

This is a pre-print version of a chapter, published in Katherine Biber, Trish Luker and Priya Vaughan (eds), *Law's Documents: Authority, Materiality, Aesthetics* (Routledge, 2022), pp 71-93.

Passport Struggles: Lawful Documents and the Politics of Recognition and Refusal

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Introduction

The passport is a jurisdictional document. This means that the passport is not only a document that has a particular legal status or that is instrumental to and created by legal regimes of state surveillance and migration control. Rather, as a jurisdictional document, the passport gives shape to legal relations, lawful subjects and practices of authority and recognition. In making this argument, I understand jurisdiction (literally meaning the power to speak the law) to be a site and practice of law's enunciation.¹ Understanding the passport *jurisdictionally* reveals how the changing forms of the passport affect relations and practices of law. It also allows for paying attention to distinct struggles over the recognition and significance of passports as legal documents that take place at these sites of law's enunciation.

This chapter traces two legal struggles over the changing forms and authority of passports: what I shall refer to as 'passport struggles'. The first passport struggle concerns recent campaigns to "de-gender" – or gender otherwise – the contemporary state-issued passport. Here, I focus on two current legal cases in the United Kingdom and the United States that turn on legal concepts of veracity and privacy in order to limit or transform the power of the state to exclusively prescribe gender in binary (female/male) terms within contemporary passport systems. The second passport struggle, in contrast, centres on the use and recognition of passports issued by First Nations political authorities, using the case of the Haudenosaunee passport as an illustrative example.

As we shall see, the first struggle seeks to use the passport as an official document through which to challenge state practices of gender binarism, thereby expanding the modes of inclusion within state systems and transforming state practices concerning the identification and inscription of individuals as legal persons within such systems. In contrast, at stake in the second struggle is the lawful encounter between Indigenous nations and settler colonial states (Dorsett & McVeigh 2012, 98).

This is a struggle for the instituting of legal relations that recognise Indigenous nations as sovereign authorities with the lawful capacity to use passports as official documents to both determine membership within their nations and conduct their external affairs with other political authorities, including settler states. Ultimately, though, both passport struggles are animated by a particular politics of recognition, a politics that, in the context of contemporary liberal pluralism and settler colonialism, Glen Coulthard (2014, 3) has described as risking ‘reproduc[ing] the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples’ demand for recognition has historically sought to transcend’.

This chapter thus seeks to trace and interrogate the legal histories and contemporary reception of the modern passport as a legal document. There is a rich body of migration studies scholarship showing how state documents such as the passport are used to solidify and police the stark legal distinction between people deemed to be citizens or non-citizens. This includes analysing how migrants ‘on the ground experience, accept and reject state bureaucratic practices in a time of increasing securitization’ (Horton, 2020, 6). The two passport struggles that I explore in this chapter, however, play out either at the margins of state citizenship such that they seek to expand ideas and practices of inclusive citizenship and identity inscription, or reject state-bestowed citizenship outright in favour of other modes of identification, nationhood and political belonging. For this reason, state regimes of documentation and their embedded politics of recognition also need to be read alongside differently situated and embodied politics of refusal articulated within collective struggles for different legal arrangements or legal categories. In the context of passport struggles, such politics of recognition and refusal have been heightened, as a result of an ever-increasing state trend towards biometrics that has given increased visibility or new significance to particular struggles over the passport form that may not have otherwise had the same meaning or significance.

This chapter proceeds as follows: First, I unpack the jurisdictional work of the passport as a particular legal document of identification created and standardised by nation-states over the course of the 20th century, tracing both its changing material form and political effects. I then turn to consider two distinct passport struggles at the start of the 21st century, situating both within the longer intersecting gendered and racial histories of the passport. Finally, I conclude by considering the significance of practices of recognition and refusal in relation to present-day state bureaucratic practices of inscription and mechanisms of surveillance at the heart of contemporary state borders.

Passports, Biometrics and the Law

In recent years, critical migration scholarship has analysed how passports constitute a specific form of state documentation that function to enrol mobile people within transnational regimes of migration control, identity surveillance and racial exclusion. As a specific act of ‘bureaucratic inscription’, the passport as an official document symbolises the efforts of modern bureaucratic states to monopolise control over the ‘legitimate means of movement’ (Torpey 2000, 6). Yet, the document’s materiality has also allowed for migrant acts of resistance to and subversion of such transnational forms of migration control and bureaucratic inscription, through, for example, practices of forged identities and counterfeit documents (Keshavarz 2019; Vogl this volume). As a result, as Sarah Horton (2020, 3, 6) has written, state documents like the passport become ‘important sites’ for both individual and collective action that have the capacity to ‘transform migrant subjectivities and conceptualizations of their place in the nation’. This chapter, likewise, pays attention to struggles over the terms and recognition of passports in order to grasp the document’s symbolic importance and transformative power in terms of recognition of identities and legal personhood. This section briefly introduces the passport as a historical creature of international law and domestic state practices, with a focus on the present-day passport’s ever-increasing entanglement in what has been termed the ‘biometric border’ (Amoore 2006).

