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> *Unconsciously the savage, in his primitive thought concepts based upon physical reaction, went beyond either morality or its religious correlations. The abstract concepts of good and evil, as we understand them, and as Christianity broadcast them through the mouthpiece of its anthropomorphic godhead, meant nothing at all to the savage. Because of this, in all primitive societies, punishment, as observed and examined through humanitarian spectacles, is a barbarous procedure.*[1]

Euro-American civilization's interpretations of alien societies demonstrates a narrow understanding of different cultures and customs. Too often modern societies imposed their own standards of social interaction upon societies deemed to be primitive with the intent of establishing more humane principles among these peoples. Many indigenous North American societies, practicing their distinct methods of social control, maintained standards which Euro-American culture arrogantly judged to be uncivilized. Ironically, some Native American societies, initially compelled to abandon traditional elements of their indigenous cultures, were later expected to reimplement these same elements so that they might achieve a more civilized state.

The Choctaw, the Cherokee, the Chickasaw, the Creek, and the Seminole, as their regional proximity might suggest, shared many social and cultural traits. Common traits may allow reasonable inferences drawn from the study of one tribe to be applied to an examination of the others. The Five Tribes lived according to similar customs, institutions, and economic patterns. For example, smaller social units, clans or *iksas*, formed the larger town or band. And it was within these smaller units that legal institutions took shape and direction.[2]

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1. GEORGE RYLEY SCOTT, THE HISTORY OF CORPORAL PUNISHMENT: A SURVEY OF FLAGELLATION IN ITS HISTORICAL ANTHROPOLOGICAL AND SOCIOLOGICAL ASPECTS 4-5 (1945).

2. DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK 40 (1992); JOHN PHILLIP REID, A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION 8-9 (1970) [hereinafter REID, A LAW OF BLOOD]; William H. Gilbert, Jr., *Eastern Cherokee Social Organization, in* SOCIAL ANTHROPOLOGY OF NORTH AMERICAN TRIBES 286 (Fred Eggan

The *iksa*, or kindred clan, was a group that claimed common matrilineal descent, and constituted the Choctaw's primary societal community. Commonly, major *iksas* were divided even further into family *iksas*. It was the family *iksa*, or domestic household, not the community at large, that provided the most effective means of conveying the few formal procedures that existed in Native American society.[3] These procedures represented ancient customs and social standards used to resolve differences within the community, or sanctions against those who may have disobeyed tribal law. Traditional Indian law placed little importance on personal rights and property, emphasizing instead the individual's need to maintain group cohesion and to strive for the betterment of all. Consequently, this informal legal system functioned effectively only if the larger community's cohesiveness was maintained through individual acceptance of customary procedures. The individual Indian's acceptance and active participation within this system displayed, however, a strong value on personal freedom, and an even stronger disvalue of physical coercion. Communal harmony was expected and maintained, but rarely as the result of forceful measures.[4]

To the first Europeans who encountered them, the social order and group cohesiveness within Indian communities was not apparent. Though formal written law codes did not exist, public opinion enforced clearly defined codes of traditional behavior and interaction. Indians sought group approval because of the close association most held with their families and clan members. For the majority of Indians, ridicule and ostracism were harsh punishments and effective tools in the maintenance of social control.[5]

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ed., 1955); JOHN R. SWANTON, THE INDIANS OF THE SOUTHEASTERN UNITED STATES 801-05 (Smithsonian Institution, Bureau of American Ethnology Bulletin No. 137, 1946) [hereinafter SWANTON, SOUTHEASTERN U.S.]; Edward Davis, *Early Life Among the Five Civilized Tribes*, 15 CHRONS. OKLA. 70 (1937). Although many cultural similarities exist among the Five Tribes, it is important to note that this is not intended to be a comparative study, clearly a task too complex for this article. Rather, the intention is to merely draw examples from these other four groups in order to better present an argument concerning Choctaw culture.

3. JOHN R. SWANTON, SOURCE MATERIAL FOR THE SOCIAL AND CEREMONIAL LIFE OF THE CHOCTAW INDIANS 79-84 (Smithsonian Institution, Bureau of American Ethnology Bulletin No. 103, 1931) [hereinafter SWANTON, SOURCE MATERIAL]; ALEXANDER SPOEHR, CHANGING KINSHIP SYSTEMS: A STUDY IN THE ACCULTURATION OF THE CREEKS, CHEROKEE, AND CHOCTAW (1947) (vol. 33, no. 4 of series), *reprinted in* FIELD MUSEUM OF NATURAL HISTORY, PUBLICATIONS OF THE FIELD MUSEUM OF NATURAL HISTORY 200-04 (1976).

4. CLARA SUE KIDWELL, CHOCTAWS AND MISSIONARIES IN MISSISSIPPI, 1818-1918, at 28 (1995); SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENT 201-02 (1989); REID, A LAW OF BLOOD, *supra* note 2, at 11-12; Fred Gearing, *The Structural Poses of the 18th Century Cherokee Villages*, 60 AM. ANTHROPOLOGIST 1156 (1958).

5. JOHN PHILLIP REID, A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT 10 (1976); WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 11, 16, 18-19 (1966); *see also* E.A. Hoebel, *Law and Anthropology*, 32 VA. L. REV. 835 (1946).

