations behind torture were not necessarily sadistic. Mutilations after death were designed to hamper the afterlife, and scalping was done in retribution for the Mexican bounty practices which accepted Indian scalps as verification of extermination.⁸¹

held hatred for the Mexican people. GERONIMO, *supra* note 6, at 110.

72. George Crook, *The Apache Problem*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 593, 597-98, 602 [hereinafter Crook, *The Apache Problem*].

73. *Id.* at 596; BETZINEZ, *supra* note 7, at 30; GERONIMO, *supra* note 6, at 59.

74. BETZINEZ, *supra* note 7, at 6.

75. ROBERTS, *supra* note 3, at 194.

76. *Id.* at 195.

77. BETZINEZ, *supra* note 7, at 68.

78. ROBERTS, *supra* note 3, at 285. A striking exception was the encirclement and crushing defeat of Victorio's band at Tres Castillos, Mexico. See DAN L. THRAPP, VICTORIO AND THE MIMBRES APACHES 293-307 (1980) [hereinafter VICTORIO].

79. See generally Crook, *supra* note 72, at 596; BETZINEZ, *supra* note 7, at 30; GERONIMO, *supra* note 6, at 59.

80. See JOHN C. CREMONY, LIFE AMONG THE APACHES 266-67 (Rio Grande Press, Inc. 1969) (1868).

81. BALL, *supra* note 6, 82-85; ROBERTS, *supra* note 3, at 43-49.

The Mexican Cession of 1848 brought some unavoidable issues into the American jurisdictional fold. The United States now had, within its southern boundary, a fierce, mobile, militaristic society whose hunting and raiding economy centered on the theft of domestic horses and cattle and whose appetite for ritualistic torture and revenge seemed unquenchable and terrifying, even to hardened frontier sensibilities.⁸² The jurisprudential debate that had presented itself at discovery, national formation, and removal was rekindled. What can, or should, a white Christian nation of superior size and power do when it attempts to acquire sovereignty over an area inhabited by non-white, non-Christian, non-agrarian aboriginal inhabitants, of modest populations but almost incomprehensible fierceness?

The United States could, theoretically, have made a total deference to the aboriginal prior possession – a nationalistic version of the “first in time, first in right” principle that was conspicuously predominant in the subsequent land and resource disposition laws.⁸³ The United States was, however, no more inclined to pursue this self-denial than had been its Spanish and Mexican predecessors – though it is significant that General William T. Sherman, frustrated by the intensity of Apache resistance, once recommended that Arizona be abandoned to the Indians.⁸⁴

In the long run, altruism or self-restraint toward vulnerable lands, species, resources or people is checked by the iron laws of economic and political competition.⁸⁵ The United States, even with its jurisdiction over the Southwest formally assured by the Treaty of Guadalupe Hidalgo in 1848,⁸⁶ remained wary of reassertions of influence and authority by Mexico. The experience in Texas had demonstrated that the nationality and raw numbers of immigrants to an area could eventually dictate the course of sovereignty.⁸⁷ The United States had, therefore, a significant interest in facilitating the movement of white yeomen, miners and entrepreneurs into the newly acquired areas.⁸⁸

Individuals were drawn by self-interest as well. Free or under-priced land, forage, water and minerals were the grist of economic advancement, and the

82. See William S. Oury, *Historical Truth: The So-Called “Camp Grant Massacre” of 1871*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 57.

83. COGGINS ET AL., *supra* note 22, at 86.

84. ROBERTS, *supra* note 3, at 81.

85. Garrett Hardin, *The Tragedy of the Commons*, in COGGINS ET AL., *supra* note 22, at 17-18.

86. Clyde A. Milner, *National Initiatives*, in THE OXFORD HISTORY OF THE AMERICAN WEST 155, 168 (Clyde A. Milner, Carol O’Conner & Martha A. Sandweiss eds., 1994).

87. See WHITE, *supra* note 26, at 64-69.

88. *Id.* at 137-54.

incipient competitors would flood onto the public domain despite the conflict with the natives and, eventually, past the point of collision with the carrying capacity of the unregulated land.⁸⁹

There were numerous reasons – race, religion and culture were among them - advanced to support the right of white Christian Americans to once again ignore Indian self-determination and take the land of the natives.⁹⁰ Perhaps the strongest argument or motive, operating in a pragmatic rather than dogmatic new society, was the idea of an economic determinism. It was an oft-voiced rationale that the Indians, as subsistence level collectivists, ranging nomadically over extensive regions,⁹¹ were not using the land efficiently or sufficiently and were, therefore, subject to displacement.⁹²

Indian lands in the Southwest were, in sum, islands in a rising stream of economic competition and growth, and were subject inexorably to erosion. Self-restraint, by either the nation or individuals, would, in the long-term, be a futile gesture, as unrepentant growth seekers under a competitive spur, would relentlessly search for openings.

Contact, then, was inevitable – and irreversible. The question then became whether the transfer of interests would be by consent or duress. In another sense would the re-allocation of resources be under law and negotiated agreement or under military conquest?⁹³ The United States, as successor to European discoverers, claimed under the doctrine of discovery, the formal, legal, fee title to the land⁹⁴ and the exclusive right to extinguish the Indians' possessory interests.⁹⁵ Though the Americanized version of the doctrine left the particular mode of extinguishment within the discretion of the federal government, the choice – as a matter of necessity if not morality – had usually been to unify title and possession with the treaties rather than force of arms.⁹⁶ This, however, was not to be the case with respect to the aboriginal lands of the Chiricahua Apache.

The early American entrants to the Chiricahua lands, prior to the Civil War, were either travelers on their way to the west coast, or prospectors. The 1851

89. See Hardin, *supra* note 85, at 17-18; see PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST* 76-77 (1988).

90. See WILLIAMS, *supra* note 10, at 13.

91. See John C. Cremony, *The Apache Race*, in 1 *EYEWITNESSES TO THE INDIAN WARS, 1865-1890*, *supra* note 5, at 8, 13.

92. See WHITE, *supra* note 26, at 115-16; LIMERICK, *supra* note 89, at 190.

93. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 587 (1823).

94. *Id.* at 573.

95. *Id.* at 587.

96. COHEN, *supra* note 14, at 52-55.

discovery of gold in the Pinos Altos region of New Mexico, which lay at the Southern end of the Black Mountains, homeland of the Warm Springs Band of Chiricahua, was an early source of conflict.⁹⁷ The Apache did not understand the allure of the seemingly useless metal, or the ravaging of the sacred earth to get it. They viewed the endeavor as both purposeless and sacrilegious.⁹⁸ Irritation grew to anger when the miners resorted to force to secure control of land, game and necessary resources.⁹⁹ The miners, belligerent and single-minded in their pursuit of wealth, were more inclined toward extermination of the native inhabitants than to cooperation or accommodation.¹⁰⁰

In 1852 an attempt to establish peace by treaty was made,¹⁰¹ the United States elicited a pledge, from several band chiefs, including Magnus Colorado of the Warm Springs Chiricahua, that the Indians would refrain from hostilities against the United States government, military and citizenry.¹⁰² The chiefs also agreed to permit the establishment of military forts and travel through the area.¹⁰³ In return, the United States pledged only to "designate, settle and adjust . . . territorial boundaries" at its earliest convenience.¹⁰⁴

The Chiricahua were to wait several decades before any real attempt to secure their homelands were made, and those attempts were, as will be seen, limited in scope and permanence. Following the treaty, relations deteriorated. Mangus was seized after a peaceful approach, tied to a tree and whipped by miners.¹⁰⁵ Cochise, the leader of the Central Band was, shortly thereafter, in 1861, unjustly and unsuccessfully imprisoned by an impetuous young lieutenant in the cavalry. Cochise escaped by cutting through the side of a tent, but there were ensuing casualties on both sides.¹⁰⁶ The two great leaders of Chiricahua, now united in rage and opposition to the miners and their military

97. ROBERTS, *supra* note 3, at 36.

98. INDEH, *supra* note 6, at 19; Peter Cozzens, *Introduction*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at xvii.

99. ANGIE DEBO, GERONIMO 59-62 (1976).

100. WORCESTER, *supra* note 69, at 72; INDEH, *supra* note 6, at 81.

101. Treaty with the Apaches, U.S.-Apache Nation of Indians, July 1, 1852, 10 Stat. 979.

102. *Id.* arts. 2, 3, 10 Stat. at 979.

103. *Id.* arts. 7, 8, 10 Stat. at 980.

104. *Id.* art. 9, 10 Stat. at 980. Language of this indefinite nature was not likely to be deemed a recognition of title. See *Northwestern Band of Shoshone Indians v. United States*, 324 U.S. 335, 341-53 (1945).

105. EVE BALL, *IN THE DAYS OF VICTORIO* 47 (2003).

106. DAN L. THRAPP, *THE CONQUEST OF APACHERIA* 14-19 (1967).

accompaniment, unleashed a firestorm of war that was to last a quarter of a century.¹⁰⁷

In times of peace and lack of stress, there was little political cohesion among the Chiricahua bands.¹⁰⁸ However, a rise of central authority paralleled the increase in necessity posed by external threat. Leadership flowed from competence rather than inherited status.¹⁰⁹ Mangus Colorado and Cochise, perhaps the greatest of the Apache leaders, were men of transcendent physical and mental capabilities. Their will, vision and personal power could galvanize even the fierce individuality of the Chiricahua into an effective political or militaristic entity.¹¹⁰ The unity was not a product of external coercion so much as the personal influence and persuasion of the chiefs, and the broad-based holding of common belief and purpose.¹¹¹

For a time, at the beginning of the 1860s, it appeared to the Apache that their resistance was successful. With the intensification of the Civil War, federal troops were withdrawn from the area, settlements were abandoned in the face of unchecked Apache threats and the population of Tucson shrank to less than 200.¹¹² The Apache sanguinity, however, was to be short-lived.

In 1862, General James H. Carleton and his troop of California Volunteers arrived in Arizona. They encountered an Apache force, concealed in the rocks of Apache Pass and blocking the entrance to the area's only spring.¹¹³ Carleton, with the aid of howitzers, drove the astonished Apaches out of the pass and away from the spring.¹¹⁴ The Apaches, who had never seen artillery before, were horrified at the disparity in technology. Asa Daklugie, son of Juh, the leader of the Southern Band of Chiricahua,¹¹⁵ later related that many feared, at that point, that the war against white intrusion was ultimately to be futile.¹¹⁶

Carleton's campaigns in the Southwest were exterminationist and genocidal in tone. He proceeded first against the Mescalero Apache and ordered his men to kill Mescalero men "whenever and wherever they can be found".¹¹⁷ He then

107. DEBO, *supra* note 99, at 61.

108. OPLER, *supra* note 2, at 463.

109. *Id.* at 465.

110. THRAPP, *supra* note 106, at 12-23; see EDWIN R. SWEENEY, COCHISE 397 (1991).

111. *Chiricahua Apache*, *supra* note 1, at 411.

112. WORCESTER, *supra* note 69, at 80; Cozzens, *supra* note 98, at xviii.

113. WORCESTER, *supra* note 69, at 82.

114. ROBERTS, *supra* note 3, at 37-38.

115. See generally DAN L. THRAPP, JUH: AN INCREDIBLE INDIAN (1992) [hereinafter JUH].

116. INDEH, *supra* note 6, at 52.

117. DEE BROWN, BURY MY HEART AT WOUNDED KNEE 20 (1991).

employed Indian – fighting legend Kit Carson, and his scorched earth tactics, to destroy the agricultural economy and the will of the Navajo.¹¹⁸ He then forced the Navajo, Chiricahua Apache, and the Mescalero Apache into a squalid, bug-infested, disease ridden internment in Bosque Redondo on the Pecos River in New Mexico.¹¹⁹

These episodes, and a growing national notoriety, ultimately led to the establishment of a treaty reservation for the Navajo in 1868.¹²⁰ There was nothing for the Chiricahua, however, nor the Mescalero who had fled Bosque Redondo some time previously.¹²¹

For the Chiricahua, the 1860s did not result in a treaty for a reservation and peace, as it had for the Navajo. Instead, the military repression by Carleton's troops continued for the remainder of the Civil War era. Typical of the tactics was the murder of Mangus Colorado in 1863 by California Volunteers. Mangus, in a reprise of his encounter with the miners, had come in for a parley, he was seized without justification, provoked, then shot and mutilated.¹²²

By the end of 1865, Carleton had been removed from command and his California troops withdrawn from the area. His policy of pacification by extermination and displacement still held sway, but it had become unorganized and increasingly ineffective.¹²³ There were too few trained soldiers, and far too little competence in the pursuit of Indian guerillas who were perfectly adapted to the terrain and completely committed to long-term resistance.¹²⁴ Arizona reeled under the impact, and consideration began on another approach.

IV. The Peace Policy as Alternative to Extermination

It was certainly true that the Civil War was a collision between competitive economies.¹²⁵ It was also undeniable that southern secession posed an inescapable decision on whether the federal union would prevail over states' rights. Less precise but more encompassing as a background rationale to the

118. *Id.* at 23-28.

119. *Id.* at 30; RUTH UNDERHILL, *THE NAVAJOS* 128 (1989).

120. UNDERHILL, *supra* note 119, at 144-63; *see* Treaty with the Navajo, U.S.-Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667.

121. UNDERHILL, *supra* note 119, at 129.

122. BROWN, *supra* note 117, at 198-99.

123. Cozzens, *supra* note 98, at xviii-xix.

124. *Id.*

125. JOSEPH M. PETULLA, *AMERICAN ENVIRONMENTAL HISTORY* 192-93 (1977).

war, however, was the moral confrontation over slavery and basic human equality. Indeed, the “uncabinable”¹²⁶ concept of equality, in the myriad permutations of individual and collective opportunities, basic rights and manifest outcomes, has, since the Civil War era, been one of the most dynamic forces in American law, economy and philosophy.¹²⁷ The visceral moral concerns over equality led quickly after the war to structural formalization in the form of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.¹²⁸ The possible implications of these statements, which go beyond race to the very heart of the social order, have unfolded gradually and without finality, pacing the very course and life of the social and political organism. An early implication, though not literally expressed,¹²⁹ was the change in treatment of the western tribes.

The nation’s movement west after the war not only forced a revisitation of the questions over a discoverer sovereigns’ rights to lands previously occupied by natives,¹³⁰ but also the issue of how these people, as individual human beings, should be regarded and treated. A policy and practice of extermination and genocide, prevalent during the Civil War and pre-war years in the Southwest,¹³¹ was glaringly incompatible with the new moral veneer that the post-slavery nation was earnestly attempting to display. In short, the humanitarian roots to the war and the resultant constitutional standards forced a rethinking of the treatment of the natives, even if the constitutional amendments did not literally apply to Indians.¹³² It was also an opportunity for an expanded governmental role for Christian reformers.¹³³ A galvanizing incident for the Indian policy reform movement was the infamous 1864 massacre at Sand Creek, Colorado.

126. Archibald Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966) (“Once loosed, the idea of equality is not easily cabined.”).

127. *Id.* at 91-94.

128. U.S. CONST. amend. XIII, cl. 1; *id.* amend. XIV, cl. 1; *id.* amend. XV, cl. 1.

129. David C. Williams argues that “reservation Indians are simply a categorical exception to the requirements of the equal protection clause.” David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 U.C.L.A. L. REV. 759, 830 (1991).

130. *See supra* Part III.

131. *See supra* Part III.

132. *See Williams, supra* note 129. The Supreme Court has avoided the application of Fourteenth Amendment strict scrutiny to Indian law as race-based classifications by use of the somewhat disingenuous assertion that an Indian tribe is a political classification rather than a racial one. *See Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974).

133. PRUCHA, *supra* note 21, at 481.

Colonel John Chivington, with a troop of Colorado volunteers, attacked a peaceful Cheyenne village at dawn and killed 150 basically defenseless men, women and children.¹³⁴ The murderous assault at Sand Creek, the slaughter of innocent non-combatants, the rampant mutilations and the subsequent gleeful display of dismembered body parts were heartily celebrated in Denver, but were viewed with outrage and revulsion by the Eastern press;¹³⁵ and ultimately by the government.

The demands for reform in the treatment of the Indians took root in the administration of Ulysses S. Grant.¹³⁶ The peace policy, as an alternative to extermination by the military, sought to create reservations in the western public domain, insulate and isolate the Indians from contacts with the whites and begin the reformation of tribal economy and culture. The Indians would be weaned from their hunting and gathering ways, instructed in agriculture and provided food, clothing and shelter materials during the transition process.¹³⁷ Not incidentally, the tribalists were to be instructed in the Christian beliefs of the reformers, and Christian sectarians were to serve as Indian agents.¹³⁸ Concerns about the possible combination of church and state and the possibility of an unconstitutional establishment of religion did not reach the scrutiny of the Supreme Court.¹³⁹ There remained, however, both a skepticism as to whether such peaceful practices should replace the directness of crushing military force, and continuing demands that all Indian affairs be turned over to the Army.¹⁴⁰

The peace policy was introduced on a broad scale in 1868 by a round of treaties and executive orders that established reservations for some of the major Great Plains, Great Basin and Southwestern tribes such as the Sioux, Shoshone, Ute and Navajo.¹⁴¹ The use of formal treaties in 1868, negotiated in the field by the executive branch and approved by the Senate proved to be

134. THE AMERICAN WEST, *supra* note 31, at 100-02.

135. PRUCHA, *supra* note 21, at 459-60.

136. *Id.* at 480.

137. *Id.* at 481-82. The peace policy as a beginning of assimilation was a retreat from the idea of inevitable extinction. See DIPPIE, *supra* note 41, at 137-38.

138. *Id.* at 145.

139. 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 8-11 (3rd ed. 1999).

140. PRUCHA, *supra* note 21, at 482.

141. Treaty with the Sioux, U.S.-Sioux Nation of Indians, Apr. 29, 1868, 15 Stat. 635; Treaty with the Eastern Band Shoshone and Bannock, U.S.-Shoshone-Bannock, July 3, 1868, 15 Stat. 673; Treaty with the Ute, March 2, 1868, 15 Stat. 619; Treaty with Navajo, U.S.-Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667.

the last gasp of a system of international-style agreements with the Indian tribes.¹⁴² After the legislative preclusion of formal treaty making with tribes in 1871,¹⁴³ statutes and executive orders, preceded by treaty-like negotiations in the field, became the formal basis for the establishment of reservations.¹⁴⁴

Peace, economic transformation and the beginnings of assimilation were embraced as a partial or potential alternative to extermination – but not a total or inevitable one. The established reservations were to be islands of respite and re-education – but tribes or individuals that had no reservation, or refused to go to their reserves on command or left without permission, were to remain the concern of the War Department.¹⁴⁵ The Military, hardened with veterans of the Civil War, was poised and ready to fight remaining hostiles, to drive them onto the reservations and to capture or kill any who later tried to escape.¹⁴⁶ The 1876 war with the Sioux, the pursuit and capture of Chief Joseph and the Nez Pierce, and the suicidal attempt by the Cheyenne to escape from Fort Robinson,¹⁴⁷ demonstrated that the iron fist of the United States military encircled the velvet glove of the reservation. The latter imagery is, perhaps, too kind.¹⁴⁸ Both options can be perceived as genocidal.¹⁴⁹ The War Department's aim was to physically destroy recalcitrant Indians, whereas the reservation was designed to disestablish their tribal culture and prepare for the assimilation of the individuals into the mainstream of the American economy and ways of life.¹⁵⁰

In Arizona, the impact of the peace policy and the reservation process was preceded and precipitated by a horrific continuation of extermination. In the spring of 1871, some peace-seeking Aravaipa Apaches,¹⁵¹ under Eskiminzin, had gathered in the vicinity of a military post called Camp Grant, where the commander, Lieutenant Royal Whitman offered them protection and food.¹⁵²

142. See Indian Appropriation Act of 1871, ch. 120, 16 Stat. 544, 566; see also FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES* 289-310 (1994).

