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THE INDIAN TRADITION IN EARLY AMERICAN LAW

Yasuhide Kawashima*

I. Introduction

In dealing with Indians, the English colonists did not use concepts of international law and conflicts of law, i.e., rules that determined jurisdiction in cases where individuals from different countries were involved. Instead, the colonists tried to extend their own law to the Indians. By the eighteenth century this policy was well-established.

However, an examination of statutes and court records reveals that the colonial government made exceptions to this rule, according some Indians special legal treatment by virtue of the Indians' own culture.¹ This article will discuss some of the major differences.

For example, while the colonists were willing to pay to thwart revenge for the killing of an Indian by a colonist, they were reluctant to allow Indians to compensate for the killing of a colonist, a common rule in the Indian tradition of retributive justice. The colonists instead demanded that the accused Indian stand trial in a colonial court.²

Although few in number, some colonists favored personalty (personal law) as opposed to the prevailing territoriality (territorial law). In 1648, William Pynchon of Springfield, Massachusetts challenged the orthodox view that all accused criminals, including Indians, must be tried at the court in the area where the crime was committed. Pynchon questioned whether Bay Colony magistrates could rightly apprehend and pass judgment on Indians in western Massachusetts who had allegedly murdered other Indians. Although the crime had

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1. The fundamental problem between the two cultures was that Indian law was based upon *personalty* (personal law), that is, the law of the land where the individual resides rules. The European legal system, on the other hand, was based upon *territoriality* (territorial law), the principle that the law of the place of action rules. Indian law involved principles of kinship, consanguinity, and principles of blood feud and clan responsibility — ideas alien to English common law.

To the Indians, law and justice were personal and were clan matters not generally involving a third party and certainly not involving an impersonal public institution. The Indians considered such English legal apparatus as courts, juries, and jails meaningless. See WILCOMB E. WASHBURN, *THE INDIAN IN AMERICA* 17-18 (1975); JOHN P. REID, *A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION passim* (1970); YASUHIDE KAWASHIMA, *PURITAN JUSTICE AND THE INDIAN: WHITE MAN'S LAW IN MASSACHUSETTS 1630-1763*, at 5-7, 177 (1986).

2. KAWASHIMA, *supra* note 1, at 230.

been committed "within the line of the patent," these Indians, he insisted, should "be esteemed as an independent free people" with their own law.³ Pynchon's position, which fully took the Indian legal tradition into consideration, was held by a very small minority and never accepted by the Puritan authorities.

II. Indians in Colonial Courts

A. Witnesses and Testimony

Because they were neither Christian nor familiar with colonial law, Indians were treated reasonably in court procedure. Indians were not bound by rules of sworn court testimony, i.e., testimony by Indians was accepted as fully admissible even though not sworn.⁴ Also, despite occasional doubts expressed by some colonists about its validity, an Indian's testimony was generally admitted as truthful.⁵

Later, popular prejudice against Indians tended to discredit them as competent witnesses.⁶ As a result, cases accepting an Indian's testimony as valid occurred less frequently during the eighteenth century. Even in trials of non-whites, an Indian's testimony was occasionally restricted, though Indians were more readily accepted as witnesses in the trial of another Indian. In 1723, the Boston selectmen ruled that "Indian Negro and molatto Evidences only with Concurring Circumstances Shall be proff sufficient to Convict Indian Negro or Molattos."⁷

In civil cases, few Indians were called to testify. In colonist versus Indian cases, however, Indian witnesses appeared before the court more frequently.⁸ In fact, colonial statutes extended the testimonial power of the plantation and tribal Indians in the trials of colonists. A 1694 act made the plantation Indians' testimony fully admissible where a colonist was on trial for selling liquor to an Indian "with other concurring circumstances amounting to an high presumption in

3. HENRY H. MORRIS, *EARLY HISTORY OF SPRINGFIELD, 1636-1675*, at 68-71 (1876).

4. 11 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 236 (Nathaniel B. Shurtleff & David Pulsifer eds., 1855-1861) [hereinafter *PLYMOUTH RECORDS*]; ALDEN T. VAUGHN, *NEW ENGLAND FRONTIER: PURITANS AND INDIANS, 1620-1675*, at 193 (rev. ed. 1979); James Axtell, *Through a Glass Darkly, Colonial Attitudes Toward the Native Americans*, *AM. INDIAN CULTURE & RES. J.* 19 (1974).