While contemporary international law treats passports as *prima facie* proof of a person’s nationality, the document *per se* has no universal definition in nor formal status under international law.ⁱⁱ This lack of exhaustive definition is also true in the domestic laws of many states. For example, Australian law does not define the term ‘passport’ in legislation or case law,ⁱⁱⁱ despite the fact that passports have been mandatory travel documents since 1916 (or at least, mandated for persons over the age of 15 years leaving and entering the Commonwealth, with some notable racialised exceptions, as discussed below). As a matter of legal technicality, the passport constitutes a form of state-issued diplomatic communication that has the purpose of verifying an individual’s identity and notifying other states that the passport-holder is entitled to the issuing state’s protection while travelling abroad (Dehm 2018). For this reason, the passport is an official document that is state property and ‘addressed to a global audience’ (McKeown, 1).^{iv} Yet, the act of possessing a passport does have substantive legal implications for mobile people. Adam Muchmore (2004, 317–318) has argued that the ‘acquisition of a valid passport fundamentally changes the international legal status of an individual in relation to the passport-issuing state’ such that the passport-holder’s nationality now ‘becomes a proper concern for international law’. In other words, the state act of issuing a passport not only transforms the relationship between the individual passport-holder and the passport-issuing state, it is also one that has jurisdictional consequences. For individuals, to cross a state border with or without a state-issued passport, or with or without state authorisation via such a

passport, also can fundamentally transform their legal status and embodied experiences. Without a passport or state authorisation, a person's very presence in a state's territory is too readily deemed an infraction and potentially subject to state criminalisation, physical deportation and eventual exclusion. This attests to the power of the passport as a legal document: it facilitates, or at least has become instrumental within, state bureaucratic regimes that enact a kind of 'ontological policing' that makes people 'illegal' and creates 'humans who can be hunted' (Chamayou 2010, 2–3).

Beyond formal status, the material form that contemporary state-issued passports have come to take has been deeply influenced by standardisation efforts within international institutions since the early 20th century. While this history is beyond the scope of this chapter, it is worth noting that, since 1980, the International Civil Aviation Organization (ICAO) has published recommended guidelines, entitled Doc 9303, for the promotion and standardisation of 'machine readable travel documents' (or MRTD). Now in its seventh edition, Doc 9303 consists of an elaborate 12-part manual that forensically details the recommended physical and technical specifications of MRTDs in order to, in ICAO's language, 'strengthen' the 'security and integrity of travel documents' (ICAO 2015; see also Dehm 2018, 346). These specifications cover, for example, the requirements of biometric ePassports to incorporate data on the unique physical properties of the passport holder (such as fingerprints and iris patterns), stored on a chipset located in the passport's cover. Through such initiatives, the contemporary passport has become, in the words of Mahmoud Keshavarz (2019, 10), a particular 'designed artifact' that not only serves state purposes for differentially controlling and restricting human movement in the service of capital and nationalism but also 'actively directs, frames, and articulates our understanding of contemporary politics in general and of mobility regimes in particular'. In particular, Keshavarz (2019, 75) draws attention to the design of the passport as a 'specific device enmeshed with bodies, relations and interactions' with state systems of identification and control.

In light of the rapid transformation of contemporary state border infrastructures, the passport as a legal document has become a 'gateway' to systems of migration management and practices of identification that exceed the document itself (Amoore 2008, 21). Amoore uses the concept of the biometric border to illuminate a 'dual-faced phenomenon' in how states in the Global North have come to control and securitise entry into their territories, especially at airports. For Amoore (2006, 336), the biometric border is constituted by, on one hand, the deployment of 'scientific technologies and managerial expertise' in border management and, on the other hand, a move to treat the physical bodies of travellers as 'sites of multiple encoded boundaries'. Biometric border systems thus produce 'particular visual knowledge of the body and subject' (Amoore and Hall 2009, 448) that is deployed within, what Joseph Pugliese (2010; 2013) has called, 'regimes of statist visibility': that is,

bureaucratic regimes of truth that 'produce bodies that are either biometrically legible or not, bodies that are either precluded or enabled to cross the border' (Pugliese 2010, 159). In particular, biometric cameras that scan travellers at airports mean that the individual traveller's physical body and outward appearance (including how the traveller's body manifests certain social, religious or cultural practice such as through their hairstyle, attire or religious dress) becomes a 'site of observation, calculation, prediction, and action' (Adey 2009). As a result, the body of the individual traveller has at times come to stand in for the document of the passport itself.

The increased sophistication and proliferation of biometric identification systems at state borders has led to claims of and efforts for the 'disappearance' or 'abolition' of the state-issued passport as a physical document. In 2018, Sydney airport, for example, implemented what was claimed to be the world's first 'passport free' trial (Coynes 2019). This involved trialling the use of facial recognition software throughout the airport departure terminal, and specifically for all pre-boarding activities. Passengers who signed up to the trial were required to have their faces scanned at different points in the terminal, in lieu of presenting their passports, enabling what was heralded as a more efficient and faster 'contactless' boarding experience. Yet, while there remain legitimate concerns around privacy and the fallibility of technology systems, the designation of the pilot program as 'passport free' was in itself somewhat misleading. Program participants were still required to possess – and indeed travel with – a physical passport, although they were not required to produce it as often as other travellers to immigration or airline officials.