143. *Id.*

144. *Id.* at 311-33.

145. PRUCHA, *supra* note 21, at 534.

146. ROBERT WOOSTER, *THE MILITARY AND UNITED STATES INDIAN POLICY, 1805-1903*, at 146-47 (1988).

147. See BROWN, *supra* note 117, at 273-349.

148. See *infra* Part VI.D.

149. See Rennard Strickland, *Genocide-At-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 722-23 (1985-1986).

150. See *supra* Part II.

151. Keith H. Basso, *Western Apache*, in 10 *HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST* 462, 488 (Alfonso Ortiz ed., 1983).

152. See BROWN, *supra* note 117, at 201-02.

It was an unofficial arrangement, not a formal reservation and was merely a humanitarian attempt by Whitman to ease the burden of the Bands' devastated economy.¹⁵³ Many citizens of nearby Tucson were, however, unappreciative of the benevolent gestures and were unenthusiastic about the proximity of the gathering and the possibility of permanence.

A vigilante force, fueled by dubious tales of Aravaipa depredations, assembled in late April. Six whites, forty-eight Mexicans, and ninety-two Papago Indians, the traditional enemy of the Aravaipa, marched east to Camp Grant and, on April 30, attacked at sunrise. Well over a hundred Aravaipa, almost all women, children or aged were murdered and mutilated, and nearly thirty children were captured and sold into slavery.¹⁵⁴

Though editorials in Arizona and Colorado were supportive, the eastern press and the federal government were outraged.¹⁵⁵ President Grant called for a criminal prosecution of the mob's instigators, which was forthcoming, although a jury of locals subsequently acquitted the defendants after a nineteen-minute deliberation.¹⁵⁶ In addition, Grant and the eastern reformers opted to expand the peace policy in Arizona, rather than turn General George Crook and his army loose on the unsubdued Apache bands.¹⁵⁷ In the fall of 1871, the Board of Indian Commissioners dispatched Vincent Colyer, dubbed "Vincent the Good" by an openly scornful Crook,¹⁵⁸ with authority to recommend the establishment of executive order reservations.¹⁵⁹

Colyer recommended the establishment of a reservation for the Warm Springs band on the Tularosa River in New Mexico – a site not accepted by the Indians who felt the Tularosa area too dry and cold, and who wanted a reservation at Ojo Caliente on the Canada Alamosa.¹⁶⁰ This was not forthcoming at the time because Colyer did not want to displace 300 Mexican settlers who were living in the area.¹⁶¹ Colyer also recommended a reservation for the Mescalero Apache east of the Rio Grande, and the White Mountain reservation near Fort Apache, Arizona.¹⁶²

153. *Id.* at 201.

154. *Id.* at 202-04; WORCESTER, *supra* note 69, at 121-22; ROBERTS, *supra* note 3, at 72-75.

155. ROBERTS, *supra* note 3, at 74.

156. *Id.*

157. ALEXANDER B. ADAMS, GERONIMO 179-80 (1971).

158. THRAPP, *supra* note 106, at 105.

159. DEBO, *supra* note 99, at 81.

160. *Id.* at 83; FRANK C. LOCKWOOD, THE APACHE INDIAN 227 (1987).

161. ROBERTS, *supra* note 3, at 91.

162. DEBO, *supra* note 99, at 83-84; ROBERTS, *supra* note 3, at 85.

Colyer had made a striking beginning to the peace policy in Arizona and, shortly, over 4000 Apaches were gathered on the executive order reservations.¹⁶³ When he departed Arizona, however, after his whirlwind visit, there was one glaring omission. He had not made peace with, nor even met, the greatest living Apache chief, Cochise and his Central Band of Chiricahua.¹⁶⁴

In the spring of 1872, Grant appointed General Oliver Howard, called "the praying general" for his pious ways,¹⁶⁵ as a special agent for the Department of the Interior. Howard was instructed to continue the peace-making efforts of Colyer and, if possible, to make an agreement with Cochise. Howard created the new San Carlos Reservation, adjacent to the previously established White Mountain Reservation, but he was unable to meet with Cochise, until he fortuitously encountered Tom Jeffords in the fall of 1872.¹⁶⁶ Jeffords, a civilian mail carrier, had made a personal compact with Cochise that enabled him to carry mail through the Chiricahua heartlands without fear of attack.¹⁶⁷ He had entered Cochise's stronghold alone and without weapons to discuss the matter of safe passage for his mail riders.¹⁶⁸ Cochise, who generally hated whites,¹⁶⁹ was nonetheless impressed with Jeffords' courage, directness and honesty. Cochise let him live and present his case, and he ultimately agreed to let Jeffords and his mail riders pass unharmed through the area.¹⁷⁰

Jeffords, alone among the Arizona whites, had been able to successfully deal with Cochise because their agreement had flowed out of a relationship bounded by trust and personal integrity.¹⁷¹ The bond between Jeffords and Cochise deepened into a friendship that was never broken. Jeffords, who heard Cochise's last words, ultimately buried the great chief in a secret place and went silently to his own grave without betraying any of the confidences accorded him.¹⁷² Throughout his life, Jeffords was firmly and uncompromisingly committed to the welfare of Cochise and the Chiricahua.¹⁷³

163. ROBERTS, *supra* note 3, at 86.

164. *Id.* at 87.

165. WORCESTER, *supra* note 69, at 135.

166. SWEENEY, *supra* note 110, at 352.

167. *Id.* at 294-95.

168. *Id.*

169. INDEH, *supra* note 6, at 25-28.

170. SWEENEY, *supra* note 110, at 294-95; ROBERTS, *supra* note 3, at 88-90; DEBO, *supra* note 99, at 76.

171. PETER ALESHIRE, COCHISE 224 (2001).

172. ROBERTS, *supra* note 3, at 141-42; ALESHIRE, *supra* note 171, at 285-89.

173. WORCESTER, *supra* note 69, at 142; THRAPP, *supra* note 106, at 168-69.

Howard was introduced to the extraordinary Jeffords at Fort Tularosa, and Jeffords in turn arranged a meeting with Cochise.¹⁷⁴ Cochise agreed to peace and the establishment of a reservation in the Dragoon Mountains, with Jeffords as the agent.¹⁷⁵ The compact was later formalized by Grant's executive order of December 14, 1872, which established a reservation of almost 3,000,000 acres.¹⁷⁶

Despite the establishment of the Chiricahua Reservation, the San Carlos Reservation, the White Mountain Reservation and the Warm Springs Reservation at Tularosa River, raiding from other unsettled bands of Apaches continued.¹⁷⁷ Crook was finally free to unleash the military counterpart to the peace policy.¹⁷⁸ His tactics were simple, direct, effective – and often controversial. He employed unrelenting force against armed resistance, compassion toward women, children, and those warriors who would surrender and agree to live in peace on the reservations, and the use of pack trains and co-opted Apache scouts to pursue and locate the mobile insurgents.¹⁷⁹ By the middle of 1874, Crook had defeated most of the resistance and forced the outlaw bands to locate on reservations.¹⁸⁰ In this same year, the authority over the Arizona reservations was transferred from the War Department to the Indian Bureau, and a plan was formed to concentrate many, if not all, of the Apache Bands on the San Carlos Reservation.¹⁸¹ Crook resisted the idea as incompatible with ethnographic reality,¹⁸² but his opposition was defused by his 1875 reassignment to the northern Great Plains.¹⁸³

174. JOSEPH ALDEN SLADEN, *MAKING PEACE WITH COCHISE* 30-64 (Edwin R. Sweeney ed., University of Oklahoma Press 1997) (1872).

175. *Id.* at 94-98, 160 n.128.

176. MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE* 18 (1997).

177. THRAPP, *supra* note 106, at 118.

178. *Id.*; see also John G. Bourke, *Crook's Campaign in '72*, in 1 *EYEWITNESSES TO THE INDIAN WARS, 1865-1890*, *supra* note 5, at 141.

179. See John G. Bourke, *The Salt River Cave Fight*, in 1 *EYEWITNESSES TO THE INDIAN WARS, 1865-1890*, *supra* note 5, at 147; Crook, *supra* note 72, at 598-602.

180. WORCESTER, *supra* note 69, at 148-67.

181. *Id.* at 168.

182. *Id.*; see ROBERTS, *supra* note 3, at 154-55.

183. BROWN, *supra* note 117, at 217. See generally JOHN G. BOURKE, *BOURKE'S DIARY: FROM JOURNALS OF 1ST LT. JOHN GREGORY BOURKE, JUNE 27-SEPT. 15, 1876* (James Willert ed., 1986).

V. The Concentration Movement

The Chiricahua Reservation was not imposed on Cochise's band by force, and was not conceived nor employed as a tool of assimilation. The boundaries and management were suggested by Cochise, they were discussed from positions of balanced strength, and the resultant political entity was intended to encompass and preserve a viable, sustainable homeland.¹⁸⁴ After establishment, there was no federal attempt at transforming the economy to an agrarian one. Rather, hunting, gathering, trading and raiding into Mexico, which bordered the reservation on the south, remained the core of Chiricahua livelihood.¹⁸⁵ Had this state of affairs continued, it could have demonstrated a post-discovery alternative of continuing tribal self-determination. It would have confirmed the possibility of a plurality of self-directed sovereigns, instead of one dominant, eurocentric sovereign and a multitude of dependent or conquered indigenous ones.¹⁸⁶

For a brief while it seemed possible – but then a series of events, so often recurrent in the history of Federal – Indian relationships as to suggest inevitability, began to unfold and destabilize the situation. Cochise, whose personal strength and countervailing efforts had brought the United States military and political powers to an impasse for almost two decades, became desperately sick and, less than two years after the establishment of the reservation, he died.¹⁸⁷ Without Cochise's offsetting presence and power, a centripetal administrative force began to hold sway. The United States unfolded plans to concentrate and confine the various Apache bands at San Carlos Reservation, and return the other reservations to the disposable public domain.¹⁸⁸

The motivations for Apache concentration, like the motives for Indian dispossession in general, ranged from impracticable theory to cynical illegitimacy. Economically aggressive whites discovered resources within the reserves -- gold, silver, prime ranch lands -- that were previously unknown or under appreciated and had become desirable. The whites often reasoned that the Indians were not productively using these elements and thus should make

184. See SLADEN, *supra* note 174, at 94-96.

185. *Id.* at 105-08; ADAMS, *supra* note 157, at 195, 197; SWEENEY, *supra* note 110, at 367-90.

186. See Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 291-93 (1986).

187. SWEENEY, *supra* note 110, at 395.

188. SLADEN, *supra* note 174, at 108; WORCESTER, *supra* note 69, at 167-71.

way.¹⁸⁹ In particular, the discovery of gold on the White Mountain Reservation and the mineral potential in the Dragoons created a pressure for diminishment or disestablishment of these reservations and concentration of the Indians at San Carlos.¹⁹⁰ The infamous Tucson Ring of corrupt businessmen wanted concentration at San Carlos to facilitate their access to the influx of federal Indian aid.¹⁹¹ Still others felt that the reservation system encouraged an unacceptable nomadic lifestyle and the continuation of raiding and fighting.¹⁹² Finally, some bureaucrats in Washington liked the idea of concentrating even ethnologically diverse or incompatible groups in a common location as it was, regardless of its impact on lives or cultures, more ostensibly orderly and efficient.¹⁹³

Concentration at San Carlos was in retrospect a crippling blow to the future of peace and mutual sovereignty, in general, and to the Chiricahua culture, in particular. The prospect of confinement in this forbidding place directly fostered a decade of resistance, escape, flight and armed conflict, and ultimately led to the imprisonment and cultural disestablishment of the Chiricahua people. Asa Daklugie, son of Juh, was quoted some seventy-five years after the concentration began.

San Carlos! That was the worst place in all the great territory stolen from the Apaches. If anybody had ever lived there permanently, no Apache knew of it. Where there is no grass there is no game. Nearly all of the vegetation was cacti; and though in season a little cactus fruit was produced, the rest of the year food was lacking. The heat was terrible. The insects were terrible. The water was terrible. What there was in the sluggish river was brackish and warm. Pools alongside the channel afforded places for insects to hatch. They served, as I know now, as breeding places for clouds of mosquitoes. Insects and rattlesnakes seemed to thrive there and no White Eye could possibly fear and dislike snakes more than do Apaches. There were also tarantulas, Gila

189. LIMERICK, *supra* note 89, at 190.

190. DEBO, *supra* note 99, at 172. David Roberts states that Cochise himself actually conducted a secretive mining operation on the Chiricahua Reservation to procure gold for use in trading in Mexico. ROBERTS, *supra* note 3, at 139-140.

191. THRAPP, *supra* note 106, at 165.

192. WORCESTER, *supra* note 69, at 191.

193. DEBO, *supra* note 99, at 95-96.

monsters, and centipedes. At times it was so hot that I am sure a thermometer would have registered well above 120 degrees.¹⁹⁴

John Clum, young, arrogant, but nonetheless innovative and not unsympathetic to the Indians, was appointed agent at San Carlos in August 1874, and was charged with implementing the concentration policy.¹⁹⁵ The Indian office in Washington specifically ordered Clum to remove the Central Band of Chiricahua from their reservation in 1876, asserting as pretexts an intratribal leadership fight and some nervous expressions of general, anti-Apache outrage from the local Arizona citizenry.¹⁹⁶ Clum attempted compliance, and President Grant formally abolished the reservation in October 1876, returning the land to the public domain.¹⁹⁷ The efforts at removal, however, splintered the Central Band. Less than half of the reservation Indians migrated to San Carlos with Clum, with the majority either fleeing south into Mexico to join Juh and his band of Southern Chiricahua, or north to Ojo Caliente, the reservation of the Eastern Chiricahua on the Canada Alamosa River.¹⁹⁸ Geronimo, the Bedonkohe Band¹⁹⁹ warrior, originally called Goyahkla,²⁰⁰ was among those escaping to Ojo Caliente and, shortly, his reputation for deadly raids and total incorrigibility began to grow.²⁰¹

Geronimo's raids and his use of the Ojo Caliente Reservation as a sanctuary attracted the attention of the Indian Department and the Army.²⁰² In April 1877, Clum was dispatched with a troop of soldiers to Ojo Caliente to remove the Eastern Band to San Carlos and to arrest Geronimo and other renegades.²⁰³ The members of the Eastern Band, who had taken no part in the raids, thought the retribution by removal to be unjustified.²⁰⁴ They would come to realize, however, that the United States was seldom precise in according blame and punishment among the Indians. Despite the assimilation movement's ostensible emphasis on individualism, white justice was meted out to Indians

194. INDEH, *supra* note 6, at 37.

195. *Id.* at 37-38; ROBERTS, *supra* note 3, at 152-57.

196. DEBO, *supra* note 99, at 97.

197. LIEDER & PAGE, *supra* note 176, at 19.

198. GERONIMO, *supra* note 6, at 125.

199. *Id.* at 54.

200. "Goyahkla" means "one who yawns" or "one who is clever." SPRING HERMANN, GERONIMO 6 (1997). "Geronimo" is Spanish for Jerome, a name supposedly given by terrified Mexican opponents calling for Saint Jerome when under assault by the Indians. *Id.* at 17.

201. DEBO, *supra* note 99, at 99.

202. LOCKWOOD, *supra* note 160, at 227.

203. DEBO, *supra* note 99, at 103.

204. BETZINEZ, *supra* note 7, at 44.

collectively. It was, of course, easier to make generalized responses instead of precise deliberations, and there were other motives – land hunger, in particular – that prompted wholesale removal rather than principled adjudication.²⁰⁵

Clum's soldiers bound Geronimo in chains, placed him in a guarded wagon, and escorted him along with a substantial number of the Eastern Band, including leaders such as Victorio, Nana, and Loco, to San Carlos, arriving in late May 1877.²⁰⁶ The Indians' first view of the scorching desolation of San Carlos, after the beauty and tranquility of Ojo Caliente, was horrifying.²⁰⁷ The Ojo Caliente Reservation, the heartland of the Eastern Band, was closed late in 1877, after a little more than three years of political existence.²⁰⁸

Clum had been moderately successful in his concentration efforts. He had succeeded in bringing about a quarter of the Chiricahua to San Carlos, and he had laid the basis for the closure of both the Ojo Caliente and the Chiricahua reservations. There were, however, numerous Chiricahua unaccounted for,²⁰⁹ and Clum, in addition, had authority and management disagreements with the military at San Carlos.²¹⁰ Frustrated, he resigned in July 1877 and went to Tombstone, a wild mining town in southern Arizona, which had exploded since the closure of the Chiricahua Reservation. He later became the mayor and editor of the local newspaper, the *Epitaph*.²¹¹

Though the United States may have regarded the executive order reservation as an administrative measure of less formality, dignity or permanence than a reservation based on statute or treaty, it was clear that the Apache peoples tended to view them as the product of bargain and solemn, enduring commitment.²¹² The establishment of these reservations was often preceded by extended discussion and mutual agreement, and was confirmed by the highest of apparent authorities, the President of the United States. It was inconceivable to the tribes, negotiating in the best of faith,²¹³ that the United States would later claim that the President himself was unauthorized by the Constitution to make dispositions of the public domain,²¹⁴ or that

205. BROWN, *supra* note 117, at 388.

206. ODIE B. FAULK, *THE GERONIMO CAMPAIGN* 17-18 (1969).

207. BETZINEZ, *supra* note 7, at 46; BALL, *supra* note 105, at 28.

208. LIEDER & PAGE, *supra* note 176, at 20.

209. ROBERTS, *supra* note 3, at 170.

210. FAULK, *supra* note 206, at 18; BROWN, *supra* note 117, at 396-98.

211. ROBERTS, *supra* note 3, at 171.

212. INDEH, *supra* note 6, at 34, 38; BALL, *supra* note 105, at 30.

213. See SLADEN, *supra* note 174, at 96-97.

214. *United States v. Midwest Oil Co.*, 236 U.S. 459, 469-72 (1914).