5. 3 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY, 1630-1692, at 222 (John Noble & John F. Cronin eds., 1901-1921) [hereinafter *ASSISTANTS RECORDS*]; 1 RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680, at 183-84 (Samuel E. Morison ed., 1933).

6. Axtell, *supra* note 4, at 19.

7. 8 REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON 175 (1876-1909); 1 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY 151 (1869-1922) [hereinafter *MASS. ACTS & RESOLVES*]; 2 *id.* at 32, 36, 42, 54-55, 781-82.

8. 1 ASSISTANTS RECORDS, *supra* note 5, at 51-55.

the discretion of the court or justices who have cognizance of the case."⁹

Another liquor law, in 1735, gave the Indians, on the eastern and western frontier, both independent and semi-independent (tributary) from Massachusetts Bay, full function as witnesses in cases involving Indian trade. These remote Indians were largely ignorant of the colonists' law and procedure, but the authorities, faced with wholesale violation of liquor regulations, stipulated that traders dealing in liquor with the Indians could be convicted solely by "the accusation and affirmation" of Indians who were brought face-to-face with the accused. Outside the area of trade, Indians were allowed to testify against colonist-defendants only in extraordinary cases.¹⁰

The southern colonies had similar practices. Although in interracial trade and land disputes Indian testimony was usually accepted as valid, there were restrictions because the Indians were not Christians. A Maryland law of 1717 declared that no Indian, slave or free, should be admitted as witness against any Christian white person.¹¹ Non-Christian minorities (which included Negroes and Mulattoes) could only be admitted as witnesses against each other. In Virginia, Christian Indians were often permitted to appear as witnesses if they were able to give some account of Christian principle. It was not until 1723 that the testimony of Indians, as well as Negroes and Mulattoes, was made admissible, under certain circumstances, in the trial of slaves for capital crimes. The court was required to instruct the witnesses to tell the truth and to warn them of the especially harsh penalty for perjury.¹²

By 1732, all Indians were forbidden to be witnesses except in the trials of slaves for capital crimes. However, a year later free Indians were permitted to appear without oath as witnesses in the trial of another free Indian. A 1744 statute went even further and allowed any free and Christian Indian to be a sworn witness in civil and criminal cases of other Indians.¹³ During the 1740s, North and South Carolina enacted similar laws. Georgia, which did not have a large

9. 1 MASS. ACTS & RESOLVES, *supra* note 7, at 151; 2 *id.* at 32, 36, 42, 54-55, 781-82.

10. See 2 *id.* at 781; 4 *id.* at 406, 689; see also Ronald O. MacFarlane, *Indian Relations in New England, 1620-1760: A Study of a Regulated Frontier* 613-14 (1933) (unpublished doctoral dissertation, Harvard University).

11. 1 LAWS OF MARYLAND, WITH THE CHARTER, THE BILL OF RIGHTS, ETC., 1704-1809, at 140 (Virgil Maxcy ed., 1811).

12. See W. Stitt Robinson, Jr., *The Legal Status of the Indian in Colonial Virginia*, 61 VA. MAG. HIST. & BIOGRAPHY 247 (1953); 4 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, 1619-1792, at 127-28 (William W. Hening ed., 1809-1823) [hereinafter VIRGINIA STATUTES].