Because of a lack of specific historical evidence, a detailed account of Choctaw culture prior to the arrival of any European is difficult. Nevertheless, it may be inferred from evidence of the colonial and early-American periods that the Choctaw possessed no laws mandating physical coercion or punishment. Tribally imposed penalties due to a lack of compliance to traditional social standards were largely unknown. Corporal punishment, when it was used in the case of minor offenses, such as stealing, was almost exclusively a clan or family-based sanction.[6] Tribal members outside an Indian's immediate family or clan were not involved in punishment. In Choctaw society conformity to communal standards, not revenge, was the motivation for these types of punitive measures.[7] The punished clan or family member was immediately accepted back into the domestic fold. With the arrival of the Europeans came a drastic contrast to this method of coercion. To the Choctaws it appeared that the Europeans used corporal punishment merely as a means of spiteful retaliation that did even more to injure a person's dignity than it did to inflict pain.[8]

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6. Greg Urban, *The Social Organizations of the Southeast, in* NORTH AMERICAN INDIAN ANTHROPOLOGY: ESSAYS ON SOCIETY AND CULTURE 177 (Raymond J. DeMallie & Alfonso Ortiz eds., 1994); John R. Swanton, *An Early Account of the Choctaw Indians*, 5 MEMOIRS ANTHROPOLOGICAL ASS'N 60 (1918); SWANTON, SOURCE MATERIAL, *supra* note 3, at 113. Here Swanton notes that "later penalties [among the Choctaw] have distinct traces of white influence," *id.*, perhaps referring to the footnote in J.F.H. CLAIBORNE, MISSISSIPPI, AS A PROVINCE, TERRITORY, AND STATE, WITH BIOGRAPHICAL NOTICES OF EMINENT CITIZENS 506 n. (La. State Univ. Press reprint, 1964) (1880) (stating that "[t]his punishment [whipping] was not known until they [the Choctaw] fell, more or less under white influence"). For a good discussion of Choctaw legal culture, see John Edwards, *The Choctaw Indians in the Middle of the Nineteenth Century*, 10 CHRONS. OKLA. 392 (1932).

7. It should be noted that in the case of more serious crimes, specifically murder and witchcraft, punishment was based solely upon the notion of revenge. The intra-tribal killing of a Choctaw could only be atoned through the death of the killer or a member of his family. *See* CLAIBORNE, *supra* note 6, at 488 (describing such punishment as "blood for blood"); H.B. CUSHMAN, HISTORY OF THE CHOCTAW, CHICKASAW, AND NATCHEZ INDIANS 263-64 (1899) ("blood revenge"). Often this life-for-life situation led to protracted blood-feuds between Choctaw kinship groups similar to those seen among American Appalachian families in the nineteenth century and some Pakistanis today. Adding further insight, John Edwards states: "The design of this law of retaliation was not the prevention of crime, but rather the glutting of the spirit of revenge, and the adjustment or balancing of accounts." Edwards, *supra* note 6, at 397. According to Angie Debo, the Choctaw eventually yielded to pressure from United States Indian agents and missionaries, and began to modify their traditional laws of retaliation. ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 39-45 (1934).

8. REID, A LAW OF BLOOD, *supra* note 2, at 241, 264; Gilbert, *supra* note 2, at 350; THEDA PERDUE, SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY, 1540-1866, at 98 (1979); CLAIBORNE, *supra* note 6, at 506; CUSHMAN, *supra* note 7, at 159; J.N.B. HEWITT, NOTES ON THE CREEK INDIANS 147 (John R. Swanton, ed., Anthropological Papers, Smithsonian Institution, Bureau of Ethnology Bulletin No. 123) (1939). In both their accounts, Claiborne and Cushman note that the culprit, once having received his punishment, was immediately accepted back into the community at large, as if the incident had never even occurred. Hewitt explains in greater detail that the fundamental idea behind such punishments was that its cleansed the culprit from

The Choctaw, subjected to a longer period of European acculturation than the other Five Tribes, eventually developed nontraditional standards of criminal punishment. Gradually the clan organizations broke down under the impact of European acculturation, and this resulted in the development of centralized authority in relationship to social control.[9] The Choctaw's acceptance of a nontraditional form of corporal punishment, largely through contact with early colonial powers and later the United States, demonstrates the abandonment of traditional family-and-clan-based perceptions of coercion and conformity in favor of control by a more centralized legal entity. Through this more structured body, they successfully maintained a cultural identity and group cohesion strong enough to withstand over a century of Euro-American cultural incursions.

The adoption of chattel slavery gave the Choctaw and many other tribes their first experience with an entirely different approach toward the use of corporal punishment. Spanish, French, and English colonial powers all practiced slavery in North America. Slavery in North America, however, did not rely solely upon the importation of Black Africans.

Native Americans employed slaves long before the arrival of any whites, yet not for entirely the same purposes as the Europeans. The Indians' understanding and use of slavery, like that of the whites, required forced labor and a submissive posture toward one's owner. Yet only in Indian society was a slave likely to be adopted into the family of his or her owner, thus creating kinship ties that many Native American cultures valued highly. When the whites arrived in the Americas they altered the indigenous custom, choosing instead to employ their standard of slavery.[10]

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the guilt of his crime. Remembering too indigenous spiritual customs and beliefs, the criminal, if absolved through such a process, carried no guilt with him out of the living world. After undergoing the prescribed punishment the culprit was, in essence, as innocent and honorable as any member of the community.

9. GRANT FOREMAN, THE FIVE CIVILIZED TRIBES: CHEROKEE, CHICKASAW, CHOCTAW, CREEK, SEMINOLE 17-77 (1934); DEBO, *supra* note 7, at 24-57; RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 168 (1975); Fred Eggan, *Historical Changes in the Choctaw Kinship System*, 39 AM. ANTHROPOLOGIST 34, 49 (1937); Gilbert, *supra* note 2, at 351. Gilbert explains that this new form of control can be assumed as a factor of group survival. More specifically, the survival of the Choctaw state, or their sovereignty, required the development of greater central authority (i.e. corporal punishment) in its relationship to their overall social structure. CHAMPAGNE, *supra* note 2, at 186. Champagne notes that while it was difficult for the Choctaw to accept national political unification and administrative centralization, changes in the centralization of legal authority and changes in differentiation of polity and kinship were more readily incorporated. The implication here is that these changes took place more easily because they represented a modification of traditional Choctaw cultural systems rather than a complete alteration, as was the case with political and administrative unification.