Congress, expressly empowered by the Constitution, might harbor a contrary or more limited intent.²¹⁵ This was, in fact, what often happened. The executive branch made, modified and terminated many such reservations in unpatterned, unprincipled and/or unaccountable fashion, throughout much of the latter nineteenth and early twentieth centuries.²¹⁶ Though Congress generally knew of such executive activity,²¹⁷ it failed to proclaim any systematic limitations on the President until the twentieth century.²¹⁸ Thus the executive, in the nineteenth century, had at least the apparent authority to set aside public domain land as reservation, to preclude private disposition, and to invoke – and to frustrate – the reliance of Indian tribes.²¹⁹

Beyond the issues of authority, it is possible, in retrospect, to review the legality of the United States' actions with respect to the executive order reservations, even though a full redressability now appears impossible, and even a partial retribution had to await the ending of World War II and the passage of a special compensatory vehicle, the Indian Claims Commission Act.²²⁰ The Supreme Court had decided half a century before that the indigenous tribes maintained a legal possessory interest in land that was protectible against the intrusion of all except the federal government, and that the federal government itself could make an extinguishment only upon purchase or justified conquest.²²¹ The tenets of Indian property were not fleshed out, however, until well into the twentieth century. In *United States v. Shoshone Tribe*,²²² the Supreme Court considered the impact of a United States decision to confer an undivided one-half interest in the Shoshone's treaty reservation to the Arapaho, a separate tribe. The Court held that a tribe's title, confirmed by treaty or statute, was to be regarded as constitutionally protected property; the United States was not free to appropriate it or dispose of it without observation of the Constitution's just

215. *Id.* at 479-80.

216. *Id.* at 470.

217. *Id.* at 475.

218. The Pickett Act of 1910, 43 U.S.C. § 141, and the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714, set out specific objectives and procedural requirements for executive withdrawals. *See* COGGINS ET AL., *supra* note 22, at 339-64; *see also* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-90 (1999) (holding that an executive order attempting to terminate a tribe's treaty rights was ineffective because of a lack of authority).

219. FEDERAL INDIAN LAW, *supra* note 11, at 166-67.

220. Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946). *See generally* LEIDER & PAGE, *supra* note 174.

221. *Id.*

222. 304 U.S. 111 (1938).

compensation clause.²²³ In contrast, unrecognized title, the aboriginal title which has not been confirmed by treaty or statute, remains subject to federal extinguishment without constitutional consequence.²²⁴ The question of what status an executive order reservation would legally retain, was not answered until later.

The Supreme Court held, in *Sioux Tribe v. United States*²²⁵ that the executive order reservation could represent a constitutionally protected property interest only if that was the intent of both the executive and congress.²²⁶ The Court in effect created a presumption that short-term executive order reservations were merely administrative tools and not confirmed property. They could thus be granted or removed without constitutional consequence, regardless of the expectations or reliance of the Indians.²²⁷ The presumption against property in executive order reservations has even been employed, in recent times, with respect to an executive order interest in place and relied on for over a century.²²⁸

The canons of construction, voluntary rules of judicial interpretation for treaties and statutes,²²⁹ reflect both the federal government's trust responsibility²³⁰ and the Court's awareness of the unequal bargaining position of the tribes.²³¹ Under the canons, the construction of treaty language and negotiated agreements confirmed by statute are liberally construed to reflect and achieve the reasonable expectations of the weaker party.²³² If an executive

223. *Id.* at 115-16.

224. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955).

225. 316 U.S. 317 (1942).

226. *Id.* at 331.

227. *See Confederated Band of Ute Indians v. United States*, 330 U.S. 169 (1947).

[E]ven if the Indians had believed that they had a compensable interest in the Executive Order lands, this fact would not necessarily have given it to them. Certainly the absence of presidential authority to give them a compensable title could not be supplied by the Indians' understanding that the President had such authority.

Id. at 179-80.

228. *See Karuk Tribe of Cal. v. Ammon*, 209 F. 3d 1366, 1378-79 (Fed. Cir. 2000).

229. *See FEDERAL INDIAN LAW*, *supra* note 11, at 127-35.

230. *See COHEN*, *supra* note 14, at 221-25.

231. *See Winters v. United States*, 207 U.S. 564, 576-77 (1908).

232. The canons of construction have, ingrained in them, a one-sidedness to attempt to heal past mistakes by the United States government.

By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account

order reservation is created, not by unilateral administrative fiat, but following extended, arms-length negotiations, as in the case of the Chiricahua Reservation,²³³ then it is certainly arguable that the law and the constitution should respect and protect such reliance.²³⁴

Though the executive order reservations accorded to the Chiricahua were short-lived as political and administrative entities, they confirmed areas of historical and prehistorical possession, and followed extended negotiations from positions of balanced power.²³⁵ Cochise had fought the whites to a standstill for over a decade and his parleys had led to the establishment of the reservation, described as “no more perfect reserve was ever created in the United States.”²³⁶ It is reasonable to suggest that the Chiricahua had a Constitutionally – protected property interest in the Chiricahua Reservation and, probably, the Ojo Caliente Reservation, that could be taken only upon payment of just compensation.²³⁷

If a case for property in the executive order reservation can be made, then not only is there an argument for just compensation, but also a contention for liability in trust. The concept of the federal trust responsibility that lay behind the canons of construction²³⁸ also supports the idea of an actionable common law fiduciary responsibility. Actual liability for a breach of trust or the failure of common-law fiduciary duties did not take firm root until the creation of either a physical²³⁹ or monetary²⁴⁰ trust corpus under active federal control. Under modern concepts of the trust, the proof of bad faith²⁴¹ or impermissibly compromised faith,²⁴² together with mismanagement²⁴³ or appropriation²⁴⁴

of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the “double sense” which might some time be urged against them.

Id. at 576-77.

233. See SLADEN, *supra* note 174, at 94-96.

234. See, e.g., *Idaho v. United States*, 533 U.S. 262, 273-74 (2001).

235. See SLADEN, *supra* note 174, at 30-64; see also INDEH, *supra* note 6, at 28-34.

236. ROBERTS, *supra* note 3, at 136.

237. The Chiricahua Apache, in 1962, argued only for a more modest, non-constitutional recovery under the Indian Claims Commission Act. See LIEDER & PAGE, *supra* note 176, at 147-74.

238. See COHEN, *supra* note 14, at 221-25.

239. *United States v. Mitchell*, 463 U.S. 206 (1983).

240. *Seminole Tribe v. United States*, 316 U.S. 286 (1942).

241. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415-16 (1980).

242. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256-58 (D.C. 1972);

would be actionable. At least as abstract retrospection, it is contendable that the seizure and disestablishment of the Chiricahua reservations were bad faith breaches of trust.²⁴⁵

The ideas of property rights, just compensation and actionable trust were, at a minimum, unclear to the Central and Eastern Bands of Chiricahua in 1876, and were not even assertable in part until well after World War II. In 1876, the consuming reality for the Chiricahua was eviction without reason, permanent dispossession of their homelands and a brutal confinement on the fiery flats of San Carlos.

VI. The Breakouts

When the Chiricahua were wrenched from their mountain homelands and their nomadic life ways, confined on the low-lying, malarial, treeless, saunlike gravel flats of San Carlos, and made dependant on grudgingly provided food and materials, they suffered for the first time a true blow to internal tribal sovereignty.²⁴⁶ Confinement, inactivity and stagnation²⁴⁷ in a hated, spiritless place were compounded in effect by a pervasive sense of injustice.²⁴⁸ Promises of a permanent homeland had been broken with no real reasons provided other than the purported unhappiness of authorities over the random raiding of individuals or small groups not subject to any central direction or control.²⁴⁹ Suspicion remained among the Indians that the real reason for removal was the white hunger for gold and land.²⁵⁰

The initial sense of distress or injustice over the removal to San Carlos gave way with passing time to physical illness, restlessness and despair.²⁵¹ Some, like Jason Betzinez and his remarkable mother,²⁵² focused on maintaining

cf. Nevada v. United States, 463 U.S. 110, 127-28 (1983).

243. United States v. White Mountain Apache Tribe, 537 U.S. 465, 474-76 (2003).

244. United States v. Sioux Nation of Indians, 448 U.S. 391, 423-24 (1980).

245. Compare Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903), for the idea that, if the United States were deemed to act as a good-faith trustee, it could unilaterally change the form of the property held in trust. Thus, if the United States was acting (or was conclusively presumed to be acting) in good-faith, it might arguably exchange the trust corpus in the Ojo Caliente and Chiricahua reservations for one in San Carlos.

246. See Williams v. Lee, 358 U.S. 217, 220 (1959).

247. See BALL, *supra* note 105, at 5, 50, 73.

248. BETZINEZ, *supra* note 7, at 44.

249. LEIDER & PAGE, *supra* note 176, at 21; ROBERTS, *supra* note 3, at 172.

250. BALL, *supra* note 105, at 5; BETZINEZ, *supra* note 7, at 50.

251. BETZINEZ, *supra* note 7, at 47, 55; BALL, *supra* note 105, at 52.

252. W.S. Nye, *Forward*, in BETZINEZ, *supra* note 7; BETZINEZ, *supra* note 7, at 18-25.

physical, cultural and emotional strength,²⁵³ but many began to harbor thoughts of flight. There were no real illusions of ultimate victory. Warriors had experienced the howitzers at Apache Pass,²⁵⁴ and select Apache leaders had, on a trip east with Clum in 1875, seen the large cities and dense populations of white.²⁵⁵ The Indians were, in sum, well aware of their own limited numbers and material resources.

Yet the passion for homeland and even temporary freedom can overcome reason. Resolve arose among many for at least an attempt at life by traditional principles in the sacred places – even if the decision would lead almost certainly to death. Juh, who had refused to go with Clum to San Carlos, provided an anthem for many Apaches. He called on them to choose glorious, probably fatal freedom over degradation and decay of spirit in San Carlos. He said “they must choose between death from heat, starvation and degradation at San Carlos and a wild, free life . . . short, perhaps, but free.”²⁵⁶

A. Victorio

Victorio, a leader of the Eastern Chiricahua or Chihenne, was described by James Kaywaykla, the grandnephew of Nana, as “the most nearly perfect human being I have ever seen.”²⁵⁷ He had fought with Cochise and Mangas Coloradas in the 1860s²⁵⁸ but had come to recognize the ultimate futility of combat with the whites. He thereafter sought only a peaceful existence in the vicinity of Ojo Caliente²⁵⁹ – a repose that was cut abruptly short by the concentration policy.

The precipitous order of removal to San Carlos caused confusion and uncertainty among the Chiricahua. They submitted to Clum’s orders to move – but it was significant that they cached their weapons in the Ojo Caliente area before leaving.²⁶⁰ The initial perplexity at removal deepened into frustration and anger at San Carlos, which the Apache came to regard as the worst place in the southwest,²⁶¹ and an unjust, undeserved punishment.²⁶² In early September 1877, Victorio, with 310 men, women and children, left San Carlos

253. BETZINEZ, *supra* note 7, at 55.

254. EDWIN R. SWEENEY, *MANGAS COLORADAS* 435-40 (1998) [hereinafter *MANGAS*].

255. BROWN, *supra* note 117, at 394.

256. INDEH, *supra* note 6, at 34; *see* JUH, *supra* note 115, at 8-9.

257. BALL, *supra* note 105, at 41.

258. *MANGAS*, *supra* note 254, at 430.

259. VICTORIO, *supra* note 78, at 99-168.

260. *Id.* at 193.

261. BALL, *supra* note 105, at 5.

262. *See* VICTORIO, *supra* note 78, at 194.

with a herd of stolen horses and a resolve to return home.²⁶³ Victorio's Chihenne band was not seeking war, though once off the reservation they fell within the United States army's general military jurisdiction over off-reservation Indians. They managed, however, to avoid pitched battles and, within a month, had made their way back into New Mexico.²⁶⁴ It was a flight paralleled, in time and nature, by the efforts of Chief Joseph and the Nez Perce to flee the army and escape relocation in a hated place,²⁶⁵ and by the long journey of the Cheyenne, north from an Oklahoma reservation toward their homeland in the Dakotas.²⁶⁶ These breakaways ended in failure, with the capture of the Nez Perce near the Canadian border,²⁶⁷ and with the slaughter of Dull Knife's band of Cheyenne as they tried to escape confinement in the army's blockhouse at Fort Robinson.²⁶⁸ Victorio's flight at first seemed more successful.

Upon reaching the mountains of southwestern New Mexico, Victorio and Loco, another leader of the Chihenne, offered to surrender if they were allowed to stay at Ojo Caliente.²⁶⁹ The United States agreed to let them stay, though officials remained quietly committed to their removal and concentration plans.²⁷⁰ The reasons for the administrative obsession with this formalistic approach was never clear to anyone,²⁷¹ let alone the Chiricahua. Yet, like an incurable disease, the concentration policy reemerged within a year and, in September 1878, another Department of Interior order was made to return the Warm Springs Apaches to San Carlos.²⁷²

Loco, displaying the reluctant acquiescence to authority and superior force that would characterize much of his life,²⁷³ agreed, but Victorio, increasingly hardened and embittered, opted to continue down a deteriorating road of resistance. He fled into the mountains with between forty and fifty warriors and commenced a reign of raiding and terror in the Rio Grande Valley.²⁷⁴

263. ROBERTS, *supra* note 3, at 177.

264. *See* VICTORIO, *supra* note 78, at 200.

265. BROWN, *supra* note 117, at 316-30.

266. *Id.* at 332-49.

267. *See generally id.* at 327-30.

268. *Id.* at 346-47.

269. WORCESTER, *supra* note 69, at 215-16.

270. *Id.* at 216.

271. VICTORIO, *supra* note 78, at 205-09.

272. *Id.* at 209.

273. LEIDER & PAGE, *supra* note 176, at 22.

274. VICTORIO, *supra* note 78, at 209-11.

In another display of the United States' own confusion and indecision over the wisdom and the applications of the concentration policy, the Army and, later, the Department of the Interior, decided that, if Victorio surrendered again, his band could go to the Mescalero Reservation, east of the Rio Grande, instead of San Carlos.²⁷⁵ But the Army and the Administration were not the only forces now to be dealt with; the increasingly angry civil authorities wanted their own recompense for the casualties and damages caused by the raiding of Victorio's Band.

On September 4, 1879, Victorio, encamped on the Mescalero Reservation, perceived an emerging threat of arrest and trial by local authorities, and he bolted.²⁷⁶ This time his run was not to his homeland or another reservation, but down a final, near-suicidal warpath.²⁷⁷ He began with around forty to seventy-five warriors,²⁷⁸ including his sister Lozen, a legendary woman with great beauty, unparalleled military skills and paranormal powers of enemy detection.²⁷⁹ The Band also included Nana, Victorio's principal lieutenant, who, though nearly seventy-five years old and hobbled by an old ankle injury, could still out think, outfight and outride most warriors half his age.²⁸⁰

The Band swelled in number as other renegades joined until it numbered between 110 and 200 Apache warriors willing to fight the United States to the death.²⁸¹ Attacking with blazing but still efficient anger, moving in and away with great speed, the guerilla army swept through west Texas, New Mexico and Chihuahua, leaving a swath of death, destruction and terror.²⁸² In a little over a year, they killed more than 1000 people and evaded nearly 4000 pursuing Mexican and American soldiers.²⁸³ The Bands' lightning pace, brilliant tactics and perfect adaptation to the land made it unstoppable and uncatchable. Victorio's reputation among whites as perhaps the finest of all American Indian military leaders grew quickly.²⁸⁴

Victorio's one consistent logistical problem, his Achilles heel, was ammunition, which had to be stolen from the whites and Mexicans and which

275. WORCESTER, *supra* note 69, at 217-18.

276. LOCKWOOD, *supra* note 160, at 229; THRAPP, *supra* note 106, at 181.

277. VICTORIO, *supra* note 78, at 218.

278. ROBERTS, *supra* note 3, at 180; LOCKWOOD, *supra* note 160, at 230; *see also* PETER ALESHIRE, WARRIOR WOMAN 122 (2001) [hereinafter WARRIOR WOMAN].

279. WARRIOR WOMAN, *supra* note 278, at 27-57.

280. STEPHEN H. LEKSON, NANA'S RAID 3-5 (1987).

281. ROBERTS, *supra* note 3, at 181; BROWN, *supra* note 117, at 399.

282. *See generally* VICTORIO, *supra* note 78, at 218-92; DEBO, *supra* note 99, at 119-21.

283. ROBERTS, *supra* note 3, at 183.

284. VICTORIO, *supra* note 78, at 312-13.

was thus always in short or irregular supply.²⁸⁵ In late September 1880, he decided to head east into the Chihuahua desert, near Tres Castillos, and recuperate while Nana and a small group went in search of ammunition.²⁸⁶ Before Nana could return, and before the Band could race across the desert to the safety of the strongholds in the Sierra Madre Mountains, Victorio was surrounded by a large Mexican force. Without sufficient arms and with no routes of escape, Victorio and most of his warriors – with the notable exceptions of Nana and Lozen – were killed on October 14, 1880.²⁸⁷

B. Depredation Law

When a Band, such as that of Victorio, fled from the reservation into the surrounding countryside, it activated not only the military authority of the army, but also the civil and criminal jurisdiction of the state or territory encompassing the reserved Indian country.²⁸⁸ The acts of violence that occurred as the Band raced through the area – the stealing of horses, burning of dwellings and killing of civilians – raised distinct and divisive issues of liability and punishment. Civilian survivors wanted the right to compensation and the state or territory usually desired the ability to indict, try, and execute the perpetrators – especially when the bands were led by notorious renegades such as Geronimo or Victorio.²⁸⁹

Criminal jurisdiction over off-reservation Indian crimes was long contemplated under federal and territorial law.²⁹⁰ The Supreme Court, even before the Major Crimes Act of 1885,²⁹¹ in the *Crow Dog* case,²⁹² held that a territorial court could try an Indian defendant for murder committed in the territory outside the reservation boundaries and that a jury could decide on punishment by death or life imprisonment.²⁹³ Such Indian defendants were most likely to receive the sentence of death by hanging,²⁹⁴ but were, after 1879, at least afforded the opportunity to seek federal habeas corpus in order to test the legality of their confinement or punishment.²⁹⁵

285. BALL, *supra* note 105, at 89.

286. *Id.* at 90.

287. *Id.* at 94-107; VICTORIO, *supra* note 78, at 301-07, 312-14.

288. See COHEN, *supra* note 14, at 348-49.

289. See, e.g., LOUIS KRAFT, GATEWOOD AND GERONIMO 40-41 (2000).

290. See COHEN, *supra* note 14, at 348-49.

291. 18 U.S.C. § 1153 (2000); see COHEN, *supra* note 14, at 300-30.

292. *Ex parte Kan-Gi-Shun-Ca* (Crow Dog), 109 U.S. 556 (1883).

293. *Id.* at 560.

294. *Ex parte Gon-Shay-ee*, 130 U.S. 343, 347 (1889).

295. *Id.* at 353; see also *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (D.