While biometric borders purport to create a more 'seamless' travel experience (Broeders & Hampshire 2013), in practice, a wealth of scholarship documents how the use of such biometric technologies discriminate against specific groups of people, in particular exposing people who are racialised as non-white or gender-diverse individuals to heightened scrutiny from airport security personnel and state border officials (see eg Pugliese 2010; Magnet 2011; Browne 2015). Much like the passport as a physical document, biometric borders continue to do racialising work, making particular bodies more 'suspect' than others, even when physical passports is no longer required to be produced by individual travellers. Importantly, scholars have shown how contemporary biometric technology mobilises and relies upon forms of knowledge and practices of surveillance that have their origins in antiblack racism and ideologies of biological essentialism, including through policing racial stereotypes and thereby creating 'different phenotypic others' (M'charek, Schramm and Skinner 2014, 468; Browne 2015, 10). Reminiscent of earlier 1990s rhetoric of a 'border-free' world under neoliberal globalisation, then, this promise of increased mobility in a 'passport-free' world is actualised for some privileged (dominantly, white, rich) people only. Instead, what is brought into being is a world that, in the words of Wendy Brown (2010, 7), 'harbours fundamental tensions

between opening and barricading, fusion and partition, erasure and reinscription'. Put simply, it is a world that is animated by a liberal ideology of freedom of movement (that is in practice available only for a select few elite) while also simultaneously materialising ever-more-concrete technologies of border fortification (that are used to police and selectively exclude the majority of the world's poor) (Bauman 2000; Kotef 2015, 10). Biometric borders then have the potential to rearticulate and intensify the gendered and racial logics of exclusion of earlier state immigration bureaucratic regimes, of which the passport is a foundational official document, albeit in new ways.

Struggle #1: Anti-Discrimination and (De)Gendering Passports

In order to understand contemporary struggles for recognition in and through the passport, it is necessary to appreciate the gendered histories of the modern state-issued passport. As a document, it has long simultaneously reflected and articulated gendered social relations, often reproducing patriarchal, colonial regimes of mobility structured by class hierarchies and racialised subordination that differentially impact upon women depending on their particular social positions. While global gendered histories of the passport are yet to be written and exceed the scope of this chapter, a couple of situated examples from the early 20th century and interwar period – a constitutive period in efforts to standardise the modern state-issued passport – illuminate this history. This gendered history is also marked by silences and exclusions on official passport documents, with, for example, other documents like marriage certificates also acting to restrict women's mobility at the turn of the 20th century (Mongia 2018), and the designation of sex/gender only becoming a required universal marker on state-issued passports until well into the 20th century.

Gender has long been a central factor in determining who is able to be a bearer of a state-issued passport as a legal document. While in the US, like elsewhere, unmarried women could be issued a state passport in their own name, the US State Department, for example, up until World War I, had a practice of routinely issuing 'joint' passports to married couples. This means that the document bore the full name of the husband only, with the name of the married woman and any of her physical descriptions being entirely absent. Rather, the document only designated her presence through the phrase 'accompanied by his wife' or 'and wife'. As Craig Robertson (2010, 49) has written, this practice of recognising married women merely through a 'literal notation', rather than in their own legal personhood, largely 'reinforced [dominantly] accepted gender roles that clearly located the husband as the head of the household and apparently relegated his wife to a public life that ideally required his presence as a preferred chaperone'. Other states similarly opted to issue 'family'

passports that assumed a male head of the family as the passport holder, a practice also endorsed by the League of Nations in its passport standardisation efforts in the interwar period.

This gendered social ordering through the passport form has, of course, not gone unchallenged. In 1924, suffragette campaigner and trailblazing barrister Helena Normanton made headlines across the British empire as the first married woman to be issued a British passport in her maiden name. A similar attempt by New York journalist Ruth Hale to obtain a US passport in her maiden name was less successful. Hale and her supporters argued that to not recognise a woman's maiden name in her passport would be to require the woman to travel under a 'fictitious name', thereby also denying 'her identity, her personality, her capacities and her achievements' (quoted in Robertson 2010, 51). In response, the US State Department argued that issuing passports in a woman's married name only was necessary to accurately verify her identity and to do otherwise would create undue confusion, potential diplomatic miscommunications and additional work for immigration officials. As we shall see, such arguments based on a politics of veracity or bureaucratic legibility and convenience continue to resonate within contemporary struggle around gendered identification markers in state passports.

Yet, the practice of issuing passports to women in their own right did not necessarily guarantee freedom from discrimination, and, at times actually enabled states to enforce gender-specific travel restrictions. For example, in February 1917, the Australian government adopted war emergency measures that included refusing to grant passports to women and children to travel through 'danger zones' to Europe, with an exception for female nurses travelling in aid of the war effort (Sydney Morning Herald 1917). This discriminatory policy included refusing to issue passports to well-known Australian suffragettes to travel to and speak in Russia in the late stages of the war (The Argus 1917). Similarly, the British Home Office initially refused to issue passports to 180 English delegates to the International Congress of Women in the Hague in April 1915 on the basis that such political meetings were 'undesirable ... so close to the seat of war' (Daily Telegraph 1915). Following the introduction of the *Passport Act 1920* (Cth) in Australia, the Minister's discretionary power to issue passports was repeatedly used to police women's mobility and sexual freedoms, with for example, the Minister refusing passports to single women wanting to accompany men abroad and to women wanting to travel abroad to marry against their parents' wishes (Dolman and Lee 2008, 88). In addition, white Australian women who married Chinese men frequently faced difficulties obtaining passports, with the Department of Interior in the interwar period mandating custom officials to scrutinise such passport applications more closely (Bellino 2020). Inversely, Australian-born women of Chinese descent who married non-British subjects were deemed to lose their British nationality, and thus their entitlement to an Australian passport (Bellino 2020). While Australian married women did

come to be issued with their own passports from 1949 onwards alongside legislative changes that introduced the formal category of 'Australian citizenship', it was not until 1983 that an Australian married woman no longer required her husband's permission in order to be issued a passport.