10. ALMON WHEELER LAUBER, INDIAN SLAVERY IN COLONIAL TIMES WITHIN THE PRESENT LIMITS OF THE UNITED STATES 48, 63, 105-08 (1913); INDIANS OF THE SOUTHERN COLONIAL FRONTIER: THE EDMOND ATKIN REPORT AND PLAN OF 1755, at 52 (Wilbur R. Jacobs ed., 1954); PERDUE, *supra* note 8, at 3-4, 19, 49. Perdue explains that the Cherokee "bondsmen," or slaves,

Both the Spanish crown and the Catholic Church sanctioned the practice of slavery among the native people. During the early colonial period the French never officially authorized slavery by law, but by the 1700s government authorities approved its practice. The English settlers had fewer Indian than African slaves, yet British colonists used Indian labor throughout New England and the South for much of the colonial period.[11] The European practice of slavery influenced the slaveholding traditions of Native Americans. Adoption into the slaveowner's family was no longer possible. The slave did not work for his or her adoptive clan or family. Instead, he or she toiled for their master, fearing abuse and forceful coercion more than they did their community's rejection. Subsequently, the Indians' notion of corporal punishment changed. The domestic family and clan's estrangement from their traditional roles required Native Americans to develop an alternative understanding of punishment. The introduction of an entirely new method of coercive influence was not likely to pass quickly.

While the institution of slavery undoubtedly provided for the severe treatment of Black and Indian slave alike, the Native American was at first far less familiar with the Europeans' written laws that may have inflicted similar punishments.[12] Colonial laws dating back as early as 1672 required that an Indian "convicted of public drunkenness forfeit and pay the sum of ten shillings, or else be openly whipped by the constable of such town or place."[13] The Indian was hardly accustomed to the effects of the white man's liquor, and naive to his rules regarding its consumption.

England was the first colonial power to pursue any degree of administration over the Choctaw Indians. After the signing of the Treaty of Paris in 1763 the English assumed foundations of French contact with the Choctaw, that had been primarily through trade.[14] The British Army maintained administration of the Choctaw up until the American Revolution. During this period the army used flogging as the primary method of punishment. Familiar with British habits, some Indians were reluctant to return captured military deserters throughout North America to English authority, knowing they would be whipped for their offense.[15] Due in part

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bear so little resemblance to European slaves that the term itself is largely inaccurate. The "unfree" people who were obtained almost exclusively through warfare, should only be understood within the context of Cherokee aboriginal society. She concludes that gradually the Europeans' economic system undermined and transformed the Cherokees' traditional form of bondage.

11. LAUBER, *supra* note 10, at 109-12.

12. *See* Yasuhide Kawashima, *The Indian Tradition in Early American Law*, 17 AM. INDIAN L. REV. 99, 99-100, 105-06 (1992).

13. H.R. REP. NO. 21-319, at 4-5 (1830) (quoting LAWS OF THE COLONIAL AND STATE GOVERNMENTS, RELATING TO THE INDIAN INHABITANTS (1830)).

14. DEBO, *supra* note 7, at 27-31.

15. Danby Pickering, Esq., *The Statutes at Large, Anno quarto Georgii III [1764], Third*

to these practices, though, flogging became the most common form of punishment for the Indian slave as well as the free "savage."[16]

The end of the American Revolution brought the Choctaw under the control of the United States government. Hoping to build more upon England's influence over the Five Tribes, the United States government actively pursued a strategy of Indian assimilation and acculturation to white society. The United States military was initially judged to be the best tool for achieving this goal.[17] In a letter to President George Washington, Secretary of War, General Henry Knox stated

> all treaties with the Indian Nations, will be humiliating to the sovereign, unless they shall be guaranteed by a body of troops. The angry passions of frontier Indians are too violent to be controlled by the feeble authority of the civil power. In such a case, the sword of the republic only, is adequate to guard a due administration of justice.[18]

The young republic's leaders saw the army as an effective means of maintaining order and administering law among the Indians.

The United States government hoped to achieve control over the Choctaw and other Native Americans throughout the Southwestern frontier, in part, by altering their indigenous customs, specifically private retaliation. The Choctaw signed their first treaty with the United States at Hopewell in 1786. In it they agreed to deliver up any criminal in Indian Territory, white or Indian, and that punishment by retaliation would not to be practiced against either whites or other Indians.[19] A similar treaty reached in 1791 between the Cherokee Nation and the United States required that

> any Cherokee Indian or Indians . . . [who] shall steal a horse from, or commit a robbery or murder, or other capital crime, on, any citizens . . . of the United States, the Cherokee Nation shall

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Session of the Twelfth Parliament of Great Britain, 5 Geo. III, ch. 33, at 315-16. The Mutiny and Desertion Act of 1765 was passed, in part, to punish British soldiers who had deserted and fled to Indian-controlled areas of the North American frontier. STRICKLAND, *supra* note 9, at 268.

16. SCOTT, *supra* note 1, at 82; LAUBER, *supra* note 10, at 262.

17. FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, at 189-212 (1962) [hereinafter PRUCHA, FORMATIVE YEARS]; FRANCIS PAUL PRUCHA, THE GREAT FATHER 57 (1986); THOMAS D. CLARK & JOHN D. W. GUICE, FRONTIERS IN CONFLICT: THE OLD SOUTHWEST, 1795-1830, at 23-39 (1989).