If, however, the killings or damages were inflicted not as isolated, individual crimes, but by an Indian tribe or band as collateral damage of war, then the criminal jurisdiction did not apply.²⁹⁶ The recognition of Indian tribes as sovereigns whose members could assert rights as belligerents under international legal principles was, perhaps, not inevitable, given the Supreme Court's holding that tribes were, at best "domestic dependent nations".²⁹⁷ The law was clear, however, that tribes possessed the right to wage war, that property losses resulting from the exercise of that right were not compensable and that Indians could not be tried for murder or robbery in a state or territory if the acts were committed in the context of war.²⁹⁸

If, however, the deaths of civilians or the destruction of property outside of recognized Indian country was done by individual Indian members of a tribe or band "in amity" or otherwise at peace with the United States, an 1891 statutory provision made a partial waiver of sovereign immunity and provided a basis for compensation.²⁹⁹ The Indian Depredation Act of 1891 granted the court of claims jurisdiction over all depredation actions and, in effect, made the United States and tribes in amity responsible for the off-reservation actions of tribal members and liable as co-defendants.³⁰⁰ The money to compensate a successful plaintiff would in most cases be paid by the United States and indemnification could be made by the tribe in amity, in the form of land

Neb. 1879).

296. *Dobbs v. United States & the Apache Indians*, 33 Ct. Cl. 308 (1898).

The books hold that when war exists every citizen of one belligerent is the enemy of every citizen of the other. Conversely, this court holds that when every white man, at a given time and in a certain territory, is found to be the enemy of every Indian, and every Indian is found to be the enemy of every white man, a condition of amity does not exist within the meaning of the fifty statutes which employ the word "amity" to prevent war upon the frontier. If a party of bad white men or a party of bad Indians engaged in rapine and murder and the remainder of the white community and of the Indian tribe did not take up arms, it was crime, but not war. If, on the contrary, the condition of affairs was such that every man on the one side stood ready to kill any man on the other side and military operations took the place of peaceful intercourse, hostility so far existed that amity ceased to exist and the purpose of the statute in allowing indemnities was at an end.

Id. at 313.

297. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

298. LARRY C. SKOGAN, *INDIAN DEPREDAATION CLAIMS, 1796-1920*, at 139 (1996).

299. Indian Depredation Act, ch. 538, 26 Stat. 851 (1891).

300. SKOGAN, *supra* note 298, at 134.

cessions or reduced appropriations, unless a treaty or statute specified otherwise.³⁰¹

A key issue in the depredation claims process was the requirement of "amity".³⁰² If a tribe was at war with the United States and not in amity, then, as noted, an individual warrior could not be tried by the state, territory or federal government for murder and losses of private property were not compensable.³⁰³ Though a warring tribe's rights as belligerent were preserved by the Depredation Act, there remained a factual issue of whether a harm was done by members of a tribe in amity, or whether it was done by members of a separate band which, in spite of the peaceful relations of the main group, was itself in a state of war.³⁰⁴ If a band at war with the United States was deemed an autonomous entity separate from a related or parent tribe in amity, then neither the United States, nor the tribe remaining in amity, nor the warring splinter band itself would be responsible under the act for damages.³⁰⁵ If, on the other hand, the splinter group was not deemed a distinct political entity but merely wayward members of the tribe in amity, then the acts could be compensable criminal acts of depredation, rather than noncompensable, nonindictable acts of war.³⁰⁶

This act and its arcane but critical distinctions was the backdrop for the Supreme Court's consideration of Victorio's rampage and the subsequent claims for depredation.³⁰⁷ When Victorio first refused to return to San Carlos, he began raiding in the Rio Grande Valley³⁰⁸. He later refused to stay at the Mescalero Reservation, and started his final resistance,³⁰⁹ numerous harms were inflicted on civilians. The plaintiff Montoya contended that the Mescalero Apache tribe, from which Victorio fled before his final outburst, was in amity with the United States and therefore liable for Victorio's depredations.³¹⁰ The Supreme Court, however, held that regardless of the Mescalero's Apache tribe's amity, Victorio's band was a separate entity with

301. *Id.* at 186-206.

302. COHEN, *supra* note 14, at 10.

303. SKOGAN, *supra* note 298, at 139-46.

304. *Id.* at 46; COHEN, *supra* note 14, at 11.

305. SKOGAN, *supra* note 298, at 146.

306. *See Francis Salois v. United States, the Northern Cheyenne & the Sioux Indians*, 33 Ct. Cl. 326 (1898).

307. *Montoya v. United States*, 180 U.S. 261 (1901).

308. *See VICTORIO*, *supra* note 78, at 209-11.

309. *See id.* at 218.

310. *Montoya v. United States*, 32 Ct. Cl. 349 (1897).

“leadership and a concert action”.³¹¹ It further held that the particular Mescalero members who caused Montoya’s damage, had joined Victorio’s band at the break-out, and that this newly united band was carrying on a war with the United States as an independent organization.³¹² Thus, the depredations of Victorio’s warring, independent band – be they done by Eastern Chiricahua or newly-joined Mescalero – were not regarded as criminal acts, or a basis for compensation by either the United States or the Mescalero Apache tribe which remained in amity with the United States at the time of the harm.³¹³ Nor were later harms by members of Geronimo’s break-out band a basis for territorial criminal jurisdiction, compensation by the United States or compensation by the Chiricahua tribe which remained in amity with the United States on San Carlos reservation during Geronimo’s flight.³¹⁴

C. Sanctuary

The Sierra Madre Occidental Mountains run north and south from the Arizona and New Mexico borders for nearly 1000 miles, and span a width of up to several hundred miles.³¹⁵ These incredibly rugged, jagged mountains comprise an area of many thousands of square miles, almost completely wild in the late nineteenth century and contain numerous summits as high as 12,000 feet above sea level.³¹⁶ The range, of volcanic origin, is laced with numerous deep, steep-walled canyons and was virtually impassible to all but the nimble

311. *Montoya*, 180 U.S. at 266.

312. *Id.* at 270.

313. *Id.*

314. *Moeller W. Scott v. United States & Apache Indians*, 33 Ct. Cl. 486 (1898).

In this case of Geronimo’s band, only 22 men broke away from the band of prisoners in May, 1886, some of whom subsequently returned to the reservation, though a few from the reservation subsequently joined Geronimo; their wives and children did not accompany them; they had no previous formation as a band; their leader was not a chief; as has been said, they were but the minority of a minority, insignificant in numbers, without home or habitat, claiming nothing but their intrinsic ability to wage war against the United States. Nevertheless they were a fearful power in the Southwest, acting independently of the United States on the one hand and of the Chiricahua band on the other; and they continued to be such until the Government recognized them as a distinct military entity by allowing them to surrender “as prisoners of war to an army in the field.” The terms of that surrender precluded the idea of their being members of a tribe in amity; and characterized all that they did as the inevitable destruction of an Indian war.

Id. at 494.

315. Factmonster.com, *Encyclopedia: Sierra Madre*, <http://www.factmonster.com/ce6/world/A0845168.htm> (last visited June 12, 2006).

316. *Id.*

Apache and their traditional indigenous enemy, the Terahumaras.³¹⁷ The vegetation varies from cactus, mesquite and palm trees in the intense heat of the lowest valleys, to grama grass, scrub oak and cedar in the hills, and pine forests - ponderosa, white stet and pinion – on the flanks of the higher summits.³¹⁸ There are a number of clear-running streams and rivers, seemingly counterposed against the desert and semi-arid climate.³¹⁹ The mountains, though themselves bereft of permanent habitation sites, were, in the late nineteenth century, flanked by small Mexican agricultural communities, with cattle, produce, crops, trading goods and alcohol.³²⁰ The Sierra Madre were, in sum, a perfect respite for the nomadic Chiricahua who had long used them for hunting, gathering, trading, raiding and refuge – primarily in the winter months, while returning north to the Black Range, the Mogollons, the Dragoons and the Chiricahua Mountains in the summer.³²¹

The ultimate sanctuary, the physical and emotional heart of the Southern Chiricahua culture, was a huge, flat-topped, steep-sided mountain rising abruptly out of the Bavispe River valley.³²² The level summit, replete with game, shelter and water, was reachable only by means of a switch-back trail which was easily controlled from above by guns, arrows or Indian-induced rock slides.³²³ This stronghold and the sanctuary of the Sierra Madre, was critical to the resistance of the Chiricahua, especially when the concentration policies of the United States began to tighten the noose around the lifeways in Arizona and New Mexico.³²⁴

Geronimo did not leave San Carlos in the fall of 1877, when Victorio first broke out – possibly because the two did not get along very well.³²⁵ Geronimo did, however, prepare for future flight³²⁶ and was ready in the spring of 1878 when Juh, his brother-in-law by virtue of marriage to Geronimo's sister

317. See ROBERTS, *supra* note 3, at 187.

318. See World Wildlife Fund, *Wild World: Sierra Madre Occidental Pine Forests (NA 0302)*, http://www.worldwildlife.org/wildworld/profiles/terrestrial/na/na0302_full.html (last visited June 12, 2006); see also JOHN G. BOURKE, AN APACHE CAMPAIGN IN THE SIERRA MADRE 49-60 (1987) [hereinafter BOURKE, APACHE CAMPAIGN].

319. BOURKE, APACHE CAMPAIGN, *supra* note 318, at 49-60.

320. *Id.*

321. BALL, *supra* note 105, at 45.

322. *Id.* at 22, 123; BOURKE, APACHE CAMPAIGN, *supra* note 318, at 67.

323. *Id.*; see also KRAFT, *supra* note 289, at 157.

324. BALL, *supra* note 105, at 32-33.

325. JUH, *supra* note 115, at 17-20.

326. DEBO, *supra* note 99, at 117.

Ishton,³²⁷ came up from Mexico and encouraged him to leave.³²⁸ In April 1878, Geronimo and Juh bolted from San Carlos, seized guns and ammunition from a wagon train and, fully armed and supplied, sped across the border into the Sierra Madre.³²⁹

Toward the end of the following summer, Victorio would leave the Mescalero Reservation on his last wild rampage.³³⁰ Geronimo, again, did not join forces with Victorio which, considering the disaster at Tres Castillos, was to his obvious benefit. In fact, Geronimo and Juh were not even official outlaws at this time. Both had returned to San Carlos from their hideout in the Sierra Madre and were living in ostensible peace on the reservation when Victorio died.³³¹

Nana, the aged but still vital Mimbres chief, and Lozen, the warrior sister of Victorio, survived Tres Castillos but were unwilling to compromise – not with the American assimilation and concentration policy and most certainly not with the Mexicans.³³² Revenge for the killing of a great leader like Victorio was, in the Apache culture, a sacred obligation of rebalance.³³³

Nana and Lozen retreated to the Sierra Madre sanctuary to begin the rebuilding of a vengeance band.³³⁴ Nana visited the Arizona reservations in the early summer of 1881 – perhaps to recruit Juh and Geronimo and perhaps to visit Noch-ay-del Klinne, the prophet.³³⁵ Though Juh and Geronimo did not join Nana until later, it is alleged that the prophet and Nana together had a vision of the rising of Mangas, Cochise and Victorio, and that this image encouraged Nana on his amazing raid which began later in the summer.³³⁶

Nana, though deferential to Victorio and, later to Juh, was himself a chief and was in charge of the hostile Chiricahua in the summer of 1881.³³⁷ He was old, perhaps seventy-five, wrinkled and lame, but still possessed of an iron will that would enable him to ride all day, sleep in the saddle, and fight

327. INDEH, *supra* note 6, at 3.

328. DEBO, *supra* note 99, at 117.

329. *Id.* at 118.

330. *See supra* notes 277-87.

331. DEBO, *supra* note 99, at 125. It is probable that Geronimo and Juh engaged in periodic raiding while living on the reservation. *See* INDEH, *supra* note 6, at 141.

332. WARRIOR WOMAN, *supra* note 278, at 161-68.

333. BALL, *supra* note 105, at 119-20.

334. DEBO, *supra* note 99, at 125-26; WARRIOR WOMAN, *supra* note 278, at 168-69.

335. LEKSON, *supra* note 280, at 8; ROBERTS, *supra* note 3, at 196; *see infra* Part VI.D.

336. LEKSON, *supra* note 280, at 7; INDEH, *supra* note 6, at 53-54; DEBO, *supra* note 99, at 128.

337. LEKSON, *supra* note 280, at 8.

ferociously.³³⁸ Unlike Victorio who had to continually consider the movement and protection of women and children,³³⁹ and unlike raiders who sought to obtain supplies and avoid confrontation,³⁴⁰ Nana had a strong handful of impeccably skilled warriors who were bent only on vengeance and terror.³⁴¹ The little band, of perhaps as few as fifteen men,³⁴² headed north out of the Sierra Madre stronghold. In a span of less than two months, in the summer of 1881, they covered 3000 miles over some of the roughest terrain in the Southwest.³⁴³ With up to 1000 soldiers and 400 civilians in futile pursuit, Nana killed fifty or more people, captured several hundred horses, burned numerous ranches, fought and won repeated skirmishes, traveled an average of fifty miles a day and re-crossed the border without suffering a single verifiable casualty.³⁴⁴

D. Cibecue

While Nana's raid raged on in the summer of 1881, Noch-ay-del-klinne, the prophet, continued his teachings on the White Mountain Reservation, immediately north of San Carlos. The man who had inspired Nana with visions of resurrected Apache chiefs³⁴⁵ was, unlike Cochise, Juh or Geronimo, not a commanding physical presence. He was short, thin, pale and quiet in demeanor.³⁴⁶ Though he had served as a scout for General Crook in his campaign against the Tonto Apache, attended school in Santa Fe and traveled with a delegation to meet President Grant in Washington D.C.,³⁴⁷ he thereafter renounced war and the material world. He became, instead, a healer, an ascetic and a mystic.³⁴⁸ Despite his mild appearance and gentle manner, he had a charisma that flowed from his words and his sincerity.³⁴⁹ He was able to

338. *Id.* at 4-5.

339. *Id.* at 12.

340. OPLER, *supra* note 2, at 332-35.

341. LEKSON, *supra* note 280, at 8; BALL, *supra* note 105, at 120.

342. THRAPP, *supra* note 106, at 212.

343. LEKSON, *supra* note 280, at 18, 32.

344. *Id.*; THRAPP, *supra* note 106, at 315-16; ROBERTS, *supra* note 3, at 194-95.

345. *See supra* notes 335-36.

346. THRAPP, *supra* note 106, at 217; LOCKWOOD, *supra* note 160, at 235-36.

347. *Id.*; WORCESTER, *supra* note 69, at 236.

348. THRAPP, *supra* note 106, at 217.

349. INDEH, *supra* note 6, at 53-59.

convince great warriors of the Apache such as Nana, Geronimo and Juh,³⁵⁰ who ordinarily had little regard for those who were not fighters for the tribe.³⁵¹

Noch-ay-del-klinne, like Wavoka of the Paiute whose visions and teachings inspired the ghost dancing of the late 1880s,³⁵² spoke of the rebirth of Red America, the resurrection of the dead chiefs and the immortality of Indian believers.³⁵³ The teachings, despite a nonviolent content, involved dancing of such intensity and frenzy that administrators on the White Mountain Reservation became increasingly concerned. The Indians, enthralled by the hypnotic power of Noch-ay-del-klinne's medicine dance, were more cohesive, less divided by tribe or band and less receptive to the Agency's individualistic assimilative policies.³⁵⁴ Though some regarded the prophet's impact as an incitement to violence,³⁵⁵ other observers, including Geronimo, thought that the message of Noch-ay-del-klinne was one of peace and restraint.³⁵⁶

In mid-August 1881, the notoriously corrupt and incompetent civilian agent, Joseph Tiffany,³⁵⁷ decided on preemptive action to deal with medicine dancing and the rising passions on the reservation. He ordered Colonel Eugene Carr of Fort Apache to proceed to Cibecue Creek, and stated that Noch-ay-del-klinne should be "arrested or killed or both."³⁵⁸ Carr, with a force of more than 100 soldiers including twenty-three Indian scouts, rode into the prophet's camp on August 30, 1881. He told Noch-ay-del-klinne that he must go with them immediately, and that any attempt at escape or rescue meant death.³⁵⁹ Carr later said that the prophet "smiled and said that he did not want to escape, he was perfectly willing to go . . . and said that no one would attempt to rescue him."³⁶⁰

350. *Id.*; see CHARLES COLLINS, *THE GREAT ESCAPE: THE APACHE OUTBREAK OF 1881*, at 35 (1994) [hereinafter *THE GREAT ESCAPE*].

351. INDEH, *supra* note 6, at 53 n.1.

352. *Id.* at 53 n.2; see JAMES MOONEY, *THE GHOST-DANCE RELIGION AND WOUNDED KNEE 764-91* (1973).

353. ROBERTS, *supra* note 3, at 196-97; *THE GREAT ESCAPE*, *supra* note 350, at 1; WORCESTER, *supra* note 69, at 236-39; DEBO, *supra* note 99, at 128; CHARLES COLLINS, *APACHE NIGHTMARE: THE BATTLE AT CIBICUE CREEK 18* [hereinafter *APACHE NIGHTMARE*].

354. *APACHE NIGHTMARE*, *supra* note 353, at 23, 31; LOCKWOOD, *supra* note 160, at 234; WORCESTER, *supra* note 69, at 237; THRAPP, *supra* note 106, at 220.

355. See DAVIS, *supra* note 3, at 5.

356. *THE GREAT ESCAPE*, *supra* note 350, at 35.

357. COZZENS, *supra* note 98, at xxvii; DEBO, *supra* note 99, at 129.

358. *Id.*; *APACHE NIGHTMARE*, *supra* note 353, at 24.

359. *APACHE NIGHTMARE*, *supra* note 353, at 44.

360. *Id.*

The arrest was witnessed by a large crowd of medicine dancers and members of the prophet's band which ominously and angrily followed the departing soldiers. Shortly and inevitably fighting broke out.³⁶¹ Carr's soldiers immediately shot the defenseless Noch-ay-del-kinne, killed his wife and son. Because the prophet was still alive, they shot him again in the head and finally, gruesomely, killed him with an ax.³⁶² One Indian account states that Noch-ay-del-kinne had a chance to escape but was so concerned about the killing on his account that he resolved to stay and meet his fate where he was.³⁶³ When the shooting started, Carr's Indian scouts, for the first and only time in the history of the Apache wars, deserted and joined the insurgents.³⁶⁴ In all, eighteen Indians died in the fighting and seven soldiers, some from the bullets of the defecting scouts.³⁶⁵

Following the uprising at Cibecue Creek, the army command sent a large military contingent to the reservation to deal with the insurgents who may have numbered as many as six hundred.³⁶⁶ The rebels were no match for the soldiers, however, and they quickly began to surrender.³⁶⁷ The army initially contemplated mass hangings but later relented and focused its retribution on the disloyal Indian scouts.³⁶⁸ Though there was no real proof that the particular defendants had done the killings charged,³⁶⁹ the army hanged three of the former scouts and imprisoned two in Alcatraz.³⁷⁰

The impacts of the uprising were not over. The dramatic increase in the presence of soldiers and patrols on the reservation, the violent repression, and the rumors of plans to arrest and possibly charge other Indian leaders greatly concerned Geronimo, Juh and the Chiricahuas.³⁷¹ Like Victorio before them, they continually suspected treachery and, remembering Mangas' fate, feared imprisonment and murder.³⁷² They believed it better to die fighting in the open

361. WORCESTER, *supra* note 69, at 246.

362. *Id.*; ROBERTS, *supra* note 3, at 199.