13. See VIRGINIA STATUTES, *supra* note 12, at 326-27, 405; 5 *id.* at 244-45; Robinson, *supra* note 12, at 253.

population of slaves and servants, did not enact any laws regarding an Indian's testimony.¹⁴

B. Jurors

Colonial courts used Indians as jurymen for Indian trials, although the majority of the panel was made up of colonists. More often, the Indian jurors supplemented, rather than substituted for, colonist jurymen. The function of these Indian jurors was to give advice to the colonist jurors. These Indian jurors were always Christian and "civilized" and were familiar with the colonial law yet they still understood the traditional Indian way of life.¹⁵

During the eighteenth century, in some Massachusetts counties where a large number of Indians resided, Indians were regularly impanelled for trials involving Indians. Indians were impanelled as jurors less often in civil trials than in criminal trials, but no law explicitly barred or restricted them from being civil jurors.¹⁶

III. Early Colonists' View on Indian Land Ownership

A. The Indians' Concept of Land Ownership

The unique nature of Indian land use and ownership attracted the attention of the colonists. The colonists soon recognized that Indians were utilizing the resources of their entire territory and not limiting usage to the "land possessed and improved by subduing,"¹⁷ in the narrow English concept of property ownership. Observers of Indian society must have been convinced that improved meant utilized, not just "under cultivation," and that Indians could not live off cultivated

14. THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA, FROM ITS FIRST ESTABLISHMENT . . . TO 1790, at 166-67 (John F. Grimke ed., 1790) [hereinafter PUBLIC LAWS OF SOUTH CAROLINA]; RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 193 (1774).

15. See 1 ASSISTANTS RECORDS, *supra* note 5, at 21-22; 5 PLYMOUTH RECORDS, *supra* note 4, at 159, 167.

16. See RECORDS OF THE SUPERIOR COURT OF JUDICATURE, COURT OF ASSIZE AND GENERAL GOAL DELIVERY, 1692-1780, at 175 (1730-1733) (manuscript court records available at the Office of the Clerk of the Supreme Judicial Court, Suffolk County Courthouse, Boston); ALEXANDER STARBUCK, THE HISTORY OF NANTUCKET, COUNTY, ISLAND AND TOWN 102-04 (1924); THE DIARIES OF BENJAMIN LYNDE AND BENJAMIN LYNDE, JR., WITH AN APPENDIX 25, 29 (1880); THE COLONIAL LAWS OF MASSACHUSETTS . . . WITH THE SUPPLEMENTS THROUGH 1686, at 152 (William H. Whitmore ed., 1887); COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, 1639-1702: THE PYNCHON COURT RECORD, AN ORIGINAL JUDGES' DIARY OF THE ADMINISTRATION OF JUSTICE IN THE SPRINGFIELD COURTS IN THE MASSACHUSETTS BAY COLONY 181 (Joseph H. Smith ed., 1961); EDWIN POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS, 1620-1692, at 89, 536, 553 (1966).

17. 1 JOHN WINTHROP, WINTHROP'S JOURNAL, "HISTORY OF NEW ENGLAND," 1630-1649, at 1, 294, 306 (James K. Hosmer ed., 1908).

land alone. Before long, colonists conceded that the land "possessed and improved by subduing" included, as far as the Indian was concerned, practically all of the tribe's territory.¹⁸ Thus, by the 1640s, it was the accepted view that colonists had no justification for taking over land as they did; the Indian did indeed hold the land in fee simple.¹⁹

The right to land was one of the most important of tribal rights. Tribal land ownership was an arrangement in which the chief or leader held the land in trust for the benefit of all the members of the tribe, not as his personal property. Land was allotted for planting fields to particular individuals for the use by their families, and the land reverted back to the tribe if that family died out.²⁰ Individual tribal members, having only the right of occupancy and use, could not alienate the land to colonists. Only the sachem, or chief, with the approval of the tribal members, was allowed to convey land belonging to the tribe.