More recently, struggles around the gender politics and gendering of passports have been initiated by transgender, nonbinary and gender diverse people. In response to transwoman Estelle Asmodelle's pioneering campaign for the official recognition of her proper gender, in 1986 the Australian Department of Foreign Affairs (DFAT) issued her with a new passport that conformed with the sex designation on her amended birth certificate. Almost two decades later, in 2003, the Department would issue a passport with an 'X' gender category to Alex MacFarlane (officially now signalling 'non-binary/indeterminate/intersex/unspecified/other'), a move that was then reported to be a 'global precedent' (Butler 2003). However, it was only in 2011, with the adoption of new DFAT guidelines (that removed the requirement for surgery in order to have the 'sex' indicator on an individual's passport changed to reflect their gender identity and that officially provided for a third gender option) that access to such passports for Australian citizens who are transgender, intersex or gender diverse has become considerably easier.^v To date, at least another 10 states globally including Argentina, Germany, India, Pakistan, Nepal and New Zealand now allow for the use of a 'X' gender marker in their passports.

Yet, so far, recognition in other jurisdictions has been slow or not forthcoming, resulting in the courts becoming a significant site of passport struggles. Two notable cases have been initiated in recent years in the UK and US in the hope of compelling reform to state passport policies and practices around sex/gender designation. In the UK, this litigation has valorised the legal concept of privacy, while in the US, the litigation has instead focused on legal arguments around veracity and equality before the law. Located within a gendered history of the state-issued passport, both cases represent contemporary instances within much longer anti-discrimination struggles over the passport as an 'accurate' official document of identity verification. There is much to be said about both these contemporary passport legal actions and their associated court decisions, including for example the extent to which legal arguments based on the paradigm of privacy may or may not be able to fully account for, challenge or transform public forms of homophobic, transphobic or anti-intersex violence and associated legal discourses and practices (Kendall 1992).^{vi} In this section, however, I read both these court cases as acts of individual refusals to be wrongly inscribed within state systems of identification as well as jurisdictional demands for state official documentation to acknowledge gender diversity by ensuring that official documents like the passport more accurately record the gender of individual passport holders.^{vii}

The UK litigation was initiated by Christie Elan-Cane, a long-time non-gendered activist. Although Elan-Cane first unsuccessfully inquired about the possibility of a gender-neutral UK passport in 1995, it was not until June 2017, following increased public campaigns and a series of governmental reviews, that Elan-Cane initiated judicial review of the ‘continuing policy’ of Her Majesty’s Passport Office to require applicants for a British passport to declare per gender as either ‘male’ or ‘female’.^{viii} In per witness statement to the court, Elan-Cane described this policy as requiring a ‘degrading and humiliating application process’ that forces non-gendered people to ‘deny our identities and make what we feel to be a false declaration’ (quoted in *R (on the application of Christie Elan-Cane) v Secretary of State for the Home Department* [2018] EWHC 1530, para. 6). In June 2018, the primary judge held that the UK authorities’ refusal to issue Elan-Cane a passport with an ‘X’ gender marker engaged per right to privacy under article 8 of the *European Convention on Human Rights* (ECHR); however, the judge found that the UK had not acted unlawfully as they had no positive obligation to issue gender-neutral passports (*Elan-Cane* [2018] EWHC 1530).

Notably, the judicial reasoning in the case demonstrated a privileging of the desire for a ‘coherent and consistent policy’ over the rights of individuals to have their gender identity recognised and reflected in official documents like the passport. Ironically, this judicial choice to prioritise policy considerations, and in particular the government’s recognised entitlement to assess the ‘wider implications’ of any policy change ‘across government as a whole’ (*Elan-Cane* [2018] EWHC 1530, para. 114) strangely negates one of the core contemporary functions of the passport: to be an ‘accurate’ official document of identification. While the primary judge acknowledged that Elan-Cane had a ‘justifiably strong personal interest in gaining full legal recognition as being a non-gendered individual’ (*Elan-Cane* [2018] EWHC 1530, para. 113), a denial of which ‘may well cause the claimant ... strong negative emotions’, he nonetheless somewhat incongruously found that ‘such strong emotions’, in his opinion, were not necessarily justified in relation the UK passport policy given that the claimant did not strictly need to make a ‘false’ declaration of per gender on per passport application form and that the UK authorities, in the absence of any declaration, would simply ‘transpose’ one of two gender options from Elan-Cane’s identification documents such as a birth certificate into the passport system (*Elan-Cane* [2018] EWHC 1530, para. 115). Indeed, the judge placed particular emphasis on the fact that the UK government had a review of its binary gender passport policy afoot,^{ix} and that there was no ‘broad’ international state consensus on how to recognise diverse gender identities in passports, particular for intersex or non-gendered people. Subsequently, the Court of Appeal upheld the decision, with Lady Justice King’s leading judgment placing weight on the importance of a coherent government review process so that ‘the passport issue’ is not ‘considered in isolation’ (*R (on the application of Christie Elan-Cane) v Secretary of State*

for the Home Department [2020] EWCA Civ 363, para. 70). As of early 2021, a further appeal is on foot, with Elan-Cane commenting that the continued legal struggle confronts a state bureaucratic system that ‘refuses to acknowledge our disenfranchisement’ and renders ‘us socially invisible’ (Wareham 2020).