363. THRAPP, *supra* note 106, at 228.

364. ROBERTS, *supra* note 3, at 199.

365. *Id.*

366. LOCKWOOD, *supra* note 160, at 239. Britton Davis, later the military agent at San Carlos, estimated that no more than fifty to sixty hostiles were involved. See DAVIS, *supra* note 3, at 5.

367. LOCKWOOD, *supra* note 160, at 242.

368. DEBO, *supra* note 99, at 131-32.

369. ROBERTS, *supra* note 3, at 200.

370. *Id.*

371. THE GREAT ESCAPE, *supra* note 350, at 37-41.

372. *Id.*; see GERONIMO, *supra* note 6, at 127-28.

than to die helplessly in confinement.³⁷³ On the night of September 30, 1881, Geronimo, Juh, and Naiche, the son of Cochise and hereditary chief of the Central Band, fled the reservation with about half of the Chiricahua men, women and children, and headed for the strongholds of the Sierra Madre.³⁷⁴

In legal retrospection, it is not hyperbole to suggest that the arrest and execution of the prophet at Cibecue Creek was one of the more egregious restraints on free speech and the free exercise of religion in American history, one clearly comparable to the massacre at Wounded Knee.³⁷⁵ It is also not far-fetched to note that the teaching, healing and prophecy of Noch-ay-del-klinne, his devoted followers and his murder at the hands of an intolerant military state were eerily biblical in nature. It is ironic, at the least, that the religious repression at Cibecue Creek, in particular, and during the assimilation movement, in general, flowed in substantial part out of a Christian presence imbedded in the policy and administration of American Indian affairs.³⁷⁶ Various Christian denominations had been accorded rights and responsibilities on particular reservations, with the Reformed Dutch Church having the sole preference to the Arizona Reservations.³⁷⁷ The instructional activities of the churches in Arizona and on other reservations were, not surprisingly, in complete disregard of the Indian values and religious beliefs³⁷⁸ and were backed up, as in the case of Noch-ay-del-klinne and the medicine dances, by the military muscle of the United States Army.³⁷⁹

First Amendment guarantees against federal interference with free speech and the free exercise of religion were, at the beginning of the assimilation era, limited in the cases where speech or belief were joined with conduct. The case of *Reynolds v. United States*³⁸⁰ held that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."³⁸¹ Thus either Congress or a territorial government could make polygamy a crime, even if the practice of plural marriage is otherwise commanded by the Mormon Church.³⁸² It would seem in hindsight that the medicine dancing at Cibecue Creek might,

373. GERONIMO, *supra* note 6, at 128.

374. THE GREAT ESCAPE, *supra* note 350, at 41-44.

375. See MOONEY, *supra* note 352, at 865-70.

376. PRUCHA, *supra* note 21, at 512-27.

377. *Id.* at 518.

378. *Id.* at 524.

379. *Id.* at 534-35.

380. 98 U.S. 145 (1878).

381. *Id.* at 164.

382. *Id.* at 166-67.

as conduct, fail to qualify under *Reynolds* as constitutionally protected speech or religion. The army, however, was not after dancing or dancers, it was after Noch-ay-del-klinne. The prophet was arrested and killed because of what he said.³⁸³ This assault on belief, speech and life was never to be forgotten by the Apache.³⁸⁴

The whites involved with the incidents at Cibecue Creek, described by Dan Thrapp as "egocentric,"³⁸⁵ were unable or unwilling to see that Indians could be moved by spirituality or to acknowledge that the medicine dance could be compatible with nonviolence. They preferred instead to believe that the emotion was a basis for insurrection³⁸⁶ and that Noch-ay-del-klinne was a cunning, scheming fraud who was bent on both provoking revolt and bamboozling his tribesmen out of goods and concessions.³⁸⁷ It seems likely that some of the white resistance to the transcendent visions of Noch-ay-del-klinne was based on self-interest. The prophet's appeal and message were spreading among tribal factions formerly antagonistic to each other, and whites may have seen this unity as disturbing.³⁸⁸ Whites were also interested in an increased diversion of the funds, rations and lands that had been set aside for the Indians and saw a quashed rebellion as an opportunity to expand their overreach.³⁸⁹ Indeed General Crook, in his retrospective examination of the prophet's murder and the ensuing insurrection, concluded that the Apache had the best of reasons for complaining and had displayed "remarkable forbearance in remaining at peace."³⁹⁰

In sum, the federal bureaucracy and military made decisions to repress what they could not – or could not afford – to understand. It resulted in a tarnishing of honor and principle, and led directly to the Chiricahua breakout.

383. Britton Davis did feel the teachings were an incitement to war. DAVIS, *supra* note 3, at 5. Incitement may be an exception to First Amendment protection. See *Brandenburg v. United States*, 395 U.S. 444 (1969). However, even those predisposed to fight or flee, such as Juh and Geronimo, did not interpret the prophets words as anything other than peaceful. See INDEH, *supra* note 6, at 52-54.

384. INDEH, *supra* note 6, at 52.

385. THRAPP, *supra* note 106, at 228.

386. *Id.*

387. APACHE NIGHTMARE, *supra* note 353, at 16-20.

388. See *supra* note 354.

389. See LOCKWOOD, *supra* note 160, at 258; see Alchisay et al., *The Apache Story of the Cibicue*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 295; George Crook, *The Apache Troubles*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 311 [hereinafter Crook, *The Apache Troubles*].

390. LOCKWOOD, *supra* note 160, at 258.

E. Interlude

On September 30, 1881, a large segment of the San Carlos Chiricahua bolted. Seventy-four Indians, led by Juh, Geronimo, Naiche, Chihuahua and Chato, fled south from San Carlos, killing any whites unlucky enough to cross their path, and seizing supplies and weapons.³⁹¹ The breakout was inspired in part by fear of the retributive army patrols criss-crossing the reservation in the aftermath of Cibecue,³⁹² but was also precipitated, in all probability, by the boredom of the reservation and the desire for the uninhibited life.³⁹³ Crossing the border and reaching the sanctuary of the mountains, they re-united with Nana's reconstituted band and thus assembled the strongest Chiricahua fighting force since the days of Cochise.³⁹⁴ It was to grow even stronger.

Life in the mountains of Mexico, in many ways recaptured the past.³⁹⁵ It seemed probable, however, at least to Juh, that the idyllic interlude could not last. He felt that the Chiricahua were doomed by the inescapable and growing weight of the invaders, and that, beyond the momentary respite of freedom, he could promise nothing but hardship and death.³⁹⁶ Still, the rugged vastness of the mountains, the ineptness of the Mexican military and the protective veil of the international border nurtured the hope of a permanent respite. It was a dream that could grow stronger with numbers, and the Chiricahua leaders began to plan reinforcements.

Loco and his band of Warm Springs Chiricahua had remained on the San Carlos Reservation during the September 30 breakout.³⁹⁷ The Sierra Madre group decided that they needed Loco and his warriors to fight, hunt and raid and the women and children to help run the mountain camp.³⁹⁸ The chiefs reckoned that they would persuade Loco to join them or, failing that, they would force him.

On April 19, 1882, at daybreak, the renegade Chiricahua warriors, led by Geronimo and, possibly, Juh and Lozen,³⁹⁹ entered Loco's village on the San Carlos Reservation, having first cut the telegraph wires connecting the agency

391. See *THE GREAT ESCAPE*, *supra* note 350, at 41-71; *DEBO*, *supra* note 99, at 131-32; *THRAPP*, *supra* note 106, at 232.

392. See *supra* notes 371-74.

393. *THRAPP*, *supra* note 106, at 234.

394. *ROBERTS*, *supra* note 3, at 205.

395. *BALL*, *supra* note 105, at 121-29. See generally *JIM FERGUS, THE WILD GIRL* 175-220 (2005).

396. *INDEH*, *supra* note 6, at 34.

397. *THRAPP*, *supra* note 106, at 235.

398. See *BALL*, *supra* note 105, at 136-39; *DEBO*, *supra* note 99, at 138.

399. *ROBERTS*, *supra* note 3, at 208; *THRAPP*, *supra* note 106, at 236.

with the outside. At gunpoint, the raiders ordered Loco and his band to leave with them.⁴⁰⁰ Loco, like Juh, was pessimistic about the future of his people⁴⁰¹ but, instead of futile and perhaps fatal resistance, he had opted for concession and peace⁴⁰² — often to the disgust of the more hardened warriors.⁴⁰³ Once his conscription was inevitable, however, he reverted to his essence as a capable war leader⁴⁰⁴ - in part because the deaths of agency personnel at San Carlos, inflicted by the kidnappers, might well have been attributed to him, anyway.⁴⁰⁵

There were nearly 100 warriors and three to four hundred women and children in Loco's band, but many were soft from the idle reservation life and few had weapons⁴⁰⁶ — deficiencies that were difficult but manageable in the escape from the United States. The captors fought a successful skirmish with United States troops near Stein's Peak, and continued on towards the border.⁴⁰⁷ Once in Mexico, however, the group ran into a disastrous ambush, laid by Mexican troops. The soldiers opened fire on the women and children who were leading the exodus, while the warriors remained at the rear to guard against pursuing Americans.⁴⁰⁸ Though the warriors quickly rallied to the front to drive the Mexicans back and allow escape, the Indians suffered seventy-eight dead and twenty to thirty captured.⁴⁰⁹

The stunned Chiricahua, finally free from the Mexican and American pursuit, staggered into the Sierra Madre camp. Their shock and grief was allayed in part by the renewal of acquaintances, by the safe haven of the mountains and by the formidable fighting capacity of the consolidated band.⁴¹⁰ They began to heal, spiritually and physically. They entered an idyllic time of traditional lifeways in the protective mountains, supplemented by periodic raids on the outlying Mexican ranches and communities.⁴¹¹ With their concentrated military power and the impregnability of the Sierra Madre, the wild Chiricahua could conceivably have maintained this pattern indefinitely.⁴¹²

400. BETZINEZ, *supra* note 7, at 56.

401. ROBERTS, *supra* note 3, at 208.

402. THRAPP, *supra* note 106, at 234.

403. BALL, *supra* note 105, at 138.

404. DEBO, *supra* note 99, at 143; BALL, *supra* note 105, at 143-45.

405. BETZINEZ, *supra* note 7, at 57.

406. DEBO, *supra* note 99, at 144.

407. BETZINEZ, *supra* note 7, at 62-66.

408. *Id.* at 71.

409. *Id.* at 75 note.

410. *Id.* at 76-77.

411. *Id.* at 77, 81-88; DAVIS, *supra* note 3, at 180-81.

412. ROBERTS, *supra* note 3, at 213-14; *see* FERGUS, *supra* note 395.

But the Apache were always restless,⁴¹³ and prone to dionysian excess rather than apollonian balance.⁴¹⁴ They had trouble with alcohol and Mexican treachery,⁴¹⁵ and ultimately had difficulty maintaining unity. Juh and his Nedhni band separated on several occasions apparently amicably, and headed south, deeper into the mountains. While Geronimo, Chihuahua, Loco, Naiche, Nana, Lozen and the Central and Eastern bands went north, with an eye towards raids in Sonora and Arizona.⁴¹⁶ On one of these separate sojourns, Juh, either ill or possibly drunk, fell from his horse and died.⁴¹⁷ Dakluge, his son, was with Juh and insisted that a stroke or heart attack, not alcohol, killed his father.⁴¹⁸

Though Juh died in an accident rather than in battle, he died a free man in his beloved mountains. He was spared the ignominy and ensuing depression that occurred when the interlude in the Sierra Madres was cut short and the wild Chiricahua were forced to return to San Carlos.

F. Crook

General George Crook, like Tom Jeffords, was successful in dealing with the Chiricahua because he was honest, courageous, fair and willing to learn and understand.⁴¹⁹ Jeffords, however, was an unapologetic spokesman for and defender of the Apache,⁴²⁰ whereas Crook was a relentless opponent on the battlefields, and a firm administrator on the reservation.⁴²¹ Still, he was viewed with great respect by most of the Indians.⁴²² His return to the Southwest from the northern Great Plains, in 1882, represented, perhaps, the best chance to correct the wavering course of the peace policy and to successfully resolve the Chiricahua's Mexican insurgency.

Crook's first task was to investigate the high unrest on the White Mountain and San Carlos reservations in the aftermath of the Cibecue Creek affair and

413. BETZINEZ, *supra* note 7, at 81.

414. *Id.* at 38.

415. *Id.* at 77-80.

416. *Id.* at 83-85, 91, 97.

417. Jason Betzinez states that Juh died after the Eastern and Central bands had surrendered to Crook, but before the Southern band, led by Juh, had come in. *Id.* at 121-22.

418. INDEH, *supra* note 6, at 75-77.

419. INDEH, *supra* note 6, at 55, 84, 111; BETZINEZ, *supra* note 7, at 120-21; WOODWARD B. SKINNER, *THE APACHE ROCK CRUMBLES* 26 (1987).

420. ALESHIRE, *supra* note 171, at 280-81.

421. FAULK, *supra* note 206, 32-46.

422. BETZINEZ, *supra* note 7, at 120-21; Philip P. Wilcox, *An End to Indian Outbreaks, in* 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 321.

the ensuing breakout of the Chiricahuas. Crook conducted extensive interviews with the Indians,⁴²³ and was convinced that the reaction to the arrest and murder of the prophet at Cibecue Creek, and the subsequent Chiricahua flight were provoked by a number of sources, including agency corruption, intrusion on the reservations by white miners and ranchers, the inadequacy of living and farming conditions on the Gila flats, a feeling that Noch-ay-del-klinne's death was premeditated and a pervasive fear that reprisals against the Indians for past misdeeds was forthcoming.⁴²⁴ Crook sought to stabilize the situation on the reservations and to restore the trust and energy of the Indian people. To these ends, he resurveyed the reservation boundaries, expelled the squatters and trespassers, encouraged agriculture by paying the Indians for hay delivered, and allowed the bands to move off the stifling flats and into the mountain highlands.⁴²⁵ Though he didn't dwell on it, Crook's understanding of the provocation of the Chiricahua flight probably convinced him that his future efforts would be to force the wild Chiricahua to return to the reservation, if he could, rather than to exterminate them.⁴²⁶

Another of Crook's reforms, one that was a prelude to his plans for a Mexican invasion, was a doubling of the number of enlisted Indian scouts.⁴²⁷ Crook, ever the pragmatist, knew that it would take an Apache to catch an Apache.⁴²⁸ Military commanders prior to Crook would hopelessly try to chase Apaches with heavy wagons, inappropriate clothing and gear and limited information. The Apache with their extraordinary physical skills, endurance, mobility and practical knowledge,⁴²⁹ were almost impossible to find, let alone defeat and capture, especially when they scattered into the canyons and crags. Crook had great admiration for the physical, mental, and military skills of the Apache and he was willing to utilize them.⁴³⁰ Crook's trust in the scouts was complete, and he was never betrayed, even though his fighting force contained considerably more Indians than regular soldiers.⁴³¹

423. See Alchisay et al., *supra* note 394, at 295-310.

424. Crook, *The Apache Troubles*, *supra* note 389; BOURKE, APACHE CAMPAIGN, *supra* note 318, at 4-8; ROBERTS, *supra* note 3, at 219, GERONIMO, *supra* note 6, at 127.

425. CROOK, *supra* note 429, at 311-13; WORCESTER, *supra* note 69, at 260-68; ROBERTS, *supra* note 3, at 220.

426. SKINNER, *supra* note 419, at 28-29.

427. WORCESTER, *supra* note 69, at 262; FAULK, *supra* note 206, at 32-34.

428. SKINNER, *supra* note 419, at 26.

429. *Id.* at 28-29; see BOURKE, APACHE CAMPAIGN, *supra* note 318, at 30-37.

430. Crook, *Interview*, *supra* note 5, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 396, 401-02.

431. *Id.* at 398-99; John G. Bourke, *With Crook in the Sierra Madre*, in 1 EYEWITNESSES TO

Having revamped the administration of the reservation and the military, and having revived the possibilities of a viable assimilation process, Crook maintained a wary eye for Geronimo and the wild Chiricahua. Any response he might make would, this time, be immensely aided by an agreement, signed by Mexico and the United States in the summer of 1882, that would allow hot pursuit of Apache raiders across the international border and into their mountain hideouts.⁴³² Beyond authorization and manpower, however, he needed a pretext for pursuit and he needed intelligence – a road map into the Indians' stronghold. Both were soon to be forthcoming.

A band of twenty-six warriors, led by the enigmatic Chato, staged another of the signature Chiricahua lightning strikes in March 1883. Coming out of the Mexican mountains and crossing the border, they covered nearly 450 miles in less than a week, sleeping on the move and traveling up to 100 miles in a day.⁴³³ They killed twenty-six people, including a federal judge and his wife, and took the judge's young son captive.⁴³⁴ The raiders were not seeking to kill, although they were clearly willing.⁴³⁵ They wanted guns, horses and ammunition, and they were able to procure these without detection by the military or resistance by civil authority.⁴³⁶

They were not able to escape all incident. Beneactiney, a cousin of Betzinez, was killed while approaching a miner's cabin,⁴³⁷ and his best friend among the raiders, a White Mountain Apache called Tso-ay, was so grief-stricken by the loss that he decided to go back to the reservation.⁴³⁸ In the spirit of non-coercive Apache individualism, his band accepted his decision, wished him well and went on without him.⁴³⁹ Tso-ay, nick-named "Peaches" by the whites because of his good looks and fair complexion, later surrendered to Britton Davis⁴⁴⁰ and agreed to lead Crook into the stronghold.⁴⁴¹ Crook now

THE INDIAN WARS, 1865-1890, *supra* note 5, at 346 [hereinafter Bourke, *With Crook*].

432. Frederick T. Frelinghuysen, *Mexico: Reciprocal Right to Pursue Savage Indians Across the Boundary Line*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 343.

433. DAVIS, *supra* note 3, at 59; BOURKE, APACHE CAMPAIGN, *supra* note 318, at 10-11; ROBERTS, *supra* note 3, at 224.

434. The boy may later have been killed, during the Crook invasion. See BETZINEZ, *supra* note 7, at 107. This was never clear, however, and his whereabouts remained an enduring Southwestern mystery. See FERGUS, *supra* note 395, at 200-03.

435. DEBO, *supra* note 99, at 159-60.

436. *Id.* at 167-68.

437. BETZINEZ, *supra* note 7, at 107, 117.

438. *Id.* at 118.

439. *Id.*

440. DAVIS, *supra* note 3, at 58-59.

441. BETZINEZ, *supra* note 7, at 118.

had both the excuse for invading the Sierra Madre and the means to make it successful.