B. The Early Colonists' Compensation for Land

Throughout the first century of colonization, Massachusetts colonists persistently tried to pay the Indians for the lands they settled, a practice later followed by other English colonies.²¹ Yet, how fully the Indians were compensated for their land is another matter.

In Indian-colonist land transactions, the colonists recognized the importance of the Indian system of land use and ownership. Still, the colonial authorities tried to resolve the conflicting property theories haphazardly. When the colonists, individually or collectively, bought land from a tribe, they did not usually ensure that individual tribal members, who had been fully guaranteed their livelihood under the tribal system, were fairly compensated. Often the colonists provided the Indians with easements: rights to hunt and fish in perpetuity, to maintain a residence, and to cultivate a garden in one corner of their former territory.²²

18. FELIX S. COHEN, *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX COHEN* 266 (1960); ROGER WILLIAMS, *A KEY INTO THE LANGUAGE OF AMERICA OR, AN HELP TO THE LANGUAGE OF THE NATIVES IN THAT PART OF AMERICA, CALLED NEW-ENGLAND* (1643), reprinted in 1 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 96, 120 (Reuben A. Guild & James H. Trumbull eds., 1963); Frank G. Speck, *The Family Hunting Band as Basis of Algonkian Social Organization*, 17 *AM. ANTHROPOLOGIST* 290 (1915); Ruth B. Moynihan, *The Patent and the Indians: The Problem of Jurisdiction in Seventeenth-Century New England*, 2 *AM. INDIAN CULTURE & RES. J.* 14 (1977).

19. COHEN, *supra* note 18, at 237.

20. See Anthony F.C. Wallace, *Political Organization and Land Tenure Among the Northeastern Indians, 1600-1830*, 13 *SW. J. ANTHROPOLOGY* 318 (1957); Speck, *supra* note 18, at 290; Moynihan, *supra* note 18, at 15.

21. KAWASHIMA, *supra* note 1, at 50-51.

22. *E.g.*, Axtell, *supra* note 4, at 17; KAWASHIMA, *supra* note 1, at 45-46.

At first, the colonists earnestly desired to protect Indians from encroachment. Some legislatures expressed sincere beliefs that the Indians, the ancient inhabitants, should have "a convenient Dwelling-Place, in this their native Country,"²³ free from invasion. Some colonies provided places for oystering and fishing and for gathering tuckahoes and wild oats, even when the lands belonged to the English.²⁴

C. *Conflict Between the Two Cultures*

The 1717 treaty negotiation at Georgetown, Maine clearly demonstrated the inherent difficulty arising from two conflicting concepts of land ownership. The spokesman for the northern New England tribes requested Governor Samuel Shute to order that they not be "molested in the Improvement of our Lands."²⁵ The governor responded that the Indians "Desist from an Pretensions to Land which the English own" and "must not call it their Land, for the English have bought it of them and their Ancesters."²⁶ The Indian delegates persisted, demanding that no more settlement be made on their land, because "We shan't be able to hold them all in our Bosoms, and to take care to shelter them, if it be like to be bad Weather, and mischief be Threatened." The governor simply turned a deaf ear to the appeal.²⁷

Later, a number of the Indians were brought to court for encroaching upon a colonist's land. The early courts, often considering the Indians' way of land use, rendered judgments either for the colonial plaintiffs with nominal damages or for the Indian defendants. In difficult cases, the courts were compelled to appoint committees to investigate the situation.²⁸

Occasionally, the courts were forced to decide issues *between* Indians relating to their tradition and custom. For example, on Nantucket Island, Massachusetts, in 1742, an Indian woman acting as the guardian of her son, Mussaquit, the sachem of the Nantucket Indians, sued two other Indians for plowing her son's land. She demanded fifteen shillings per acre as an acknowledgement. She insisted that no land should be improved by any Indian without the sachem's consent. The justice

23. 2 VIRGINIA STATUTES, *supra* note 12, at 140.

