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VALUES IN TRANSITION: THE CHIRICAHUA APACHE FROM 1886-1914

*John W. Ragsdale, Jr.**

Abstract

Law confirms but seldom determines the course of a society. Values and beliefs, instead, are the true polestars, incrementally implemented by the laws, customs, and policies. The Chiricahua Apache, a tribal society of hunters, gatherers, and raiders in the mountains and deserts of the Southwest, were squeezed between the growing populations and economies of the United States and Mexico. Raiding brought response, reprisal, and ultimately confinement at the loathsome San Carlos Reservation. Though most Chiricahua submitted to the beginnings of assimilation, a number of the hardiest and least malleable did not. Periodic breakouts, wild raids through New Mexico and Arizona, and a labyrinthian, nearly impenetrable sanctuary in the Sierra Madre led the United States to an extraordinary and unprincipled overreaction. The entire tribe was removed for the deeds of the renegades and were held, with both the raiders and the Army scouts, as prisoners of war for twenty-seven years. The impact of confinement in Florida, Alabama, and Oklahoma led ultimately to a splintering of the tribe. This article follows the history, the unprecedented preemptive force by the United States, the survival but ultimate division of the tribe, and the role of value in all the processes. Three seminal Apache figures – Geronimo, Asa Daklugie, and Jason Betzinez, all of whom produced autobiographies – provide focus on the common and divergent values and their confirmation in the evolving law and politics.

Table of Contents

I. Introduction	40
II. The Resistance, Rebellion, and Final Surrender of the Chiricahua . . .	46
III. Prisoners of War	63
A. Legality and Morality	63

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B. Confinement in Florida, Alabama, and Pennsylvania: Purposes, Conditions, and Problems	70
C. Fort Sill	75
IV. Individual Values	82
A. Jason Betzinez	83
B. Asa Daklugie	88
C. Geronimo	92
V. Epilogue and Prologue	98

I. Introduction

The Chiricahua Apache fought the last of the significant Indian military engagements with the United States¹ in a spectacular fashion that transfixed the nation: lightning raids in the mountains and deserts of the Southwest, numerous incidents of destruction, depredation, ambush, battle, and torture, and evanescent escapes across the border into the labyrinthian Sierra Madre Mountains of Mexico. The names of the legendary Chiricahua leaders – Mangas Coloradas, Cochise, Victorio, and Geronimo – have captured the fascination, fear, anger, and admiration of Americans for well over a century. Yet, participation in these last rebellions and defenses of homeland were varied, politically and individually, and never homogeneous. The United States' responses, however, often were uniform, perhaps unwisely and unfairly.² Most of the Chiricahua were not combatants and did not participate in armed aggression, resistance, or insurrection. Most remained on established reservations, complied with ordered relocations, and attempted to learn agriculture. Yet, when rebel bands from the main bodies fought and fled, the military response was undeviating. When reservations were closed, removals imposed, and, in the end, confinement as prisoners of war ordered for well over a generation, all the Chiricahua – the separate bands, men, women,

1. See DAVID ROBERTS, *ONCE THEY MOVED LIKE THE WIND* 13 (1994) (“At the end, in the summer of 1886, they numbered thirty-four men, women, and children under the leadership of Geronimo. This small group of Chiricahua Apaches became the last band of free Indians to wage war against the United States Government. The ‘renegades,’ as white men called them, were mercilessly pursued by five thousand American troops (one-quarter of the U.S. Army) and by some three thousand Mexican soldiers. For more than five months Geronimo’s band ran the soldiers ragged. The combined military might of two great nations succeeded in capturing not a single Chiricahua, not even a child.”); see also DOUGLAS V. MEED, *THEY NEVER SURRENDERED* 145-49 (1993) (covering isolated Chiricahua renegades that persisted in Mexico for a number of decades, with the last reported incidents occurring with the Bronco Apaches in the mid-1930s).

2. See *infra* notes 137-78 and accompanying text.

children, aged, warriors, and even United States Scouts – were affected without differentiation.³

The social structure, laws, culture, and values of the Chiricahua people were, in this unsettled time, under tremendous pressure. How did they respond? Though core principles and values proved resilient, they were not immutable and the structure of the society was not invariable. Changes in individual perceptions occurred, and resulting variance in the politics, economy, culture, and law ensued.⁴

The course of value in the Chiricahuas' time of deep-rooted transition provides a vivid study of the intersection between philosophy and the institutionalization of such belief and world-view in the economic, political, and legal structure of the society.⁵ Let us restate a few generalizations about the role of value in an institutionalized, structured society.

The philosophy and values of the people infuse the core of an ongoing society.⁶ Values, though often intangible and even indeterminate, are engines for the train of social structure and its trajectory.⁷ Grant Gilmore wrote that

3. See generally FRANK C. LOCKWOOD, *THE APACHE INDIANS* 291-318 (1987). See *id.* at 318 (“By far the greater part of the tribe remained true to the government in the outbreak of 1885, and the most valuable and trustworthy of the Indian scouts were taken from among them. For their allegiance, all have been rewarded alike – by captivity in a strange land.”) (quoting Fifty-first Congress, First Session, Executive Document No. 83).

4. See *infra* notes 249-375 and accompanying text.

5. See generally John W. Ragsdale, Jr., *Ecology, Growth and Law*, 16 CAL. W. L. REV. 214, 265-98 (1980) (discussing the concept of institutionalization of value and belief within the economic, political, and legal structure, and the provision of momentum to such values that may be independent of or additional to the values of a present, effective consensus).

6. See *id.*

7. See ROBERT PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* 283-84 (1974).

Romantic reality is the cutting edge of experience. It's the leading edge of the train of knowledge that keeps the whole train on the track. Traditional knowledge is only the collective memory of where that leading edge has been. At the leading edge there are no subjects, no objects, only the track of Quality ahead, and if you have no formal way of evaluating, no way of acknowledging this Quality, then the entire train has no way of knowing where to go. You don't have pure reason – you have pure confusion. The leading edge is where absolutely all the action is. The leading edge contains all the infinite possibilities of the future. It contains all the history of the past. Where else could they be contained?

The past cannot remember the past. The future can't generate the future. The cutting edge of this instant right here and now is always nothing less than the totality of everything there is.

Value, the leading edge of reality, is no longer an irrelevant offshoot of structure. Value is the predecessor of structure. It's the preintellectual awareness that gives rise to it. Our structured reality is preselected on the basis of value, and

“[l]aw reflects but [does not] determine [] the moral worth of a society.”⁸ Value and structure are, however, reciprocating and synergistic, even though value is dominant.⁹ Value leads to structure,¹⁰ but structure can relate back secondarily to the revitalization, or even inculcation, of value in the society.¹¹ The unity is thus in constant, reverberating motion – an equilibrium or homeostasis that shifts with changes in the environment, the economy, the politics, the law, and, preeminently, the minds and desires of the people.¹² The

really to understand structured reality requires an understanding of the value source from which it's derived.

Id.

8. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110 (1977).

9. On the concepts of reciprocity, value, and choice, see LAURA THOMPSON & ALICE JOSEPH, *THE HOPI WAY* 37 (1965).

Theoretically all phenomena, natural and supernatural, living and dead – including man, animals, plants, the earth, sun, moon, and clouds, the ancestors and the spirits – are interrelated and mutually dependent through the underlying dynamic principle of the universe – which we shall call the law of universal reciprocity. This law implies the concept of immanent or cosmic justice. The emphasis is not, however, on the idea of rewards and punishments or on punishments alone (retribution), but on the mutual exchange of essentially equivalent but not identical values according to fixed traditional patterns, in the interests of the common [wealth]. Man, the elements, animals, plants and the supernatural cooperate in an orderly fashion, by means of a complex set of correlative interrelationships, for the good of all.

This concept of the universe is not “mechanistic” in the usual sense of the term, on account of the special role played by man in the scheme of things. Whereas, according to Hopi theory, the non-human universe is controlled *automatically* by the reciprocity principle, man is an active agent who may or may not acquiesce in it. While the world of nature is *compelled* to respond in certain prescribed ways to certain stimuli, man not only responds but also *elicits* response. Hence, man, in the measure that he obeys the rules, may exercise a certain limited control over the universe.

Id.

10. See PIRSIG, *supra* note 7, at 284.

11. For example, wilderness, preserved under law, becomes a resource to which succeeding generations, otherwise isolated from their natural roots, can return and rekindle the values. See MAX OELSCHLAGER, *THE IDEA OF WILDERNESS* 351 (1991) (“All nature will fable, Thoreau tells us, if we will but let it speak. We must forget our conventional wisdom, for this is a positive ignorance, and return to nature. We have been weaned early from her breast, and we are not as wise as the day we were born. But our Mother will speak to us, if we will listen. Her words yet have earth clinging to their roots; her statements are grounded in granitic truth. Such fables are revealed, however, only to a person of Indigen wisdom, who seeks no more than a sympathy with intelligence – a negative knowledge, because its meaning goes beyond the web of belief.”); see also CHARLES WILKINSON, *THE EAGLE BIRD* 72-74 (1999).

12. GILMORE, *supra* note 8, at 109-10 (“[T]he function of law, in a society like our own,

shifting may be gradual, almost imperceptible, or dramatic and precipitous. Massive changes in the social matrix may cause a complete dislocation between value and institutionalization. The structures, necessarily and fundamentally, will reform.

To restate: law, politics, economy, custom, and religion institutionalize and regularize the values, philosophy, thought, and world-views of the people. They provide vehicles for enforcement, for transmission to new generations and immigrants, and for reinvigoration and reassurance of the inhabitants. Though there is cohesion between structure, value, and reciprocity, the values are preeminent. The structure is essentially subordinate to the mind. Freedom and humanity will ultimately prevail.¹³

The origins of value are potentially numerous and the process of inculcation imprecise.¹⁴ As noted, social structure and the secular command of law may play roles in both the affirmation and instillation of value, but they tend to be subordinate.¹⁵ Economy reflects and bears on value. An agrarian society,

is altogether more modest and less apocalyptic. It is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us. If the assumption is wrong, if there is no consensus, then we are headed for war, civil strife, and revolution, and the orderly administration of justice will become an irrelevant, nostalgic whim until the social fabric has been stitched together again and a new consensus has emerged. But, so long as the consensus exists, the mechanism which the law provides is designed to insure that our institutions adjust to change, which is inevitable, in a continuing process which will be orderly, gradual, and, to the extent that such a thing is possible in human affairs, rational.”)

13. See VICTOR FRANKL, *MAN'S SEARCH FOR MEANING* 51-52 (1984) (“Another time we were at work in a trench. The dawn was grey around us; grey was the sky above; grey the snow in the pale light of dawn; grey the rags in which my fellow prisoners were clad, and grey their faces. I was again conversing silently with my wife, or perhaps I was struggling to find the *reason* for my sufferings, my slow dying. In a last violent protest against the hopelessness of imminent death, I sensed my spirit piercing through the enveloping gloom. I felt it transcend that hopeless, meaningless world, and from somewhere I heard a victorious ‘Yes’ in answer to my questions of the existence of an ultimate purpose. At that moment a light was lit in a distant farmhouse, which stood on the horizon as if painted there, in the midst of the miserable grey of a dawning morning in Bavaria. ‘*Et lux in tenebris lucet*’ - and the light shineth in the darkness. For hours I stood hacking at the icy ground. The guard passed by, insulting me, and once again I communed with my beloved. More and more I felt that she was present, that she was with me; I had the feeling that I was able to touch her, able to stretch out my hand and grasp hers. The feeling was very strong: she was *there*. Then at that very moment, a bird flew down silently and perched just in front of me, on the heap of soil which I had dug up from the ditch, and looked steadily at me.”)

14. See CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* 1-40 (1988).

15. See GILMORE, *supra* note 8, at 110.

attuned to the rhythms of the seasons and the flows of natural capital – sun, water, soil, flora, and fauna – will value and respond to the land’s capacities and balances more directly and deeply than an urbanized, technological society.¹⁶

Human physiology relates directly to value in that the human biological organism is the generator and repository of values, beginning with the fundamental interests in survival and reproduction. The senses – taste, smell, touch, sight, and hearing – respond to the environment and help form the thoughts and reflections of the mind.¹⁷ The scope of the senses and the capabilities of the mind – thought, reason, and emotion – bear on the shape and content of values. A mind may sense but not understand infinity and eternity, and therefore may respect if not value them.¹⁸ The mind thus tends, perhaps by necessity, to establish values based on observations, experiences, and reflections within the limits of human comprehension.

The perceived commands of God, both in individual experience and as institutionalized by religion, will, in contrast to the commands of a secular state, likely prove to be a relatively enduring source of value.¹⁹ Indeed, the view of the natural world as the product and presence of God is perhaps the predominant source of personal and societal value and the paramount measure of virtue and social performance throughout observable history.²⁰

It bears repeating and warrants reflection that values, formed from physiology and external forces, become themselves the progenitors of confirming institutions, while simultaneously remaining susceptible to future reformation stemming from the same or similar external sources. Values and their resultant institutions thus remain vulnerable to the impact of the values and institutions of other societies.

When the Europeans invaded North America, they bore the values that underlay mercantilism and, later, industrialization – values in individualism, private property, capital accumulation, free-market competition, technological

16. See J. DONALD HUGHES, *AMERICAN INDIAN ECOLOGY* 5-22 (1983).

17. See John Ragsdale, Jr., *The Natural Law of Rhythm and Equality*, 58 *UMKC L. REV.* 375, 378 (1990).

18. See WILKINSON, *supra* note 11, at 7 (“We can understand that our civilization is just one modest rock outcrop on a great plain that stretches to the horizons and beyond. Out on that plain, under that sky, we can wonder at time and feel small in it and give it respect.”).

19. CORMAC MCCARTHY, *THE ROAD* 5 (2006) (“He knew only that the child was his warrant. He said: If he is not the word of God God never spoke.”).

20. See Charles J. Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 *IND. L.J.* 426, 430-32 (1975).

innovation, and growth.²¹ When these values and their associated economic, political, and legal structures collided with the essentially stable state, subsistence-based tribal societies, displacement became inevitable.²² Increase in European numbers, expansion of their institutions, the spread of European pathogens in close-knit tribal communities, and inevitable warfare accelerated the deterministic process.²³ The native societies were pushed back, first across the Mississippi and then, as national sovereignty expanded to the Pacific, to the northern and southern fringes.²⁴ In the territories of Arizona and New Mexico, the desert climate and rugged topography provided a degree of insulation against the European wave, with the early exception of Catholic priests and Spanish conquistadors.²⁵ After the Mexican Cession, however, and concurrently with the Civil War, the miners, the railroad builders, the hardiest of settlers, and the American military increasingly began to move into even this refuge.²⁶ The ensuing confrontations with the Chiricahua Apache were to provide the fiercest and final chapter in the basic transformation of Indian values and structure.

This article will trace the course of this remarkable, heroic, and deeply disturbing episode in American history and federal Indian relationships. The next section will sketch the history of the Chiricahua and the policies of the United States from the Civil War era to the final surrender of Geronimo in

21. See JOHN STEELE GORDON, *AN EMPIRE OF WEALTH* 6-36 (2004); WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY* 143-45 (1977).

22. See OPHULS, *supra* note 21, at 225-32 (discussing the characteristics of a steady state society); see also TIM FLANNERY, *THE ETERNAL FRONTIER* 268 (2001); HUGHES, *supra* note 16, at 105-11 (discussing the vulnerability of a steady state to an aggressive, growth-oriented civilization).

23. BRIAN W. DIPPY, *THE VANISHING AMERICAN* 32-44 (1982); HENRY F. DOBYNS, *THEIR NUMBER BECOME THINNED* 8-26 (1983); DAVID E. STANNARD, *AMERICAN HOLOCAUST* 57-146 (1992).

24. 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER* 11-18, 183-269 (1984) [hereinafter PRUCHA, FATHER].

25. JACK D. FORBES, *APACHE, NAVAJO, AND SPANIARD* 3-40 (1994); PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST* 222-26 (1987).

26. The Treaty of Guadalupe Hidalgo, U.S.-Mexico, Feb. 2, 1848, 9 Stat. 922, ended the Mexican War and provided for the cession of 525,000 square miles to the United States. The Treaty assured Mexican settlers and Pueblo Indians, north of the border, of their recognized rights in land, *id.* art. VIII, 9 Stat. at 929-30, and provided the United States with the jurisdictional power and responsibility for dealing with the nomadic Indian tribes that raided settlers and miners in the ceded area. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 321-22 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN]; LIMERICK, *supra* note 25, at 235-36.

1886.²⁷ The third section will focus on the incarceration of the Chiricahua tribe in Florida, Alabama, and Oklahoma.²⁸ It will deal with the legality and morality of confinement, the near-genocidal impacts of disease, the forced re-education, and the physical relocation of the Chiricahua in Florida, Alabama, Oklahoma, and finally, for the majority, in New Mexico.

Section four will be an exploration of the central concepts and values that inspired several key Chiricahua individuals, and how these values led to new social, political, and legal forms.²⁹ In particular, it will focus on Jason Betzinez as a leader of the assimilationist Chiricahua who ultimately chose to stay in Oklahoma;³⁰ Asa Daklugie, who led the traditional Chiricahua to a merger with the Mescalero Apache on their reservation in southern New Mexico;³¹ and finally, Geronimo, who died at Fort Sill, probably at the age of eighty-six,³² but who represented a resilience and a pragmatism that infused both branches of the divergent Chiricahua and emanated into the future.

Section five, an epilogue and a prelude to a future work on the present and future of the divided societies, will view the post-division re-emergence of society and sovereignty among the Fort Sill Apache and the Chiricahua, enfolded with the Mescaleros.³³

II. The Resistance, Rebellion, and Final Surrender of the Chiricahua

When the Europeans first became aware of North America and encountered the indigenous people and their subsistence economies,³⁴ they were faced with the fundamental issue of acquiring the power or right of land use. Some invaders, such as the Spanish, were inclined toward military force,³⁵ while others, such as the English, who were more concerned with new communities

27. See *infra* Part II. Significant portions of the research and writing in this chapter appeared in an expanded form in an earlier article by the author. See generally John W. Ragsdale, Jr., *The Chiricahua Apaches and the Assimilation Movement, 1865-1886: A Historical Examination*, 30 AM. INDIAN L. REV. 291 (2005-2006) [hereinafter Ragsdale, *Chiricahua Apaches*].

28. See *infra* Part III.

29. See *infra* Part IV.

30. See JASON BETZINEZ, *I FOUGHT WITH GERONIMO* 195-96 (1987).

31. See EVE BALL, *INDEH: AN APACHE ODYSSEY* 183-93 (1980).

32. See ANGIE DEBO, *GERONIMO* 7 (1976) (fixing Geronimo's birth date at about 1823 by extrapolation and comparison with events and with the life of Jason Betzinez's mother, a cousin of Geronimo, making him eighty-six at the time of his death).

33. See *infra* Part V.

34. See HUGHES, *supra* note 16, at 1-9; GORDON, *supra* note 21, at 5-6.

35. DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA* 57 (1992).

than adventure and plunder, secured their early footholds with negotiation and purchase.³⁶ Though forceful dispossession certainly occurred, treaties of cession became the predominant method of land acquisition.³⁷ When the non-Indian population grew to the point that seizure of land instead of bargain and exchange was possible, the emergent colonies and, following the Revolution, the United States, found themselves obligated by the precedent of treaty-making as well as the documents themselves.³⁸ As the power balance shifted to increasingly favor the whites, however, they began to manipulate both the formative process of the agreements and the subsequent interpretations. Treaties often became masks for duress, misrepresentation, and unconscionability.³⁹

Following the final departure of the Indians' English allies, the treaties securing the homeland of the eastern and southern tribes were renegotiated under the authority of the Indian Removal Act.⁴⁰ Tribes, under intense local and national duress, were essentially forced to sign the removal treaties and relocate in the remote, unknown, and, for the time being, undesired regions beyond Arkansas, Missouri, and Iowa.⁴¹ Tribal sovereignty – the ability to make their own laws and live under them – was never explicitly denied or infringed by the now dominant federal government,⁴² but such retained sovereignty could not assure the permanence of location, even beyond this new frontier at the edge of the Great Plains. Indeed, the promises of enduring repose made often in the removal treaties were to last less than two decades for most tribes.