On May 1, 1883, six weeks after Chato's raid, Crook crossed the border into Mexico with a troop of eleven officers, forty-two regular soldiers, seventy-six mule-packers, 266 mules, and 193 red-bandanaed Apache scouts, including Tso-ay.⁴⁴² The mountain terrain, incredibly rough for the pursuers, was a vast natural fortress for the fugitives. There was an abundance of fuel, adequate water, sheltering trees and caves, and an almost endless maze of deep canyons and sharp rocky summits.⁴⁴³ The entourage moved carefully and quietly. Perhaps because of a complacent view that their stronghold was impenetrable, the Chiricahua apparently were unaware of the American advance.⁴⁴⁴ Even Lozen, with the power to detect the presence of enemies,⁴⁴⁵ was surprised by the invasion.

On May 15, after almost two weeks of arduous, secretive travel through the mountains, Tso-ay led the group into two Chiricahua rancheries, or camps, maintained primarily by women and children, which the United States' force quickly subdued.⁴⁴⁶ The great majority of the Chiricahua warriors and leaders; however, were not there. They were in other, distant camps or raiding in Sonora and Chihuahua.⁴⁴⁷ Geronimo, in particular, was 170 miles to the east where he was raiding Mexicans to procure captives for trading.⁴⁴⁸

Jason Betzinez, Geronimo's cousin who himself was no mystic, was with Geronimo on the raid and, many years later, reported a striking example of Geronimo's gift of clairvoyance. Geronimo, suddenly and without explanation, became aware that the Sierra Madre base camps had been captured by Crook and the United States forces. He told his band that they must abort the raid and return immediately.⁴⁴⁹ Crook, meanwhile, held the camps and waited. Insurgent Chiricahua came in, slowly but steadily in small segments. Many indicated that they were tired of the uncertainty of the outlaw life, and that they wished to surrender and return to the reservation.⁴⁵⁰

442. Bourke, *With Crook*, *supra* note 431, at 346. The red bandanas were to distinguish the scouts from the hostiles. ROBERTS, *supra* note 3, at 228.

443. Bourke, *With Crook*, *supra* note 431, at 357-62; BOURKE, APACHE CAMPAIGN, *supra* note 318, at 44-46, 59-63.

444. Bourke, *With Crook*, *supra* note 431, at 362; ROBERTS, *supra* note 3, at 230.

445. WARRIOR WOMAN, *supra* note 278, at 55-57, 222.

446. BOURKE, APACHE CAMPAIGN, *supra* note 318, at 76-78.

447. *Id.* at 78.

448. BETZINEZ, *supra* note 7, at 112-14.

449. *Id.* at 113-15.

450. BOURKE, APACHE CAMPAIGN, *supra* note 318, at 81-85; Bourke, *With Crook*, *supra*

Geronimo and other leaders including Nana, Naiche, Loco, Chato, Lozen and Chihuahua, arrived back on May 20, and waited warily on high cliffs above the United States camp.⁴⁵¹ Later Crook met the leaders for a discussion that defused the potential confrontation – a meeting that may have been preceded by his own inadvertent capture. Crook, an obsessive hunter, had apparently gone off alone after game during the stand-off and, according to some witnesses like Apache scout John Rope, he was surprised and disarmed by Geronimo and his band.⁴⁵² Some scholars dispute the incident,⁴⁵³ some hypothesize about Crook's possible motives,⁴⁵⁴ and others believe that Crook made a major mistake and was lucky that Geronimo and the Chiricahua chiefs were inclined to surrender.⁴⁵⁵

The Chiricahua insurgents were generally disheartened. Juh, a mainstay of the resistance, was separated in the south; they were low on ammunition, they were outnumbered, their sanctuary had been invaded and they were tired of being on the defensive.⁴⁵⁶ Geronimo agreed to return to the reservation and to try farming for a living, but he and several other leaders said they would need time to assemble their people before the trip back.⁴⁵⁷ On May 30, Crook started back with his invading force and 384 insurgents, including Nana and Loco.⁴⁵⁸

Geronimo, Chato, Naiche and Chihuahua had promised to come in as soon as they reassembled their scattered bands.⁴⁵⁹ They would take their time. Naiche arrived in October, Chihuahua in November, Chato in February 1884, and finally, later in February, Geronimo.⁴⁶⁰ Crook had been criticized by the press for allowing the wild Chiricahua to keep their arms and come back unescorted, and there were false reports of depredations by the returnees.⁴⁶¹

note 431, at 371-77.

451. BETZINEZ, *supra* note 7, at 116; BOURKE, APACHE CAMPAIGN, *supra* note 318, at 84-85; ROBERTS, *supra* note 3, at 235.

452. Grenville Goodwin, WESTERN APACHE RAIDING AND WARFARE 167 (2004).

453. THRAPP, *supra* note 106, at 295-302. Betzinez does not mention that this occurred. BETZINEZ, *supra* note 7, at 116.

454. DEBO, *supra* note 99, at 183.

455. ROBERTS, *supra* note 3, at 235-36.

456. *Id.* at 236-37; BETZINEZ, *supra* note 7, at 116; LOCKWOOD, *supra* note 160, at 269; BOURKE, APACHE CAMPAIGN, *supra* note 318, at 86-87; WORCESTER, *supra* note 69, at 275.

457. BOURKE, APACHE CAMPAIGN, *supra* note 318, at 95-97.

458. DEBO, *supra* note 99, at 186-88; ROBERTS, *supra* note 3, at 298; BOURKE, APACHE CAMPAIGN, *supra* note 318, at 104.

459. DEBO, *supra* note 99, at 196.

460. *Id.* at 196-97.

461. BOURKE, APACHE CAMPAIGN, *supra* note 318, at 95; SKINNER, *supra* note 419, at 33-

Crook ordered Britton Davis to wait with troops and scouts at the border to accompany the hostiles to San Carlos, and to ensure no incidents occurred between the Indians and civilians.⁴⁶²

Geronimo arrived with fifteen men, seventy women and children, and 350 head of Mexican cattle that he had recently stolen and planned to use as the start of a herding operation at San Carlos.⁴⁶³ Geronimo was irritated at Davis' presence,⁴⁶⁴ but accepted it when Davis convinced him that it was for Geronimo's own protection against vigilante white civilians.⁴⁶⁵ Davis was forced to make good on his assurances when Arizona authorities attempted to assert jurisdiction over Geronimo and his band.⁴⁶⁶ Davis managed to get the officials drunk, and Geronimo, his people and the rustled cattle were long gone by the time they sobered up.⁴⁶⁷

Geronimo's beginnings as a rancher, and Davis' creative duplicity ultimately came to naught as Crook enforced a form of international depredation law. He confiscated the cattle at San Carlos, sold them and sent the proceeds to the Mexican owners.⁴⁶⁸ Geronimo never forgot, nor did he forgive Crook for the incident.⁴⁶⁹

G. New Beginnings of Assimilation at Turkey Creek

The wild Chiricahua may have hoped that sanctuary in Mexico would allow avoidance of the choice between a military confrontation with the United States and assimilation, but Crook's epic strike re-asserted the central dilemma once again. The Apache, despite their militancy and passion for their lifeways, had a pragmatic core – even Juh and Victorio, as well as Geronimo, had, on occasion, agreed to try peace on the managerial terms of the whites. With Juh and Victorio dead, the Apache attempted once more to adjust to the muted cadence of the reservation life.

Crook, who understood the Apaches and their needs, gave them choice in where to live on the reservation, and allowed them to keep their weapons for hunting and protection.⁴⁷⁰ The Chiricahua chose to settle on Turkey Creek,

38.

462. DAVIS, *supra* note 3, at 77.

463. *Id.* at 84-85.

464. *Id.* at 84.

465. *Id.* at 84-85.

466. *Id.* at 89-90.

467. *Id.* at 90-101.

468. SKINNER, *supra* note 419, at 41-44.

469. *Id.*; GERONIMO, *supra* note 6, at 128-29, 132; DAVIS, *supra* note 3, at 101.

470. ROBERTS, *supra* note 3, at 247; DAVIS, *supra* note 3, at 102; Crook, *Interview*, *supra*

seventeen miles southwest of Fort Apache, and higher up in the mountains, with pinion trees, ponderosa pines, clear water and moderate summer climate.⁴⁷¹ Britton Davis was selected as the Indians' immediate military supervisor, with Crook maintaining the overall direction.⁴⁷²

The objective of the reservation life was still transformation and assimilation, rather than the insulation and perpetuation of the established economy and culture. Crook believed that the Apache, at the forefront of Indian intelligence and capacity, could make rapid strides.⁴⁷³ In 1886, he had even begun discussing the Apache as a property owner, a capitalist and a potential voting citizen.⁴⁷⁴

Davis, in general agreement with the objectives of assimilation, thought pastoral grazing and animal husbandry were most suitable to the terrain, climate and predisposition of the Chiricahua.⁴⁷⁵ Indeed, Geronimo had anticipated cattle-raising until his herd was confiscated by Crook.⁴⁷⁶ The Indian administrators in Washington, however, held a rigid view on what they deemed acceptable civilization and insisted on agriculture.⁴⁷⁷ Geronimo, again displaying pragmatism when the odds were not in his favor, complied and became, at least by San Carlos standards, a somewhat successful farmer.⁴⁷⁸

Geronimo's modest agricultural success did not however, resonate with Davis,⁴⁷⁹ who thought him a "vicious, intractable and treacherous man."⁴⁸⁰ Geronimo, along with Naiche, Chihuahua, Nana and Kaatennae, an angry, brooding Warm Springs Apache who was a highly regarded warrior and in line to be chief of the Eastern band, remained aloof and suspicious.⁴⁸¹ Davis was open with most of the Chiricahua, and became especially friendly with Loco and Chato.⁴⁸² Chato, who may have been jealous of Kaatennae,⁴⁸³ enlisted as a scout and became an informant for Davis.⁴⁸⁴ The spy network later informed

note 5, at 404.

471. DAVIS, *supra* note 3, at 107.

472. *Id.* at 93.

473. Crook, *The Apache Problem*, *supra* note 72, at 601-03.

474. *Id.*; ROBERTS, *supra* note 3, at 246.

475. DAVIS, *supra* note 3, at 102.

476. *See supra* notes 468, 469.

477. DAVIS, *supra* note 3, at 102.

478. DEBO, *supra* note 99, at 229, 233; BETZINEZ, *supra* note 7, at 125.

479. DAVIS, *supra* note 3, at 136-37.

480. *Id.* at 142.

481. ROBERTS, *supra* note 3, at 250; THRAPP, *supra* note 106, at 306-07.

482. *Id.*; DAVIS, *supra* note 3, at 115.

483. INDEH, *supra* note 6, at 84; BALL, *supra* note 105, at 20.

484. DAVIS, *supra* note 3, at 106, 111.

Davis of a supposed plot by Kaatennae to kill him.⁴⁸⁵ Davis had Kaatennae arrested, tried before an Indian jury and sent to Alcatraz.⁴⁸⁶ Kaatennae returned after eighteen months a changed person: good-natured, friendly and willing to serve as a scout for Crook.⁴⁸⁷

Kaatennae's transformation – or brainwashing⁴⁸⁸ – presents in microcosm some successes and perhaps troubling tradeoffs of the assimilation process. It is certainly true that Kaatennae was reformed and rendered more compatible with white standards of civilization. But the cultural cost emblematic in the incident was significant. The army had employed Apache scouts spies and juries set against the Indian's own people and the result was a fissure that would spread with time.⁴⁸⁹ The gulf between "progressive" and "traditional" factions of tribal society hindered and occasionally paralyzed most tribal governments, including the Apache.⁴⁹⁰

Other collisions, originating deep in the cultural core, emerged at San Carlos. The military, rather hypocritically considering the habits of officers and soldiers, tried to prohibit the Apache from brewing and drinking Tizwin, a relatively mild, beer-like intoxicant made from corn.⁴⁹¹ They also forbade the Apache custom of cutting the noses of adulterous wives and beating them for other transgressions.⁴⁹² The Apache figured that social drinking and family discipline were purely internal affairs, and none of the army's business. They were willing to live at peace, and attempt to farm instead of raid, but recreational and domestic affairs, they felt, were beyond the justified reach of the administrators.⁴⁹³ Old warriors, such as Nana, especially resented officious young upstarts like Davis advising them on how to treat their women.⁴⁹⁴

A final source of unrest was particularly ominous because it had lurked in the background of other reservation breakouts. When disagreements arose between the civil and military authorities,⁴⁹⁵ or when anti-Indian clamor began

485. *Id.* at 123-25.

486. *Id.* at 130.

487. WORCESTER, *supra* note 69, at 287.

488. ROBERTS, *supra* note 3, at 268.

489. PRUCHA, *supra* note 21, at 600-03; INDEH, *supra* note 6, at 49-50; DEBO, *supra* note 99, at 450.

490. FEDERAL INDIAN LAW, *supra* note 11, at 194-95; LIEDER & PAGE, *supra* note 176, at 46-49.

491. DAVIS, *supra* note 3, at 139-42.

492. *Id.*

493. *Id.* at 142, 145.

494. *Id.* at 145-46.

495. Charles P. Elliott, *An Indian Reservation Under George Crook*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 405, 406-07.

to grow louder in local politics and press,⁴⁹⁶ the prominent warriors such as Geronimo, Nana, Naiche and Chihuahua began to get nervous. Civilians were constantly seeking to expand their authority over the reservation and bring Chiricahua leaders to trial for killings and thefts that occurred on the warpath.⁴⁹⁷ Almost simultaneously with the uproar over the bans on Tizwin and wife-beating came the rumor of possible arrests and trials in the Arizona courts.⁴⁹⁸ Geronimo made his decision to leave San Carlos and return to Mexico.

On May 17, 1885, a group of forty-two warriors and ninety-two women and children, headed by Geronimo, Naiche, Chihuahua, Mangas, and Lozen, broke loose from the reservation after first cutting the telegraph wires and concealing the break with rawhide.⁴⁹⁹ The communications gap gave the Indians a head start of several hours, and enabled them to seize horses, weapons and ammunition.⁵⁰⁰ Chato, Loco and the majority of the Warm Springs band, including Betzinez, decided not to go.⁵⁰¹ Chihuahua, also, may have had second thoughts and might have returned to the reservation except that he ran into Davis' pursuing scouts, and was forced to continue his fight.⁵⁰²

It has been hypothesized that Geronimo induced Chihuahua to flee by falsely telling of Davis' and Chato's murders and impending repercussions.⁵⁰³ When Chihuahua learned the truth, the story goes, he angrily split with Geronimo.⁵⁰⁴ The story was perhaps fanciful as Chihuahua and Geronimo were closely allied in Mexico and remained friends in confinement.⁵⁰⁵ Chihuahua's son Eugene, states that the two separated in flight to confound the

496. G. Gordon Adam, *Resolution Adopted at Meeting of Residents of Cochise County, Arizona Regarding Outbreak of Indians From San Carlos Reservation*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 414.

497. DEBO, *supra* note 99, at 240-41; KRAFT, *supra* note 289, at 85-86; ROBERTS, *supra* note 3, at 256.

498. *Id.*; DAVIS, *supra* note 3, at 200-01; BETZINEZ, *supra* note 7, at 129; GERONIMO, *supra* note 6, at 129.

499. Charles P. Elliott, *The Geronimo Campaign of 1885-1886*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 427, 428 [hereinafter Elliott, *The Geronimo Campaign*]; THRAPP, *supra* note 106, at 314-15.

500. ROBERTS, *supra* note 3, at 258; DEBO, *supra* note 99, at 238-41.

501. BETZINEZ, *supra* note 7, at 129-50.

502. DAVIS, *supra* note 3, at 152-53; THRAPP, *supra* note 106, at 316.

503. ROBERTS, *supra* note 3, at 257; FAULK, *supra* note 206, at 58.

504. *Id.*; see GERONIMO, *supra* note 6, at 129 n.3.

505. ROBERTS, *supra* note 3, at 258; FAULK, *supra* note 206, at 60; see DEBO, *supra* note 99, at 361, 371 (pictures).

pursuers⁵⁰⁶ - Chihuahua headed northeast toward the Black Range, and Geronimo went south toward Mexico.⁵⁰⁷ By the end of May, Chihuahua, also, turned toward Mexico and by mid-June most of the renegades had eluded the pursuers and were safely in the Sierra Madre once again.⁵⁰⁸ They had suffered few if any casualties in the conflict – filled pursuit.⁵⁰⁹

The civilian population of Arizona was in a hysterical state – raging against Geronimo, Crook, the reservation system, the Chiricahua and Indians in general.⁵¹⁰ David Roberts thinks that the reaction was extreme, given the relatively small number of insurgents and the vastness of the Southwest.⁵¹¹ He asserts that the response was heightened in part because the Indian wars were over, assimilation was accelerating and the Indian, like wilderness, was assuming a place of nostalgia, curiosity and legend in the American consciousness.⁵¹² The high emotion may well have led to the administration's own overreaction at the time of final surrender.

VII. Final Breakouts and Surrenders

The runaway Apaches ensconced in Mexico in the summer of 1885 posed problems for Crook that were different in nature than those of two years earlier. The escapists, knowing that the strongholds were no longer secret, resorted to another means of nondetection – incessant movement. Crook sent Emmet Crawford and Britton Davis into Mexico with several companies of soldiers and Apache scouts.⁵¹³ The scorching heat, rough terrain, and constantly moving, dividing and reassembling Chiricahua made pursuit virtually impossible.⁵¹⁴

In late June, however, there was some success. Chato and his company of scouts captured Chihuahua's base camp while the warriors were away, and took a number of women and children into custody.⁵¹⁵ Shortly, thereafter, the women and children at Geronimo's support camp were also captured.⁵¹⁶ The

506. INDEH, *supra* note 6, at 98.

507. FAULK, *supra* note 206, at 58; KRAFT, *supra* note 289, at 92.

508. FAULK, *supra* note 206, at 62-65; KRAFT, *supra* note 289, at 93-95.

509. ROBERTS, *supra* note 3, at 258.

510. See Adam, *supra* note 496, at 414-23.

511. ROBERTS, *supra* note 3, at 259.

512. *Id.*

513. DAVIS, *supra* note 3, at 153-55.

514. ROBERTS, *supra* note 3, at 261-62.

515. Robert Hanna, *With Crawford in Mexico*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 509, 514; DAVIS, *supra* note 3, at 167.