18. Letter from General Henry Knox to President George Washington (Aug. 7, 1789), *in Wabash, Creeks, Cherokees, Chickasaws, and Choctaws*, 1 AMERICAN STATE PAPERS: CLASS II, INDIAN AFFAIRS 12, 52-53 (Walter Lowrie & Matthew St. Claire eds., 1832) [hereinafter STATE PAPERS: INDIAN AFFAIRS].

19. Treaty with the Choctaw, Jan. 3, 1786, 7 Stat. 21, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 11 (Charles J. Kappler ed., 1904) [hereinafter KAPPLER].

> be bound to deliver him or them up, to be punished according to the laws of the United States.[20]

By 1790, the first of the Trade and Intercourse Acts was passed. Initially enacted in an attempt to guarantee respect for Choctaw and other Indian treaties on the part of whites in Indian Territory, the signing of new treaties and the passage of additional intercourse acts made it clear the United States government was determined to exercise increasing judicial control over not only Indian-against-white crimes, but Indian-against-Indian as well.[21]

In an act approved in 1793, jurisdiction for crimes committed in Indian Territory was given to the superior courts of the territories and to United States circuit courts in whichever region the accused was apprehended or first brought. For noncapital crimes jurisdiction was given to territorial county courts and United States district courts.[22] Still, Indians understood little the complexities or procedures in United States' criminal courts. More important, perhaps, both Indians and the frontier military officers charged with apprehending and detaining criminals became increasingly dissatisfied with the current system of justice. Indians awaiting trial or sentencing strongly objected to being held for extended periods in jail, sometimes stating they would prefer execution to protracted imprisonment.[23] Similarly, army officers voiced their frustration with civil legal procedures, with some convinced that both justice meted out to Indians and greater United States authority in Indian Territory could be better achieved through military trials and the execution of punishment.[24]

Army courts, according to their own legal codes, commonly dispensed a form of justice that, over time, became increasingly accepted among the various Native American tribes in Indian Territory, the Choctaw among them.[25] Such crimes as "Sending a Challenge to fight" and "Drunkenness"

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20. Treaty with the Cherokee, July 2, 1791, art. X, 7 Stat. 39, *reprinted in* 2 KAPPLER, *supra* note 19, at 29, 31; *see also* PRUCHA, FORMATIVE YEARS, *supra* note 17, at 189 (referring to the Cherokee (1785), Chickasaw (1786), Wyandots (1789), and the Creek (1790), all of whom had similar clauses in their treaties with the United States).

21. PRUCHA, FORMATIVE YEARS, *supra* note 17, at 193, 212; DOCUMENTS OF UNITED STATES INDIAN POLICY 14-15, 17-21, 28-29, 38, 64-68 (Francis Paul Prucha ed., 2d ed. 1990); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 362-64 (Univ. of N.M. photo. reprint 1971) (1942) [hereinafter COHEN]; FRANCIS PAUL PRUCHA, SWORD OF THE REPUBLIC: THE UNITED STATES ARMY ON THE FRONTIER, 1783-1846, at 209 (1969) [hereinafter PRUCHA, SWORD]. Prucha explains that the intercourse law of 1834 specifically authorized the use of military force "in preventing or terminating hostilities between any of the Indian tribes." *Id.* This is particularly significant considering wars between native groups in the Southeast were seldom over land or trade, but principally for revenge, SWANTON, SOUTHEASTERN U.S., *supra* note 2, at 686-701, which was by no means a lost element of indigenous culture during this period.

22. Act of Mar. 1, 1793, ch. 19, 1 Stat. 329, 329-31 (repealed May 19, 1796).

23. 19 THE TERRITORIAL PAPERS OF THE UNITED STATES 692 (Clarence Edwin Carter ed., 1934).

24. PRUCHA FORMATIVE YEARS, *supra* note 17, at 195-98.

25. *See* Treaty of Doak's Stand, Oct. 18, 1820, U.S.-Choctaw, 7 Stat. 210, *reprinted in* 2

among soldiers were punishable by "suffering corporal punishment as shall be inflicted by the sentence of a court." Indeed, during this period, flogging was the most frequent form of punishment in the United States Army.[26] And the United States generally saw the Indians as amenable to the laws chosen for their administration. In a letter to the Secretary of War, Jedidiah Morse, agent for the War Department, wrote that the "Cherokees, Choctaws, and Chickasaws are in circumstances very favorable to be educated and merged in the mass of the nation. On these tribes we hope the government will make the experiment of the practicability of a complete civilization of Indians."[27] Ultimately, though, despite the army's concerns and intentions, the United States government determined that civil legal forms, not military, should be exercised in Indian Territory.[28] Still, there were circumstances concerning the Indians' assumed acculturation that created difficulties for the United States.

The Indians' willingness to accept corporal punishment by no means made them compliant to all methods of punishment, some of which were entirely foreign to their tribal customs. In a letter given to Congress concerning the issue of Indian administration, President Thomas Jefferson asked the legislature to consider

> whether the provisions of the law inflicting on the Indians, in certain cases, the punishment of death by hanging, might not permit its commutation into death by military execution; the form of punishment, in the former way, being particularly repugnant to their ideas, and increasing the obstacles to the surrender of the criminal.[29]

KAPPLER, *supra* note 19, at 191, 193-94 (indicating a willingness to assume certain duties customarily carried out by the U. S. Army, the Choctaw in this treaty, agreed to organize a corps of lighthorsemen within their nation "so that good order may be maintained"); *see* Bob L. Blackburn, *From Blood Revenge to Lighthorsemen: Evolution of Law Enforcement Institutions Among the Five Civilized Tribes to 1861*, 8 AM. INDIAN L. REV. 49 (1980). Blackburn attributes the organization of the lighthorse among the Five Tribes primarily to the growing American influenced mixed-blood population. *Id.* at 59. This assumption, however, neglects to consider other motivations which this paper seeks to address. Blackburn is correct in stating that the lighthorse, as indicated in their respective criminal codes, used violence or physical coercion as a tool of law enforcement. His explanation of their development falls short, though, by interpreting this law enforcement body merely as a means of facilitating recently adopted white attitudes toward property, ownership, and religion.