24. See, e.g., 3 VIRGINIA STATUTES, *supra* note 12, at 467; see also STARKE, *supra* note 14, at 211.

25. A Conference of His Excellency the Governor Samuel Shute, with the Sachems and Chief Men of the Eastern Indians . . . , at 7-8 (1717) (Huntington Library Manuscripts No. 15105) (available at Huntington Library, San Marion, Calif.).

26. *Id.*

27. *Id.*; 3 MAINE HISTORICAL SOCIETY COLLECTIONS 361-75 (1st ser., 1831-1906) [hereinafter MAINE HIST. COLLECTIONS].

28. CHARLES E. BANKS' COPY OF DUKES COUNTY COURT RECORDS: DOCUMENTS RELATING TO MARTHA'S VINEYARD COURT RECORDS 22 (n.d.) (manuscript records available at the New England Historic Genealogical Society, Boston, Mass.) [hereinafter DUKES COUNTY COURT RECORDS]; KAWASHIMA, *supra* note 1, at 188-89.

of the peace court ruled in her favor and, on appeal, the Common Pleas court affirmed. The defendants then deviated from the normal appeal procedure and petitioned the General Court for permission to appeal to the Superior Court or for some other means of securing their demands. The defendants, having attracted the General Court's attention, asserted that they were entitled in their inherent tribal relations to improve the sachem's land without paying for it. A committee appointed by the General Court studied the situation. The committee discreetly suggested that the General Court make recommendations acceptable to both parties instead of having the Superior Court decide the issue, mainly because of the court costs to be imposed eventually on one of the parties.²⁹

III. Colonial Treatment of Indian Criminals

A. Sex Crimes

In criminal affairs, Indian offenders sometimes received lighter punishment because Indian law defined and punished fewer sex crimes than European law. For example, there was no crime of fornication. Sexual relations, except for the rare occurrences of rape, were personal matters outside the jurisdiction of sachem and council.³⁰ However, in colonial communities, strict punishment of Indians for a sex crime against a colonist or against a resident Indian was a general policy. That strict policy resulted from the colonists' desire to protect their own society and to force Indians to conform to the colonial concept of sexual crime. Yet, occasionally, the authorities were forced to compromise. For example, in 1682, a Plymouth court tried an Indian who had allegedly raped a colonist woman. The statutory penalty was death, but after conviction he was sentenced to a whipping and ordered to leave the colony "considering hee was but an Indian, and therefore in an incapacity to know the horribleness of the wickedness of this abominable act, with other cerconstences considered."³¹

Sex crimes among Indians outside the colonists' communities apparently went largely undetected. It may well be that the authorities chose not to enforce the law rigidly against the tribal and plantation Indians, who presumably had no clear concept of sexual crimes.³²

29. 13 MASS. ACTS & RESOLVES, *supra* note 7, at 175.

30. See REID, *supra* note 1, at 75, 78; DANIEL GOOKIN, HISTORICAL COLLECTIONS OF THE INDIANS IN NEW ENGLAND . . . (1674), reprinted in MAINE HIST. COLLECTIONS, *supra* note 27, at 149; ELISABETH TOOKER, AN ETHNOGRAPHY OF THE HURON INDIANS, 1615-1649 28 (1964); KAWASHIMA, *supra* note 1, at 6.

31. See 1 ASSISTANTS RECORDS, *supra* note 5, at 21-22; 5 PLYMOUTH RECORDS, *supra* note 4, at 98; see also David Bushnell, *Treatment of Indians in Plymouth Colony*, 36 NEW ENG. Q. 205 (1953).