In the decade of the 1840s, the United States added Texas, the Mexican Cession, and Oregon.⁴³ The permanent Indian frontier, once considered land beyond the pale of white desire or necessity, now lay squarely in the middle of the sprawling, restless, bi-coastal nation. The lure of gold, water, timber, animal forage, and settlement land in the West drew the migrants directly into

36. DAVID E. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 57-58 (5th ed. 2005) (citing COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 55 (Rennard Strickland et al. eds., 1982)).

37. COHEN, *supra* note 26, at 14-15.

38. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-61 (1832).

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

40. Indian Removal Act, ch. 148, 4 Stat. 411 (1830).

41. PRUCHA, FATHER, *supra* note 24, at 183-269.

42. *Worcester*, 31 U.S. at 561.

43. RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 73-84 (1991).

the barriers of legal restraint that protected the transplanted tribes and their new reserves.⁴⁴ This proved to be but a temporary inconvenience to a nation now firmly committed to expedience rather than promise.

The federal government negotiated with thinly veiled pressure another round of removal treaties with the barely settled tribes.⁴⁵ By the mid-1850s, most of the tribal peoples in the Central Plains had surrendered their holdings and departed for yet another new home in the Oklahoma Indian territory. With the exception of some greatly constricted reservations and individual allotments, the mid-continental Indian impediments to western movement were eliminated.⁴⁶

The flood west accelerated until the edgy young nation turned in on itself with the Civil War over slavery and economics, and both civilian movement and military presence temporarily declined in the West.⁴⁷ The federal legislative will, however, was liberated by southern secession from the delicate attempts to both confine and accommodate slavery. Congress quickly began the passage of laws designed to open the West, aid the development of business, transportation, and a mobile yeoman citizenry, and structure the politics of the anticipated post-war, slaveless nation.⁴⁸

The Homestead Act of 1862, the Mining Acts of 1866, 1870, and 1872, and the Desert Land Act of 1877,⁴⁹ together with the common law development of the prior appropriation of water⁵⁰ and the common grazing privileges on the public domain,⁵¹ were an invitation for American pioneers and entrepreneurs to enter the vast western land in a search for resources, wealth, and new beginnings. Backed by these acts and doctrines, settlers, cattlemen, miners, timber cutters, and road builders were not deemed mere trespassers on the federal lands, but were instead considered legal entrants whose license and bare possession could ripen into title.⁵² These laws also guaranteed that whites would contact and conflict with the resident Indian tribes, whose aboriginal

44. *Id.* at 89-91.

45. GEORGE W. MANYPENNY, *OUR INDIAN WARDS* 111-33 (1880).

46. *Id.*; see also JOSEPH B. HERRING, *THE ENDURING INDIANS OF KANSAS* 29-146 (1990); John W. Ragsdale, Jr., *The Dispossession of the Kansas Shawnee*, 58 *UMKCL. REV.* 209, 239-54 (1989-1990).

47. DONALD E. WORCESTER, *THE APACHES* 80 (1992).

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

49. WHITE, *supra* note 43, at 142-54.

50. See *Cal. Or. Power Co. v. Portland Bearer Cement Co.*, 295 U.S. 142, 153-58 (1935).

51. *Buford v. Houtz*, 133 U.S. 320, 328-29 (1890).

52. GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 113 (6th ed. 2007).

possession had neither been extinguished by the United States⁵³ nor confirmed and recognized under treaty or statute.⁵⁴ In fact, these dispositional laws, especially those dealing with precious metals, may have assured that conflict with even recognized Indian title was inevitable as well.⁵⁵

In the aftermath of the Civil War, President Ulysses S. Grant, influenced perhaps by the Fourteenth Amendment's commitment to the equal protection of the laws,⁵⁶ sought a peaceful alternative to the mounting tensions in the West. Concentration of the tribes and their subsistence economies on reservations was proposed as an alternative to extermination by the military and white immigrants.⁵⁷ Such concentration took place under treaty prior to 1871, and, after that date, under statute or executive order.⁵⁸ Tribes may not have noticed much difference in the dignity or purported permanence of the

53. *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).

54. 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*, 21 U.S. at 585.

55. 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; DEE BROWN, *THE AMERICAN WEST* 132-39 (1995). 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. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980).

56. See Ragsdale, *Chiricahua Apaches*, *supra* note 27, at 306-07 ("It was certainly true that the Civil War was a collision between competitive economies. 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 war, however, was the moral confrontation over slavery and basic human equality. Indeed, the 'uncabinable' 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. 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. 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, was the change in treatment of the Western tribes.") (citations omitted).

57. See DIPPIC, *supra* note 23, at 144-46; PRUCHA, FATHER, *supra* note 24, at 479-83.

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

various approaches, as all involved prior negotiation of agreements in the field and solemn promises from those with apparent authority to speak for the United States. The western tribes may well have felt that such bilateral promising reflected a continuing federal commitment to the undiminished continuation of tribal sovereignty within the new, usually truncated tribal borders. This was not necessarily to be. In an ever-increasing number of cases, the creation of concentrated reservations was accompanied by efforts to transform the culture and economy of the tribes and prepare them for assimilation.⁵⁹

The assimilation movement, destined to hold sway for more than half a century, was designed to break down tribal communalism and retrofit the unbuffered individuals for life and competition in a free-market economy.⁶⁰ More significantly, the movement sought to break the tribal hold on land and culture and the nomadic, space-consuming lifestyle of hunting and gathering, and replace it with an agrarian economy, individualized land holding, and the Christian faith.⁶¹ Not incidentally, the assimilationists also sought to free up millions of acres of land for white appropriation and, following the anticipated inculcation of agricultural self-sufficiency, the termination of any federal social welfare burdens.⁶²

The winds of assimilation that blew through the United States between the mid-nineteenth century and the 1934 Indian Reorganization Act⁶³ were strongest in the areas where land was fertile and white desire high, and where tribes, already weakened by repeated assaults and displacements, were most vulnerable and malleable. Assimilation efforts also reached the mountains and deserts of the Southwest, but the impacts were delayed, disrupted, and ultimately muted by the rugged terrain, the arid climate, and an irreducible human temperament.⁶⁴ The attempts at concentration, confinement, economic transformation, and cultural reform provoked some dramatic instances of resistance, perhaps most notably on the part of the Chiricahua Apache.⁶⁵

59. See PRUCHA, FATHER, *supra* note 24, at 534-35.

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

61. FRANCIS PAUL PRUCHA, *THE INDIANS IN AMERICAN SOCIETY* 16-24 (1985).

62. COHEN, *supra* note 26, at 75-84; JANET A. MCDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934*, at 1-5 (1991).

63. Wheeler-Howard Act (Indian Reorganization Act), 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

64. See, e.g., LEO CRANE, *INDIANS OF THE ENCHANTED DESERT* 206-07 (1972); see also MCDONNELL, *supra* note 62, at 14-15.

65. See Ragsdale, *Chiricahua Apaches*, *supra* note 27, at 299.

The traditional Chiricahua were never a unified tribe, at least in the reductionist American conception, which often lumped together loosely related groups for political or administrative convenience.⁶⁶ The Chiricahua encompassed three separate but interacting bands, which in turn had substantially autonomous sub-groups.⁶⁷ The eastern band, called the Chihenne or Warm Springs Apache was, along with the Bedonkohe, localized in the Black Mountain region of southwestern New Mexico.⁶⁸ The central band, the Chokonen, was centered in the Dragoon, Chiricahua, and Dos Cabezos Mountains of southeast Arizona, and the southern band, the Nednhi, lived primarily in the Sierra Madre Mountains of northern Chihuahua and Sonora.⁶⁹ These groups – bound by blood, culture, and history – communicated, cooperated, and associated with one another on a frequent but still autonomous basis.⁷⁰

The Chiricahua, though competent in the desert, were mountain people, and their traditional economy was based on hunting, gathering, and some planting – melons, corn, pumpkins, and beans – as supplements to the wild harvest.⁷¹ Natural bounty declined significantly following the Spanish invasion when ranching and farming communities emerged in northern Mexico. The domestic stock and resources of the ranchers and farmers proved a tempting target for Apache raiders,⁷² and the ensuing retaliatory responses by aggrieved owners and the Mexican military led to multiple cycles of violence, retribution, and a deeply entrenched enmity between Mexicans and Chiricahuas.⁷³

In the encounters with the Mexicans, the Chiricahua perfected their guerilla warfare tactics: operating in small, independent units; moving at high speed

66. See *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115-17 (1938) (holding 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); see also John W. Ragsdale, Jr., *Individual Aboriginal Rights*, 9 MICH. J. RACE & L. 323, 338-39 (2004).

67. MORRIS E. OPLER, AN APACHE LIFE-WAY 1-4 (1996); Morris E. Opler, *Chiricahua Apache*, in 10 HANDBOOK OF THE NORTH AMERICAN INDIAN: SOUTHWEST 401, 401-02, 411 (Alfonso Ortiz ed., 1983) [hereinafter Opler, *Chiricahua Apache*].

68. Opler, *Chiricahua Apache*, *supra* note 67, at 401-02.

69. *Id.*

70. *Id.* at 401-02, 411.

71. *Id.* at 413.

72. EDWARD H. SPICER, CYCLES OF CONQUEST 546 (1976) ("The presence of livestock – sheep, goats, cattle, horses – in New Mexico and Sonora stimulated the Athapaskan-speaking people to a predatory, parasitic way of life.").

73. WORCESTER, *supra* note 47, at 15-23.

on foot or horseback over rough terrain; striking quickly and efficiently from cover; avoiding head-on confrontations, if possible.⁷⁴ Warriors had superb physical fitness, a vast array of survival skills, combat prowess with horse, gun, bow, knife, and lance, and a gruesome ability to inflict pain as well as endure it.⁷⁵

The Mexican cession of 1848 brought these issues into the American jurisdictional province. The United States now had within its southern borders a fierce, roving, militaristic society whose economy centered on raiding and whose appetite for violence and torture was highly unnerving, even to hardened frontier perspectives.⁷⁶ The first American encounters with the Chiricahua prior to the Civil War involved miners who were drawn into the Black Mountain homeland of the Warm Springs band by the discovery of gold in 1851.⁷⁷

In 1852, several Apache leaders, including Mangas Coloradas, Chief of the Warm Springs band, signed a treaty agreeing to refrain from hostilities and allow both travel and the establishment of forts in return for some vague federal promises to “at its earliest convenience designate, settle and adjust their territorial boundaries.”⁷⁸ Relations quickly deteriorated when Mangas, approaching in peace, was seized, tied to a tree, and whipped by miners,⁷⁹ and Cochise, leader of the central band, was trapped after a peaceful parley with the cavalry. Cochise escaped by cutting through the tent walls, but some of his less fortunate relatives were held and later hung by the impetuous Lieutenant Bascom.⁸⁰ These great leaders of the Chiricahua united in a deadly rage against both civilians and military, and the ensuing encounters throughout the early 1860s featured mutual efforts at extermination.⁸¹

74. GRENVILLE GOODWIN, WESTERN APACHE RAIDING AND WARFARE 16-19 (Keith H. Basso ed., 2004); WORCESTER, *supra* note 47, at 8-9; George Crook, *The Apache Problem, in EYEWITNESSES TO THE INDIAN WARS, 1865-1890*, at 593, 597-98, 602 (Peter Cozzens ed., 2001) [hereinafter EYEWITNESSES].

75. Crook, *supra* note 74, at 596; see BRITTON DAVIS, THE TRUTH ABOUT GERONIMO 80 (1976); Ragsdale, *Chiricahua Apaches, supra* note 27, at 301.

76. See William S. Oury, *Historical Truth: The So-Called “Camp Grant Massacre” of 1871, in EYEWITNESSES, supra* note 74, at 57-62.

77. ROBERTS, *supra* note 1, at 36.

78. Treaty with the Apaches, U.S.-Apache Nation of Indians, July 1, 1852, 10 Stat. 979, 980. Language of such indefinite nature would not likely be deemed a recognition of title. See *Nw. Band of Shoshone Indians v. United States*, 324 U.S. 335, 341-53 (1945).

79. EDWIN R. SWEENEY, MANGAS COLORADAS 400 (1998).

80. EDWIN R. SWEENEY, COCHISE 142-65 (1995) [hereinafter SWEENEY, COCHISE].

81. DEBO, *supra* note 32, at 61-79; DAN L. THRAPP, THE CONQUEST OF APACHERIA 6-23 (1967) [hereinafter THRAPP, CONQUEST].

Grant's post-Civil War Indian peace policy began in earnest in 1868 with a number of reservations established in the West and Southwest, including one for the Navajo in northern Arizona.⁸² Nothing, however, was forthcoming for the Apache until the early 1870s when a number of reservations were created for Apache bands by negotiated executive order rather than treaty: the Mescalero Reservation east of the Rio Grande in New Mexico, the Warm Springs Reservation in southwestern New Mexico, the White Mountain and San Carlos Reservations in central Arizona, and Cochise's reservation for the central band in southern Arizona's Dragoon Mountains.⁸³ Cochise's three-million-acre reservation, in particular, was created by executive order in 1872 in precise accord with Cochise's demands.⁸⁴

Under the peace policy, the established reservations were intended to be alternatives to war and extermination, and islands of respite and possible reformation. Groups or individuals that refused to go there or left without permission, however, were to remain the responsibility of the War Department and the battle-ready soldiers recently hardened in the Civil War.⁸⁵ After the establishment of the Apache reservations, General George Crook, commander of the Arizona forces, was free to unleash the military counterpart to the peace policy. Employing unrelenting force against armed resistance, compassion toward women, children, and men willing to surrender and live in peace on the reservations, and the use of Indian scouts to pursue and locate mobile renegades, Crook was able to induce most of the Apache – willing and otherwise – to locate on the reservations prior to his 1875 reassignment to the Sioux wars on the Northern Great Plains.⁸⁶

The reservation created in 1872 along Arizona's southern border for Cochise's central band was the product of Cochise's strength and particular wish for a traditional, sustainable, defensible homeland. It was not a federal administrator's creation; not where the federal government would have preferred, nor was it a focal point for any federal, cultural, or economic transformations – at least while Cochise was alive and his white friend, Tom

82. 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, Mar. 2, 1868, 15 Stat. 619; Treaty with Navajo, U.S.-Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667.

83. DEBO, *supra* note 32, at 83-84; ROBERTS, *supra* note 1, at 85-86.

84. SWEENEY, COCHISE, *supra* note 80, at 363.

85. PRUCHA, FATHER, *supra* note 24, at 534.

86. THRAPP, CONQUEST, *supra* note 81, 118-43; DEE BROWN, BURY MY HEART AT WOUNDED KNEE 217 (1991) [hereinafter BROWN, WOUNDED KNEE].

Jeffords, was the agent.⁸⁷ Yet, Cochise's illness and death in 1874, only two years after the reservation was established,⁸⁸ allowed the United States to unfold a plan to concentrate and confine the various Chiricahua bands at the San Carlos and adjacent White Mountain Apache Reservations, close several of the executive order reservations (including that of Cochise), and return the included lands to the disposable public domain.⁸⁹ The motives for this centralization may have been based on several factors: the discovery of gold on Indian lands, the continuation of Indian raiding off the reservations, the desire of Tucson businessmen to access and divert federal Indian aid, and perhaps a preoccupation with linear efficiency.⁹⁰ San Carlos, however, was a barren, treeless, low-lying, torrid site, loathed by the mountain-dwelling Apache, and concentrations there led directly to a decade of unrest, conflict, and ultimately to the deportation, imprisonment, and cultural transformation of the entire Chiricahua people.⁹¹

The concentration began in 1876 when the federal government ordered the central band of the Chiricahua to depart for San Carlos, after which their Dragoon Mountain Reservation would be closed and returned to the public domain and the eagerly awaiting miners.⁹² Less than half of Cochise's band migrated to San Carlos, with the rest either fleeing south to join Chief Juh and the Nedhni in Mexico, or northeast to the Warm Springs Reservation on New Mexico's Canada Alamosa River.⁹³ Geronimo, from the Bedonkohe band, was an ally of Cochise and an occasional resident on the reservation who refused removal to San Carlos. He camped instead in the vicinity of Ojo Caliente on the Warm Springs Reservation and continued raiding in both the United States

87. See SWEENEY, COCHISE, *supra* note 80, at 367-90; JOSEPH ALTON SLADEN, MAKING PEACE WITH COCHISE 94-98 (Edwin R. Sweeney ed., 1997).

88. SWEENEY, COCHISE, *supra* note 80, at 367-97; *see also id.* at 397 ("No other leader had succeeded in obtaining a reservation in his country, one which was run by the Indians in conjunction with their agent without military interference.").

89. See DEBO, *supra* note 32, at 95-114; THRAPP, CONQUEST, *supra* note 81, at 165-81; WORCESTER, *supra* note 47, at 175-207.

90. DEBO, *supra* note 32, at 95-96, 172; THRAPP, CONQUEST, *supra* note 81, at 165; WORCESTER, *supra* note 47, at 191.

91. See BALL, INDEH, *supra* note 31, at 37-42; BETZINEZ, *supra* note 30, at 46, 141 ("[We] felt the Government itself had at least contributed to, if not being largely responsible for, starting the Apache troubles by moving us from our own reservation in 1876 to San Carlos. At the latter place, sickness in the tribe, hatred of us by the San Carlos Indians, and the general desolate condition of the country had caused our chiefs to break away and go to Mexico.").

92. MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE 19 (1997).

93. LOCKWOOD, *supra* note 3, at 217; ROBERTS, *supra* note 1, at 157.

and Mexico.⁹⁴ This provided in part an excuse for closing the Warm Springs Reservation, even though the chiefs – Victorio, Loco, Nana – and their people may have played no part in the raids.⁹⁵ They were thus clearly embittered over the deportation. The raiding was also the basis for the army's taking custody of Geronimo, putting him in chains, and transporting him, along with Chihenne, to San Carlos where he was inexplicably released.⁹⁶

The relocation of the Warm Springs band at San Carlos was intended to be permanent, and the prospect of losing their beloved homeland in New Mexico was devastating and intolerable to many of the Chihenne.⁹⁷ In September of 1877, Victorio, the principal chief of the Chihenne, led over three hundred men, women, and children out of San Carlos and headed east toward home on the Canada Alamosa.⁹⁸ After numerous engagements with federal military and civilians on the way, he arrived back at the sacred spring at Ojo Caliente where the United States for a time relented and let the band remain.⁹⁹ Subsequent events, including federal pressure to return to San Carlos, another movement and reprise on the nearby Mescalero Reservation, and increasing threats from New Mexico civil authorities, forced Victorio into a final, desperate run, which resulted in brilliant maneuvers by his band throughout southern New Mexico, west Texas, and Mexico, numerous encounters with the pursuing cavalry and civilians, and many deaths.¹⁰⁰ Finally, on October 14, 1880, Victorio's skill and luck ran out; he and most of his band were surrounded and killed by Mexican soldiers at Tres Castillos, Mexico.¹⁰¹

Several key leaders of Victorio's Chihenne band, including Nana (lame and aged, but still vital) and Lozen (the sister of Victorio, a legendary woman warrior and a mystic), escaped the carnage at Tres Castillos and began the re-

94. See GERONIMO AS TOLD TO S.M. BARRETT, HIS OWN STORY 125 (Frederick W. Turner III ed., 1970).

95. BETZINEZ, *supra* note 30, at 44 ("The Warm Springs Apaches were responsible for few if any of these raids but of course the white settlers made no distinction between the various bands."); DEBO, *supra* note 32, at 109-10; LOCKWOOD, *supra* note 3, at 227.