516. Henry W. Daly, *The Geronimo Campaign*, in 1 EYEWITNESSES TO THE INDIAN WARS,

warriors remained at large, but the capture of the camps, and the noncombatants, was not without significance, as the fighting men depended on these logistical centers as bases from which to launch forays and support evasion.⁵¹⁷

Geronimo kept moving. In the late summer of 1885 he led his hapless pursuers on a less-than-merry chase through the rocks, mountains, monsoon rains and searing desert heat. At one stretch he covered more than 500 miles in twenty-four days and afforded the gasping military scarcely a glimpse.⁵¹⁸ At the end of the summer, Davis, disgusted and exhausted, resigned from the army and turned to ranching.⁵¹⁹

Geronimo carried on without him. In September, the tireless old warrior⁵²⁰ sneaked back into Arizona in pursuit of captives which he secured without incident.⁵²¹ Though these kidnapped women and children helped fulfill the support necessities, the Apaches remained short of ammunition.⁵²²

In November 1885, Ulzana (or Josanie),⁵²³ a brother of Chihuahua, rode across the border with around a dozen men. In the next two months, this whirlwind band would ride some 1200 miles, kill thirty-eight people, steal 250 horses and considerable ammunition, and lose no more than one person.⁵²⁴ Ulzana's raid was motivated by revenge as well as procurement. At one point, the band attacked compliant reservation Indians within sight of Fort Apache.⁵²⁵

After appraising the failure of his campaign against the fugitives, Crook tried to restructure his pursuit force. Crawford's company was reduced to three officers, a pack train and 100 scouts.⁵²⁶ This mobile, almost all Indian force fared somewhat better. In January 1886, they seized a base camp of

1865-1890, *supra* note 5, at 447, 481, 482; William Shipp, *Captain Crawford's Last Expedition*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 516, 518.

517. DEBO, *supra* note 99, at 245.

518. DAVIS, *supra* note 3, at 193-94.

519. *Id.* at 195.

520. Observers in 1885, mesmerized by his strength and determination, figured his age at around forty. See Daly, *supra* note 516, at 448. In actuality, he was around sixty. See DEBO, *supra* note 99, at 7.

521. Elliott, *The Geronimo Campaign*, *supra* note 499, at 443-44; ROBERTS, *supra* note 3, at 262-63.

522. BALL, *supra* note 105, at 179.

523. DEBO, *supra* note 99, at 248.

524. *Id.*; ROBERTS, *supra* note 3, at 263. James Kaywaykla said that none were lost. BALL, *supra* note 105, at 179.

525. Daly, *supra* note 516, at 470; DEBO, *supra* note 99, at 248.

526. DAVIS, *supra* note 3, at 196-97; ROBERTS, *supra* note 3, at 264.

Geronimo and apparently started him thinking about a possible surrender.⁵²⁷ He dispatched his women emissaries, Lozen and Tahdaste, to sound out Crawford concerning a conference, but, before it could take place, Crawford's company was attacked by Mexican troops who may have mistaken the scouts for hostiles.⁵²⁸ Crawford was killed in the fighting, while Geronimo and his warriors watched from nearby hills with some bemusement.⁵²⁹ The brief respite provided by his adversary's bloody entanglement was insufficient to revive Geronimo's fading resolve. He conferred with Crawford's successor, Lieutenant Marion Maus, and indicated a desire to discuss surrender terms with Crook, two months hence at Canyon de Los Embudos.⁵³⁰

Geronimo, Naiche and Chihuahua kept their pledged appointment and met Crook at the canyon, twenty miles south of the border, in late March 1886.⁵³¹ Geronimo attempted to explain his breakout from San Carlos by saying he felt discriminated against and feared treachery.⁵³² Crook was not sympathetic. He said Geronimo's fears did not explain his killing of innocents.⁵³³ Still, Crook was not inclined to insist on unconditional surrender, as some of his superiors desired, probably because he knew that Geronimo would not agree and would flee once again.⁵³⁴ Crook promised that the fugitives would be sent east for no more than two years, allowed to rejoin their families and ultimately permitted to return to Arizona.⁵³⁵ Chihuahua was immediately inclined to agree while Geronimo held out for a while but eventually relented with his memorable statement: "Once I moved about like the wind. Now I surrender to you and that is all."⁵³⁶

But, of course, it wasn't.

Geronimo was fearless and peerless in face-to-face combat, but he maintained throughout his life an abiding, overwhelming dread of death by trickery or formal legal proceedings. His trepidation was not unrealistic. Indeed the clamor for his execution began almost immediately after the

527. Shipp, *supra* note 516, at 523-25; DAVIS, *supra* note 3, at 197; ROBERTS, *supra* note 3, at 265.

528. DEBO, *supra* note 99, at 249-50.

529. *Id.* at 250; Shipp, *supra* note 516, at 529.

530. Daly, *supra* note 516, at 465; DEBO, *supra* note 99, at 251.

531. Daly, *supra* note 516, at 466; BETZINEZ, *supra* note 7, at 134.

532. DAVIS, *supra* note 3, at 200-02.

533. *Id.* at 204.

534. DEBO, *supra* note 99, at 260-61; ROBERTS, *supra* note 3, at 270.

535. FAULK, *supra* note 206, at 91.

536. DAVIS, *supra* note 3, at 207-10.

surrender in Canyon de los Embudos.⁵³⁷ Whether Geronimo actually knew this or not, he was correctly apprehensive and, after a night of hard drinking, and listening to the dire predictions of immediate hanging made by the white bootlegger Bob Tribollet, he again succumbed to his demons.⁵³⁸ Forty Chiricahua, including Geronimo, Naiche, eighteen warriors, fourteen women, and six children,⁵³⁹ broke away and ran for the mountains. Maus gave chase several hours later, but the Indians covered sixty miles without a stop and Maus' troops were left far behind.⁵⁴⁰ A discouraged Crook started north with Nana, Chihuahua and about sixty Chiricahua who, having resisted the questionable allure of yet another quixotic breakaway, were now bound for removal to Florida.⁵⁴¹

President Grover Cleveland and General Phil Sheridan, the head of the army, were not amused. Sheridan previously advised Crook not to accept surrender under condition, and – above all – not to allow Geronimo to escape.⁵⁴² Crook offered to resign and Sheridan accepted.⁵⁴³ Moreover, Sheridan and Cleveland indicated they planned to ignore the conditions of surrender and make any removal to Florida permanent.⁵⁴⁴

Crook worried that if Geronimo and Naiche learned that the terms of limited banishment, agreed on at Canyon de los Embudos, were no longer operative, they would never come in to the reservation.⁵⁴⁵ Crook also decided not to tell the good-faith Chihuahua. On April 7, 1886, while Geronimo and Naiche remained at large, Chihuahua, Nana and seventy-five other Chiricahua were put on a train bound for what they assumed was a two-year hiatus in Florida.⁵⁴⁶ In fact, they would be prisoners for twenty-seven years and would never return to Arizona.

537. ROBERTS, *supra* note 3, at 274.

538. FAULK, *supra* note 206, at 92; GERONIMO, *supra* note 6, at 132.

539. DEBO, *supra* note 99, at 265; WORCESTER, *supra* note 69, at 298; LOCKWOOD, *supra* note 160, at 289.

540. ROBERTS, *supra* note 3, at 273-75.

541. WORCESTER, *supra* note 69, at 299.

542. THRAPP, *supra* note 106, at 345, 348.

543. ROBERTS, *supra* note 3, at 275.

544. FAULK, *supra* note 206, at 96; DEBO, *supra* note 99, at 267-68.

545. George Crook, *Resume of Operations Against the Apache Indians, 1882 to 1886*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 569, 583 [hereinafter Crook, *Resume*]; KRAFT, *supra* note 289, at 125.

546. *Id.*; John P. Gardner, *Escorting Chihuahua's Band to Florida*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 567.

On April 2, 1886, control of the Arizona army passed from Crook to General Nelson A. Miles.⁵⁴⁷ Miles, who had little regard for Indians,⁵⁴⁸ did not want to rely on Apache scouts as extensively as Crook had, so he discharged most of them and replaced them with regular army and gadgetry.⁵⁴⁹ He was particularly fond of his heliograph system which relayed sun-reflected messages from mountain tops around the Southwest – and had no effect whatsoever on the pursuit of Geronimo.⁵⁵⁰ He almost doubled the number of field troops to 5000 – one quarter of the entire United States army⁵⁵¹ – and, to the disgust of the Indians, chose to command them from a safe distance instead of from the front as Crook had.⁵⁵²

None of these maneuvers had an impact on Geronimo, Naiche and the rebel band who in the summer of 1886 raced on like phantoms, defying all odds, logic, and reason itself. Naiche later said: “We saw that we were in for it and would probably be killed, anyway, so we concluded to take our chances and escape with our lives and liberty.”⁵⁵³

Geronimo subsequently told his biographer:

We were reckless with our lives, because we felt every man’s hand was against us. If we returned to the reservation, we would be put in prison and killed; if we stayed in Mexico, they would continue to send soldiers to fight us; so we gave no quarter to anyone and asked no favors.⁵⁵⁴

Naiche and Geronimo made, according to David Roberts, a perfect team in that final summer of freedom – riding hard through the mountains, swooping back into the United States on raids for ammunition and supplies, fleeing back into Mexico – always a long step ahead of their exhausted and frustrated pursuers.⁵⁵⁵

547. Nelson A. Miles, *On the Trail of Geronimo*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 536.

548. *Id.* at 537-39.

549. William W. Neifert, *Trailing Geronimo by Heliograph*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 557; KRAFT, *supra* note 289, at 126.

550. Neifert, *supra* note 549; ROBERTS, *supra* note 3, at 279. *But see* THRAPP, *supra* note 106, at 351.

551. DEBO, *supra* note 99, at 269; BROWN, *supra* note 117, at 411 (estimating one third of the regular army).

552. ROBERTS, *supra* note 3, at 285.

553. William H. Ballou, *Apaches at Pickens*, CHICAGO TRIBUNE, Mar. 5, 1888, *quoted in* SKINNER, *supra* note 419, at 204.

554. GERONIMO, *supra* note 6, at 133.

555. ROBERTS, *supra* note 3, at 283.

The central thrust of the pursuit was Captain Henry Lawton and his troops who followed the Indians for literally thousands of miles, over mountains, deserts, rocks and sand, through blistering heat and driven monsoon rains.⁵⁵⁶ Despite their dogged efforts, Lawton's troops didn't kill or capture a single Chiricahua while the Indians, who regarded civilians as well as soldiers as their enemies, killed hundreds.⁵⁵⁷

In July 1886, while his efforts to apprehend Geronimo and Naiche were amounting to nothing, Miles enforced a substitute plan, breathtaking in its unfairness and indifference to any legitimate objectives of the assimilation movement. Since he couldn't catch the renegades, Miles reasoned, he would instead remove all the peaceful Chiricahua from San Carlos and relocate them either to Florida or Oklahoma.⁵⁵⁸ This removal certainly would preclude future Chiricahua insurgencies and outbreaks and might even prompt Geronimo to surrender.⁵⁵⁹ In any event, it would potentially placate the Arizona citizenry who basically hated and feared all Apaches and who were increasingly apoplectic over the army's inability to capture Geronimo.⁵⁶⁰ Thus, the four hundred Chiricahua who had maintained peace at San Carlos – farming, ranching, selling hay and scouting – were, against the advice of Crook, Bourke, Davis and Gatewood, who knew them best, targeted for betrayal and removal.⁵⁶¹

Miles, to his partial credit, did advise that the humid Florida coast was likely to be a malarial death trap for mountain people like the Apache, and that semi-arid western Oklahoma was preferable.⁵⁶² However, an 1879 amendment to the annual Indian Appropriation Bill, added at the insistence of nervous neighbors, prohibited the relocation of Apaches in the Oklahoma Territory.⁵⁶³ Still, removal was in the wind and, since Chihuahua was already in St. Augustine, it seemed to be blowing toward Florida.

556. FAULK, *supra* note 206, at 106-11; KRAFT, *supra* note 289, at 127-28; Leonard Wood, *On Campaign in Sonora*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 546.

557. Crook, *Resume*, *supra* note 545, at 585; DAVIS, *supra* note 3, at 234; ROBERTS, *supra* note 3, at 285.

558. FAULK, *supra* note 206, at 152-55.

559. SKINNER, *supra* note 419, at 73-74; ROBERTS, *supra* note 3, at 286-87.

560. LOCKWOOD, *supra* note 160, at 313-14; FAULK, *supra* note 206, at 111; *see* Adam, *supra* note 496.

561. LOCKWOOD, *supra* note 160, at 316; DAVIS, *supra* note 3, at 233; DEBO, *supra* note 99, at 271.

562. SKINNER, *supra* note 419, at 74.

563. *Id.*; DEBO, *supra* note 99, at 273.

Miles sent a delegation of San Carlos Apache leaders, headed by Chato, to see Washington officials and, purportedly, to discuss tribal futures.⁵⁶⁴ Chato pleaded against removal and may have thought himself successful⁵⁶⁵ but, despite his receipt of a silver medal from the government, he wasn't. Indeed, President Cleveland was plotting the delegation's arrest and imprisonment in Florida even while the discussions in Washington were going on.⁵⁶⁶ The delegation was detained at Fort Leavenworth on its return and, on September 12, the perfidy was completed, as Chato – the reformed warrior, loyal scout and reservation leader – was shipped to Fort Marion, Florida to be confined with the other renegade Chiricahua as prisoners of war.⁵⁶⁷ The irony was captured by Angie Debo who wrote: "Thus, peaceable people, living quietly on their reservation, tending their little farms and striving in all ways to conform to government policy were changed by bureaucratic semantics into 'prisoners' to be 'confined.'"⁵⁶⁸

During the spring and summer of 1886, while he plotted the removal of the peaceful Chiricahuas, Miles was forced to reconsider the necessity of Apache scouts in the field.⁵⁶⁹ He re-enlisted a substantial number for whom the love of adventure, freedom and physical action, and the assurance that their families were cared for while they were gone, overcame the fact that they were pursuing friends and sometimes relatives.⁵⁷⁰ They were, of course, unaware that they were to be lumped together with their prey and incarcerated once surrender was effectuated.

When even the scout-led pursuit faltered at the withering pace set by the spectral Geronimo, Miles created a special diplomatic unit whose sole objective was to find and present terms of surrender to Geronimo.⁵⁷¹ Kayitah and Martine, two Chiricahua Apache well-known to Geronimo, were selected as emissaries.⁵⁷² They were to be led by Lieutenant Charles Gatewood, an experienced field officer and reservation administrator whom the rebels respected.⁵⁷³ The entourage included George Wratten, a civilian who spoke

564. FAULK, *supra* note 206, at 155-56; KRAFT, *supra* note 289, at 135-36, 200.

565. DEBO, *supra* note 99, at 276.

566. FAULK, *supra* note 206, at 158.

567. *Id.* at 159-65.

568. DEBO, *supra* note 99, at 279.

569. James R. Caffey, *A Theatrical Campaign*, in 1 EYEWITNESSES TO THE INDIAN WARS, 1865-1890, *supra* note 5, at 562; ROBERTS, *supra* note 3, at 287-88.

570. INDEH, *supra* note 6, at 47; BETZINEZ, *supra* note 7, at 135-37.

571. KRAFT, *supra* note 289, at 129-48.

572. FAULK, *supra* note 206, at 111-12.

573. *Id.* at 112-13, 126; KRAFT, *supra* note 289, at 134.

Apache and who was eventually to accompany the Chiricahua on their removal and live with them in confinement.⁵⁷⁴

In August 1886, Lawton and his troops were hopelessly confounded by Geronimo. They futilely searched in central Sonora while, in actuality, Geronimo was holed up many miles to the north, near Juh's old stronghold on the great bend of the Bavispe River.⁵⁷⁵ Their precise whereabouts became better known when the women warriors and messengers, Lozen and Tahdaste, entered the town of Fronteras, seeking food, mescal and the possibility of a peace agreement.⁵⁷⁶ Officials, on learning their identity, gave them the supplies and got word to Lawton and Gatewood.⁵⁷⁷ The Gatewood group, traveling ahead of the troops, followed the trail of the women up the Bavispe River. Following a tense encounter with the rebels on the zig-zag trail leading to the stronghold, Martine and Kayitah were able to meet with Geronimo and secure a conference.⁵⁷⁸

Gatewood told Geronimo that all the Chiricahua at San Carlos had been sent east for confinement with Chihuahua.⁵⁷⁹ This, indeed, was imminent, though at the time and unknown to Gatewood.⁵⁸⁰ The news stunned the fugitive warriors and they decided to surrender, in significant part because of the strong desire to reunite with their families and friends.⁵⁸¹ The warriors, after deliberating in the consensus-based, non-hierarchical, democratic fashion characteristic of the traditional bands, agreed to meet General Miles at Skeleton Canyon, immediately north of the Arizona border.⁵⁸²

Gatewood's tasks were not finished, however, as he still had to get the skittish Geronimo and his warriors to the meeting place at Skeleton Canyon.⁵⁸³ The trip was a tense, delicate affair, as Mexican troops, American officers and emboldened civilians all wanted a crack at the surrendering Geronimo and, to further complicate things, Miles dithered, delayed and almost sabotaged the

574. KRAFT, *supra* note 289, at 134-35. Wratten would later marry an Apache woman and was the grandfather of Allan Houser, a talented American artist and sculptor. See BARBARA H. PERLMAN, ALLAN HOUSER 76-79 (1987).

575. KRAFT, *supra* note 289, at 145-48; THRAPP, *supra* note 106, at 354-56.

576. INDEH, *supra* note 6, at 106-08; ROBERTS, *supra* note 3, at 289-90; THRAPP, *supra* note 106, at 355-56.

577. DEBO, *supra* note 99, at 281.

578. INDEH, *supra* note 6, at 106-08.

579. KRAFT, *supra* note 289, at 166.

580. ROBERTS, *supra* note 3, at 293.

581. KRAFT, *supra* note 289, at 169.

582. *Id.* at 168-71; DEBO, *supra* note 99, at 287.

583. FAULK, *supra* note 206, at 128-33.

parlay.⁵⁸⁴ Miles did even more. Prior to his appearance he implied that Lawton should murder Geronimo, a suggestion that Lawton firmly refused.⁵⁸⁵

Resorting to verbal treachery instead of physical, Miles concluded a surrender agreement with Geronimo on September 4, 1886. He repeated many of Crook's earlier promises including a reunion with families, a separate reservation, amnesty and a limited stay in Florida.⁵⁸⁶ None of these were kept.⁵⁸⁷ The next day, still unknown to the surrendered band, the 434 reservation Chiricahua, many of whom had never been to war, most of whom had pursued the policies of assimilation in good faith at San Carlos, and numerous of whom had served the government loyally as scouts, were placed on a train for Fort Marion, Florida where they were to be incarcerated with Chihuahua's band as prisoners of war.⁵⁸⁸ As Jason Betzinez laconically wrote, "It seemed a bit unjust, especially because we felt that the government had at least contributed to, if not been largely responsible for, starting the Apache troubles by moving us from our own reservation in 1876 to San Carlos."⁵⁸⁹

It could have been even worse, at least for Geronimo and Naiche, President Cleveland wanted to ignore all the promises and turn the Apache leaders over to the Arizona civil authorities for trial and execution.⁵⁹⁰ This was too much, even for Miles and he stood firm in his statements that the Chiricahua had surrendered under condition.⁵⁹¹ Cleveland relented and Geronimo and his warriors would escape the gallows. They would not escape, however, the ensuing life of cages and confinement that, though eased in time, would never again include the sky islands of Arizona and the Sierra Madre.⁵⁹²

584. *Id.* at 133-40; KRAFT, *supra* note 289, at 173-94.