32. KAWASHIMA, *supra* note 1, at 167.

B. Property Crimes

Similarly, colonial authorities carried out discretionary policies toward an Indian accused of crime against property. In Indian society, the two seemingly incompatible concepts of individual ownership and sharing existed concurrently. This practice stressed user's rights over the rights and powers of nominal owners. However, because of this, "theft" became the most frequently charged crime among Indians, but such offenses were seldom brought before the court.³³

C. Exemptions for Indians

1. Hunting Laws

Indians were exempted specifically from some colonial laws. When authorities prohibited deer hunting for particular months of the year to prevent extinction, Indians, whose very existence depended on the deer, were exempted and allowed to hunt deer freely for their own use.³⁴

2. Fencing Laws

Legislatures and courts throughout the colonies imposed upon the landowner a duty to fence his land against trespassing cattle. If this requirement was not met, damages caused by cattle were not recoverable.³⁵ Here, Indians were treated differently because the early colonists recognized the Indian way of life and tried to protect the Indians' interests. As early as 1641, the Massachusetts General Court ordered colonists to keep their cattle from destroying the Indian corn. The town was to help the Indians fence their cornfields; if they refused, they would assume only one-half of the damage (not the entire damage as whites were required to do) incurred by the roaming cattle.³⁶

Another court ordered townspeople to build fences around Indian-

33. WASHBURN, *supra* note 1, at 21-22, 31-33; John H. Dowling, *Individual Ownership and the Sharing of Game in Hunting Societies*, 70 AM. ANTHROPOLOGIST 502-07 (1968); KAWASHIMA, *supra* note 1, at 175; *see also, e.g.*, DUKES COUNTY COURT RECORDS, *supra* note 28, at 17, 19-22.

34. LAWS OF MARYLAND AT LARGE, 1637-1763, at 1730, ch. 17 (Thomas Bacon ed., Annapolis, 1765); PUBLIC LAWS OF SOUTH CAROLINA, *supra* note 14, at 275-76; Yasuhide Kawashima & Ruth Tone, *Environmental Policy in Early America: A Survey of Colonial Statutes*, 27 J. FOREST HIST. 175-76 (1983).

35. *See* 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, 1628-1686 106, 215, 241, 333 (Nathaniel B. Shurtleff ed., 1853-1854) [hereinafter RECORDS OF MASSACHUSETTS BAY]; 2 *id.* at 15, 39; 3 *id.* at 241; *see also* THE COLONIAL LAWS OF MASSACHUSETTS, REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672, CONTAINING ALSO THE BODY OF LIBERTIES OF 1641, at 132 (William Whitmore ed., 1889); RICHARD B. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW, WITH SPECIAL REFERENCE TO THE SEVENTEENTH AND EIGHTEENTH CENTURIES 209 (2d ed. 1964); DAVID T. KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692, at 118 (1979).

36. *See* THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 28-29 (Thomas Barnes ed., 1975); 1 RECORDS OF MASSACHUSETTS BAY, *supra* note 35, at 150.

owned fields at their own expense and to construct an impoundment where the Indians would keep straying animals until proper compensation was paid. An act in 1667 required colonists who failed to help the Indians to construct fences to pay the full damage if their stock trespassed onto Indian land.³⁷

Statutory regulations and court decisions on fencing formulated a protective policy for the Indians. However, by the end of the 1600s, the Indians were no longer considered separate and came under the uniform law of fencing.³⁸

3. *Fires*

The colonists adopted from the Indians the use of fire as a means of forest modification. Indians had used fire extensively to clear forest undergrowth, thereby facilitating travel, encouraging the growth of fodder for deer, and clearing land for planting. The Indians claimed that the fire, which was set twice a year, did not threaten soil fertility or mature woody vegetation.³⁹

Colonists later came to use fire chiefly as a means of clearing land for planting. The tool was the same, but the effect was different. The fires set by the Indians burned primarily the undergrowth, were not as hot, and did less damage to the soil than those of the colonists.

In most colonies during the seventeenth century, burning was allowed under restricted conditions. In 1634, Plymouth passed the first fire prevention legislation forbidding the setting of fires, except for specific seasons. Other colonies established similar burning seasons. As a method of forest clearing, the use of fire continued, but later laws became

37. See 11 PLYMOUTH RECORDS, *supra* note 4, at 143, 219; THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY NEW PLYMOUTH 652 (William Brigham ed., 1836).