96. DEBO, *supra* note 32, at 103-14.

97. Ragsdale, *Chiricahua Apaches*, *supra* note 27, at 316-21.

98. ROBERTS, *supra* note 1, at 177.

99. WORCESTER, *supra* note 47, at 215-16.

100. DAN L. THRAPP, VICTORIO AND THE MIMBRES APACHES 209-18 (1974).

101. *Id.* at 293-307; EVE BALL, IN THE DAYS OF VICTORIO 88-99 (1970) [hereinafter BALL, VICTORIO]. This book was narrated to Eve Ball by James Kaywaykla who at the time of his telling was the last survivor of the massacre at Tres Castillos. He would grow into manhood as a prisoner of war, become a leader among the Fort Sill Apaches, and die on June 27, 1963. *Id.* at xii-xv.

assemblage of the Chiricahua dissidents in the sanctuary of the vast and trackless Sierra Madre Mountains of Mexico.¹⁰²

Geronimo and Juh remained on the San Carlos Reservation during the Victorio breakout, but were themselves inspired to bolt a year later by a series of events.¹⁰³ Nana, who had reconstituted a significant Chiricahua force in the Sierra Madre, conducted a brilliant raid through Arizona in the summer of 1881. In two months, the seventy-five-year-old chief and fifteen warriors rode over three thousand miles, successfully fought a number of encounters with the military, raided ranches and wagon trains in pursuit of horses, guns, and ammunition, and escaped with negligible casualties back into Mexico.¹⁰⁴

Also in the summer of 1881, a White Mountain Apache prophet called Noche-del-Klinne explained a vision of Apache resurrection and a dance that would bring its fulfillment. Mystical fervor and dancing around the prophet's camp on Cibique Creek led to a military intervention, the death of Noche-del-Klinne, and a fierce battle in which a number of United States Indian Scouts mutinied and seven soldiers were killed.¹⁰⁵ The incident was followed by a hanging of several mutineers, an intensification of the military presence on the reservation, and greatly elevated internal tensions.¹⁰⁶

On September 30, 1881, a month after Noche-del-Klinne was killed, Geronimo, Juh, Naiche (the son of Cochise), and seventy-two other men, women, and children fled the reservation and headed for Mexico.¹⁰⁷ President Chester A. Arthur brought George Crook back to Arizona, where he was now faced with several thousand unsettled Indians on the San Carlos and White Mountain Reservations and several hundred rebel Chiricahuas in Mexico. He instituted reforms to deal with tensions on the reservation, including incentives for agricultural production and disincentives for drinking, spousal abuse, and unauthorized off-reservation activity.¹⁰⁸ The issue with the southern hostiles was to prove more problematic.

102. BALL, VICTORIO, *supra* note 101, at 115-19; STEPHEN H. LEKSON, NANA'S RAID 3-10 (1987).

103. CHARLES COLLINS, THE GREAT ESCAPE 41-44 (1994) [hereinafter COLLINS, ESCAPE].

104. LEKSON, *supra* note 102, at 9-32.

105. CHARLES COLLINS, APACHE NIGHTMARE: THE BATTLE AT CIBIQUE CREEK 14-69 (1999).

106. COLLINS, ESCAPE, *supra* note 103, at 40-41; GERONIMO, *supra* note 94, at 128; ROBERTS, *supra* note 1, at 200-01.

107. COLLINS, ESCAPE, *supra* note 103, at 40-41; *see also* ROBERTS, *supra* note 1, at 202-07.

108. Alchisay et al., *The Apache Story of the Cibique*, in EYEWITNESSES, *supra* note 74, at 295-310; George Crook, *The Apache Troubles*, in EYEWITNESSES, *supra* note 74, at 311-13.

On April 19, 1882, Juh, Geronimo, and a large party of raiders snuck into San Carlos, kidnapped Loco's entire band of Warm Springs Apaches, and fled back to Mexico.¹⁰⁹ This resulted in a force of over six hundred Chiricahua Apaches, including the best fighting men, gathered in a seemingly impregnable mountain stronghold across the border.¹¹⁰ From this base in the vast Sierra Madre, the wild Chiricahua could conceivably have maintained their romantic life-way – hunting, gathering, and raiding – on an indefinite basis.¹¹¹ Several variables qualified that possibility, one being the internal unpredictability of the large group of loosely coordinated Chiricahuas. They had trouble with alcohol and Mexican treachery and difficulty maintaining internal cohesion, though divisions and departures generally seemed amicable.¹¹² The central and eastern bands, under Geronimo, Chihuahua, Naiche, Loco, Nana, and Lozen, at one point went north, while Juh and the Nednhi headed south. While on this separate sojourn, Juh died in an accident rather than in battle.¹¹³

Another variable was General Crook, who brought his unorthodox, pragmatic approach to the problem of the wild Chiricahua. He chose to rely predominantly on mobile pack trains, mules, Indian scouts, and a recent hot-pursuit agreement between the United States and Mexico that would permit response across the border.¹¹⁴ A raid by Chatto and Chihuahua in the spring of 1883 designed to procure guns, horses, and ammunition, provided the necessary pretext for response,¹¹⁵ and a White Mountain Apache named Tso-ay, who had been with the Chiricahua in the Sierra Madre and who had returned alone to San Carlos, provided the intelligence for breaching the stronghold.¹¹⁶ Crook managed to enter the sanctuary and capture several

109. BALL, VICTORIO, *supra* note 101, at 136-45; BETZINEZ, *supra* note 30, at 56-75.

110. ROBERTS, *supra* note 1, at 213.

111. *Id.*

112. BETZINEZ, *supra* note 30, at 76-92.

113. *Id.* at 122. Daklugie, the son of Juh, felt that his father died from a heart attack or a fall, but not from alcohol. See BALL, INDEH, *supra* note 31, at 75 ("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."); Ragsdale, *Chiricahua Apache*, *supra* note 27, at 337.

114. See JOHN G. BOURKE, AN APACHE CAMPAIGN IN THE SIERRA MADRE 30-37 (1987); ODIE B. FAULK, THE GERONIMO CAMPAIGN 32-34 (1993); WOODWARD B. SKINNER, THE APACHE ROCK CRUMBLES 26-29 (1987); Frederick T. Frelinghuysen, *Mexico – Reciprocal Rights to Pursue Savage Indians Across the Boundary Line*, in EYEWITNESSES, *supra* note 74, at 343.

115. ROBERTS, *supra* note 1, at 224.

116. *Id.* at 226-27; see also BETZINEZ, *supra* note 30, at 116-20 (describing Tso-ay's

Chiricahua camps while the warriors were away on a raid. On their return and without a battle, the Chiricahua leaders in May of 1883 agreed to reassemble their uncaptured, scattered bands, pack up belongings, and return to San Carlos.¹¹⁷ They all kept their promises – even Geronimo – although they took their time and arrived separately, with Geronimo, driving a large herd of stolen Mexican cattle, being the last to arrive in February of 1884.¹¹⁸

The return was the first beginning of assimilation for most of the Chiricahua, and for a while it seemed productive. Crook allowed the Chiricahua to live at Turkey Creek, higher up in the mountains and pine forests of the White Mountain Reservation.¹¹⁹ Though the Chiricahua were culturally more inclined toward cattle raising than farming, the former was initially precluded by Crook's confiscation of Geronimo's herd of stolen Mexican cattle at the time of his return to the reservation.¹²⁰ Still, the Apache – even Geronimo – made some agricultural beginnings,¹²¹ and Crook, by 1886, foresaw the Chiricahua as capable of eventually joining the mainstream of American society as voters, property owners, and economic competitors.¹²²

departure from the wild Chiricahua much differently than Roberts).

117. WORCESTER, *supra* note 47, at 275.

118. *Id.* at 279-82; see DAVIS, *supra* note 75, at 82-101; GERONIMO, *supra* note 94, at 128-29.

119. DAVIS, *supra* note 75, at 102.

120. *Id.* at 101.

121. BETZINEZ, *supra* note 30, at 125; DEBO, *supra* note 32, at 229, 233.

122. George Crook, *The Apache Problem*, in EYEWITNESSES, *supra* note 74, at 601-03.

The Apaches had such a deep-seated distrust of all Americans that four points of policy at once obtruded themselves. First, to make them no promises that could not be fulfilled. Second, to tell them the exact truth at all times. Third, to keep them at labor and to find remuneration for that labor. Fourth, to be patient, to be just, and to fear not.

The greatest of these was the question of compensated labor. No sermon on the dignity of labor could prove so eloquent an appeal to the dormant better nature of the Apaches as the disclosure of the fact that one hundred pounds of hay was worth \$1.00 at the quartermaster's corral. To show him that the labor of his squaws and the children was worth money was soon followed by the teaching that more money could be made if he added his labor to theirs. At large posts like Camp Apache there is a steady demand for every pound of hay the Apaches can put in, but there is also a cry for fuel for the troops and grain for the horses. We are taking the Apache by the hand and quietly teaching him the use of the axe and the plow. He is receiving his first money earned by the honest sweat of his brow. What shall he do with it? "Put it into cattle; they graze on your hillsides and grow in value while you sleep."

The Apache is becoming a property owner. It is property won by his own toil, and he thrills at once with the pride of acquisition and the anxiety of possession.

He is changing both inside and out; exteriorly, he is dressed in the white man's garb, wholly or in part; he hasn't so much time for gaudy ornamentation and indulges less in beads, feathers, and paint. Mentally, he is counting the probable value of his steers and interested in knowing how much of his corn crop the quartermaster may want next month.

He is receiving his education. Education is progress. Progress and vagabondage cannot exist in the same village. The Apache who owns ten or a dozen cows becomes a man of power; his opinions are heard with respect, and his decisions sought in the disputes of his neighbors. He sees that he has gained an influence greater than that of warriors or medicine men, and it is gratifying to know that his prosperity, instead of exciting envy, has encouraged emulation.

....

Man is at all times the creature of his surroundings. Place [sic] in the cultivated circles of the older states, no matter what may be his color or race, his nature becomes softened and refined, the angles are rounded, his manner and language become gentle and polished. Place him on the desert or the mountain-top, force him to struggle with the elements, to contend for existence with the wild animals which surround him, and he degenerates rapidly into an equality with these animals. Like them, he develops keenness of vision, sharpness of hearing, stealthiness of tread. He learns to bear without complaint hunger, thirst, fatigue. Excessive heat is familiar to him and extorts not more complaint than does the excessive cold which follows it. To cross over steep, rocky mountains, to swim swift rivers, are incidents merely in a career which is a never-ceasing struggle for the preservation of the dubious boon of life. It is in such a struggle that we should look for the survival of the fittest, and it is in just such a struggle we find it – acuteness of sense, perfect physical condition, absolute knowledge of locality, almost absolute ability to preserve oneself from danger, let it come from what source it may.

We have before us the tiger of the human species. To no tribe in America can these remarks apply with more force than to the Apaches of Arizona. To see them as they first appeared to the white man – half clad, half fed, covered with vermin, with no semblance of property beyond the rude arms with which they doggedly waged war against unpitying nature – it was easy to believe, and many Americans did believe, that nothing could be more easily affected than their extermination or subjection. It has taken the expenditure of countless treasure and blood to demonstrated [sic] that these naked Indians were the most thoroughly individualized soldiers on the globe; that each was an army in himself, waiting for orders from no superiors – thoroughly confident in his own judgment and never at a loss to know when to attack or when to retreat.

The Apache can be compared most aptly to the wild animal he fittingly calls his cousin – the coyote. The civilized settlements are his sheepfolds, and even supposing that a toilsome campaign results in destroying forty out of a band of fifty, the survivors are as much to be dreaded as ever, until they very last one can be run down, killed, or got under control and taught to labor for his bread.

In one brief sentence I may embody the idea that man is more or less savage according to the certainty with which his food may be obtained and that, all things

But there were more twists on the road to societal transformation. The restless Apache, irritated by restrictions on drinking and domestic practices and nervous because of recurring threats of civil retaliation for prior depredation, broke out again.¹²³ On May 17, 1885, Geronimo, Naiche, Nana, Chihuahua, Lozen, and Mangus (son of Mangas Coloradas), along with forty warriors and around one hundred women and children, fled into Mexico and, aware that the original stronghold was breachable, resorted to incessant movement to confound pursuers.¹²⁴ The Apache proved almost impossible to confront, let alone defeat or capture. They grew, however, increasingly tired of running and were short of supplies.

In November, 1885, Ulzana, a brother of Chihuahua, made another stunning raid for provisions into Arizona. Over the span of two months, Ulzana and twelve racing men covered twelve hundred miles, killed thirty-eight persons, procured considerable horses, guns, and ammunition, and escaped back into Mexico with the loss of only a single rebel.¹²⁵ By March of 1886, however, the insurgents again had enough and negotiated surrender to a clearly less sympathetic Crook. Still, Crook promised the fugitives that they would be sent to Florida for a maximum of two years, reunited with their families, and ultimately allowed to return to their beloved Arizona. Chihuahua was first to

being equal, the difficulty of subjecting any given race or people will be in the inverse ration of its food supply. Those tribes which have the largest accumulations of food and clothing will in nearly every case fight desperately for the preservation of their villages; but those villages once destroyed, their power is broken, and they soon sue for peace.

But where man raises no harvests, dries no fish, preserves no meat, lives simply from hand to mouth, the trouble in effecting his capture becomes immeasurably greater, and after he has been provide with improved breechloaders, he is transformed into a foe of the most dangerous character within human knowledge.

Id.

123. LOUIS KRAFT, GATEWOOD AND GERONIMO 85-86 (2000); LOCKWOOD, *supra* note 3, at 279-81.

124. DAVIS, *supra* note 75, at 152-95; *see also id.* at 195 ("After chasing futilely after Geronimo through rocks, mountains, searing desert heat and monsoon rains, Davis, disgusted and exhausted, resigned from the army and turned to ranching."); ROBERTS, *supra* note 1, at 256-63; Ragsdale, *Chiricahua Apaches*, *supra* note 27, at 347.

125. BALL, VICTORIO, *supra* note 101, at 179-80; ROBERTS, *supra* note 1, at 263 (noting that James Kaywaykla said none were lost). *See generally* JAMES R. OLSON, ULZANA (1973).

assent, and the others, including Geronimo, quickly agreed.¹²⁶ Crook's problems, however, were not over.

On the way back to Arizona, Geronimo and Naiche were supplied with liquor by a civilian bootlegger and frightened with tales about lynch-minded civilian authorities waiting at the border for the Apache return.¹²⁷ The two leaders, with a contingent of sixteen other warriors and twenty women and children, broke away again, leaving a dispirited Crook to return with Nana, Chihuahua, and about sixty other breakouts, but without the quicksilver Geronimo, who was once again on the loose in Mexico.¹²⁸ Crook's resignation on return was accepted. Chihuahua, Nana, and a number of renegades were deported by train to Florida on April 7, 1866, assuming only a two-year hiatus, and General Nelson Miles was appointed to replace Crook and to deal with the task of finding the elusive Geronimo.¹²⁹

The final run of Geronimo and Naiche was even more quixotic, hopeless, and brilliant than its predecessors. Miles, who had disparaged Crook's tactics and use of Indian scouts, insisted on regular cavalry pursuit with no less than five thousand soldiers – one quarter of the United States Army.¹³⁰ They were assisted but not made more successful by about four thousand Mexican soldiers, a modern and useless heliograph signaling system, and centralized command from the rear by Miles.¹³¹ Geronimo and Naiche flew through the mountains and deserts like phantoms, back and forth across the border, raiding, retreating, vanishing, leaving their exhausted, frustrated pursuers with scarcely a glimpse.

126. FAULK, *supra* note 114, at 87-91. Geronimo said, "Once I moved about like the wind. Now I surrender to you and that is all." *Id.* at 91.

127. *Id.* at 92-93.

128. WORCESTER, *supra* note 47, at 298-99; see THRAPP, CONQUEST, *supra* note 81, at 145 (estimating that there were seventy-five in Chihuahua's band). Another count was seventy-six, made by John P. Gardner at Bowie Station, Arizona, a number revised in Florida to seventy-seven, due to a birth en-route. John P. Gardner, *Escorting Chihuahua's Band to Florida*, in EYEWITNESSES, *supra* note 74, at 567.

129. George Crook, *Resume of Operations Against Apache Indians, 1882-1886*, in EYEWITNESSES, *supra* note 74, at 581-89; Nelson A. Miles, *On the Trail of Geronimo*, in EYEWITNESSES, *supra* note 74, at 536-39.

130. DEBO, *supra* note 32, at 269; see also BROWN, WOUNDED KNEE, *supra* note 86, at 411 (stating that this was nearly one third of the combat force of the army).

131. ROBERTS, *supra* note 1, at 278-85; James R. Caffey, *A Theatrical Campaign*, in EYEWITNESSES, *supra* note 74, at 562-66; William Neifert, *Trailing Geronimo by Heliograph*, in EYEWITNESSES, *supra* note 74, at 557-61.

Miles was finally forced to reconsider Crook's innovation of Indian scouts in the field,¹³² but even those who had remained fit on the reservation and those who had knowledge of the tangled Sierra Madre still could not match the pace, skill, or maneuvers of Geronimo and his spectral band.¹³³ Miles resorted to other options. He began to devise a plan for the wholesale removal of all the Chiricahua reservation people, regardless of age or gender, regardless of participation in any insurrection, regardless even of their affirmative cooperation and willing assistance in United States military campaigns. Miles cynically figured that complete removal, while clearly over-inclusive, would preclude any future Chiricahua insurgency, might prompt Geronimo to surrender, and could potentially appease Arizona citizens who had grown increasingly apoplectic over the repeated breakouts, depredation, and failures of effective military response.¹³⁴

During the summer of 1886, while he plotted the removal of the innocent Chiricahua and after the obvious failure of even the scout-led military to successfully corner Geronimo, Miles created a special unit to find the runaways and again present conditions of surrender: Kayitah and Martine (two Chiricahua well-known to Geronimo), George Wratten (a civilian trader who knew the Chiricahua and, uncommon among whites, spoke their language fluently), and Lieutenant Charles Gatewood (an experienced field officer who was liked and trusted by the Apache).¹³⁵ This group managed to find Geronimo and convince him that one more final surrender, under conditions, was in his best interest.¹³⁶

Miles concluded a somewhat theatrical conditional-surrender agreement with Geronimo on September 4, 1886. He repeated many of Crook's earlier surrender promises, including reunion with families and a limited stay in Florida, and even made new pledges about absolution for past transgressions. The day after surrender and unknown to Geronimo's band, the reservation Chiricahua, including those who had never been to war, those who had learned to farm in good faith at Turkey Creek, and even those who had served as scouts for the cavalry, were placed on a train for Florida, to be held, like Chihuahua, Nana, Geronimo, Naiche, and the rebel bands, as prisoners of war.

132. Caffey, *supra* note 131, at 563-64.

133. FAULK, *supra* note 114, at 107-12; KRAFT, *supra* note 123, at 133.

134. LOCKWOOD, *supra* note 3, at 313-14; ROBERTS, *supra* note 1, at 286-87; *see also* SKINNER, *supra* note 114, at 73-74.

135. KRAFT, *supra* note 123, at 133-35.

136. *Id.* at 149-94.

III. Prisoners of War

A. Legality and Morality

General Miles, as noted, considered a number of possible reasons to justify the deportation and imprisonment of all the Chiricahua – not just the rebels, but also those who remained compliant on the reservations and those who served the United States as valuable scouts.¹³⁷ It was theorized that this might pressure the insurgents to surrender and that, in the future, it would clearly preclude subsequent breakouts.¹³⁸ It was also speculated that removal might partially appease the angry citizens of Arizona, who longed to hang the rebels and who might be partially satisfied by assurance of their future absence.¹³⁹

The apologies for the cynical plot of Miles stand in sharp contrast to logic, morality, and the law itself. As to consistency, it is noteworthy that the United States was able to avoid liability for the depredations of the Chiricahua insurgents by successfully arguing before the courts that the rebels were not “in amity” with the main Chiricahua tribe or with the United States, which maintained jurisdiction over the reservation.¹⁴⁰ In the case of *Scott v. United States and the Apache Indians*,¹⁴¹ the court refused to find liability on the part of the United States or the Chiricahua tribe for the acts of Geronimo’s breakout band. The court felt that the band operated independently of both larger entities and that “the terms of . . . surrender precluded the idea of their being . . . a tribe in amity.”¹⁴² The United States should not have it both ways.