26. H. REP. 9-20, at 363, 365 (1806) (section titled "Department of War"); PRUCHA, SWORD, *supra* note 21, at 32.

27. JEDIDIAH MORSE, A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES, ON INDIAN AFFAIRS 32-33 (1822).

28. PRUCHA, FORMATIVE YEARS, *supra* note 17, at 195.

29. Letter to the United States Congress from President Thomas Jefferson (Jan. 27, 1802), *in Trade*, 1 STATE PAPERS: INDIAN AFFAIRS, *supra* note 18, at 653-55; CUSHMAN, *supra* note 7, at 158. Cushman notes that the Choctaw objected to execution by hanging, at least in part, because the individual hanged could then not go to the "happy hunting grounds." *Id.*; Carolyn

With certain exceptions, the United States government continued its efforts to push for the Indians' acceptance of what it saw as more civilized laws, social values, and customs.

According to American government officials the Choctaw were making noted strides toward fully integrating certain aspects of white culture into their own. In a letter to Speaker of the House Henry Clay, Secretary of War John C. Calhoun stated, "While many of the Indian tribes have acquired only the vices with which a savage people usually become tainted, others appear to be making gradual advances in industry and civilization. Among the latter description may be placed the Choctaw, Cherokees, Chickasaws, and perhaps the Creeks."[30] Increasingly it was apparent that members of the Five Tribes did satisfy many of the United States government's concerns by adhering to specific laws and customs practiced by Americans, and occurrences in Indian Territory seem to corroborate the Secretary of War's claims. In one incident, a United States citizen, apprehended in Indian Territory after committing a theft in the Cherokee Agency, received thirty-nine lashes from Cherokee lighthorsemen upon the recommendation of the American Indian agent. The agent concluded, because the culprit was "a proper subject of their laws, [he] had a right to receive the same penalties that would be inflicted on one of their own people for a similar offense."[31]

Despite these "advances," the United States government believed it could ill-afford to slow its efforts toward assimilating these and other groups of Native Americans throughout Indian Territory. Calhoun's letter to Clay further demonstrates the American government's goals:

> Although partial advances may be made under the present system to civilize the Indians, until there is a radical change, they will insensibly waste away in vice and misery. It is impossible, with their customs, that they should exist as independent communities. Our guardianship, and our opinion, and not theirs, ought to prevail.[32]

Foreman, *The Light-Horse in Indian Territory*, 34 CHRONS. OKLA. 18 (1956). Foreman notes that while in some cases the Cherokee did employ death by hanging, similarly to what the Choctaw did, most Cherokees requested death by rifle shot because it was feared the hanging rope would "damage the spirit." *Id.*

30. Letter to Speaker of the House Henry Clay from Secretary of War John C. Calhoun (Jan. 15, 1820), *in Progress Made in Civilizing the Indians*, 2 STATE PAPERS: INDIAN AFFAIRS, *supra* note 18, at 200-201.

31. Letter from Joseph McMinn, Cherokee Agency, to the Secretary of War (June 9, 1824) (available in National Archives, Office of Indian Affairs, Cherokee Agency East, Letters Received, Microcopy 234, Roll 71).

32. Letter to Henry Clay from John C. Calhoun, *supra* note 30, *in Progress Made in Civilizing the Indians*, 2 STATE PAPERS: INDIAN AFFAIRS, *supra* note 18, at 200-01.

In response to these and other pressures, as early as 1822, one Choctaw district mandated the punishment of thirty-nine lashes for infanticide, spousal abandonment, and livestock thievery.[33] In 1826, organized government and a code of written laws began in Mississippi with the adoption of a tribal constitution by a council of Choctaw chiefs and representatives of the nation's three districts. This constitution included a clause for lighthorsemen, charged with enforcing laws and executing punishments, who were to be placed under the command of the respective district chiefs.[34] Due in part to the federal government's efforts and influence, and their own understanding of group survival, the Choctaw began to abandon some of their ancient laws and accommodate what white society viewed as more civilized concepts within the framework of a written constitution.[35] Despite their efforts to accommodate white laws, the Choctaw could do little to accommodate the whites' increasing want for their land. In January 1830, the state of Mississippi passed legislation extending its laws over the Choctaw, thus denying the legitimacy of their tribal laws. In September, some eight months after Mississippi's legislative action, and much prodding from the United States federal government, the Choctaw signed the Treaty of Dancing Rabbit Creek, becoming the first of the Five Tribes to move to lands west of the Mississippi River.[36]

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33. CUSHMAN, *supra* note 7, at 88. For a discussion of Choctaw-white relations in Mississippi prior to statehood, see Martin Abbott, *Indian Policy and Management in the Mississippi Territory, 1798-1817*, 14 J. MISS. HIST. 153 (1952).

34. *See* CUSHMAN, *supra* note 7, at 150; LESTER HARGRETT, A BIBLIOGRAPHY OF THE CONSTITUTIONS AND LAWS OF THE AMERICAN INDIANS 54-55 (reprint ed. 1976) (1947); Blackburn, *supra* note 25, at 59-60. For a good overview of Choctaw constitutional development through the 1850s, see W. DAVID BAIRD, PETER PITCHLYNN: CHIEF OF THE CHOCTAWS 24-27, 53-55, 63-64, 69, 115-16, 124, 126 (1972).