Other colonies went further. The Duke of York's Law made the town assume the responsibility for compensating Indians whose corn had been damaged by cattle. Similarly, a court in Hartford, Connecticut, in 1659, ruled that the owners of cattle should make retribution to Indians whose corn was damaged. See DUKE OF YORK'S BOOK OF LAW 34 (1665), *quoted in* MORRIS, *supra* note 35, at 216; RECORDS OF THE PARTICULAR COURT OF CONNECTICUT, 1639-1663, *reprinted in* 22 CONNECTICUT HISTORICAL SOCIETY COLLECTIONS 208 (1928).

38. See 1 MASS. ACTS & RESOLVES, *supra* note 7, at 333-34; KONIG, *supra* note 35, at 187.

39. WILBUR R. JACOBS, DISPOSSESSING THE AMERICAN INDIAN: INDIANS AND WHITES ON THE COLONIAL FRONTIER 8, 25, 127 n. (1972); CHARLES F. CARROLL, THE TIMBER ECONOMY OF PURITAN NEW ENGLAND 30-32, 34-35, 164 (1973); CALVIN MARTIN, KEEPERS OF THE GAME: INDIAN-ANIMAL RELATIONSHIPS AND THE FUR TRADE 180 (1978); Calvin Martin, *Fire and Forest Structure in the Aboriginal Eastern Forest*, INDIAN HISTORIAN, Fall, 1973, at 38, 38-41; GEORGE P. MARSH, MAN AND NATURE 120 (1965).

more strict and more conscious of the long-term effects of fire upon the environment.⁴⁰

Later, some colonies prohibited forest clearing by fire altogether. A 1727 New York law directed at the burning of old grass on Hampstead Plains is noteworthy for its ecologically sensitive attitude. The Act prohibited the "ill and useless Practice" of burning, insisting that it impoverished the soil, destroyed the roots of the grass, and disposed the ground to barrenness. The Act imposed a ten-pound fine for a violation. None of these colonial laws, however, ever restricted the Indians' burning practice.⁴¹

V. Conclusion

The early colonists' sensitivity toward the Indian tradition and custom, demonstrated in various areas of colonial law, should not be overemphasized. In some areas, the authorities exhibited apathy, indifference, and hostility toward the Indian culture.⁴²

Quite simply, the colonists' consideration of the native culture in their legal policy and practice was a passive approach. The colonial authorities considered Indian law and custom in order to accord equitable treatment for the Indians who were caught in the clash of the two cultures. The colonists did not intend to learn from the Indians or adopt their principles. In fact, no significant changes took place in the English legal tradition as the result of Indian contact.

40. See 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND, 1636-1792, at 96, 107, 114 (J. R. Bartlett ed., 1856-1865); 3 *id.* at 513; 5 *id.* at 340; see also CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 112 (J.H. Trumbull & C.J. Hoadley eds., 1814); 7 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, 1636-1776, at 456-57 (1850-1890); CHARTER TO WILLIAM PENN. AND LAWS OF THE PROVINCE OF PENNSYLVANIA, PASSED BETWEEN THE YEAR 1682 AND 1700, at 137, 208 (George Staughton, *et al.*, eds., 1879); 3 MASS. ACTS & RESOLVES, *supra* note 7, at 40-41, 682-83.

41. See 1 LAWS OF NEW YORK FROM THE YEAR 1691, TO 1773 INCLUSIVE 141-42 (Peter van Schaack ed., 1774).

42. The colonial bounty programs for wolves and the penalty that an Indian must kill a wolf as a form of punishment clearly demonstrated the colonists' insensitivity to the Indian aversion to the killing a wolf. See, *e.g.*, Bushnell, *supra* note 31, at 205.