137. See *supra* note 134 and accompanying text.

138. See *supra* note 134 and accompanying text; see also FAULK, *supra* note 114, at 153-54; JOHN ANTHONY TURCHENESKE, JR., THE CHIRICAHUA APACHE PRISONERS OF WAR 1-14 (1997).

139. FAULK, *supra* note 114, at 153-54; TURCHENESKE, JR., *supra* note 138, at 1.

140. See LARRY C. SKOGEN, INDIAN DEPREDAATION CLAIMS 143-44 (1996); Ragsdale, *Chiricahua Apache*, *supra* note 27, at 325 (“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.”).

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

142. *Id.* at 6 (“But 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

If Geronimo was found not to be in amity with the Chiricahua for purposes of shielding the United States from liability, then the Chiricahua should not thereafter be punished by the United States for having a linkage to Geronimo.

Beyond the problem of logical consistency, however, is the issue of using innocents as means to another end. Using the guiltless as bait to induce surrender of the guilty is incompatible with any ideal or standard of individualized justice.¹⁴³ A further problematic rationale used by Miles was the doctrine of preemption: no Chiricahua breakouts could occur in Arizona's future if no Chiricahuas remained in Arizona. Preemption, which is utilization of a concrete response to a hypothetical case, seems of doubtful accord with the ideals of justice.¹⁴⁴ In one sense appropriate to the common law of the West, preemption may fail to meet the limitations on the right of self-defense,

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.”); see also *Montoya v. United States*, 180 U.S. 261, 264-65 (1901); *Dobbs v. United States & the Apache Indians*, 33 Ct. Cl. 308 (Ct. Cl. 1898).

143. LIEDER & PAGE, *supra* note 92, at 31 (“Even if Geronimo and those who had joined him were guilty of violating laws of which they had no knowledge, the United States turned Blackstone, the first great systematizer of Anglo-American law, on his head. The government was willing to make ten or more innocents suffer for the sins of each guilty Chiricahua.”); see also *Ragsdale, Chiricahua Apaches, supra* note 27, at 358.

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. Shortly thereafter, his band was kidnapped by Juh and Geronimo and force-marched into the Sierra Madre. The group was returned to San Carlos following Crook's successful invasion, where it resumed the peaceful pursuit of farming and grazing. Betzinez and his people resisted the insurgency following the Cibecue Creek killing of Noch-ay-del-klinne, 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.

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. 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. How could the role of law and the ideal of individualized justice have produced or explained these results?

Id. (citations omitted); see BETZINEZ, *supra* note 30, at 44-46, 56-76, 116-25, 129-48; DEBO, *supra* note 32, at 236-37, 273-79, 345-46.

144. ALAN M. DERSHOWITZ, PREEMPTION 37-40 (2006); see also *Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950).

which include the immediacy, likelihood, and extent of the threat.¹⁴⁵ Beyond, it may amount to unconstitutional discrimination.¹⁴⁶ There was no evidence before Miles that the Chiricahua, who refused to join Geronimo or those that aided in his pursuit, presented any reasonable, imminent threat of harm or any problems more significant than those of other tribes.

Still further, the imprisonment of the Chiricahua tribe for the isolated sins of Geronimo's band was incompatible with the individualistic thrust of the assimilation movement, which began under Crook at Turkey Creek and continued afterward throughout confinement.¹⁴⁷ The Dawes Act of 1887,¹⁴⁸ which codified earlier efforts at assimilation and carried them forward until 1934,¹⁴⁹ sought to pierce or shatter the tribal veil and imbue the tribal members with a veneration for individual self-sufficiency and salvation, private property, and free-market competition.¹⁵⁰ The collective treatment of the Chiricahua was diametrically opposed to these objectives, and the hypocrisy was clearly sensed by the Indians.¹⁵¹

It would seem that the professed values of America were at times in conflict with the young nation's desires for efficiency and immediate gratification, especially when the casualties of contemptuous practicality were the unpopular and politically powerless. Could there be a legal remedy for such moral slackness?

The constitutionality of the incarceration of the Chiricahua is an inquiry related to the one into morality, but there are significant differences. Some comparison might be made between the Chiricahua removal as a hedge against future breakouts and the isolation of people of Japanese ancestry as a wartime measure on the West Coast, designed to forestall possible espionage or sabotage. The United States Supreme Court, in *Korematsu v. United States*,¹⁵² sanctioned the exclusion of racially identifiable people – those of Japanese

145. See *Allen v. United States*, 164 U.S. 492, 497-98 (1896).

146. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

147. See COHEN, *supra* note 26, at 79; Merrill E. Gates, *Addresses at the Lake Mohonk Conferences*, in *AMERICANIZING THE AMERICAN INDIANS* 339-40 (Francis Paul Prucha ed., 1978).

148. COHEN, *supra* note 26, at 77.

149. The Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (2006), prohibited the further allotment of Indian land. *Id.* § 461. Other provisions sought to aid in the reestablishment of tribal sovereignty, tribal lands, and tribal capacity to interact with other governments, agencies, and economic entities. *Id.* §§ 462-478.

150. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7-9 (1995); GETCHES ET AL., *supra* note 36, at 141-86.

151. See BETZINEZ, *supra* note 30, at 141.

152. 323 U.S. 214 (1945).

descent – from sensitive military areas. The Court recognized the over-inclusiveness of the order, but conceded the high necessity.¹⁵³

We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken against it.¹⁵⁴

The Court felt that the military imperatives answered any charge that the exclusion or group punishment was based on racial antagonism, and thus it sustained the exclusions as within the constitutional war powers of Congress and the Executive. Though the Court upheld the particular exclusion based on pressing public necessity, it genuflected toward the basic proposition that laws curtailing the rights of a single racial group are inherently suspect and subject to stricter analysis.¹⁵⁵ Could the Chiricahua have demanded a strict scrutiny of their racial or ethnicity-based confinement?

It is highly doubtful that the Chiricahua or any Indian tribe could, despite actual discrimination, have raised a constitutional issue of race-based exclusion.¹⁵⁶ Though the Fourteenth Amendment was held to insure that blacks enjoyed the same rights under law as whites,¹⁵⁷ the Amendment's application to Indian tribes was unclear.¹⁵⁸ Section two of the Fourteenth Amendment expressly limited congressional representation on the basis of "Indians not taxed,"¹⁵⁹ and the Supreme Court held, in *Elk v. Wilkins*,¹⁶⁰ that

153. *Id.* at 218-19.

154. *Id.* at 218.

155. The Court prefaced its decision by stating:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Id. at 216.

156. That the discrimination falls along tribal lines rather than race per se may explain the difference from *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). See *infra* notes 157-66 and accompanying text.

157. *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879).

158. David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 830, 869-70 (1991).

159. See *id.* at 832; see also Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165 (2010). Berger agrees with Williams that the tribes continued to hold a separate status in the aftermath of the Equal Protection Clause.

Improving the status of Indians and tribes was neither the focus nor the goal of the

the citizenship provisions of section 1 of the Fourteenth Amendment did not apply to Indians.¹⁶¹ Thus, citizenship and the right to bring constitutional actions premised on citizenship would require either particular provisions under a naturalization act or a universal approach, granting full, unqualified citizenship to all Indian people, which was in fact forthcoming in the Indian Citizenship Act of 1924.¹⁶² Even if the Chiricahua had standing to raise constitutional claims, they would have likely failed to elicit strict scrutiny of any race-based burden – at least if contemporary precedent were applied to this hypothetical. Strict scrutiny, the constitutional demand for the demonstration of both a compelling governmental interest and narrowly tailored means, follows on the initial presentation of a race-based classification.¹⁶³ The case of *Morton v. Mancari*,¹⁶⁴ however, indicates that laws which treat tribes as such may be deemed to utilize political classifications by nature rather than race.¹⁶⁵ Such classifications will be judged under a more lenient standard than strict scrutiny, and “[a]s long as the special treatment can be tried rationally to the fulfillment of Congress’s unique obligation toward the Indians, such legislative judgments will not be disturbed.”¹⁶⁶

One might well question, again for hypothetical purposes, whether the federal treatment of the Chiricahua was fulfilling any unique obligation. Supreme Court precedent, contemporary with their tribal confinement,

Reconstruction amendments or the Civil Rights Acts. Their central purpose was to free the slaves and ensure that freedom was meaningful. But as the other non-white, non-citizen group with a long history in the United States, Indians inevitably figured in the debates of the Reconstruction Congress. The subject was raised in two central ways. For advocates of Reconstruction, violations of tribal rights, and particularly the showdown between the Cherokee Nation and the State of Georgia, were powerful examples of the need for federal power to prevent state deprivations of essential rights. Opponents, conversely, argued against the Fourteenth Amendment by claiming it would make citizens of the Indians. To counter this argument, proponents emphasized the sovereign rights of tribes and the moral obligations these rights created. Throughout the period, pro-Reconstruction Congressmen advocated preserving the distinct rights of Indians in ways that suggest their consistency and even complementarity with the goals of Reconstruction.

Id. at 1171-72.

160. 112 U.S. 94 (1884).

161. *Id.* at 109.

162. Ch. 233, 43 Stat. 253.

163. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 235-36 (1995).

164. 417 U.S. 535 (1974).

165. *Id.* at 554 n.24.

166. *Id.* at 555.

indicated that federal judgments about Indian wards¹⁶⁷ and their property¹⁶⁸ were conclusively presumed in good faith.¹⁶⁹ Yet, more modern opinions state that the good faith of government is a factual issue, and if a tribe can demonstrate that a government action is self-interested and not a good-faith attempt to fulfill trustee duties, then constitutional considerations will apply.¹⁷⁰ It would thus seem arguable, again from a theoretical stance, that the federal actions against the Chiricahua tribe would, even under the more relaxed standard of *Morton v. Mancari*, raise substantial issues under the Fifth Amendment.

The possibility that the confinement of the Chiricahua could be redressed as a statutory tort emerged after World War II when Congress passed the Indian Claims Commission Act.¹⁷¹ The Act was passed with a variety of motivations ranging from a desire to bolster America's moral stature in the world to a thinly veiled plan to end federal obligations to particular Indian tribes.¹⁷² In general, the Act was designed to make monetary compensation for

167. *United States v. Kagama*, 118 U.S. 375, 383 (1886) (holding that the federal government held a constitutional, plenary power over the tribes because “[t]hese Indian tribes are the wards of the nation”).

168. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

169. *Id.* (“The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches, and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property, and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation v. Hitchcock*, 187 U.S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.”).

170. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415-16, 423-24 (1980) (holding that the good faith of Congress is a factual matter and not to be presumed and that Congress's duress-induced procurement of the Black Hills was an uncompensated taking rather than a good-faith “transmutation” of wardship property).

171. Ch. 959, 60 Stat. 1049 (1946) (formerly codified at 25 U.S.C. §§ 70 to 70v-3).

172. LIEDER & PAGE, *supra* note 92, at 51-68.

takings and damage to tribal lands, though it included a somewhat obscure and unprecedented provision for redressing claims based on “fair and honorable dealing that are not recognized by any existing rule of law or equity.”¹⁷³ The Chiricahuas filed a claim under the Act for taking and damage of tribal property before the 1886 removal to Florida.¹⁷⁴ They were successful on their claim for uncompensated taking of aboriginal land in New Mexico and Arizona and also on their claim for trespass damages. They settled for a \$22 million award in 1979.¹⁷⁵

The Chiricahua also sought reparation for the damage done to the structure and culture of the tribe, and advanced the Indian Claims Commission Act’s provision for claims based on fair and honorable dealing as the vehicle.¹⁷⁶ The United States Court of Claims, reviewing a dismissal of this claim, stated that, for purposes of the appeal, it would be assumed that “confinement constituted a wrongful arrest, imprisonment, and exclusive punishment of some individual Indians.”¹⁷⁷ The Court of Claims felt that the fair and honorable dealings clause could not, however, afford the Chiricahua relief unless the United States had undertaken some special tribal relation akin to a managerial trust and failed to fairly or honorably perform. In particular, the United States could only be held liable to the Chiricahua under the fair and honorable dealings clause when it had undertaken a special duty to protect and foster the traditional power and structure of the tribal organization. The Commission and the court did not feel that had happened.¹⁷⁸

173. 25 U.S.C. § 70a (1946) (amended 1974) (terminated 1978); *see also* GETCHES ET AL., *supra* note 36, at 281-83.

174. LIEDER & PAGE, *supra* note 92, at 114.

175. *Id.* at 173-74.

176. *See supra* note 173 and accompanying text; *see also* Fort Sill Apache Tribe of Okla. v. United States, 477 F.2d 1360, 1362 (Ct. Cl. 1973).

177. *Fort Sill Apache Tribe*, 477 F.2d at 1361.

178. *Id.* at 1366 (“In this light, the court is constrained to agree with the decision reached by the ICC on this issue, finding that no special relationship existed between the Chiricahua Tribe and the United States sufficient to bring this claim within the ‘fair and honorable dealings’ clause. It should be further noted that, given the discussion of the nature of the appellants’ claim with respect to clause (2), the court will not lightly imply a duty upon the Government of the type sought by appellants when the same claim is raised under the clause (5) language. This is not to preclude the possibility that under some treaty language the Government may have undertaken the responsibility of protecting the tribal structure of a given group, and have thereby created a definable group interest, damage to which would involve a breach of the ‘fair and honorable dealing’ clause. Such a special relationship, however, must be clearly indicated. This is not the situation in the case at hand where the pertinent treaty and Act of Congress do not deal with the matter at all. The court, therefore, finds that the appellants’ claim does not fall within the jurisdiction of the ICC under the ‘fair and honorable dealings’ clause and the

B. Confinement in Florida, Alabama, and Pennsylvania: Purposes, Conditions, and Problems

Confinement of Chihuahua and members of his band, who surrendered to Crook and were deported while Geronimo and Naiche were still at large,¹⁷⁹ was at Fort Marion on the Atlantic Coast of Florida. The Fort, only 180 feet on a side, was capable of housing less than two hundred.¹⁸⁰ Yet, after the lodging of the non-combatant reservation Chiricahua, along with Chihuahua's earlier arrivals, there were almost five hundred Chiricahua at Fort Marion.¹⁸¹ Geronimo's breakout band, which surrendered six months after Chihuahua and left Arizona about the same time as the main tribe, was housed in far more spacious quarters at Fort Pickens on the western panhandle of Florida.¹⁸² Geronimo's group was perhaps even more fortunate in that relocation in Florida was neither desired nor agreed to by President Cleveland or General Miles' superior officers. They had initially wanted Geronimo detained, tried, and hung,¹⁸³ but their wishes were never clearly relayed to Miles before Geronimo's train left Arizona.¹⁸⁴ When the President and central military commanders finally understood that Geronimo had surrendered under terms offered by Crook and Miles and not unconditionally, they grudgingly conceded to imprisonment in lieu of capital prosecution.¹⁸⁵

Life was extraordinarily difficult for the Chiricahua in Florida, especially for those at Fort Marion. The high humidity and cramped quarters were suffocatingly uncomfortable for a mountain people used to free movement and clear, dry air.¹⁸⁶ Even worse, the climate, insects, poor sanitation, and crowding spawned malaria and tuberculosis.¹⁸⁷ The Chiricahua, previously

Commission was correct in holding that as to clause (5) the petition failed to state a claim upon which relief can be granted under the ICC Act.”)

179. See *supra* notes 128-29 and accompanying text.

180. LIEDER & PAGE, *supra* note 92, at 31-32; H. HENRIETTA STOCKEL, SURVIVAL OF THE SPIRIT 72, 86 (1993) [hereinafter STOCKEL, SURVIVAL].

181. See *supra* note 180 and accompanying text; see also LIEDER & PAGE, *supra* note 92, at 31-32 (estimating that the Fort was a little smaller in size than a football field and that each prisoner had about sixty-five square feet of living space).

182. See SKINNER, *supra* note 114, at 121 (estimating that Fort Pickens could have accommodated at least two thousand people).

183. ROBERTS, *supra* note 1, at 297.

184. FAULK, *supra* note 114, at 167; WORCESTER, *supra* note 47, at 307-08.

185. DEBO, *supra* note 32, at 308; SKINNER, *supra* note 114, at 83-102; TURCHENESKE, JR., *supra* note 138, at 12-13.

186. BALL, INDEH, *supra* note 31, at 126-27.

187. H. HENRIETTA STOCKEL, SHAME AND ENDURANCE 21 (2004) [hereinafter STOCKEL,

among the healthiest and fittest of people, began to sicken and succumb at rates far in excess of the national averages.¹⁸⁸ Even those without illness were cramped in close quarters with nowhere to move, little to do, and nothing of purpose or worth to look forward to.¹⁸⁹ Menial tasks around the forts and the making of trinkets for sale to the throngs of curious tourists provided some respite – and income – for the restless and often ill Chiricahua.¹⁹⁰

Beyond the questions of basic legality and morality, there was confusion over the terms and possible purposes of confinement. The original assertion of deterrence of future depredation seems, of course, an incomplete, if not preposterous, justification for the continuing, indeterminate military confinement of women, children, newborns, and the aged.¹⁹¹ The possible purpose of custodial reconstruction and assimilation paralleled, in a draconian way, the ongoing turn-of-the-century policy of the federal government toward tribal people in general, but the core assimilation emphasis on private land and individualism was completely blunted in the Chiricahua case by the mass confinement of innocents in a closely controlled setting without rights of land ownership, self-initiative, and free movement.¹⁹²

The sentiments of the surrounding white communities, which provided a reason for the removal of the Chiricahua from Arizona, may have played some part in the continuation of this confinement in Florida, Alabama, and Oklahoma. The captive Chiricahua were a fascination, a tourist attraction, and a source of local income.¹⁹³ Not all the non-Indians, however, viewed the Chiricahua as either dangerous criminals to be segregated or exotic attractions to be trained or gawked at. Sympathetic forces in the white community began to speak out in support, and a general public which by 1890 had witnessed an end to the Indian wars, a closing of the frontier, and a taming of much of the non-Alaskan wilderness, was becoming more interested in the conservation of America's uniqueness than its subjugation.¹⁹⁴ In particular, the Indian Rights

SHAME]; STOCKEL, SURVIVAL, *supra* note 180, at 78-86; TURCHENESKE, JR., *supra* note 138, at 15-16.

188. BALL, INDEH, *supra* note 31, at 158.

189. LIEDER & PAGE, *supra* note 92, at 33.

190. BALL, INDEH, *supra* note 31, at 137; STOCKEL, SHAME, *supra* note 187, at 23-25.

191. See *supra* notes 134, 138 and accompanying text.

192. See *supra* notes 60-62, 122 and accompanying text; see also *infra* note 197 and accompanying text.

193. STOCKEL, SURVIVAL, *supra* note 180, at 81, 107.

194. ROBERTS, *supra* note 1, at 312 ("Upon its subjugated foes a conquering nation projects its fantasies of the just order. The Apaches, so often likened to tigers, were now caged animals in a zoo, paraded to elicit the *frisson* that wildness always harbors.").