In contrast, the US litigation has been more successful in its efforts to promote official recognition of diverse gender identities and advance political and legal reform of US passport law and policy. Unlike the English law’s focus on the right to privacy via the ECHR, US law instead has allowed for advocates to mobilise arguments based on legal equality and the veracity of official documents. The US case was brought by Dana Zzyym, an American nonbinary intersex advocate and an associate director for the Intersex Campaign for Equality. In 2014, when applying for a passport, Zzyym refused to select either a ‘male’ or ‘female’ sex marker option, as required by the US federal form, and instead wrote ‘intersex’ below the ‘sex’ category on the application form. Like the UK Passport Office, the US State Department decided to deny the request. This was despite the fact that, prior to 1976, US passports did not include any sex/gender marker. In 2015, Zzyym initiated a discrimination lawsuit against the State Department, arguing that the Department’s refusal to issue them with a gender-neutral passport violated the guarantee of equality protection under the US Constitution, among other laws.

Initially, the US District Court found in favour of Zzyym on administrative grounds, holding that the Department’s decision was ‘arbitrary and capricious’ as it had not followed a ‘rational decision-making process in deciding to implement the binary-only gender policy’ and ordered the Department to reconsider their decision (*Zzyym v Kerry* (D Col, Civ No 15-cv-02362-RBJ, 22 November 2016) 6). However, the Department refused to do so, prompting a further 2018 district court order, and eventually a US Court of Appeals judgment in 2020, both largely in Zzyym’s favour (*Zzyym v Pompeo* (D Col, Civ No 15-cv-02362-RBJ, 19 September 2018); *Zzyym v Pompeo* (10th Cir, No 18-1453, 12 May 2020)). Importantly, the Court of Appeals found that the Department’s binary sex policy would result in ‘inevitable inaccuracies’ and thus ‘sunders’ the reliability of passports as official identification documents (*Zzyym* (10th Cir, No 18-1453, 12 May 2020), 18–19). That said, the Court stopped short of ordering the Department to issue Zzyym an accurate passport, merely mandating that the Department review Zzyym’s application once more. While, in Zzyym’s words, the ‘long battle’ for the recognition of diverse gender identities continues, future legal and policy reform appears likely in light of a proposed Gender Inclusive Passport Act being currently before the US Congress and the new Biden Administration’s campaign commitment to introducing the option of an ‘X’ gender marker on government documents, including passports (Safronova 2021).

The initiation of both court actions represent a public political, legal and ethical challenge to present-day practices of gendered inscription in law's documents and seek to offer some form of redress for such enduring bureaucratic forms of violence, mis-identification and exclusion. In contesting law's binary categories for inscribing humans, these challenges signal an important attempted reconfiguration of law's power and the jurisdiction of state authorities to fully determine identity categories. As Lee Godden (2007, 181) has argued, law 'through the assertion of jurisdiction, acts on and through bodies to "identify" and ascribe legal status to the subject/individual'. This means that jurisdiction 'is not simply the assertion of bare control over bodies in a territorial compass but also comprehends the manner and form by which law insinuates itself as the indispensable means of control by establishing a necessary nexus between body and "law"' (Godden 2007, 181–2). Both the *Elan-Cane* and *Zzyym* cases then represent a refusal on the part of nonbinary and gender diverse people to be 'wrongly' inscribed within state bureaucratic systems, even if such gestures are not refusing the act of bureaucratic inscription per se. Although these struggles still leave in place the state as the proper authority for authorising movement and for verifying the identities of individual travellers, they nonetheless promise to potentially 'queer' some of the basic categories for officially classifying individuals that have become foundational to state regimes of mobility (on 'queering' law's categories in an international human rights context, see Otto 2015; McNeilly 2019). In making visible present-day state bureaucratic practices that deny people their proper identities or even full legal personhood, these passport struggles not only insist on the recognition and legibility of more diverse gender identities within state border regimes of visibility and visibility, but also challenge the power of the passport as an official document to uphold restrictive regimes of gender binarism and discrimination.

Struggle #2: Lawful Encounters and First Nations Passports

The passport as a gendered document, of course, intimately intersects with its history as a document of racial exclusion. In her compelling genealogy of the modern state vis-a-vis Indian intra-imperial migration, Radhika Mongia (2018, 113) argued that the passport was and remains a concrete technology that 'nationalise[s] bodies along racial lines', and that its attempted universalisation was, in part, borne out of efforts to restrict the entry of 'free' Indian migrants as British subjects to settler colonial states within the British empire, like Canada, in the early 20th century. In an Australian context, while Australian federated states from 1901 largely relied upon official mechanisms such as the passenger landing permit systems and the notorious dictation test to restrict and enforce racial entry quotas, a 1904 immigration amendment did exempt certain Indian and Japanese (but not

Chinese) 'merchants, students and tourist travellers' from the dictation test provided that they possessed a passport issued by their government (Lake and Reynolds 2008, 161). Following the institution of a near-universal compulsory passport regime during World War I, the Australian government additionally negotiated arrangements with certain Southern European states such as Malta to restrict their issuing of passports to their nationals to travel to Australia (Weekly Times 1925).

Moreover, interwar state legislation providing for passports as compulsory travel documents also contained explicit racial exceptions. In Australia, while the adoption of the *Passport Act 1920* (Cth) made it a criminal offense to depart Australia without a passport, it explicitly excluded specific racialised categories of people from requiring a passport in order to leave Australia including, for instance, 'any aboriginal native of Asia, or any island in the East Indies, or in the Indian or Pacific Oceans' (section 3(2)(m)).^x This provision functioned to advance an agenda of hegemonic white nationalism, making it not only easier for racialised non-white people to depart Australia but also acting as a 'surreptitious encouragement' (Chesterman and Galligan 1997, 99).