35. ACCULTURATION IN SEVEN AMERICAN INDIAN TRIBES 487, 494 (Ralph Linton ed., 1963) [hereinafter ACCULTURATION]; William G. McLoughlin, *Who Civilized the Cherokee?*, 13 J. CHEROKEE STUD. 57 (1988). In chapter 9, Linton discusses the factor of selection by the receiving group, in this case the Choctaw. Ralph Linton, *The Process of Cultural Transfer*, *in* ACCULTURATION, *supra*, at 483. He notes that any society, so long as it exists as a distinct entity, will not take over all aspects or characteristics of an alien culture. *Id.* at 487. Rather, "[i]t will pick out certain things from the range of those made available for borrowing and accept these while remaining indifferent or actively opposed to others." *Id.* As was the case with the Choctaw and the accommodation of the nontraditional use of corporal punishment, the society is compelled to modify its culture if it is to survive within the context of new environmental conditions. *Id.* at 502. This point is further illustrated by McLoughlin in his discussion of the Cherokee. He notes that the "civilization" of the Cherokee, within a similar context, does not mean assimilation or acculturation "but rather a successful adaptation to new circumstances upon terms seen by their people as congruent with ancient cultural traditions." McLoughlin, *supra*, at 58. Here we can see the Choctaws' ability to adapt to, or accommodate the many changes forced upon them without losing a sense of identity or group cohesion. To a large extent this factor dispels much of the idea of assimilation or acculturation which in most cases implies passivity on the part of Native Americans.

36. Samuel J. Wells, *Federal Indian Policy: From Accommodation to Removal*, *in* THE

Forced removal to reservations west of the Mississippi River did little to change the legal course the Five Tribes chose for themselves while they still lived in their ancestral lands. After traveling through the Choctaw Nation, the Reverend Henry C. Benson noted that "The punishments, at the time of which we write [1859] consisted of fines, whipping, and death; and, there were no prisons in which to confine the culprits."[37] By the onset of the American Civil War the Choctaw had incorporated much of white culture into their own, and with it a strict adherence to corporal punishment.[38]

In 1861 an Act of Congress abolished flogging as a means of punishment in the United States Army. Eleven years earlier, a similar act abolished flogging as punishment in the United States Navy.[39] In the Choctaw Nation, though, there was a stark contrast. Through the decades subsequent to the Civil War and as late as 1901, Choctaw courts continued to punish guilty offenders by flogging.[40] Native Americans, still unaccustomed to the concepts of prison or confinement, eventually saw corporal punishment as a more honorable method of castigation.[41]

Introduced by Euro-Americans, the nontraditional use of corporal punishment, which seemed at first so alien to the Choctaw, evolved to become a traditional means of maintaining order. No longer could the previous traditional tribal customs serve the same purpose. During the Second District

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CHOCTAW BEFORE REMOVAL 181, 181-213 (Carolyn Keller Reeves ed., 1985); BAIRD, *supra* note 34, at 36-39; CLARK & GUICE, *supra* note 17, at 233-53; Treaty of Dancing Rabbit Creek, Sept, 27, 1830, U.S.-Choctaw, 7 Stat. 333, *reprinted in* KAPPLER, *supra* note 19, at 310.

37. HENRY C. BENSON, LIFE AMONG THE CHOCTAW INDIANS, AND SKETCHES OF THE SOUTH-WEST 29 (Johnson Corp. reprint 1970) (1860). Written from 1858-1859, Benson recollects his travels throughout the Choctaw Nation and Indian Territory before and after their removal west of the Mississippi River.

38. Five examples of corporal punishment passed by the Choctaw National Council in 1858 are: Kidnapping Act of Oct. 23, 1858, § 1 (Choctaw) (one hundred lashes for kidnapping), *reprinted in* CONSTITUTION AND LAWS OF THE CHOCTAW NATION, TOGETHER WITH THE TREATIES OF 1855, 1865, AND 1866, at 182 (Scholarly Resources photo. reprint 1973) (Joseph P. Folsom ed., 1869) [hereinafter CHOCTAW LAWS]; Livestock Act of Oct. 23, 1858, § 1 (Choctaw) (thirty-nine lashes for cruelty to animals), *reprinted in* CHOCTAW LAWS, *supra*, at 182-83; Larceny Act of Oct. 26, 1958, §§ 1, 4 (Choctaw) (one hundred lashes for larceny), *reprinted in* CHOCTAW LAWS, *supra*, at 187; Mayhem Act of Oct. 26, 1858, § 1 (Choctaw) (one hundred lashes for mayhem), *reprinted in* CHOCTAW LAWS, *supra*, at 192; Incest Act of Oct. 26, 1858, §§ 1, 2 (one hundred lashes for incest, and two hundred lashes, to be administered over two days, for repeated offense), *reprinted in* CHOCTAW LAWS, *supra*, at 190-91. Swanton notes that incest was traditionally a major crime among the Choctaw, but there is no record of the punishment on account of it. SWANTON, SOURCE MATERIAL, *supra* note 3, at 111.

39. Act of Aug. 5, 1861, ch. 54, § 3, 12 Stat. 316, 317; Act of Sept. 28, 1850, ch. 80, 9 Stat. 513, 515.

40. Records of the Mosholatubbee District Court at 77-78 (vol. 350 of Choctaw Nat'l Records, Okla. Hist. Soc'y); Records of the Pushmataha District Court at 46 (vol. 371 of Choctaw Nat'l Records, Okla. Hist. Soc'y); Records of the Apuckshunnubbee District Court at 49, 54, 60, 76, 81 (vol. 362 of Choctaw Nat'l Records, Okla. Hist. Soc'y).