Association and vigilant observers in the press were sensitive to the plight of the captives and began to voice the need for legal and political action.¹⁹⁵ Local residents in Florida, Alabama, Oklahoma, and Pennsylvania – farmers, craftsmen, and service providers – were often willing to hire the Chiricahua and give them training as well as money.¹⁹⁶ The Army officers that had known them through war, negotiation, and removal, such as Crook, General Oliver Howard, and his son, Guy, were friends and supporters during confinement. They were concerned about the well-being of the Indians, especially the scouts who had been instrumental in ending the Apache wars and were active in the efforts at relocation.¹⁹⁷

A white man playing one of the largest roles in the transformation of the Chiricahua was Richard Pratt, a career military man who retired as a Brigadier General but who is most known for founding and supervising the Carlisle Indian School in Pennsylvania. The school, the first of the off-reservation Indian boarding facilities, was intended to save the Indians from literal extinction and educate the young in academic, domestic, agricultural, and industrial life-ways that would enable both students and the Indian people as a whole to assimilate into the non-Indian world.¹⁹⁸ Pratt came to Fort Marion to recruit young Indian students, a process that caused considerable angst because of the exceptionally strong bonds of the Chiricahua families.¹⁹⁹ The trauma would extend beyond just physical separation to the very issues of identity.²⁰⁰

The boarding schools were intended to weaken both family ties and the cultural teachings of the tribe, and instill mainstream American values toward

195. STOCKEL, SURVIVAL, *supra* note 180, at 86-89; TURCHENESKE, JR., *supra* note 138, at 16.

196. BETZINEZ, *supra* note 30, at 156-59; DEBO, *supra* note 32, at 349-50; STOCKEL, SHAME, *supra* note 187, at 76.

197. See ROBERTS, *supra* note 1, at 304-05; DEBO, *supra* note 32, at 359; GENERAL GEORGE CROOK: HIS AUTOBIOGRAPHY 289-300 (Martin F. Schmitt ed., 1986); SKINNER, *supra* note 114, at 97.

198. See RICHARD HENRY PRATT, BATTLEFIELD AND CLASSROOM 221-22 (2003); PRUCHA, FATHER, *supra* note 24, at 234-37.

199. LIEDER & PAGE, *supra* note 92, at 33-34.

200. See KATHERINE ELLINGHAUS, TAKING ASSIMILATION TO HEART 173-87 (2006); see also *id.* at 173 (“Elaine Goodale . . . described Richard Pratt as not having a particular sentiment about a particular people ‘preserving the identity of other races’ and so on. His healthy and inevitable and philosophical theory is the annihilation of the Indian and his salvation as an America citizen.”); COHEN, *supra* note 26, at 81 (noting that Pratt also made the dramatic statement that the Carlisle philosophy was to “Kill the Indian and Save the Man”).

work, property, and individuality.²⁰¹ Reformation had an overt, external aspect, as Indian youth were shorn of long hair, instructed to speak English, compelled to wear nontraditional white clothing, and presented with Anglo-Saxon names – Jason, James, Dorothy, Ramona, Asa – that they were required to use and respond to.²⁰² Pratt chose over one hundred Chiricahua, ranging in age from nine (James Kaywaykla) to twenty-seven (Jason Betzinez).²⁰³ Many of these children were imbued with techniques of adaption for the white world, both by the school and with the assistance of local farmers, families, and businesspeople who employed the students and housed them during summer vacations.²⁰⁴ The tribal teachings and ties, though weakened in many cases, were seldom broken, and most of the students, even if anglicized, returned to their people after schooling – that is, if they were still alive.²⁰⁵

The death rate from disease at Carlisle was truly staggering, with over twenty-five percent of the Chiricahua children brought to the school in 1886 and 1887 dead by May 1889.²⁰⁶ These death rates, which were paralleled by those in confinement in the Florida forts, stemmed from the humid climate, close quarters, insects, and inadequate sanitation. They heightened concerns that the Chiricahua prisoners and a number of the students were facing unacceptable risks.²⁰⁷ In 1887, the remaining prisoners at Fort Marion were moved; the wives of the separately confined warriors and the children not at Carlisle were sent to join the men at Fort Pickens, and the remainder of the prisoners were removed to the Mount Vernon barracks, thirty-one miles north of Mobile, Alabama. A year later, all the prisoners at Fort Pickens joined the main body at Mount Vernon.²⁰⁸

Mount Vernon was not much of an improvement for the Chiricahua, though the 2,162 acres were a spacious respite from the cramped quarters of the forts. The area itself was a heavily forested, practically sunless, swampy lowland with unproductive, sandy soil, swarms of insects, incessant high humidity and rain, and an isolation from even the diversion and slight income that had been provided by the visitors to the forts. The prisoners may have been even more

201. STOCKEL, SHAME, *supra* note 187, at 51-67.

202. See BALL, INDEH, *supra* note 31, at 144-51; BALL, VICTORIO, *supra* note 101, at 199-202; BETZINEZ, *supra* note 30, at 153-54.

203. DEBO, *supra* note 32, at 320; STOCKEL, SURVIVAL, *supra* note 180, at 122-23.

204. See BALL, INDEH, *supra* note 31, at 150; BETZINEZ, *supra* note 30, at 156-59.

205. DEBO, *supra* note 32, at 356.

206. LIEDER & PAGE, *supra* note 92, at 36; STOCKEL, SURVIVAL, *supra* note 180, at 124-29.

207. TURCHENSKE, JR., *supra* note 138, at 15-31.

208. LIEDER & PAGE, *supra* note 92, at 35.

despondent than at Fort Marion.²⁰⁹ They built rough, earthen floored cabins, gambled, sold a few trinkets to the occasional tourists, and tried to maintain the continuity of their culture and tribal ceremonies.²¹⁰

Perhaps most significantly, the rampant disease encountered in Florida accompanied the Chiricahua to Alabama; they continued to die from malaria and tuberculosis at frighteningly high rates, surpassing those of the great European plagues.²¹¹ Investigations and statements by Guy Howard and

209. STOCKEL, SHAME, *supra* note 187, at 72-75; *see supra* note 180 and accompanying text. Eugene Chihuahua gave Eve Ball a vivid description of the salvation at Mount Vernon:

The buildings were located on a ridge, in the swamp. They were built of brick, in the 1830s, and were enclosed by a massive brick wall. We had thought Fort Marion a terrible place with the mosquitoes and rain, but this was worse. The only way it was better was that it was larger.

The married couples were placed in the tumbledown houses with dirt floors. The unmarried men were housed together. It rained nearly all the time and the roofs leaked. On top of that the mosquitoes almost ate us a live. Babies died from their bites. It was hot and steamy. We had been accustomed to dry heat in Arizona and could take it, but that humidity! It was worse than that at St. Augustine; it was terrible. Everything moulded [sic] – food, clothes, moccasins, everything.

But we took it, and without complaining. If the children could stand it, so could the older people. And Nana went about telling us to remember that we were Apaches and that we had been trained to suffer.

They set the men to cutting down trees and building houses. Once they got a roof on those huts we could keep dry, but we still had swarms of mosquitoes tormenting us night and day.

I don't remember any officer's family living there. But it was a good place for Apaches to go – and to die. The officers had no screens. I don't think anybody did at that time. But they had a thin cloth tacked over the windows. They had curtains made of it draped over the beds, too. Still, they also probably suffered from the mosquitoes.

Then our people got the shaking sickness. We burned one minute and froze the next. No matter how hot and muggy it was, no pile of blankets would keep us warm. We chilled and shook – not all the time, but every afternoon or every other day. There was an army doctor who gave us medicine, nasty bitter medicine. I don't know whether or not it did us any good. We had our own Medicine Men, but none of them had the Power over this malaria.

BALL, INDEH, *supra* note 31, at 152-53 (citations omitted).

210. BALL, INDEH, *supra* note 31, at 153-59; DEBO, *supra* note 32, at 352-55; SKINNER, *supra* note 114, at 167-73; STOCKEL, SURVIVAL, *supra* note 180, at 140-44.

211. *See* ROBERTS, *supra* note 1, at 302-03; H. HENRIETTA STOCKEL, WOMEN OF THE APACHE NATION 49-50 (1991); *see also* SHERRY ROBINSON, APACHE VOICES 13-14 (2000) (noting that the great woman warrior Lozen, who survived years of warfare, succumbed to tuberculosis at Mount Vernon); LIEDER & PAGE, *supra* note 92, at 37 (“The Chiricahuas dropped in numbers by 40 percent in a mere eight years of imprisonment. By way of

General Crook strongly counseled that the Chiricahua must be relocated to a more favorable climate or face extinction. Crook, Miles, Howard, and others felt that Fort Sill, Oklahoma was a satisfactory site, both from a geographic and a political perspective.²¹² Crook died in 1890, but his urgings were carried on by officers in charge of the Chiricahua as well as Richard Pratt from Carlisle.²¹³ By the fall of 1894, a decision to move the Chiricahua to Oklahoma was made and facilitating legislation was passed, despite the wishes of some groups like the Indian Rights Association, who preferred to relocate the Chiricahua to North Carolina.²¹⁴

C. Fort Sill

After the despair in Florida and Alabama, the removal of the Chiricahua to Fort Sill, Oklahoma in 1894 was, despite a fire en route that destroyed most of their personal goods,²¹⁵ a reprieve – a return to light and air that was palpable relief. The sky and sun were no longer hidden behind the dark pines of the lowland swamp, there was far less of the oppressive humidity, and there were thousands of areas in which to move about. Adjacent to the Fort were the Wichita Mountains, perhaps not comparable to the Dragoons or the Black Range, but still rising 1,500 vertical feet out of the southern Oklahoma plain and offering granite, pines, clear running water, sage, mesquite, deer, and even coyotes to the welcoming senses of the Chiricahua.²¹⁶

comparison, the Black Death carried off half the population of fourteenth-century Europe, but it took a hundred years to do so.”); RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL* 133 (1990) (noting that the population of all the Indian tribes were simultaneously in a decline that reached its nadir in 1900).

212. See DEBO, *supra* note 32, at 358-63; TURCHENESKE, JR., *supra* note 138, at 20-30.

213. TURCHENESKE, JR., *supra* note 138, at 27.

214. LIEDER & PAGE, *supra* note 92, at 38; TURCHENESKE, JR., *supra* note 138, at 29-30, 40.

215. STOCKEL, SHAME, *supra* note 187, at 101.

216. ROBERTS, *supra* note 1, at 305-06; SKINNER, *supra* note 114, at 396-97. Eugene Chihuahua recounted to Eve Ball,

Captain Scott had not lied to us. We could see the mountains. They weren't tall like ours but they were mountains. There were trees, and we didn't have to climb one to see the sun. There was water in the creek – clear sparkling mountain water. There were mesquite beans, and we began gathering and shelling them. We hadn't seen one since we were taken to Florida. We gathered several hundred bags of them. And there were deer – not so many as at Turkey Creek, but a good many.

You'll laugh at this, but I don't mind. The best of all was to hear the coyotes sing, and the cry of the quail too. We hadn't heard them since we left Fort Bowie. And the smell of sage was good to us.

BALL, INDEH, *supra* note 31, at 160. Captain Hugh Scott, referred to by Eugene, was in

The Fort itself was less of an austere fortified bastion than Marion or Pickens, and more of an expansive staging ground for the Army's campaigns against the Kiowa, Comanche, and southern Cheyenne in the 1860s and 1870s.²¹⁷ The grounds covered fifty thousand acres and were surrounded by the Kiowa and Comanche reservation, provided for by the 1867 Medicine Lodge Treaty.²¹⁸ The Fort had been scheduled for decommission and the land for return to the tribes, and it was thought that it instead could be utilized by the Chiricahua.²¹⁹ Captain Hugh Scott, the post commander and agent for the Indians, made further negotiations with the Kiowa and Comanche, leading to the addition of twenty-seven thousand acres, which were also assumed to become part of the future Chiricahua home.²²⁰

Captain Scott respected the culture and the needs of the Indians and gave them the freedom to locate their residences in scattered villages headed by traditional leaders such as Geronimo, Loco, Chihuahua, Naiche, Mangus, Martine, and Kayitah.²²¹ The first winter was spent in traditional brush wickiups, after which the Indians began the building of permanent, wood-frame houses, and the establishment of a new economy. Scott helped with the establishment of a tribal cattle herd to supplement the more individualized production of melons, cantaloupes, and other garden crops.²²² The Chiricahua men took readily to the ranching and quickly became adept at the herding and raising of cattle. They were aided by the return of the Carlisle graduates, particularly Asa Daklugie, who had studied animal husbandry at school and who took charge of the herd at Fort Sill.²²³ The Chiricahua, with a solid ranching and agricultural base, were moving quickly and impressively toward economic stability.

command of the Chiricahuas at Fort Sill. Though he did not remain there throughout their stay, he was instrumental in settling the Chiricahuas, building their cattle herd, and negotiating the removal of the majority of the Chiricahuas to the Mescalero Apache reservation in 1913. *Id.* at 160 n.* (citing H.R. DOC. NO. 1249 (1913)).

217. ROBERT WOOSTER, *THE MILITARY AND UNITED STATES INDIAN POLICY 1865-1903*, at 153-59 (1988).

218. Treaty with the Kiowa and Comanche, Oct. 21, 1867, 15 Stat. 581. The treaty provided that the tribes would not oppose established military posts on their land, including Fort Sill. *Id.* Yet, the land was still held by the tribes and it was assumed that it would revert to them when the post was abandoned. See DEBO, *supra* note 32, at 359-60.

219. DEBO, *supra* note 32, at 446; see also LIEDER & PAGE, *supra* note 92, at 41.

220. TURCHENESKE, JR., *supra* note 138, at 53-66.

221. BALL, INDEH, *supra* note 31, at 161; STOCKEL, SHAME, *supra* note 187, at 107.

222. DEBO, *supra* note 32, at 374-77; STOCKEL, SHAME, *supra* note 187, at 107-08.

223. BALL, INDEH, *supra* note 31, at 162-64.

The Chiricahua men regained their energy and athleticism. They relished the hard work of herding – sometimes on horseback, sometimes even on foot – fencing, haying, well digging, and home construction.²²⁴ Many of them – even Geronimo – were enlisted in the Army as soldiers or scouts, and paid accordingly.²²⁵ The cattle and hay production produced surpluses for sale to the Army and surrounding communities, and the proceeds, like the herd itself, were held collectively for investments and improvements.²²⁶ Though the Apache operated individually in certain household endeavors such as garden agriculture and craftsmanship – Geronimo’s signature and memorabilia, for example, were always in high demand²²⁷ – they were still tribalists and embraced central cooperative enterprise.

As an aside, it can be noted that debates over the desired predominance of capitalism, free-market enterprise, socialism, or statism are often absolutist in tone and ignore the reality that aspects of all are generally visible in any given social and economic relationship. Beginning with the nuclear family, one can easily identify cooperation and production in accord with capability, and redistribution in accordance with need. One can also observe concern with individualism and efficiency – the pursuit of optimal benefit in excess of cost. Both are valued, but efficiency and self-interest are subordinated to cooperative relations and emotional stability. The range of altruism, cooperation, and redistribution may expand beyond the family to the extended family, the band, the tribe, the neighborhood, the faith, the community, or even the state, but not without limits. An essential aspect for the existence of altruism and the subordination of self-interest and efficiency may well be finite limits, the placement of which should be the proper focus of debate.²²⁸

224. BETZINEZ, *supra* note 30, at 168-69.

225. DEBO, *supra* note 32, at 372-74.

226. BETZINEZ, *supra* note 30, at 170; STOCKEL, SHAME, *supra* note 187, at 108.

227. DEBO, *supra* note 32, at 388, 400, 405.

228. GARRETT HARDIN, THE LIMITS OF ALTRUISM: AN ECOLOGIST’S VIEW OF SURVIVAL 132 (1977) (“In the absence of competition between tribes the survival value of altruism in a crowded world approaches zero because what ego gives up necessarily (by the definition of the rules of One World) goes into the commons. What is in the commons cannot favor the survival of the sharing impulses that put it there – unless limits are placed on sharing. To place limits on sharing is to create a tribe – which means a rejection of One World. So if we desire a world in which altruism can persist we must reject the ideal of One World and consciously seek to retain a world of more or less separate, more or less antagonistic units called (most generally) tribes. They may be synonymous with nations as we now know them, or they may be some new political inventions. A state of One World, if achieved, would soon redissolve into an assemblage of tribes.”).

There was no serious debate over distributions among the Chiricahua, even though the group was composed of innocent victims, rebels who incurred disproportionate external wrath and punishment, and the turncoat scouts that had pursued them. The common bonds of culture, family, and history brought these disparate groups into a coherent, if not consistently harmonious, body, which effectively functioned socially, politically, and economically.²²⁹ It did, that is, until more external events were brought to bear on the star-crossed Chiricahua – events that would result in a divergence that, though not uncivil or even unfriendly, was nonetheless final.

The arc of the Chiricahua rose from a nadir in Florida and Alabama, reached its new zenith before the turn of the century at Fort Sill, and then began another descent. Hugh Scott, ever a friend of the Indians, left as commander of Fort Sill in 1897, and the Chiricahua, despite their rapid progress toward assimilation, were still deemed prisoners of war. There was no literal imprisonment; in fact, during the Spanish-American War in the summer of 1898, they were basically unguarded, but they still were not free.²³⁰ They had to check with the military when entering or leaving the Fort, they were subject to orders and the performance of uncompensated tasks, and perhaps most significantly, they did not own interests in the land itself. Respiratory illness, never a problem in Arizona, began with a vengeance in Florida, continued at Carlisle and in Alabama, and followed on to Oklahoma, where an inordinately high number of children and adults died prematurely.²³¹

The process of allotment, the central tool of assimilation, took its toll on the captive Chiricahua, even though they had no land of their own to individualize. The key thrust of allotment was to break up the tribally held land and make individual apportionment among the tribal members of an amount – 160 acres – that paralleled the dispositions of public domain under the Homestead Act. This was designed to weaken the tribe as a cultural, political, and economic entity, and empower the recipient individual who, with personal means of gain-seeking, might achieve both self-sufficiency and market competitiveness. These allotments ideally could both free the United States from support obligations and allow the landed Indians to enter the economic and social mainstream. Not incidentally, the process of allotment

229. For example, Chatto, though serving as an army scout, Washington delegate, and spy, was imprisoned along with the rebels and still managed to maintain enough cohesion with the tribe to serve as a village headman at Fort Sill. *See* DEBO, *supra* note 32, at 372. Chatto did, however, feel resentment, which caused him to be somewhat of a pariah. He died at Mescalero in 1934 following an automobile accident. *Id.* at 450.

230. DEBO, *supra* note 32, at 365-77.

231. *See id.* at 377-78; STOCKEL, SURVIVAL, *supra* note 180, at 201-20.

was crafted to free up a “surplus” of tribal land not needed for allotment and allow it to be sold to eager white settlers. The mixture of Indian and white yeomen on landed agricultural estates would be the final glory of democracy and the assimilation process.²³²

It did not work out that way, of course, at least not in the sense of Indian empowerment and assimilation. Allotment resulted in a dramatic loss in tribal land holdings from 138 million acres held in 1887 down to 48 million acres in 1934, the year of the Indian Reorganization Act (IRA).²³³ It also meant impoverishment for most of the Indian individuals (who often got the worst of the allotments), inadequate capital to make new beginnings, little instruction, limited access to markets, and a weakened tribe and social service network to buffer them. These dramatic failings of allotment led to a complete change in federal Indian policy in 1934, when the IRA ended allotment and began the rebuilding of tribal sovereignty.²³⁴

For the Chiricahua, the negative forces of allotment began on the periphery of their new foothold at Fort Sill. The Kiowa and Comanche Reserve, established under the Medicine Lodge Treaty of 1867 and surrounding Fort Sill, was substantially allotted in derogation of treaty provisions. The Supreme Court sustained the process of allotment despite possible fraud and bad faith,²³⁵ and the way was cleared not only for allotment on the Southern Plains, but for the assimilation movement in general. Surplus lands of more than two million acres around Fort Sill were opened to white settlers under the public-land-

232. See *supra* notes 60-62 and accompanying text; see also WORCESTER, *supra* note 47, at 326-30.

233. WORCESTER, *supra* note 47, at 328.

234. See COHEN, *supra* note 62, at 75-89.

235. *Lone Wolf v. Hitchcock* 187 U.S. 553 (1903). Though the Medicine Lodge Treaty stated that no treaty of cession for reservation land would be valid unless signed by at least three quarters of the adult tribal males (Article 12), Congress approved a bill authorizing allotment in severalty and sale of the surplus. *Id.* at 554-55. The Indians claimed that assent was procured by fraud, but the Supreme Court felt this was not a justiciable issue. *Id.* at 556, 564.

In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations, and concealment, that the requisite three fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians since all these matters, in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts.