Despite this, racialised people were still able at times to defy border regimes and to travel in spite of such exclusions. In the late 19th and early 20th centuries, Indigenous peoples across the British empire were at times able to travel under different identity documents. For example, in the late 19th century, Indigenous seamen such as Native American whalers could travel on certificates of protection that were issued by port authorities and functioned as identity documents (Shoemaker 2015). Later, during the First World War, Australian Aboriginal soldiers largely used army-issued metal identity discs as a form of official identification that authorised war-related travel. Some Indigenous soldiers were subsequently issued British passports towards the end of the war to facilitate their repatriation back to Australia. This practice allowed, for instance, Aboriginal campaigner AM Fernando to use his British passport to remain in Europe, making a permanent home for himself in England and subsequently traveling extensively across Europe to draw public attention to the abuse of Aboriginal people in Australia (Paisley 2012).^{xi}

In Australia, the subsequent *Passport Act 1938* (Cth) formally recognised the power of the Minister to issue Australian passports to 'an aboriginal native' of Australia or 'of any country under the protection of His Majesty' as British subjects. However, in practice, Aboriginal peoples' access to Australian passports was still highly constrained by draconian state-based 'native' administration regimes that gave state officials extensive control over intimate facets of Aboriginal peoples' lives as well as their authorised movement. In the state of Western Australia, for example, Aboriginal people could in theory apply for a Certificate of Citizenship that would exempt them from the native

administration regime and that looked and functioned 'in the manner of a passport' (*Natives (Citizenship Rights) Act 1944 (WA)*, section 5(4)). As a result, John Chesterman and Brian Galligan (1997, 133) have argued that Aboriginal people in Western Australia in the mid-20th century, as a matter of law, did not have citizenship rights but rather 'an ability to be exempted from the citizenship exclusion that otherwise affected' all Aboriginal peoples.

Not only have regimes of entitlements and access to the passport been highly racialised, but the question of what passports ought to be recognised and on what terms has long been a racialised one too (see, e.g., Mongia 2018; Singha 2013). Take but one example in the Australian context. Writing in *Australian Worker* union newspaper in 1923, acclaimed socialist writer Mary Gilmore raised alarm about British passports being issued to Indians residing in London, a practice that she saw as being a direct affront to Australia's then legal regime of white supremacy. 'It seems curious' she wrote, 'to think that the lives of the white races in the Empire should hinge on the meaning of a piece of paper issued to an individual in London' (Gilmore 1923). She went on to suggest that the 'question of the passport' was not a 'trifling matter', but rather one in which 'the colour of Australian democracy' and the survival of the White Australia policy was at stake. In this way, the passport as a modern state document was seen as central to and intimately entangled in transnational projects of whiteness that sought to 'draw the global colour line' within and beyond the British Empire (Lake and Reynolds 2008).

Yet, rather than focusing only on the racialising work of state-issued passports, this chapter now turns to passports issued by Indigenous First Nations political authorities in order to certain passports as legal document of Indigenous sovereignty and self-determination. The use and recognition of First Nations passports has a long history, including for instance by Cayuga statesman Chief Deskaheh to travel to London and Geneva in the early 1920s to advocate for the recognition of Indigenous sovereignty and territorial rights (Franz 2020). More recently, First Nations passports have been used by delegates of the Aboriginal Provisional Government to leave and re-enter Australia when travelling to Libya in the 1980s and Canada in the 2010s (Robertson 2015). Since then, in February 2020, the Australian Border Force (2020) has issued an operational directive in relation to the border clearance of any non-citizens who asserts a right to enter Australia on the basis of 'claiming to be Aboriginal Australian or Torres Strait Islander'. While the directive does not recognise such a right of non-citizens, it does make clear that it does not apply to any person 'reasonably suspect[ed]' of being an Australian citizen.

Significantly, in July 2010, an international controversy arose when the Iroquois Nationals, the national men's lacrosse team of the Haudenosaunee Confederacy, were grounded at New York's JFK

Airport en route to England to compete in the World Lacrosse Championships. The team, consistent with their practice for previous international tournaments since 1980, were travelling on their Haudenosaunee passports, issued by the Onondaga Nation.^{xii} To their frustration, new state biometric passport requirements adopted post 9/11 under the so-called Western Hemisphere Travel Initiative meant that both the US and UK authorities decided to no longer recognise their Haudenosaunee passports. This decision was based on deeming the team's Haudenosaunee passports not compliant with the new biometric requirements as they did not contain the mandated electronic chips, digital photographs nor numerical barcodes in them (Mick 2010). Although the team's representatives were able to successfully lobby then US Secretary of State Hillary Clinton for a 'one-time' exemption in the form of a letter of authorisation to allow them to leave and re-enter the US on their Haudenosaunee passports, this letter came too late to allow for re-application for UK visas. As a result, the team was prevented from participating in the lacrosse competition and forced to return home.