585. FAULK, *supra* note 206, at 140-43.

586. ROBERTS, *supra* note 3, at 295-97; DEBO, *supra* note 99, at 294-95, 304.

587. *Id.* In 1898, Geronimo confronted Miles at the Trans-Mississippi and International Exposition in Omaha and charged him with lying to induce the surrender. Miles freely admitted lying but claimed he learned lying from Geronimo. He said, "You lied to Mexicans, Americans and to your own Apaches, for thirty years. White men only lied to you once and I did it." *Id.* (quoted by DEBO, *supra* note 99, at 405).

588. DEBO, *supra* note 99, at 298-300; ROBERTS, *supra* note 3, at 295.

589. BETZINEZ, *supra* note 7, at 141. Jason, ever the optimist, professed to enjoy the train ride, if not the duplicity. *Id.* at 142-43.

590. ROBERTS, *supra* note 3, at 296-97; DEBO, *supra* note 99, at 295-96; FAULK, *supra* note 206, at 168.

591. DEBO, *supra* note 99, at 296-98, 308; ROBERTS, *supra* note 3, at 297; FAULK, *supra* note 206, at 168-71.

592. FAULK, *supra* note 206, at 173; DEBO, *supra* note 99, at 298-312; ROBERTS, *supra* note 3, at 297-98.

VIII. Conclusion: Some Reflections on the Laws of War and Assimilation

Even in captivity, they showed resilience. The chiefs and great warriors lived through the disease and confinements of Florida and Mount Vernon, Alabama, and the move westward, in 1894, to Fort Sill, Oklahoma. Nana, bitter and unrepentant to the end, died at Fort Sill in 1896, Chihuahua died in 1901, and Naiche, who became a painter and, like Chihuahua, a Christian, lived long enough to attain freedom from prisoner of war status, and return west with half the Ft. Sill Apaches to join the Mescalero Apaches in New Mexico in 1913.⁵⁹³ He died in 1921.⁵⁹⁴

Geronimo, emblematic of the Chiricahua resistance and constantly in the gunsights of American and Mexican forces for two decades of war, never succumbed to bullets. He died in 1909, an old man of nearly ninety, from pneumonia, brought on by a fall while intoxicated, and a night outdoors in a cold February drizzle.⁵⁹⁵

It is said that Geronimo's survival of the violent years was preordained by a vision. Geronimo's sister, Ishton, the wife of Juh, was very sick at the time of Daklugies' birth, and hovering near death. According to Chihuahua's son, Geronimo was maintaining a mountain-top vigil for his sister, and had a vision of Ussen who told him: "Go back to your sister. Both she and the child will survive. And you will live to be an old man, and you will die a natural death."⁵⁹⁶

The vision meant that bullets could not kill Geronimo, that he – to his later chagrin – could not, like Victorio, end his life in battle for his people.⁵⁹⁷ He could suffer wounds, but he would not die. E. A. Burbank, an artist who painted portraits of Geronimo and his daughter Eva in the late 1890s, and who heard Geronimo state that bullets could not kill him, was astounded to see the bullet scars on Geronimo's body. "I knew he had been in many battles and had been fired on dozens of times, but I had never heard of anyone living with at least fifty bullet wounds on his body. Geronimo had that many scars."⁵⁹⁸

It also seemed certain that, if Geronimo were not killed in combat, he would be executed under his captor's criminal law. Mexicans, Arizonans, the military, even the President of the United States thought that Geronimo should face trial and more or less certain execution, for his repeated acts of

593. See DEBO, *supra* note 99, at 436-54.

594. *Id.*

595. *Id.* at 439-41.

596. INDEH, *supra* note 6, at 181.

597. *Id.*

598. E.A. BURBANK (TOLD TO ERNEST ROYCE), BURBANK AMONG THE INDIANS 31 (1946).

terrorism.⁵⁹⁹ Geronimo, himself, in his later years, was deeply troubled by the deaths and mayhem that he inflicted on innocents – especially children. David Roberts includes a quote attributed to Geronimo:

Often I would steal up to the homes of white settlers and kill the parents. In my hatred I would even take the little ones out of their cradles and toss them in the air . . . , catch them on my sharp hunting knife, and kill them. I wake up groaning and very sad at night when I remember the helpless little children.⁶⁰⁰

Several events united to protect Geronimo from a demise by trial and hanging. His surrender to Crook and Miles had clearly been both voluntary and conditional.⁶⁰¹ Miles had not only not overruled Crook's terms of conditional surrender, but had made new, somewhat theatrical, pledges of safety, reunion, limited banishment and return to reservation life.⁶⁰² Miles later admitted that he knew the promises would not be kept and that he lied in making them.⁶⁰³ To his credit, however, he resisted efforts by the administration to hold Geronimo for execution.⁶⁰⁴ The ultimate awareness by President Cleveland that Geronimo had indeed surrendered voluntarily, under conditions, led to his final decision to confine Geronimo rather than kill him.⁶⁰⁵

Future attempts by the government to try Geronimo and execute him, were always on his mind, especially when he dictated his very cautious autobiography.⁶⁰⁶ Daklugie, who translated Geronimo's words to S.M. Barrett,⁶⁰⁷ later told Eve Ball:

We were prisoners of war, and I believed that at any time a change in military command might mean massacre for us. Nobody had any sense of security. There was a chance that Barrett was a spy and the book a device for getting information not obtainable by any other means. We understood that there was a difficulty in obtaining the government's consent for the project and that Barrett

599. ROBERTS, *supra* note 3, at 297-98; FAULK, *supra* note 206, at 168-73.

600. ROBERTS, *supra* note 3, at 313.

601. DAVIS, *supra* note 3, at 199, 215-18, 232-34.

602. KRAFT, *supra* note 289, at 191-94.

603. DEBO, *supra* note 99, at 295, 405.

604. FAULK, *supra* note 206, at 167-73.

605. *Id.*; see DEBO, *supra* note 99, at 303-08.

606. GERONIMO, *supra* note 6.

607. *Id.* at 41.

had to appeal to the president for approval. That seemed to indicate that they wanted Geronimo to admit something.

We talked it over. Geronimo was shrewd and cautious. Also he had great Power, much greater Power than I.⁶⁰⁸

The desire to try Geronimo may have been blunted by his celebrity, which grew after surrender and reached an apogee when he rode in Theodore Roosevelt's inaugural parade.⁶⁰⁹ Geronimo, and other Indian war leaders, had become elements of nostalgia for the conquering nation. Indians, like wilderness, could be confined with boundaries, domesticized and forgiven. As David Roberts said, "Upon its subjugated foes, a conquering nation projects its fantasies of the just order. The Apaches, so often likened to tigers, were now like caged animals in a zoo"⁶¹⁰

A final impediment, to any future decisions to charge Geronimo criminally, was a monetary one. For the United States to avoid liability for acts Geronimo had committed on the warpath, it had to acknowledge that Geronimo's band was separate from the Chiricahua tribe which was in amity with the United States, and at peace on its reservation.⁶¹¹ Neither the United States, nor a tribe in amity with the United States could, under the Depredation Act of 1891, be financially responsible for the acts of a separate, break-away band.⁶¹² This also meant that the splinter group was itself entitled to be treated as a sovereign belligerent under the international rules of war, rather than as a collection of criminals.⁶¹³ The political and sovereign nature of Geronimo's band was especially evident as the United States, thought vastly superior in size and numbers, was forced to agree to conditions in the field.⁶¹⁴ In short, consistent treatment of Geronimo's band as a separate sovereign at war precluded the United States, by precedent and logic as well as self-interest, from a retrospective effort to recharge Geronimo, as a common criminal, under the territorial law.

More amazing than Geronimo's survival, as a matter of fact and law, was the precipitous and wholly unjustified incarceration of the peaceful

608. INDEH, *supra* note 6, at 173.

609. DEBO, *supra* note 99, at 417-19. When asked why he chose a mass murderer to ride in the parade, T.R. replied, "I wanted to give the people a good show." *Id.* at 419.

610. ROBERTS, *supra* note 3, at 312.

611. See Carol Chomsky, *The United States – Dakota War Trials: A Study in Military Justice*, 43 STAN L. REV. 13, 33-34 (1990).

612. *Scott v. United States & the Apache Indians*, 33 Ct. Cl. 486 (1898); see *supra* note 314.

613. *Connors v. United States*, 180 U.S. 271, 275 (1901).

614. See *supra* note 601.

Chiricahuas of San Carlos. These innocent tribal members were arrested and confined as prisoners of a war in which they had no part – other than a common race and culture.⁶¹⁵ Consider the Kafkaesque odyssey of Jason Betzinez of the Warm Springs band. As a young man, he was living in peace under Chief Loco at Ojo Caliente when, without apparent reason, his people were removed and forced to concentrate with other bands at loathsome San Carlos.⁶¹⁶ Shortly thereafter, his band was kidnapped by Juh and Geronimo and force-marched into the Sierra Madre.⁶¹⁷ The group was returned to San Carlos following Crook's successful invasion, where it resumed the peaceful pursuit of farming and grazing.⁶¹⁸ Betzinez and his people resisted the insurgency following the Cibecue Creek killing of Noch-ay-del-kinne, and the break-outs of Geronimo. They maintained the peace and the course of assimilation but were rewarded only by removal, dispossession of land and property and treatment as prisoners of war for almost a third of a century.⁶¹⁹

Consider, also, the case of Chato. At one time a fierce, unrelenting raider and warrior; he completely reoriented his life and values at San Carlos. He became a loyal scout and sergeant in the military, a confidant of the reservation administrators, a leader of the peaceful Chiricahua, a property owner and a delegate to the president.⁶²⁰ For this service and transformation, he was rewarded with an imprisonment indistinguishable from the very rebels he had fought against. He remained embittered until his death at Mescalero reservation in 1921.⁶²¹ How could the role of law and the ideal of individualized justice have produced or explained these results?

America was, perhaps, more enamored with the abstract ideals of democracy, equality and justice, than with the practice. It is easier to criticize the process of other nations or groups toward a model of civilized behavior than it is to live up to these precepts – especially when detailed observance works against one's immediate self-interest.⁶²² In the case of the Chiricahua, America's constitutionally – based ideal of individualized justice succumbed

615. See JOHN ANTHONY TURCHENESKE, JR., *THE CHIRICAHUA APACHE PRISONERS OF WAR* 1-14 (1997).

616. BETZINEZ, *supra* note 7, at 44-46.

617. *Id.* at 56-76.

618. *Id.* at 116-25.

619. *Id.* at 129-48.

620. DEBO, *supra* note 99, at 236-37, 273-77, 345-46.

621. *Id.* at 279.

622. See, e.g., the Supreme Court's critique of the Sioux system of rehabilitative justice in comparison with the United States' plan of extraterritorial jurisdiction and capital punishment. See *supra* notes 292-93.

to the expediency of collective, preemptive action. Rather than wait for an imminent threat to emerge and instead of individualized adjudications of guilt and responsibility, the United States chose to strike bluntly and prematurely against an entire, peaceful tribe.

Such over-inclusion was not unprecedented in the assimilation era. The slaughter of more than 300 Miniconjou Sioux at Wounded Knee in the precipitous strike against Ghost Dance unrest,⁶²³ and the slaying of Noch-ay-del-klinne for his prophecies⁶²⁴ were obvious departures from both common law and international law theories of self-defense.⁶²⁵ They also were not in accord with any evolving constitutional vision of either due process and equal protection,⁶²⁶ or freedom of speech and religion.⁶²⁷ The imprisonment of the peaceful Chiricahua may have been the most extreme departure from law, despite the fact that no individuals were murdered or executed. There was no unrest or imminent threat of violence or insurgency at San Carlos in the summer of 1886. There was only the racist prediction that another Geronimo might someday emerge,⁶²⁸ and the possibility that the removal of the peaceful Chiricahua might flush Geronimo out of the Sierra Madre.⁶²⁹ Even if the latter turned out to be true,⁶³⁰ there was no reason to keep the tribe imprisoned once Geronimo had surrendered.

It is also possible that the summary treatment of the Chiricahua was designed to prevent white violence rather than Apache violence. The citizens of Arizona feared and hated all the Apache, especially the Chiricahua,⁶³¹ and removal would alleviate the threat of future civilian responses such as that at Camp Grant or Sand Creek.⁶³²

The idea of separating the races to prevent friction and violence was well-rooted in American law and, soon after the removal, received constitutional

623. BROWN, *supra* note 117, at 439-45.

624. *See supra* notes 358-62.

625. *See, e.g.,* Allen v. United States, 157 U.S. 675, 681 (1895). Hugo Grotius, in his definitive text on International Law, *De Jure Belli ac Pacis*, lists only two acceptable bases for a just war: to repel an invasion, and to punish an insult to God. *See* Wikipedia.org, *International Law*, http://en.wikipedia.org/wiki/International_law (last visited June 12, 2006).

626. *See* The Civil Rights Cases, 109 U.S. 3, 12 (1883); Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

627. Reynolds v. United States, 98 U.S. 145, 162-64 (1878).

628. ROBERTS, *supra* note 3, at 287.

629. *Id.* at 286.

630. KRAFT, *supra* note 289, at 166-69.

631. FAULK, *supra* note 206, at 153-54.

632. *See supra* notes 134-56.

sanction. In the 1896 case of *Plessy v. Ferguson*,⁶³³ the Supreme Court sustained the practice of “separate but equal” as compatible with the Equal Protection clause of the Fourteenth Amendment. The Court felt that separation of colored and white travelers was in accord with “the absolute equality of the two races before the law,”⁶³⁴ and was reasonable from a due process standpoint because a legislature “is a liberty to act with reference to established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”⁶³⁵

Even if *Plessy* could be read to confirm the reasonableness and general constitutionality of separation by removal, it could not be seen to provide an excuse for a twenty-seven-year confinement of the whole tribe – young, old, women, children as well as men – as prisoners of war and the total deprivation of their rights in liberty and property.

The limits of race-based confinement in wartime were explored sixty years after the Chiricahua removal in the Supreme Court case of *Korematsu v. United States*.⁶³⁶ A deeply divided Court sustained the emergency, wartime ability of the government to profile by race, exclude persons of the targeted race from their homes in military sensitive areas and force them to register and live in relocation centers on an indefinite basis.⁶³⁷ The dissent felt that these measures, which fell far short of those imposed on the Chiricahua in both duration and intensity, were clearly unconstitutional.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one’s antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.” Article 3, s 3, cl. 2. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.⁶³⁸

633. 163 U.S. 537 (1896).

634. *Id.* at 544.

635. *Id.* at 550.

636. 323 U.S. 214 (1944).

637. *Id.* at 219-20.

638. *Id.* at 243 (Jackson, J., dissenting).

Black, writing for the majority, sought to refute this implication and distance the holding from situations such as that of the Chiricahua.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers — and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies — we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do this.⁶³⁹

Perhaps the federal government could escape re-evaluation under the restraints of due process and equal protection by first resorting to the fiction of *Morton v. Mancari*⁶⁴⁰ that federal Indian law is political rather than racial, and then advancing the self-serving wardship decisions of the assimilation-era Supreme Court. In *United States v. Kagama*,⁶⁴¹ the Court declared that tribes are the “wards of the nation,”⁶⁴² and in *Lone Wolf v. Hitchcock*,⁶⁴³ the Court recognized the essentially unreviewable power of the guardian to transmute the property of the ward.⁶⁴⁴

639. *Id.* at 223.

640. 417 U.S. 535, 554 n.24 (1974).

641. 118 U.S. 375 (1886).

642. *Id.* at 382.

643. 187 U.S. 553 (1903).

644. *Id.* at 567-68.

But the Chiricahua not only lost their property, they lost their liberty and the United States did not call them wards in need of guidance, but prisoners deserving of punishment and confinement. It is true that the goals and techniques of assimilation were continued with respect to the captive Chiricahua, especially with respect to the children.⁶⁴⁵ There was, however, no illusion of choice. At best the transformation was reminiscent of the brain washing of Kaaetennae in Alcatraz.⁶⁴⁶

In truth, the Chiricahua tribe fell through a crack in the moral and legal façade of the nation. It resulted in the destruction of a coherent tribe – death in fact for many, and the slow strangling of a once vibrant culture.⁶⁴⁷ It clearly was not in accord with the contemporary or resultant law of individual and minority rights and was not even in accord with reasonable self interest – the Chiricahua homeland, lusted after by whites at the time of removal, is now largely empty and uninhabited.⁶⁴⁸

645. See GENEVIEVE BELL, *TELLING STORIES OUT OF SCHOOL: REMEMBERING THE CARLISLE INDIAN INDUSTRIAL SCHOOL, 1879-1918* (1998).

646. See *supra* notes 485-88.

647. LIEDER & PAGE, *supra* note 176, at 267.

648. Though uninhabited the land maintains its timeless aura:

Eighty years on, it seem unfathomable that white Americans could have found no way to coexist, in all empty magnificence of the Southwest, with a mere twelve hundred Chiricahua – roughly the population today of such wayside Arizona hamlets as Pima or Morenci. The heartland of the Apache, upon which even the caravans of modern tourism have left little mark, pulses with the absence of the people who knew and used that wilderness best.

Along the rocky terraces above Aravaipa Creek, the saguaro blooms; its green fruit bulbs and withers, untasted by the human tongue. In the Dragoon Mountains, close by Cochise's bones, the mesquite branches load each August with beans that drop ungathered. The junipers and pinons yield their crop on slopes where only ground squirrels scavenge. Each May the agaves swell with the moisture of the soil, but no women come to dig their roots and bake the fleshy mescal hearts beneath the ground.

The sacred pool at Ojo Caliente brims in the silence, spilling toward the canyon where a thousand swallows dart and sing; the red face-painting clay sleeps in its geologic bed. In Apache Pass, the spring that Mangas nearly gave his life to hold seeps in its shadowy cranny, drunk only by the animals. Over Turkey Creek the hawks soar on spirals of wind, while the tall pines drift and toss and no one sees them.

Upstream from Canon de los Embudos, the chipped flakes, black and gray and ruddy, disappear under each summer's shifting sand, where no fingers shape the flint. High in the Sierra Madre, the zigzag trail to Juh's Stronghold lies covered in the swaying grama grass. The deer flit safe beneath the cottonwoods along the blue Bavispe River, where, with no human ear to wonder what they say, at dusk

Finally, the treatment of the Chiricahua was deceptive and hypocritical. The United States, seeking to avoid depredation liability, would argue in court that Geronimo was a separate entity from the peaceful Chiricahua,⁶⁴⁹ but, seeking to serve its white constituency, it would in essence state that all Chiricahua are the same and subject to dispossession and deportation. It may be true that there were only a few hundred of them, but such microcosms and small arenas are tests of character. A nation can either confirm its greatness, demonstrate honor and keep its promises,⁶⁵⁰ or it can reveal a central rot that, though padded for a time with size, power and wealth, will eventually spread and shatter the trunk from within.

the coyotes yip and howl.

ROBERTS, *supra* note 3, at 315.

649. *Scott v. United States & the Apache Indians*, 33 Ct. Cl. 486 (1898).

650. *Fed. Power Comm'n v. Tuscarora Nation*, 362 U.S. 99, 142 (1960) (Black, J. dissenting).