Id. at 567-68.

disposition laws, with the proceeds to be placed in trust for the tribes. New towns, most notably Lawton, sprang up in the vicinity.²³⁶ Though the new settlement provided services and employment opportunities to the Chiricahua, it also meant the temptation of vice. Alcohol, always an issue for the Dionysian Chiricahua who tended toward binge drinking, reemerged as a substantial social and economic problem and was in part responsible for the death of Geronimo in 1909.²³⁷

Allotment was premised in part on the fact that land and sovereignty are almost inseparably linked. The ability of a group to be sovereign or individual – to make and live under their own initiative – is highly dependent on a land base over which both ownership and jurisdiction extend.²³⁸ The Chiricahua at Fort Sill, though the recipients of repeated assurances of permanence, had, by the turn of the century, no legal entitlements to the land. Their expectations of sovereignty, jurisdiction, and self-control were correspondingly at risk.

The Spanish-American War, though lasting only a few months in the summer of 1898, led to a reconsideration of the decisions to decommission Fort Sill and permanently resettle the Chiricahua. By 1910, a decision to use the Fort as an artillery training base had been made and the federal government was planning yet another relocation of the Chiricahua.²³⁹ This decision was not in accord with the original assurances and understandings, and arguably was not even in accord with the United States' limited interest in the site.²⁴⁰ The decision to move the Chiricahua, however, was final, and the issue became one of location.

The interest of many in the tribe, as well as the federal government, centered on the Mescalero Apache Reservation in south central New Mexico. The Mescalero Apache, relatives of the Chiricahua, held a reservation of almost 500,000 acres and expressed a willingness to accept Chiricahua

236. LIEDER & PAGE, *supra* note 92, at 43-44.

237. SKINNER, *supra* note 114, at 456-57.

238. See Joseph Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 51 (1991) (“Morris Cohen taught us that property rights are delegations of sovereign power, giving owners an ability, limited but real, to induce others to do what the owner wants. At the same time, defining an interest as a property right gives the owner some protection from having that interest confiscated by the state. The state therefore both defines property rights and defines limits on its ability to alter the definition and distribution of property rights. Property is derived from sovereignty but also creates sovereignty.”).

239. DEBO, *supra* note 32, at 446.

240. See TURCHENESKE, JR., *supra* note 138, at 184-85; see *id.* at 184 (“It is an incontrovertible fact that the War Department was morally and legally obligated to transfer ownership of Fort Sill to the Chiricahua Apache prisoners of war for their reservation.”).

immigrants.²⁴¹ Congress passed a facilitating law in 1912, providing for the release of the Chiricahua from prisoner-of-war status when relocation occurred.²⁴² There were, however, still decisions to be made among the Chiricahua themselves.

Some of the Chiricahua expressed interest in relocating, if possible, in the traditional Warm Springs band's homeland near Ojo Caliente. Others were interested in the possibility of remaining in Oklahoma and receiving allotments in the Fort Sill area. An inspection showed that the Ojo Caliente area had been degraded by improvident agricultural practices in the years following the Chiricahua departure in 1877.²⁴³ The ultimate choice then became one between Mescalero and the Fort Sill area.²⁴⁴

It was to be a choice between diverging life-ways, economics, and politics, and either prong was fraught with attendant difficulties as well as advantages. Those that chose to go to Mescalero would have a clearer opportunity to maintain tribal unity and culture, as the vast Mescalero Reservation had not been a target of allotment and assimilation, and the immigrants would have a cohesive land base.²⁴⁵ There would, however, be substantial economic issues: the transportation of the Chiricahua cattle herd was impossible, and agriculture at high altitude, with colder winters and shorter growing seasons, would be difficult.²⁴⁶ Those choosing to remain in the Fort Sill area needed government

241. C.L. SONNICHSEN, *THE MESCALERO APACHES* 228 (2d ed. 1973).

242. DEBO, *supra* note 32, at 447.

243. Jason Betzinez describes the disappointing inspection of the Warm Springs band traditional homeland around Ojo Caliente:

In the morning we resumed our journey to Monticello. This was where the Apaches had made their first peace with the Mexicans. We did not stop, because we all were anxious to get on to our old reservation. From Monticello the route led up the dry creek bed which previously had been such a nice little stream. Now it was all filled in with gravel, which made it twenty jumps wide instead of the one jump which it had been before.

We arrived at the old agency after dark but got up early next morning in our eagerness to look around at our old homeland. What a depressing sight it turned out to be! The whole country, once so fertile and green, was now entirely barren. Gravel had washed down, covering all the nice valleys and pastures, even filling up the Warm Springs, which had completely vanished. The reservation was entirely ruined. Looking around bitterly, I said to myself, "Oklahoma is good enough for me."

BETZINEZ, *supra* note 30, at 194-95.

244. SONNICHSEN, *supra* note 241, at 228.

245. *Id.* at 265 (noting that the Mescalero reservation was not suitable for allotment as it was rugged mountain country with limited agricultural potential).

246. *See infra* Part V.

help in procuring allotments from the Comanche and Kiowa in the area north of the Fort, and the size, location, and availability of such allotments was unclear.²⁴⁷ It seemed likely that agriculture, cattle raising, and tribal cohesion would be problematic.²⁴⁸ Still, those opting for Fort Sill would have actual individual ownership of land instead of a beneficial tribal ownership in trust and thus an opportunity for personal self-sufficiency and independence.

In December, 1912, a tribal vote was taken and 187 elected to go to New Mexico, while 78 opted to secure allotments in Oklahoma. Most of the older Chiricahua, including the chiefs, warriors, and scouts such as Naiche, Chatto, Martine, and Kayitah, along with the strong traditionalists among the young, such as Asa Daklugie and Eugene Chihuahua, went to Mescalero.²⁴⁹ Many of the younger adults and Carlisle graduates, including Jason Betzinez and James Kaywaykla, who, like Daklugie and Eugene Chihuahua, had been involved in the outbreaks of Geronimo and Victorio as children, decided to remain in Oklahoma. The celebrated Chiricahua cattle herd was sold and the money placed in a trust fund for use in the moving expenses.²⁵⁰ None of what followed would prove easy.

IV. Individual Values

Fundamental values are the polestars, the focal points, the centers of consciousness of the people as individuals; the values of the people as a collective are the wellspring of custom, politics, and law. They are not beyond change or adaption, but are still deep-set and generally function as at least temporary absolutes, subject to modification only after experience and reflection. On occasion, however, the values are subject to sudden, extreme pressure, and both individuals and society must quickly respond. Reflection may be delayed by reaction.²⁵¹ The Chiricahua were subject to a rapid series of massive social shocks: invasion, displacement, relocation, and confinement. Particular individuals and their central beliefs provided varying points of cohesion, reaffirmation, and reorientation for the stunned Chiricahua people.

247. *See infra* Part V.

248. Captain Hugh Scott had recognized that the Chiricahuas' last hope was a combination of communalistic and individualistic principles at Fort Sill, in particular a common grazing area. Scott felt that individual holdings of 160 acres or less would be inadequate for economic self-sufficiency. *See* TURCHENESKE, JR., *supra* note 138, at 186.

249. *See* SONNICHSEN, *supra* note 241, at 228; WORCESTER, *supra* note 47, at 324.

250. DEBO, *supra* note 32, at 448.

251. *See supra* notes 5-20 and accompanying text.

The results may have been survival and endurance, but they also included dissonance and division in residence, culture, politics, and law.

A. Jason Betzinez

Jason Betzinez may have in the beginning seemed an unlikely candidate to be a leader in philosophy or policy. In fact, it was his malleability under the inescapable forces of invasion, confinement, and assimilationist policies that thrust him and his reformed values into a point of reference for the evolving way of the group that would become the Fort Sill Apaches.²⁵²

As a Warm Springs Apache youth in Chief Loco's band, Jason was, by his own candid admissions, not a warrior or really even a viable candidate.²⁵³ He emerges from his remarkable autobiography as a strong, fit, athletic individual, but never one who sought or enjoyed violence. Geronimo and Nah-thle-tla, Jason's amazing mother who lived to be 112,²⁵⁴ were cousins, and Jason always liked and respected Geronimo. He himself, however, had never engaged in raiding or combat when his Warm Springs band was kidnapped from the San Carlos Reservation by breakout Apaches and forced into the

252. See SKINNER, *supra* note 114, at 162; WORCESTER, *supra* note 47, at 329-30.

253. Jason's father was killed when Jason was young, and his upbringing was directed largely by his mother who, though Geronimo's cousin and an incredibly handy woman, was not inclined toward violence or warfare.

I had worshiped my father. His death grieved me deeply. I now began to appreciate how much a father's love and guidance means to a growing boy. The raising of my sister and myself, including both our support and our training, fell entirely on my mother. Though she had to work very hard to obtain enough food and clothing for us she saw to it that we were never in want. Also she had strong principles of conduct which she impressed on us. Very likely these had been passed down to her from her grandfather, old Mah-ko. At any rate, she taught us to be truthful, obedient, respectful to our elders, and above all to be industrious. In the tradition of Mah-ko as well as from the example of my father, she taught us to be kind and friendly.

But before we could become tame Indians we had to go through twenty-five years of intermittent warfare against the whites and the Mexicans.

BETZINEZ, *supra* note 30, at 38-39. See also Jason's description of a fire fight with Mexicans:

Before we disappeared the soldiers saw us and opened fire. Though no harm resulted I was filled with great fear and trembling. It made me wonder how many times in the future I would have to run like this with the bullets zipping past.

To the wild Indians this was a small incident, just the beginning of a campaign. But I wasn't sure that I was going to enjoy going on the warpath!

Id. at 83.

254. *Id.* at 18 (noting that at her death in 1934 in Oklahoma, she was said to be the oldest mother in the United States); see also DEBO, *supra* note 32, at 451 (calculating her age as 110).

Sierra Madre. Jason later accompanied Geronimo on several raids in Mexico, but he served only as a non-combative apprentice.²⁵⁵ He was shot at by Mexican soldiers on numerous occasions, but he never killed anyone or even returned fire, and never joined the ranks of recognized warriors.²⁵⁶

When Crook invaded the stronghold and induced surrender of the rebels, Jason went back to San Carlos with a resolve to live peacefully and learn the new ways of farming. It was at Turkey Creek that Jason, always strong and healthy even if not inclined toward fighting, discovered or formed a core belief that meshed with both American pioneer mentality and the white theories of assimilation – an almost spiritual belief in the individual salvation of hard work.

Under the instruction of Army officers we planted crops and tried to raise some livestock. Personally I was convinced that a man must go to work to earn a living for himself and his family. I still had my mother and my sister to support, hence had been unable to get married. My sister was married but her husband had left her. We had no teams of domesticated horses, no plows, wagons, or farming implements other than salvaged shovels and hoes. But, as I have said, I managed to raise a good crop of potatoes and corn the first year, which encouraged me to plant even more the second year. I sowed some barley as well as corn. That summer I made hay and cut firewood, all of which I sold at Fort Apache. It was a deep satisfaction to receive this, the first money that I had earned by myself. I began to realize that work is good for all mankind, Indians as well as whites.²⁵⁷

In the midst of this revelation, Jason and other Chiricahua on the San Carlos and White Mountain Reservations, most of whom had never been on raids of any kind, were suddenly declared prisoners of war, separated from work and property, and shipped off to incarceration in Arizona. Jason, in his laconic way, allowed that “it seemed a bit unjust”; he noted that the government was including many people blameless of transgressions, and the government was itself responsible for the rebels’ unrest, as it had closed homeland reservations

255. BETZINEZ, *supra* note 30, at 81-107.

256. *Id.* at 107 (noting that since he was not regarded a full-warrior, he had access only to a revolver which he acknowledged was not much use in a real fight); *see also* BALL, INDEH, *supra* note 31, at 53 n.1 and accompanying text; *id.* at 142 n.4 (noting that Daklugie and others regarded Jason as a coward because he was not admitted as a warrior, and Jason resented this).

257. BETZINEZ, *supra* note 30, at 140-41.

and forced relocation at San Carlos.²⁵⁸ Jason, however, took the misfortune and mistreatment in stride, did not dwell on his losses, and instead used his new philosophy and resolve to find opportunity and purpose even while in confinement.

As a young man the life of a prisoner didn't make much difference to me, for I was able to find pleasure and interest there just as I had in less favorable circumstances. But even more important to me, I was able to put into effect my recent conviction that a man's future lay in being able and willing to *work*. In this we had some assistance at Fort Marion. The War Department bought lumber and carpenter's tools. They appointed instructors to teach us the trade of a carpenter, at least all who wanted to learn. I'll admit that many of the Indians preferred to loaf but for myself it was a very welcome opportunity. Later in life I was able to look back on my period at Fort Marion as having been useful to me, especially when I became a farmer and had to build things around my home.²⁵⁹

In April of 1887, Jason met a man who, like Crook, would shape the reformation of his thought. Captain Richard Pratt came to Fort Marion and selected young Chiricahua for education at his Carlisle School.²⁶⁰ Jason, at twenty-seven, was no child, so the learning of white customs, language, and skills was probably more difficult. He thrust himself into the discipline and the schooling, however, "determined to take full advantage of this opportunity to make something of myself, to lift myself to a more useful life."²⁶¹

At Carlisle, Jason's burgeoning beliefs in the individual salvation of self-sufficiency and hard work dovetailed with his discovery and full embracement of Christianity, which he said "changed my whole life."²⁶² His successful accommodation to life, work, and belief in the non-Indian society was, however, offset by his strong residual feelings of responsibility for his family and tribe. In 1900, after working in a Pennsylvania steel mill, attending a Presbyterian church, and playing baseball and football for the company teams,

258. *Id.* at 141.

259. *Id.* at 146. Jason, whose positive attitude parallels that of philosopher and psychologist Victor Frankl, a survivor of the Nazi death camps, see *supra* note 13, also wrote, "I felt we were honored to be living in the oldest Spanish fort in the United States, even as prisoners of war." BETZINEZ, *supra* note 30, at 146.

260. BETZINEZ, *supra* note 30, at 149.

261. *Id.* at 153.

262. *Id.* at 156 ("The most powerful influence on my life at this or any other time was my introduction to the teachings of Christianity.").

he returned to the Chiricahuas, who were by then prisoners of war at Fort Sill, Oklahoma.

Jason was not himself considered a prisoner of war,²⁶³ but he lived and worked under the same conditions as those who were. He continued to embrace work, especially in his specialized skill of blacksmithing, and like many Chiricahua men, he enlisted in the United States Army as a scout. He rose to the rank of sergeant, and this position of authority, along with his strong Christian and work beliefs, set him against a number of historic practices which Jason felt to be significant social retardants: the disease-spreading winter medicine dances, gambling, and especially binge drinking. Jason tried to control the winter dances, arrested a lot of drunks and physically confronted and restrained a number of violent, armed men, including famous warriors like Naiche and Kaahtenny.²⁶⁴ Jason, powerful, idealistic, and incorruptible, proved to be perhaps a somewhat off-putting paragon to some traditionalists.

Early in the twentieth century, the idea began to form among some of the traditionalist Chiricahua, as well as within the War Department, that the Chiricahua should be moved back to New Mexico to live on the reservation of the Mescalero Apache or perhaps on a revived reservation surrounding the traditional Warm Springs Apache homeland at Ojo Caliente. Departure for a renewal of reservation life in New Mexico posed a fundamental problem for Jason and his now deeply implanted values of individualized work and self-sufficiency. In a discussion with General Fitzhugh Lee in 1902, he said,

I was born and raised among these Indians. I lived just like they did – a hard life, homeless and hopeless. But through a Government school I had a chance to better myself. I learned about the good and useful things of life. I learned to be a blacksmith. I worked in a steel mill. I learned farming. Now I am being forced to choose between this new, good life and that of the old primitive life o[ut] West. If I go west to live in a camp as a reservation Indian, all that I have gained, all that I have learned, will be lost.

Here in Oklahoma, in spite of what these other Indians have told you, the water, the grass, and climate are good. Where the health has been bad it is due to the Indians' own foolishness. My wish

263. *Id.* at 164.

264. Naiche was, as the son of Cochise, the hereditary chief of the central band and the long-time cohort of Geronimo. Kaahtenny was a formerly fierce warrior who was second in command to Nana and who had been imprisoned and reformed at Alcatraz. See ROBERTS, *supra* note 1, at 29, 222, 268, 279-83.

this day is that the Government should give me a house and land and permit me to remain.²⁶⁵

Jason thus began to focus on two additional elements in his developing philosophy: the need for property rights in land as a foundation for individualism and self-sufficiency, and the preclusive effect of a return to reservation life where land interests were communal and legal title held in trust by the United States.²⁶⁶ A return to reservation life would, however, allow a continuation and perhaps a strengthening of the traditional Chiricahua sovereignty and culture, though clearly not a return to the nomadic way of raiding.²⁶⁷

Jason preferred the future of landed self-sufficiency and focused on the procurement of individualized Kiowa and Comanche allotments for those Chiricahua who wished to remain in the Fort Sill area. In the end, the tribe divided with the majority opting for Mescalero, and a substantial minority including Jason, James Kaywaykla, and a number of other Carlisle graduates choosing to pursue allotments in the area north of Fort Sill.²⁶⁸ In his even-handed retrospection, Jason noted the outcome of the political and cultural schism, forged in substantial part by the values he had learned from the army, the missionaries, and Carlisle:

Since 1913 both groups of Apaches, those who remained at Fort Sill and those who went to Mescalero, have done fairly well. In the latter group the death rate had gone down somewhat, so that their numbers are increasing slightly. Those of us who remained in Oklahoma have done a great deal better. Originally there were eighty-seven of us, now there are one hundred and eighty.

I think I have an even sounder reason for claiming that the Apaches would have done better had they remained in Oklahoma and settled on allotments of land. In New Mexico they probably have been fairly well taken care of by the Government, and I understand that some of them, especially the younger Apaches, have made a good start in cattle raising and farming. I have been gratified, too, to be told that quite a number who joined the church during the mission days at Fort Sill have remained firm in the Christian faith. Eventually all these Indians, like other reservation

265. BETZINEZ, *supra* note 30, at 190.

266. See COHEN, *supra* note 26, at 1003-09.

267. See *infra* Part V.

268. BETZINEZ, *supra* note 30, at 195-96.

Indians, will reach a higher state of culture. But my point is, they still are *reservation* Indians. As long as the Indian remains on the reservation he will develop only very slowly. He is, if anything, too well taken care of today. He doesn't learn to stand on his own feet, to earn his living entirely by his own efforts. The future of the Indian lies in getting out and settling down like any other American citizen, in supporting himself by agriculture, a trade, or a profession. All over the world, the tribal life is disappearing. It is archaic. As I have said many times, man must earn his bread and butter by the sweat of his brow. I have done it. So can the other Indians, and the sooner they start the quicker will they attain a more satisfying and useful life.²⁶⁹

B. Asa Daklugie

Daklugie, called Asa (or Ace) at Carlisle (though he disliked the name),²⁷⁰ was a leader of the Chiricahuas at Fort Sill and at Mescalero, and was instrumental in the decision to divide and move. He was the son of the legendary warrior Chief Juh, the leader of the Nednhi²⁷¹ or southern band of the Chiricahua, and Ishton, the sister of Geronimo who, like her brother, was a Bedonkohe Apache.²⁷² Daklugie was also a life-long enemy of Jason Betzinez, whom he regarded a non-warrior and a coward.²⁷³ In truth, Jason and Daklugie were more similar than either would have cared to admit, and ultimately they may have come to compatible positions on the necessities for the people.

Daklugie was born in the winter of 1869 or 1870 in a delivery that was so difficult Geronimo feared his sister would die.²⁷⁴ He sought a vision and received words he attributed directly to Ussen: Ishton would not die and neither would Geronimo, at least not by bullets. Ussen said Geronimo would live to old age, with life eventually ended by natural causes.²⁷⁵

269. *Id.* at 198-99.

270. BALL, INDEH, *supra* note 31, at 144 ("We didn't know till later that they'd even imposed meaningless new names on us, along with other degradations. I've always hated that name. It was forced on me as though I had been an animal.")

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

272. *See* ROBERTS, *supra* note 1, at 62-63, 104.