During their time in New York, the team's efforts to travel on their Haudenosaunee passports attracted significant international media attention, including interviews with the team's then executive director, Percy Abrams. In one particular interview, Abrams (2010) explained at length why the team members had refused to apply for US or Canadian passports, despite their eligibility, stating that 'it was a matter of nationality ... our nation is the Iroquois nation, or as we call ourselves the Haudenosaunee [and] the passport I carry is the Haudenosaunee passport'. It is worth quoting an extended excerpt from the interview transcript (Abrams 2010) to get a sense of how Abrams frames the significance of the Haudenosaunee passport as a legal document:

Abrams: We have the right of self-determination. We have the right to present our own passport.

Interviewer: But isn't this a situation where you would be able to hold on to your passport from the Iroquois confederacy to get a new [state-issued] one, or would you have to turn it in?

Abrams: Why would I turn it in?

Interviewer: If you decided to get a US passport, for example. Wouldn't you be able to have both?

Abrams: Well technically I suppose you could have both. But in this case we are representing the Iroquois nation in this tournament. When we go to the games, we present our

passport ... This is our nationality and our identity. That's the stance we're taking.
[We are] asking the US to accept our nationality, our right to self-determination ...

Interviewer: I guess I'm just wondering how getting this document would be any strike against your identity. You would still be exactly who you are, coming from where you came from ...

Abrams: [sighs] It's a matter of a national pride. ... This is the document that we wish to carry for this game. This is our choice and our right to carry this and we should be able to carry this and travel abroad. Let me just tell you we have been travelling for over 30 years with this document. ...

The above exchange is noteworthy, not simply for the interviewer's inability to recognise the foundational issue as one of Indigenous nationhood, identity and self-determination. Indeed, Abrams repeatedly framed the issuing and use of First Nations passports as a legal practice of Indigenous nationhood; that is, practices that constitute and reflect what Glen Colthard (2014) has called a 'resurgent politics of recognition'. Couthard (2014, 18) describes such practices as:

less oriented around attaining legal and political recognition by the state, and more about Indigenous peoples empowering themselves through cultural practices of individual and collective self-fashioning that seek to prefigure radical alternatives to the structural and subjective dimensions of colonial power

This struggle draws attention to the work of documents in shaping lawful encounters, or encounters between different forms of law: one emanating from the asserted authority of the state, the other grounded in Indigenous jurisprudence and sociality. Focusing on the encounter between these forms of law reveals how Indigenous uses of passports mark the failure of settler colonial states to fully monopolise the 'legitimate means of movement' (Torpey 2000, 6) in the face of Indigenous nations that refuse to stop being and acting sovereign (Simpson 2014; Dehm 2021). Since 2010, as a result of much political efforts of the part of Haudenosaunee diplomats, the Iroquois Nationals have been able to travel on their Haudenosaunee passports to some foreign states, such as the Czech Republic in 2011 and Israel in 2018.

Conclusion: Re-Documenting the Forms and Ends of the Passport

Law is of course only one site in which struggles around the power and significance of the modern passport play out. In 2017, at the National Gallery of Victoria's Triennial exhibition, I had the

pleasure of encountering acclaimed Angolan photographer Edson Chagas' series, *Tipo Passe* (2012-14) (literally, 'passport photo' in Portuguese). *Tipo Passe* consists of a series of photographs that play on the genre of the official passport photo, with each photograph titled after and depicting a portrait of a different individual. Yet in place of an official passport photo's biometric realism, in Chagas' creations, each person wears a distinct Bantu mask, a head adornment from pre-colonial times of cultural and religious significance, to conceal their face from view. Chagas' photographs thus invoke intertwined motifs of culture and identity in order to raise questions about the authenticity of official documents, the limits of bureaucratic knowability and even the constructed notions of legal personhood. The use of the Bantu masks, now considered valuable commodities on the global art market, draws attention to the commodification of African cultures and identities and the grossly uneven circulation of goods and people between the Global North and Global South, in an analogous way to the modern passport itself. Put differently, Chagas' artwork interrogates how African artwork may be highly valued and travel freely to states in the Global North but the majority of African people may not, discriminated against by reason of their nationality and respective passports.

In this sense, the series can be read as a critique of how modern passports purport to identify unique individuals for the purpose of facilitating movement, but can in fact do the opposite through 'classifying them into a collectivity' that may be 'restricted by its cross border mobility' (Jensen 2009, 817), thereby eluding to the racial violence underpinning contemporary state border regimes. Yet, read in another light, the photographs in *Tipo Passe* in and of themselves also perform a certain politics of refusal, with the individual subjects refusing to appear as the biometric rendering of human faces demanded by state authorities in seemingly benign bureaucratic documents like the passport. To re-document in this way is to draw into question the form and ends of the modern passport as an authentic and indeed desirable document of bureaucratic identification and inscription, as well as the uneven mobility regimes that it enables and sustains.

The future of passport struggles is by no means settled. Concerning passport struggles over gender recognition, in March 2017, Australian and Aotearoa/New Zealand intersex organisations and advocates jointly issued the Darlington Statement (2017) that named and challenged acts of sex/gender classification as state 'structural violence'. While the Statement recognised that individuals should be 'free to choose' their gender markers, it also named the 'larger goal' to be 'not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them'. Since then, in Australia, there have been legislative efforts to remove the designation of gender altogether from official documents like the passport (Kelly and Robert, 2018). Yet, even with such new initiatives, much more is needed to ensure that the long histories of discrimination,

interrogation, harassment and even stasis do not continue to inform the experiences of transgender, nonbinary or gender diverse travellers at state borders (McNabb, 2017, 34; Quinan & Bresser 2020).