41. STRICKLAND, *supra* note 9, at 168-69; DEBO, *supra* note 7, at 176-77.

Court at Apuckshunubbee's December 1897 term, the court heard 111 cases. Of the 107 identifiable cases, fifty of the defendants were sentenced to be flogged for their crimes. Petty larceny, grand larceny, and rape all carried one hundred lashes if convicted. Others, guilty of lesser crimes, received fewer lashes.[42]

One account of corporal punishment in the Choctaw Nation noted this procedure:

> Before the hour appointed the neighborhood assembled around the church which stood about forty rods distant from the missionhouse, where they indulged in social conversation and smoking; never, however, mentioning, or even hinting the subject which had brought them together. The culprit was as gay and cheerful as any of them, walking with an air of perfect indifference, chatting and smoking with various groups sitting around on blankets spread upon the ground. Precisely at the moment designated, the lighthorse would appear. The crowd then went into the church, closed the door and commenced singing a religious hymn, taught them by the missionaries, which they continued until the tragedy outside was over. At the same time the culprit shouted "Sa mintih!" (I have come!) then ejaculated "Sa kullo!" (I am strong!). He then elevated his arms and turned his back to the executioner and said: "Fummih" (whip). When he had received fifteen or twenty blows, he calmly turned the other side to the Fum-mi (one who whips); and then again, his back, uttering not a word nor manifesting the least sign of pain. As soon as the whipping was over, the church door was opened and the whole assembly came out and shook hands with the "Fum-ah" (whipped), thus reinstating him to his former position in society, and the subject was then and there dropped, never to be mentioned again, and it never was.[43]

Similar occurrences saw culprits tied to whipping trees or posts, often in the center of town among stores, churches, and schools, where all present lighthorsemen participated in executing the punishment. If a person fainted during the punishment they were not released until all the lashes were inflicted. In some cases involving the particularly severe punishment of a hundred lashes, the recipients might die as a result.[44] Another account noted

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42. Records of the Apuckshunnubbee District Court at 16 (vol. 362 of Choctaw Nat'l Records, Okla. Hist. Soc'y).

43. CUSHMAN, *supra* note 7, at 159; SWANTON, SOURCE MATERIAL, *supra* note 3, at 112-13. Swanton also uses Cushman's account as his primary example of corporal punishment among the Choctaw.

44. Interview with Charlie Bird (Creek) (n.d.), in Grant Foreman, 8 Indian-Pioneer Papers

that the convicted offender was tied to the front door of the court house and lashed with a dogwood switch administered up and down the bare back. Many people within the larger tribal community, no longer just the guilty party's immediate family or clan, attended floggings and executions.[45]

These recollections demonstrate a number of conditions that were at one time unknown to the Choctaw and their legal traditions. Their acceptance of an alternative method of coercion and control assumes the long-term considerations of group survival. Ultimately the continuation of any semblance of a Choctaw sovereignty was preferable to complete tribal fragmentation through white assimilation.[46] The development of centralized authority, at the expense of customary standards of individual freedom checked primarily through family and clan relationships, enabled the larger group structure to survive.[47]

This centralized authority prompted changes in traditional legal concepts and the use of corporal punishment. Significantly, a member of the larger tribal community flogged a fellow tribesman guilty of a criminal act. Unlike earlier times, neither man was likely to adhere to any traditional notions of clan or family-kinship affiliation. Consequently the individual administering the punishment was not likely to be related to the culprit, either by family or clan. Criminals were no longer recipients of passive ridicule or ostracism as a means of coercion. Conformity for the tribe's greater good was achieved solely through fear of physical abuse. The flogging itself was sometimes carried out on the steps of the court house, a structure built to facilitate a written legal code's administration. These conditions represent few of the traditional customs the Choctaw had once employed. Forced to survive within the confines of an increasingly hostile alien culture, the Choctaw saw no other alternative than to selectively abandon certain traditional relationships and embrace some of the nontraditional ways of Euro-American culture.[48]

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142 [hereinafter Papers] (available at the Oklahoma Historical Society); Interview with Zeke Bibber (Choctaw) (n.d.), in 8 Papers, *supra*, at 10; Interview with George Brown (Choctaw) (n.d.), in 12 Papers, *supra*, at 81; Interview with G.W. Burroughs (white resident of the Creek Nation) (n.d.), in 13 Papers, *supra*, at 381, Interview with Alec Berryhill (Creek) (n.d.), in 7 Papers, *supra*, at 376-77; THEDA PERDUE, NATIONS REMEMBERED: AN ORAL HISTORY OF THE CHEROKEES, CHICKASAWS, CHOCTAWS, CREEKS, AND SEMINOLES IN OKLAHOMA, 1865-1907, at xv-xx, 32-34 (1993). In her introduction Perdue emphasizes the importance of the oral tradition, particularly among Native Americans, and the great research opportunities provided by Foreman and the other Works Progress Administration employees associated with the "Indian-Pioneer Papers" project.

45. Interview with Arther J. Cline (white resident of the Choctaw Nation) (n.d.), in 2 Papers, *supra* note 44, at 121.

46. RENNARD STRICKLAND, *To Do the Right Thing: Reaffirming Cherokee Traditions of Justice Under Law*, 17 AM. INDIAN L. REV. 337, 342-43 (1992).

47. Eggan, *supra* note 9, at 42, 49; Gilbert, *supra* note 2, at 351.

48. CHAMPAGNE, *supra* note 2, at 26. Champagne notes that if the Choctaw are to form a centralized and differentiated society, they will need to institutionalize a differentiation of locality

The United States' administration in the Indian Territories seemingly proved to be successful in its efforts to acculturate and civilize the Native American. Whites assumed correctly that many Indians would be compelled, through either influence or force, to adopt new cultural standards on the road to full assimilation. Corporal punishment became a component of this perceived assimilation. Initially it was considered a far more civilized and efficient method for maintaining order, rather than the Native Americans' practice of ridicule and ostracism, and blood revenge, which whites clearly did not understand. Nevertheless, the United States Government did not necessarily recognize that the Indians, in the face of losing all vestiges of tribal identity, were willing to accept certain aspects of white culture only so that they might preserve elements of their own.