273. BALL, INDEH, *supra* note 31, at 142 & n.4.

274. *Id.* at 13; *see also supra* note 271 and accompanying text.

275. BALL, INDEH, *supra* note 31, at 13.

Juh and Geronimo were linked by blood and culture, but not clearly bound to the Warm Springs Apache and Cochise's central band in the Dragoons. They lived with and fought alongside both groups, but still came and went at will to the southern stronghold in the Sierra Madre.²⁷⁶

Daklugie's childhood, unlike that of Betzinez, was not bound to the reservations, and he developed a stronger adherence to the religion, myths, and oral histories of the free Chiricahua. He also developed a fierce, unyielding, life-long hatred for both Mexicans and whites. It is significant that Jason, though occasionally displaying the sense of racial superiority that most Apaches held,²⁷⁷ was never consumed by hate or predisposition, and tended to treat people on an individualized, race-free basis. Indeed, he married a white missionary, Anna Hermessa, and was by all indications completely happy.²⁷⁸

Daklugie, though grudgingly accepting the honesty and worth of certain whites like Crook, Tom Jeffords, Pratt, Hugh Scott, and George Wratten,²⁷⁹ was for most his life centrally directed to the defense of and provision for his people. Though Betzinez certainly was not opposed to this, he saw salvation for the people as a consequence of the transformation and self-sufficiency of the individual. In fact, Daklugie may eventually have come to accept this to a significant degree,²⁸⁰ but for much of his young adulthood, he was influenced by the words and deeds of his father, Juh, and Geronimo, who resisted the United States' closures of the reserved homelands and the concentration at hated San Carlos. Juh, while acknowledging that he could promise the rebels nothing certain except hardship and death, repeatedly returned to the Mexican

276. *See id.* at 2 n.2, 14, 31-36.

277. BETZINEZ, *supra* note 31, at 143 ("You may be surprised to learn that the Apache has a strong feeling of racial superiority and regards others as being lesser creatures."). Eve Ball stated that Daklugie went far beyond this position to one of unrelenting hatred. She wrote,

He was so determined to become an effective leader of his people . . . that he accepted, at least on the surface, the strange and to him detestable practices of the white race in order to deal with them on their own level. But he never ceased hating them.

Don L. Thrapp *Foreword* to BALL, INDEH, *supra* note 31, at xv.

278. BETZINEZ, *supra* note 30, at 203-09. Daklugie married Ramona, the daughter of Chihuahua and, according to Eve Ball, "Never, I think, have I ever known a happier marriage than that of Ramona and Ace Daklugie." BALL, INDEH, *supra* note 31, at 32, 164.

279. BALL, INDEH, *supra* note 31, at 27-29, 126, 151, 154, 163; *see also id.* at 279-80, 313 (noting that in his later life at Mescalero, Daklugie showed respect and even friendship for Ted Sutherland and his biographer, Eve Ball).

280. *See id.* at 311.

mountains, and the images of the stronghold were central to Daklugie's philosophy of tribalism.²⁸¹

Daklugie was with the rebels in Mexico as a teenager, and after the death of his father, he traveled with a band headed by Mangus, the son of Mangas Coloradas. This band was separated from Geronimo at the time of his last surrender and was the final group to come in. Daklugie was trained, armed, and ready to continue resistance, but Mangus, protective of Daklugie and his own son, Frank, refused to allow it and made a separate surrender.²⁸²

Daklugie, shipped east by train, saw Geronimo briefly at Fort Pickens and was informed by his uncle that he was to go to Carlisle.²⁸³ Geronimo, the consummate warrior, was also, like his cousin Jason, a pragmatist. This conjunction of rebellion and practical accommodation perhaps reflected unresolved divisions in his own life.²⁸⁴ At this juncture, however, Geronimo clearly recognized that full scale resistance or denial was futile, and that Daklugie and the Chiricahua needed training in the white ways if they were to compete and survive.²⁸⁵

After a confrontation and scuffle with Pratt at Carlisle, Daklugie eventually came to respect him and much of what he did.²⁸⁶ In particular, Daklugie felt that learning to raise cattle was, unlike farming, an acceptable future for the warrior Chiricahua; cattle ranching, while less exhilarating than the hunt or the raid, was still physical, outdoors, and collective.²⁸⁷ Daklugie, like Juh, Geronimo, and other patriot traditionalists, believed that the people were more important than the individual.²⁸⁸ This indeed was the basic division between the values of Jason and Daklugie; both may have believed in self-sufficiency, but Jason saw it more as an end, whereas Daklugie saw it as necessary to the greater good of the tribe.²⁸⁹

After almost nine years at Carlisle, Daklugie returned to the Chiricahua at Fort Sill, determined to begin the raising of cattle. He clashed with military commander Hugh Scott in much the same fashion as he had with Pratt, and he once again went beyond antipathy to a point of mutual respect.²⁹⁰ Daklugie

281. *Id.* at 2-7, 13-21, 34; see also THRAPP, JUH, *supra* note 271, at 10-35.

282. BALL, INDEH, *supra* note 31, at 86-87, 118; see DEBO, *supra* note 32, at 311.

283. BALL, INDEH, *supra* note 31, at 135-36.

284. ROBERTS, *supra* note 1, at 312-13.

285. BALL, INDEH, *supra* note 31, at 136.

286. *Id.* at 150-51.

287. *Id.* at 149-50.

288. *Id.* at 146.

289. *Id.* at 311.

290. *Id.* at 162-63.

and the other Chiricahua came to see Scott as a soldier who sought to understand the Indians and advance their welfare.²⁹¹ On the advice of George Wratten, the Chiricahuas' interpreter, Scott decided to place Daklugie in charge of building and managing the cattle herd. By the time of the Chiricahua departure to New Mexico, it was the best herd in the state.²⁹²

In 1909, the army decided to expand Fort Sill into a field-artillery-training center despite the prior assurances of permanence to the Chiricahua. Because the majority of the Chiricahua, the Mescalero Apaches, and the New Mexico citizens seemed comfortable with the move, the United States once again felt it politically acceptable to relocate the Chiricahua. Some of the Chiricahua, as noted, preferred allotments in the Fort Sill area, but Daklugie emerged as the dominant proponent of a move to Mescalero, even if it meant the sale of the cattle herd he had worked so hard to establish.²⁹³ What Daklugie saw and liked at Mescalero was 500,000 acres of remote, forested mountain land, perhaps difficult to farm, but still a place where the Chiricahua could run cattle and shelter their culture and religion.²⁹⁴ Both Betzinez and Daklugie sought independence and permanence, but while Jason believed it would flow best from individual ownership, Daklugie thought it could be achieved under tribal management of lands in trust.²⁹⁵

There were many problems for the Chiricahua: difficulties with housing, sanitation, agriculture, and rebuilding the cattle herd. Daklugie and Eugene Chihuahua, as leaders of the move, agonized at times over their choice.

Eugene and I are largely responsible for bringing our people here. At the time we did it we did not have the wisdom to know that we were making a terrible mistake. We thought that we had made the right decision. We had no alternative except that of staying in Oklahoma and becoming farmers. No Apache really wanted to farm; but those who did it are better off than are the ones who came to this reservation. Why? Because those at Fort Sill became dependent on themselves by the farming experience, and they seem to have been strengthened. While it is true that we were in captivity in Oklahoma, it was an entirely different type of supervision. The Apaches will tell you that they did better under military control than under the civilian administration. The officers

291. *Id.* at 161.

292. *Id.* at 163.

293. *See supra* notes 241-49 and accompanying text; *see infra* Part V.

294. BALL, INDEH, *supra* note 31, at 184, 273.

295. *Id.* at 186, 189.

at Fort Sill had wisely left both the management and decisions largely up to the chiefs or headmen, each of whom had a village. Their primary functions were to maintain order and standards. It is different here at Mescalero, even though it is perhaps the richest in natural resources of any in the United States.²⁹⁶

Daklugie felt that reservation life, while sheltering the tribe and its culture, may have also impaired the ability of the tribe and its members to reach true independence and self-sufficiency. Daklugie thus reached a conclusion remarkably similar to that of his antagonist Betzinez. Before his death, he spoke his misgivings to Eve Ball:

“Because they are just reservation Indians. They have been born and reared in captivity. They haven’t the courage to do anything about it. In one way they are still in captivity of a worse kind than we were as prisoners of war. They have been deprived of all initiative since they became members of the tribe here. All decisions are made for them. They see nothing ahead for themselves or their children. They have never been free nor thrown upon their own resources. They know that they can’t own land [individually], though they can own houses. At times many go hungry, but they know that they won’t starve. The government does see to that.

“How many people on this reservation do you think could leave it, get employment, and live on their own resources? Very few? You are right. There are three strikes against them before they start: they are Indians; they have been downgraded till they lack confidence; they are not treated as equals.”²⁹⁷

C. Geronimo

There are several reasons why the philosophy and central values of Geronimo are somewhat less clearly expressed in his autobiography than in the books created by Daklugie and Betzinez. For one thing, both Asa and Jason were educated at Carlisle and were quite fluent in English speaking and writing. For another thing, Geronimo’s autobiography – prepared from his careful statements by S.M. Barrett, a Lawton, Oklahoma school superintendent, with the assistance of Asa Daklugie as interpreter – was a

296. *Id.* at 311-12 (internal quotation marks omitted).

297. *Id.* at 312-13 (alteration in original) (internal quotations marks omitted).

guarded translation. Geronimo's words in Apache were terse and unembellished, and did not always convert directly into English, even with Daklugie's assistance.²⁹⁸ Beyond this, Daklugie later stated that Geronimo was fearful that Barrett might be a spy for the federal or civil authorities, who were seeking a basis to prosecute Geronimo and possibly hang him.²⁹⁹ Still, Geronimo's often-reticent text provides some vivid indication of deep principles and emotions that could unite and inspire the people and their law. Notable were his unrestrainedly eloquent expressions of longing and love for his birthplace and homeland in the Gila River headwaters of the Black Range. He expressed a deep desire for his people to return there, even if he himself could not.

We are now held on Comanche and Kiowa lands, which are not suited to our needs – these lands and this climate are suited to the Indians who originally inhabited this country, of course, but our people are decreasing in numbers here, and will continue to decrease unless they are allowed to return to their native land. Such a result is inevitable.

There is no climate or soil which, to my mind, is equal to that of Arizona. We could have plenty of good cultivating land, plenty of grass, plenty of timber and plenty of minerals in that land which the Almighty created for the Apaches. It is my land, my home, my fathers' land, to which I now ask to be allowed to return. I want to spend my last days there, and be buried among those mountains. If this could be I might die in peace, feeling that my people, placed in their native homes, would increase in numbers, rather than

298. See ROBERTS, *supra* note 1, at 310. Barrett noted in his introductions to the autobiography:

Geronimo refused to talk when a stenographer was present, or to wait for corrections or questions when telling the story. Each day he had in mind what he would tell and told it in a very clear, brief manner. He might prefer to talk at this own tepee, at Asa Daklugie's house, in some mountain dell, or as he rode in a swinging gallop across the prairie; whenever his fancy led him, there he told whatever he wished to tell and no more. On the day that he first gave any portion of his autobiography he would not be questioned about any details, nor would he add another word, but simply said, "Write what I have spoken," and left us to remember and write the story without one bit of assistance.

GERONIMO, *supra* note 94, at 45-46.

299. See BALL, INDEH, *supra* note 31, at 173-74; GERONIMO, *supra* note 94, at 45; ROBERTS, *supra* note 1, at 310.

diminish as at present, and that our name would not become extinct.

I know that if my people were placed in that mountainous region lying around the headwaters of the Gila River they would live in peace and act according to the will of the President. They would be prosperous and happy in tilling the soil and learning the civilization of the white men, whom they now respect. Could I but see this accomplished, I think I could forget all the wrongs that I have ever received, and die a contented and happy old man. But we can do nothing in this matter ourselves – we must wait until those in authority choose to act. If this cannot be done during my lifetime – if I must die in bondage – I hope that the remnant of the Apache tribe may, when I am gone, be granted the one privilege which they request – to return to Arizona.³⁰⁰

Geronimo also expresses in his book and demonstrated in his actions a love for family and a gentleness with children that seemed to contrast dramatically with his ferocity as a warrior.³⁰¹ Some of the apparent incongruity may be explained by the fact that many of his wild forays and his life-long hatred for Mexicans stemmed from a never-quenched desire for revenge for atrocities inflicted on his family and loved ones.³⁰²

Geronimo had a deep confidence in spiritual power – his own and that of both the Christian God and the Apache God, Ussen.³⁰³ Part of his personal power was foretold in a vision he received before the birth of his nephew, Daklugie. The vision, or voice, said, “The child will be born, and your sister will live; and you will never be killed with weapons, but live to old age.”³⁰⁴ The artist, E.A. Burbank, who painted portraits of Geronimo and his family at Fort Sill and who came to be perhaps Geronimo’s closest white friend,³⁰⁵ once

300. GERONIMO, *supra* note 94, at 139-40.

301. *Id.* at 66-67; *id.* at 146-47 *illus.7* (displaying a picture of Geronimo, as husband, father, and farmer in the melon patch at Fort Sill).

302. *See id.* at 71-77; *id.* at 73 (“I was never again contented in our quiet home. True, I could visit my father’s grave, but I had vowed vengeance upon the Mexican troopers that had wronged me, and whenever I came near his grave or saw anything to remind me of former happy days my heart would ache for revenge upon Mexico.”).

303. *See id.* at 136-38.

304. DEBO, *supra* note 32, at 77 (internal quotation marks omitted).

305. E.A. BURBANK AS TOLD BY ERNEST ROYCE, BURBANK AMONG THE INDIANS 38 (Frank J. Taylor ed., 1944) (“I like Burbank better than any white man I have ever known. He has never lied to me and has always been kind to me and my family.”) (internal quotation marks omitted).

saw that Geronimo's body was marked by at least fifty bullet-wound scars. He expressed amazement that anyone could live after being shot that many different times, to which Geronimo replied, "Bullets cannot kill me!"³⁰⁶

Other believers in Geronimo's power included Daklugie, who said that Geronimo had great power, including the ability to foresee the future.³⁰⁷ Jason Betzinez, ever practical and not inclined toward mysticism, still believed without question or explanation Geronimo's power to foresee the future and perceive events at great distance. Jason witnessed an extraordinary occurrence when Geronimo, over one hundred miles from the Chiricahua base camps in the Sierra Madre, suddenly saw and knew that the camps had been captured by the American army, an absolutely accurate cross-dimensional perception of Crook's surprise invasion into the stronghold.³⁰⁸ On the rushed ride back, Geronimo made another dead-accurate prophecy of the exact manner that they would be informed of the event by uncaptured camp members. Jason said, "Thus the event that Geronimo had foretold when we were still several days' journey away, and had repeated last night, came to pass as true as steel. I still cannot explain it."³⁰⁹

Geronimo, intelligent, pragmatic, and ever curious, did not regard the prophecies or his power as preclusive of supplementation. Whereas Daklugie tended to view the traditional faith as a presumptive absolute and Betzinez made a nearly full transition to Christianity and the modern economy, Geronimo made a more balanced consideration of both, albeit with inconsistent results.³¹⁰ He was baptized in the Dutch Reformed Church,³¹¹ but was later suspended from membership in 1907 for his refusal to give up gambling and drinking.³¹² He was reconsidering Christianity again in the period before his death, although he never successfully avoided the vices which in part led to his death.³¹³

Another example of Geronimo's ability to simultaneously balance inconsistent propositions in his complex, vibrant mind was his approach to economics. Unlike Daklugie, he did not loathe farming and he engaged in it – sometimes with success – as a youth, later at Turkey Creek, and finally at

306. *Id.* at 31 (internal quotation marks omitted).

307. BALL, INDEH, *supra* note 31, at 87.

308. BETZINEZ, *supra* note 30, at 113-15.

309. *Id.* at 115.

310. DEBO, *supra* note 32, at 431-33; *see* GERONIMO, *supra* note 94, at 136-38.

311. DEBO, *supra* note 32, at 432; GERONIMO, *supra* note 94, at 138 n.3.

312. DEBO, *supra* note 32, at 435; GERONIMO, *supra* note 94, at 138 n.3.

313. DEBO, *supra* note 32, at 437-38.

Fort Sill.³¹⁴ He may have preferred ranching, but he maintained a nuanced, non-ideological approach to survival. Indeed, Geronimo went a good bit beyond Jason Betzinez along the road of competitive, individualistic gain-seeking.³¹⁵ He was a consummate gambler, with a significant part of his gaming success stemming from his preternatural athletic skills. He could run, shoot, ride, and jump with excellence well into old age, and, despite his multiple woundings, he was always eager to compete for money and was invariably successful.³¹⁶ Geronimo was also a canny businessman, exhibiting a drive for monetary success independent of any corresponding need to consume. He was able to market his signature, his accoutrements, his crafts, and his artistic creations at healthy prices. He sold his wares at Fort Pickens, Mount Vernon, Fort Sill, and more generally when he was on the road at national expositions, fairs, and celebrations, including Theodore Roosevelt's inauguration, where he paraded with the President.³¹⁷ Angie Debo wrote of Geronimo as a businessman:

During the Fort Sill years, Geronimo became a commercial property, an exhibit to ensure the success of a celebration. If other Indians accompanied him, they fell into the background. His conduct on these occasions was a lasting demonstration of the code of courtesy and good breeding the Apaches had managed to retain even as hunted outlaws. He appeared self-possessed, alert, and not unfriendly to the people who crowded around him, and all the time he was observing, learning, marking down everything with his fresh curiosity and his active mind. At the same time, he used every opportunity he found to plead for a return to his homeland. Also, being Geronimo, he kept an eye open for business.³¹⁸

314. See BALL, INDEH, *supra* note 31, at 251; DEBO, *supra* note 32, at 374; GERONIMO, *supra* note 94, at 59-60, 111, 119. Britton Davis, never a real fan of Geronimo, was quite scornful of Geronimo's motives for farming and results at Turkey Creek. See DAVIS, *supra* note 75, at 136-37.

315. GERONIMO, *supra* note 94, at 119-20 (noting that Geronimo was concerned about the accuracy of the split between individual and tribal accounts, and occasionally asked hard questions about whether proceeds from the sale of stock or grain had been properly allocated to the individuals and to the collective "Apache Fund").

316. BURBANK, *supra* note 305, at 23-25.

317. DEBO, *supra* note 32, at 400-19.

318. *Id.* at 400.

It was reported by Burbank that, at his death, Geronimo had over \$10,000 deposited in a Lawton bank.³¹⁹ This sum would be comparable to a vastly larger amount in today's dollars.³²⁰

Perhaps the most distinctive and exemplary value of Geronimo – the one that drove him relentlessly, infused his people, and inspired the larger white society, both in his time and over the years – was his quest for freedom. His repeated breakaways and his wild, deadly rides through the Southwest did in fact bring unjust retribution against innocent tribal members, but that certainly was not his objective or even his reasonable expectation. Geronimo's rebel bands were independent entities, and the civil and federal reactions against the compliant, law-abiding Chiricahua are best viewed as the misplaced transference of anger and frustration. Geronimo's freedom flights were in reality his alone-forays into wildness and the unknown, without hope, plan, logic, or apology. Geronimo's lasting regret was that he surrendered when he didn't have to. On his deathbed, he told Daklugie that he wished he could have died like Victorio, running free and fighting.³²¹

Whether the value in heedless freedom could be a basis for society and law is fundamentally, oxymoronically questionable. Unconfined freedom, like altruism,³²² is unsustainable over time and must certainly end at some point in surrender, collapse, or death. Still, the burning, blinding, exhilarating purity of the exercise remains in the mind unforgettable – to the Chiricahua, to the confined, to the dispossessed, and even to the successful, comfortable elements of the larger society.

The modern reassertion of the primary importance of economic growth is an affirmation often made under the spur, banner, and justification of freedom. It is an avowal made despite the inevitable entropic degradation of such freedom and growth in a finite environment, and despite the evidence of likely collateral catastrophes for human bystanders and natural systems. In many ways, today's freedom-loving growth proponents provide a modern analogue to the last wild rides of Geronimo.