Likewise, the very emergence of biometric borders and their entrenched racial logics has become the object of civil society and activist campaigns. Recently, the UN Special Rapporteur on Racism expressed concern at the 'prevalence of biometric data systems, racialized surveillance and racialized predictive analytics' in maintaining racially discriminatory state structures and urged that states needed to provide effective remedies, including compensation, for any such violations (*Racial Discrimination and Emerging Digital Technologies 2020*, para. 38). In the US context, for example, Mijente, a Latinx and Chicana social organisation for racial, economic and gender justice, continues to actively mount their #NoTechForICE campaign that puts public condemnation and scrutiny on multinational corporations that provide technology systems to state immigration enforcement. And, further, in September 2019, the Beyond Border Causus of The Red Nation (a coalition of Indigenous and non-Indigenous activists advocating for Native liberation) issued a Manifesto acknowledging that the 'liberation of undocumented [people] is tied to the liberation of Indigenous people' and calling for the abolition of the immigration-prison-industrial complex. While such struggles present concrete challenges to the mechanisms of surveillance and 'ontology of exclusion' (Mountz 2011) at the heart of contemporary state borders, for now, these borders and their associated documentary practices continue to relentlessly and pervasively expand, including through using the material bodies of individual travellers as their targets and ends. The changing forms and functions of the modern passport show how physical documents are becoming ever-more entangled in, and even at times eclipsed by their digitised versions within, technological systems of surveillance and control themselves.

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ENDNOTES

ⁱ This follows Peter Rush's theorising of jurisdiction referring 'first and foremost to the power and authority to speak in the name of the law and only subsequently to the fact that law is stated – and stated to be someone or something' (Rush 1997, 150; see also Dorsett and McVeigh).

ⁱⁱ The closest international definition of the modern passport is the fairly circular one provided by ICAO concerning a 'machine readable passport' (MRP) as a 'passport conforming with the specifications contained in Doc 9303-4'. MRP are a sub-set of the Machine Readable Travel Documents (MRTD), defined as "Official document[s], conforming with the specifications contained in Doc 9303, issued by a State or organization which is used by the holder for international travel (e.g. MRP)' (ICAO 2015, 15).

ⁱⁱⁱ The *Australian Passports Act 2005* (Cth) does not define the term 'passport', and, like ICAO, only defines the term 'Australian passport' under section 6 in circular fashion as meaning 'a passport issued under this Act'. The Explanatory Memorandum (2004) does, however, note that a 'passport is a document', with 'document' being a defined term under the Act. For Australian case law concerning passports as legal documents, including an interesting reference to the idea of a destroyed passport as being a 'dead document' in the first-mentioned case, see *In the Marriage Of: Samir Saad Appellant/Husband And: Hiam Saad Respondent/Wife* [1992] FamCA 44 (4 August 1992) and *1001288* [2010] RRTA 912 (22 October 2010).

^{iv} For instance, an Australian passport is the property of the Australian state: *Australian Passports Act 2005* (Cth) section 54.

^v Under s 21 of the Australian Passport Determination 2015, it is 'preferable', but not essential, that the sex/gender in a person's Australian passport matches their cardinal documents ie. a birth certificate or a citizenship certificate.

^{vi} Legal argument that rest upon an asserted 'right to privacy' conceive of public authority as external to the 'private realm' and thus seek to arrange state jurisdiction in particular ways. As Kendall Thomas has demonstrated in the context of US sodomy laws criminalising certain forms of gay sex, the 'conceptual grid of the privacy paradigm' is unable to fully account for public forms of homophobic, transphobic or anti-intersex violence and associated legal discourses and practices. Thomas powerfully argues that while this need not mean abandoning legal claims based on the right to privacy, it does necessitate a more comprehensive analysis that 'force[s] privacy to go public' by advocating instead for a constitutional protection based on 'the physical security of the embodied individual' (Thomas 1992, 1443).

^{vii} On gendered and queer practices of refusal as a mode of resistance to patriarchal cultures, see van Marle (2006).

^{viii} In the UK, passports are issued by the Home Secretary in exercise of the Royal Prerogative. This means there is no specific law requiring inclusion of a gender category or status in UK passports, but rather the bureaucratic practice of requiring a gender category and using only male/female designations has developed over time and become entrenched in technological systems.

^{ix} The primary judge held that this review would need to 'consider to what extent if any, in an age of increasing social and legal awareness and acceptance of the importance of issues relating to diversity and equality, the recording of an individual's sex and/or gender in official and other documentation is justified. The range and nature of the documentation which may be affected will be required to be understood, including whether its purpose is to record historical or current information. It will also be necessary to consider the extent to which other identities both within and beyond the binary concept of gender are to be recognised, and if so, whether they are to be self determined or are to be objectively evidenced' (at para. 151).

^x Such provisions reflected earlier colonial legislation across the British empire that treated indenture Indian and South Asian labour an 'an exception to the overarching principle of freedom of movement' and subject to specific mechanisms of control and coercion (Mongia 2018, 115).

^{xi} Fiona Paisley notes how Fernando was likely to have been issued several British passports, including one that was issued to him in 1921 (likely for the purpose of repatriation following wartime internment), stamped with an entry visa for Constantinople in 1923 and used (even though it had by then lapsed) by Fernando when travelling to several cities in Italy in 1925 until he was apprehended by the Milan police (Paisley 2012, 89).

^{xii} The Haudenosaunee is a political confederacy that includes the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora First Nations.