By the latter half of the nineteenth century, corporal punishment had been largely abandoned in the United States. Arkansas, which was directly adjacent to the Choctaw Nation, as an organized territory, did employ corporal punishment during the first half of the nineteenth century; however, by 1848 it was no longer in the state's legal statutes.[49] Similarly, Oklahoma Territory, once a part of Indian Territory, first enacted statutes relating to criminal procedure in 1890, making no provisions for corporal punishment. Instead, conviction of a felony or misdemeanor carried the punishment of death, imprisonment, or fine.[50] Prior to its official organization, Oklahoma Territory operated under the auspices of Nebraska law which also made no provision for corporal punishment.[51]

Increasingly, white society viewed Indian Territory as a lawless land, where tribal courts and their primitive laws and customs were ill-equipped to contend with the ways of modern society. In the June 1890 issue of *New England* magazine, W.D. Crawford cautioned readers, "The great and crying evil of the hour here [Indian Territory] is the uncertainty and lack of law. Perhaps in no place in the world may be found such a complicated system of nation within nation, and laws so vague and administered by such a variety

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and kinship from political organization, and simultaneously build political commitments to a national government that replaces any local, regional, and kinship loyalties. Seemingly, this particular incident demonstrates this transition noted by Champagne.

49. LAWS OF ARK. TERRITORY, Crimes & Misdemeanors § 7(2), at 173 (J. Steele & J. M'Campbell comps., 1835); *id.* § 8(1), at 174; *id.* § 11(1), at 175; *id.* § 13(1)-(4), at 176-80; E.H. ENGLISH, A DIGEST OF THE STATUTES OF ARKANSAS: EMBRACING ALL LAWS OF A GENERAL AND PERMANENT CHARACTER, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY OF 1846; TOGETHER WITH NOTES OF THE DECISIONS OF THE SUPREME COURT UPON THE STATUTES 318-428 (1848). It should be noted, however, that these statutes applied solely to whites. Blacks were subject to corporal punishment. *Id.*

50. THE STATUTES OF OKLAHOMA, 1890, at 956 (Will T. Little comp., 1891).

51. COMPILED STATUTES OF THE STATE OF NEBRASKA, 1881 (4TH EDITION), WITH AMENDMENTS OF 1882 TO 1889, COMPRISING ALL THE LAWS OF A GENERAL NATURE IN FORCE, NOVEMBER 1, 1889, at 999-1099 (Guy A. Brown & Hiland H. Wheeler comps., 1889).

of courts and officials."[52] In a similar article printed in the February 1895 issue of the *North American Review*, United States Senator Orville H. Platt, a Republican from Connecticut, lamented, "Five separate Indian governments, dealing only with Indian citizens and their property, are no longer adequate, or, indeed tolerable. There must be government there for whites as well as for Indians, and it must be adopted to the wants of both." Platt concluded, in a most patriotic manner, "Indian governments no longer protect life, liberty, and property."[53] Such harsh criticisms as these, voiced within the national arena, made it increasingly clear that many in white society fervently disagreed with Native American legal procedures in Indian Territory. Conversely, many who actually lived in Indian Territory, both Indian and white, viewed these political and cultural jeremiads as entirely unfounded. Territorial residents believed law and order in the Choctaw Nation and the rest of Indian Territory was just and effective.[54]

Throughout this period the Choctaw continued to rely on flogging for punishments until the provisions of the Curtis Act officially ended tribal government in Indian Territory in 1906.[55] Clearly, though, by this time white society's opinion of corporal punishment had changed. Corporal punishment was now recognized as an "uncivilized" method of deterring criminal behavior. Many believed that the Indians might complete their assimilation into white society, if they were only willing to abandon this archaic practice.

Although the Choctaw early on did accept the more nontraditional application of corporal punishment, by the 1900s it had become an integral part of their social and legal traditions. The Choctaw continued to use flogging after it was no longer practiced by whites in the United States, for it had represented to them a semblance of tribal identity which they had adopted early in their association with white culture.

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52. W.D. Crawford, *Oklahoma and the Indian Territory*, 2 NEW ENG. MAG. 454, 456 (1890).

53. Orville H. Platt, *Problems in Indian Territory*, N. AM. REV., Feb. 1895, at 160, 198.

54. Interview with Melvina Franklin Brown (Choctaw) (n.d.), in 12 Papers, *supra* note 44, at 142-43; Interview with Alec Berryhill (Creek) (n.d.), in 8 Papers, *supra* note 44, at 376-77; Interview with Richard Lewis Berryhill (Creek) (n.d.), in 8 Papers, *supra* note 44, at 437-39; Interview with Freelyn Alex (Creek) (n.d.), in 2 Papers, *supra* note 44, at 10-12; Interview with Tandy Anderson (Choctaw) (n.d.), in 2 Papers, *supra* note 44, at 360-61; Interview with William T. Cuthbertson (white resident of the Choctaw Nation) (n.d.), in 2 Papers, *surpa* note 44, at 350-57; Interview with Lee Ary (white resident of the Choctaw Nation) (n.d.), in 3 Papers, *supra* note 44, at 183.

55. COHEN, *supra* note 21, at 429-30. The Curtis Act, passed in 1898, provided for the end of tribal courts in Indian Territory and declared Indian law unenforceable in federal courts. For the Choctaw, however, tribal government was not officially terminated until March 4, 1906. *Id.*