Alexander Adams provided an accurate restatement of and perspective on the principles of Geronimo:

319. BURBANK, *supra* note 305, at 24.

320. See MEASURING WORTH, <http://measuringworth.com> (last visited Dec. 31, 2009) (indicating that a 1909 dollar might, in 2009, be worth between seventeen and four hundred times as much). In another sense, Geronimo's account would be worth between \$170,000 and \$4,000,000 in today's currency.

321. BALL, INDEH, *supra* note 31, at 181.

322. See *supra* note 228 and accompanying text.

Yes, by American standards, he did sometimes break his word, but hardly as often as the Americans broke faith with him. And even though the Americans did not keep their agreements, he was willing to make new pacts with them again and again. Yes, he did get drunk on mescal, but no more often than many of the soldiers who pursued him. He killed women and children, but the Americans killed just as many or more, and as long as the victims were Apaches, they did not consider it a crime.

But above all, he fought, with skill and courage, as few men ever have against overwhelming odds. And he fought, not for greed or profit or empire, but only for the two causes Americans respect the most – his homeland and his freedom.³²³

V. Epilogue and Prologue

The release from prisoner-of-war status was clearly not an end to the travails of the Chiricahua. In retrospect, the interlude at Fort Sill, though under military supervision, may have been the one real respite the Chiricahua enjoyed following the closing of the homeland reservations.³²⁴ The beginnings of a transition to self-sufficiency at Fort Sill, coupled with promises of permanence, were, however, dealt blows first by release from custody, then divergence, and finally, in the case of the Mescalero immigrants, the assumption of trusteeship by the unresponsive and often incapable Department of Interior.³²⁵

The Mescalero Chiricahua located in the remote Whitetail area, many miles from the agency, and even farther from the off-reservation towns. The narrow valley was rich in timber, but its high altitude meant cold winters and short growing seasons.³²⁶ There were, additionally, difficulties in the construction of housing and water facilities, and problems getting the necessary assistance from the federal government.³²⁷ Not only were the Chiricahua unable to market agricultural surplus, but they suffered from hunger as well as the

323. ALEXANDER B. ADAMS, GERONIMO 314-15 (1971).

324. BALL, INDEH, *supra* note 31, at 311-12.

325. *Id.*; see also BETZINEZ, *supra* note 30, at 170.

326. BALL, INDEH, *supra* note 31, at 184.

327. See STOCKEL, SHAME, *supra* note 187, at 144-46.

weather.³²⁸ The cattle herd at Fort Sill, a source of pride and example of resolve, had to be sold prior to the move and rebuilt in New Mexico.³²⁹

The slow, often painful re-beginnings of Mescalero took time, and some of the Chiricahua immigrants expressed desire to leave for Ojo Caliente or go back to the Fort Sill area.³³⁰ Yet, in spite of the difficulties and doubts expressed at times by even Daklugie and Eugene Chihuahua, the Mescalero Chiricahuas persevered and ultimately felt they had wisely chosen a place to preserve their traditions and unite them with a more modern livelihood.³³¹

Certain adaptations, however, may have permanently changed at least some of the traditional ways. The Chiricahua increasingly intermarried with the Mescalero and Lipan Apache, and the composition of the people and the culture at Whitetail began to blend.³³² Economics and politics precluded isolationism. The Indian Reorganization Act of 1934, though ending allotment and embracing the prospect of a continuing tribal presence and sovereignty,³³³ also provided for tribal constitutionalism and business incorporation as means to integrate the resurgent tribes internally and with the outside world.³³⁴ The models for tribal constitutions and corporations, though not necessarily rigid or compulsory, tended to follow examples from the non-Indian community and tended to be adopted and utilized unchanged by the tribes. Though these facilitated governance and interaction with outside governments and business, they often were incongruent with long-standing tribal traditions and values, and often led to clashes between modern progressive and traditional elements within the Indian societies.³³⁵ Inevitably, but still ironically, Daklugie became a leader in both business and government, and, though never really relenting in his dislike or distrust of whites, was adept in dealing with them. The adoption of a constitution for the Mescalero Apache Reservation also meant

328. *Id.*

329. DEBO, *supra* note 32, at 448; *see* STOCKEL, SHAME, *supra* note 187, at 145.

330. STOCKEL, SHAME, *supra* note 187, at 146 (noting that Scott, on a visit to Mescalero, was so struck by the poor conditions that he offered to escort anyone who wished to return to Oklahoma, and several accepted his offer).

331. BALL, INDEH, *supra* note 31, at 276, 311.

332. *See* LIEDER & PAGE, *supra* note 92, at 73; STOCKEL, SHAME, *supra* note 187, at 147; STOCKEL, SURVIVAL, *supra* note 180, at 272.

333. Wheeler-Howard Act (Indian Reorganization Act), 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

334. 25 U.S.C. § 476 (organizational provision for tribal constitutionalism); 25 U.S.C. § 477 (incorporation provision for tribal business).

335. *See* GETCHES ET AL., *supra* note 36, at 187-95; LIEDER & PAGE, *supra* note 92, at 73-74; *see also* Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1915), *cert. denied*, 425 U.S. 903 (1916) (suit by traditionalist Indians to halt progressive Indians' leasing of Black Mesa coal).

that as of 1936, the Chiricahua Apache were blended in and no longer a distinct political or cultural entity.³³⁶

The Fort Sill Apache, in spite of their desire to preserve the stability and course of economy developed during their supervision by the military, faced issues at least as daunting as those endured by the Mescalero immigrants. They knew they had to vacate the military reserve itself, but they had been led to expect allotments of at least 160 acres, in accord with both the Allotment Acts and the Homestead Act.³³⁷ The plan had been for the federal government to purchase allotments made to Kiowa and Comanche tribal members who later died without heirs. There was inadequate congressional funding to purchase full allotments, however, and the result was that most Chiricahua received parcels of around eighty acres and some never received any.³³⁸ The undersized allotments were widely scattered over an area of one thousand square miles, thus precluding attempts at cattle grazing and greatly hampering social interaction.³³⁹ Even farming was difficult, certainly for creating marketable surplus, and even for self-sustainability.

The Fort Sill Apache, however, like their compatriots at Mescalero, were again surprisingly adaptable. Those choosing Fort Sill were generally well-educated at Carlisle and determined to enter the economic mainstream and succeed. They pursued economic independence without the supporting buffer of either wardship or formal tribal identity, though cooperation, mutual support, and cultural ties among the people still existed.³⁴⁰ Leaders among the Fort Sill group, including Jason Betzinez, formed a business committee to pressure for the fulfillment of promises made by the federal government.³⁴¹ Unlike the Mescalero Chiricahuas, however, they were leery of a return to formal tribal status and organization under the Oklahoma Indian Welfare Act

336. LIEDER & PAGE, *supra* note 92, at 74 (“After two decades on the reservation, the Chiricahuas had voluntarily done what many decades of warfare, years of imprisonment and wayward government policy, along with the attrition brought about by disease, had not accomplished - the elimination of the Chiricahuas as a distinct tribal and cultural unit.”); *see also* SONNICHSEN, *supra* note 241, at 269-72 (providing a more sympathetic view of the IRA influence at Mescalero).

337. *See* GATES, *supra* note 48, at 464-66, 495-529.

338. *See* BETZINEZ, *supra* note 30, at 201; LIEDER & PAGE, *supra* note 92, at 76; STOCKEL, SHAME, *supra* note 187, at 149-50; *id.* at 150 (noting that Betzinez headed a committee that petitioned the government in December of 1920 and asked that, in the names of fairness and promise, the allotments be provided to all intended recipients).

339. LIEDER & PAGE, *supra* note 92, at 76-77.

340. *See* DEBO, *supra* note 32, at 451-53; STOCKEL, SHAME, *supra* note 187, at 149-51.

341. *See supra* note 338 and accompanying text.

of 1936,³⁴² which replicated the Indian Reorganization Act of 1934 provisions for Oklahoma Indians.³⁴³ The Fort Sill Apache, often disillusioned by federal laws, administration, and unperformed promises, may have even believed that federal entreaties to organize were part of a conspiracy to take their allotments and force them back to communal life under federal control.³⁴⁴

Some economic relief and a basis for cooperation between the Mescalero Apache and the Fort Sill Apache was, as noted earlier, afforded by the Indian Claims Commission Act of 1946, which provided a vehicle for some monetary reparation for injuries to Indian property, if not for damages to the structure and culture of the tribe and its members.³⁴⁵ In a sense, the individualism and quest for a non-tribal sustainability which motivated many of the Fort Sill Apache, like Jason Betzinez, united with the pragmatic traditionalism of the Mescalero Chiricahua before the Indian Claims Commission. The resulting award was the seventh largest made by the Commission, and one fifth went to the Fort Sill Apache per capita as they had no formal tribal organization or reservation.³⁴⁶

In 1976, the Fort Sill Apache, in part because of the leverage afforded by the claim settlements, sought and received federal recognition as a tribe, and adopted both a constitution and a charter.³⁴⁷ The misgivings about tribalism had been partially offset by a modern quest to begin the re-assemblage of a tribal land base and utilize the jurisdictional advantages of tribal sovereignty and immunity to compete more aggressively in the mainstream economy. By 2000, this would come to include a successful casino in Lawton.³⁴⁸ Meanwhile, the Mescalero Apache, with their substantial land base and exceptional natural resources, have not only reinvigorated a ranching and timber economy, but have added tourism – gaming, skiing, golf, and fishing – as well.³⁴⁹ In addition, the Mescalero Chiricahua and the Fort Sill Apache continue to maintain family and kinship connections, even though the cultural

342. 25 U.S.C. §§ 501-509 (2006).

343. See LIEDER & PAGE, *supra* note 92, at 79-81.

344. See *id.*

345. See *supra* notes 171-78 and accompanying text.

346. See BALL, INDEH, *supra* note 31, at 290-91; LIEDER & PAGE, *supra* note 92, at 174.

347. Clifford P. Coppersmith, *Apache, Fort Sill*, ENCYCLOPEDIA OF OKLAHOMA HISTORY & CULTURE, <http://digital.library.okstate.edu/encyclopedia/entries/A/AP003.html> (last visited Dec. 31, 2009).

348. *Id.*

349. See MESCALERO APACHE RESERVATION INFORMATION, <http://mescaleroapache.com> (last visited Dec. 31, 2009).

integrity of the Fort Sills has attenuated because of the limited social proximity.³⁵⁰

Archiving over the course of both the Fort Sill Apache and the Mescaleros is the still-vibrant mystique of Geronimo and his unrelenting, lifelong quest for freedom and homeland. The location of his remains has become a legal and emotional issue, as the burial site symbolizes a center and orienting place for the lives, emotions, and laws of the people. The location also relates to the wishes of Geronimo himself, who spent much of his life and energy attempting to return to his homeland and birthplace. He continually expressed hope that he would ultimately be buried there.³⁵¹ The passage of the Native American Grave Protection and Repatriation Act of 1990 (NAGPRA)³⁵² has inspired several contenders for the repatriation or control of his remains.

Michael Idrogo and the Americans for the Repatriation of Geronimo sued the United States Army under NAGPRA, seeking an exhumation and reburial of Geronimo's body in the vicinity of his birthplace on the upper Gila River.³⁵³ The court dismissed Idrogo's case because he could not successfully allege injury in fact, necessitated by the Constitution, and thus had no standing.³⁵⁴ The court asserted that Idrogo was not a member of any Indian tribe, recognized or otherwise, and could show no evidence of lineal descent other than his height and ability to speak Spanish, which were somewhat similar to attributes of Geronimo.³⁵⁵

Harlyn Geronimo, a great-grandson of Geronimo and clear lineal descendant for purposes of standing and NAGPRA,³⁵⁶ filed suit in the United States District Court for the District of Columbia, seeking to repatriate Geronimo's remains from either Fort Sill or the Skull and Bones Chapter House within the Yale University campus.³⁵⁷ It has long been rumored that Prescott Bush, a graduate of Yale, member of Skull and Bones, and father and grandfather of two United States presidents (both of whom were also Skull and Bones members), had exhumed Geronimo's skull in violation of the

350. Coppersmith, *supra* note 347; *see also* STOCKEL, SHAME, *supra* note 187, at 148-53.

351. *See supra* note 300 and accompanying text.

352. 25 U.S.C. §§ 3001-3013 (2006).

353. *Idrogo v. U.S. Army*, 18 F. Supp. 2d. 25, 26-27 (D.D.C. 1988).

354. *Id.* at 29.

355. *Id.* at 27-28.

356. *See* 25 U.S.C. § 3002(a)(1) (vesting ownership of Native American human remains, excavated or discovered on federal or tribal lands, in lineal descendants, as the first priority).

357. Complaint at ¶ 1, 40, 43, *Geronimo v. Obama*, No. 1:09-CV-00303, 2009 WL 455211 (D.D.C. 2010).

Antiquities Act of 1906³⁵⁸ and sequestered it in the Skull and Bones vault.³⁵⁹ Pleadings in the case asserted that either Skull and Bones, Fort Sill, or both might be charged under NAGPRA with the return of any of Geronimo's remains or grave goods for reburial in New Mexico. The NAGPRA provision cited in the complaint was 25 U.S.C. § 3002, which applies to remains discovered or excavated on federal land after 1990.³⁶⁰ This could include the United States Army facility at Fort Sill, but would not seemingly include the Skull and Bones Society in New Haven, which might house remains procured in violation of the 1906 Antiquities Act but well before NAGPRA.³⁶¹ Repossession of illegally procured artifacts is within the province of the United States itself as landowner or trustee,³⁶² but private individuals – even lineal descendants – did not have a clear title or cause of action until excavations occurred after NAGPRA's passage in 1990.³⁶³

A better claim for Harlyn Geronimo and his attorney, Ramsey Clark, could have been the allegation that Fort Sill and possibly the Skull and Bones House are “museums” within the broad terms of 25 U.S.C. § 3005 and accompanying regulations, which extend coverage to all institutions with legal custody and some measure of federal funding.³⁶⁴ Museums are required by NAGPRA to repatriate remains to lineal descendants regardless of when or where the remains were exhumed.³⁶⁵ Even this claim might be complicated because a genetic link must still be proved for lineal descendency, and the bones of both Yale and Fort Sill have been questioned as those of Geronimo.³⁶⁶

358. 16 U.S.C. §§ 431-433 (2006).

359. ALEXANDRA ROBBINS, *SECRETS OF THE TOMB* 144-46 (2002); *see also* Complaint at ¶ 43, *Geronimo*, 2009 WL 455211.

360. *See* Complaint at ¶ 45, *Geronimo*, 2009 WL 455211.

361. 16 U.S.C. § 433 (“[It is illegal to] appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated.”).

362. *See* *United States v. Shivers*, 96 F.3d 120, 124 (5th Cir. 1996); *Black Hills Inst. of Geological Research v. U.S. Dep’t of Justice*, 967 F.2d 1237, 1238-40 (8th Cir. 1992).

363. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 45-47, 59-61 (1992).

364. *See* COHEN, *supra* note 26, at 1236-37; 25 U.S.C. §§ 3001(8), 3005(a) (2006); 43 C.F.R. § 10.2(a)(3) (2006).

365. *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 939-40 (10th Cir. 1996).

366. *See* Amanda Warner, *Comanche Descendant: Geronimo Not Buried at Fort Sill*, *TIMES RECORD NEWS* (Feb. 20, 2009, 12:07 AM), <http://www.timesrecordnews.com/news/2009/feb/20/the-rest-of-the-story-comanche-descendant-not-at/>; *see also* ROBBINS, *supra* note 359, at 146.

A further complication – or resolution – may be the position of the Fort Sill Apaches. Jeff Houser, Chairman of the Fort Sill Apache, said in a recent statement, “We believe, out of respect for Geronimo and all of the Apaches who are buried there, that we should not desecrate their graves, but leave them alone as is the Apache custom. There is nothing to be gained by digging up the dead.”³⁶⁷

The quest for the bones one hundred years after Geronimo’s death reflects the primacy of value. The lawsuits and the defenses of repose represent the attempts to use law to protect or perhaps recapture the emotion and spirit that have moved the people.

In summation, the experience of the Chiricahua in resistance, rebellion, confinement, and resurrection shows the preeminence of the value for law and social action. All the protagonists seen here – Betzinez, Daklugie, and Geronimo – were men of independence who were still deeply concerned with the welfare of family and people. They at times seemed on different roads. Betzinez seemed to embrace individualism over tribalism,³⁶⁸ but in the end he celebrated community.

And now it is time to end my story. Unlike that earlier Jason, I have found the Golden Fleece. It is the solid gold of a grand and enduring fellowship with my many dear friends, both Indian and white, and the companionship of my beloved wife. Its core consists of the deep satisfaction I feel in the knowledge of a life well spent and a firm faith in that sweet Message of a better life in the hereafter.³⁶⁹

Daklugie, the traditionalist, sought isolation for the continuation of tribal culture separate from whites. He once said about Mescalero, “Mountains in

367. See Warner, *supra* note 366. For a historical and pictorial account of the Housers and the Fort Sill Apache, see BARBARA H. PERLMAN, ALLAN HOUSER (1987). George Wratten, the white interpreter who accompanied the Chiricahua throughout captivity, married Annie White, a Chiricahua, at Mount Vernon. They had two daughters, Amy and Blossom. Blossom married Sam Houser at Fort Sill in 1910 and Allan was born in 1914, destined to become one of the most famous and celebrated sculptors in American history. *Id.* at 66, 76-77, 95-140.

The excavation of a grave on federal land to determine descendency, cultural affiliation, or circumstances of death would require compliance with the Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (2006). An applicant must secure a permit, dependent on qualifications and purpose, and federal land managers have some discretion on whether to grant them. See *In re The Exhumation of Meriwether Lewis*, 999 F. Supp. 1066, 1069 n.8 (M.D. Tenn. 1998).

368. BETZINEZ, *supra* note 30, at 199.

369. *Id.* at 209.

which to pray, wood, water, grass, abundance of game and no White Eyes! Best of all, we would live among our own people and worship Ussen according to our own religion."³⁷⁰ Yet, Daklugie's beloved wife Ramona was a Christian, as was his best friend, Eugene Chihuahua, and Naiche, the hereditary Chiricahua Chief.³⁷¹

Beyond this, Daklugie ultimately accepted the necessities of modern structure under the IRA and interaction with the white world on both an economic and political basis. Eve Ball said of Daklugie,

It is interesting to note that Daklugie so disliked the white race and its laws that he would not admit having gained anything from conditions forced upon the Apaches. Nevertheless, he had accepted Geronimo's edict as to the necessity of his learning what both considered to be the chicanery of the oppressors so that he might be able to protect his people from trickery and deceit.³⁷²

Nearing the end, Daklugie relented even more when he promised Mrs. Ball that he and Eugene would watch over her from beyond and protect her.³⁷³

Geronimo was perhaps the most nuanced of all. He recognized from the outset of surrender that the salvation of the Chiricahua as individuals and as a people depended on a pragmatic but principled evolution. According to Daklugie, Geronimo said that the future of the Apache lay in learning the ways of the whites in order to compete with them.³⁷⁴ Still, the exhilaration of the freedom rides and his weakness for alcohol were never fully subordinated to his practicality.³⁷⁵

In the end, these extraordinary people showed that passion and belief drive the laws, but simultaneously that the philosophy, values, and practices of a resilient people are not hidebound ideology or immutable habits. The Chiricahua have remained responsive to necessity and the truth as they emerge. The values, though deep and cherished, have been modified by new realities; compromises and concessions have been made, new linkages have been formed, and commitments have been reaffirmed. Thus, the principled, vibrant, evolving Chiricahua people move forward into the future.

370. BALL, INDEH, *supra* note 31, at 184.

371. *Id.* at 171; DEBO, *supra* note 32, at 430-31.

372. BALL, INDEH, *supra* note 31, at 184.

373. *Id.* at 313.

374. *Id.* at 136.

375. SKINNER, *supra* note 114, at 456-62.

