

SUBJECTS OF SOVEREIGNTY: INDIGENEITY, THE REVENUE RULE, AND JURIDICS OF FAILED CONSENT

AUDRA SIMPSON*

I

INTRODUCTION: SETTLER SOVEREIGNTY AND THE PROBLEM OF INDIGENEITY

This article is an anthropological examination of the way in which indigeneity and sovereignty have been conflated with savagery, lawlessness, and “smuggling” in recent history. The national “problem” of indigenous smuggling is reconstructed here as it was portrayed in the public eye, largely via the media, and then through conflict-of-laws cases concerning the interpretation and applications of the “revenue rule.” Different understandings of sovereignty led to the “public problem” of smuggling. National laws outlawing smuggling implied that one view of sovereignty was more legitimate than others—that is, settler law over indigenous law. In the end, the smuggling problem was an index of the fragility of settlement itself, a fragility that was demonstrated repeatedly through the maintenance of legal boundaries and jurisdiction, the collection of taxes, and anxiety over whose law and whose jurisdictions should prevail when affronts to those boundaries had been made.

This article concerns economic activities that express indigenous cultural and historical practice and that reflect a larger set of socio-economic conditions. The Canadian media framed smuggling as an abuse of a system of indigenous rights recognized under Canadian law and hence a problem for any recognition by the Canadian sovereign of indigenous sovereignty. The “problem” of smuggling was then constructed through the courts as wrongdoing by tobacco companies and as a question of how the United States, as a sovereignty, could assist Canada, as a sovereignty, thereby missing the larger, critical context of Iroquois¹ trade practices and treaty interpretation across the borders of the United States and Canada, and the recognition of indigenous sovereignty.

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This Article is also available at <http://www.law.duke.edu/journals/lcp>.

*Assistant Professor of Anthropology, Columbia University. Many of the sources cited in this article were obtained by the author from personal interviews with Mohawks from Kahnawake. LAW & CONTEMPORARY PROBLEMS was thus unable to independently verify this authority. Unless otherwise noted, these sources are on file with the author.

1. “The Iroquois” is a French transliteration of a word that refers to the *Haudenosaunee*, or “People of the Longhouse,” as they call themselves. This is a confederacy of six indigenous nations: Mohawk, Oneida, Onondaga, Cayuga Seneca, and Tuscarora, that extended their dominion across what is now the northeastern United States and parts of Canada. They now reside on fifteen reservations and

II

SMUGGLING AND ITS JURISDICTIONAL IMPLICATIONS

The Canadian Broadcasting Corporation (CBC) documentary, *The Dark Side of Native Sovereignty*,² broadcast in 1996, subjected Mohawk trade and traffic to an intense form of scrutiny. Viewers saw indigenous protagonists in a bustling, underground cigarette trade justify their participation in trade through appeals in a system that had already constructed their activities as criminal or deviant. Through the television program's appeal to tradition, to (special) rights, and to sovereignty, viewers saw the representations of these traders harden around the image of "smuggling." This was achieved through a chain of confluences that removed the practice and its practitioners from a larger field of exchange in which it occurred, that of smuggling tobacco *corporations*.

The role of "Big Tobacco" in illegal trade in cigarettes from Canada to the United States for eventual sale back into Canada culminated in a 2001 Racketeering Influenced and Corrupt Organizations (RICO) suit.³ This suit was filed by the government of Canada against R.J. Reynolds and others, a conglomeration of tobacco manufacturers, for conspiring to circumvent tax laws in Canada.⁴ After Canada doubled its taxes on cigarettes in 1991, R.J. Reynolds sales declined significantly. The company then conspired to avoid paying Canadian taxes on cigarettes by exporting cigarettes manufactured in Canada—and sometimes Puerto Rico—to the United States where they were then sold to distributors who transported the cigarettes back to Canada and placed them on the black market.⁵ It is asserted in the court decision that "[a]t least some of the smuggling was conducted by selling the Canadian cigarettes to residents of the St. Regis/Akwesasne Indian Reservation . . . on the New York–Canadian border."⁶ The Akwesasne Mohawk reservation and other Iroquois reservations factored more centrally into this plan when Canadian cigarettes were exported to distributors who transported the cigarettes back into Canada through reservations in upstate New York.⁷ The cigarette-transport scheme also involved mail fraud and wire fraud.⁸

Canada brought the RICO suit in the United States because many of the defendants and witnesses were based in the United States and because "much

unrecognized, traditional communities and cities spanning the borders of the United States and Canada.

2. Canadian Broadcasting Corporation's Witness television broadcast Aug. 20, 1996 (transcript on file with author).

3. Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103 (2d Cir. 2001).

4. *Id.*

5. *Id.* at 106–09.

6. *Id.* at 106.

7. *Id.* at 106–07.

8. *Id.*

of the alleged illegal activity took place there.”⁹ The Second Circuit determined that Canada could not use RICO statutes to recover lost tax revenues or costs associated with implementing their laws in U.S. courts¹⁰ because of the revenue rule, the common-law principle dating back to 1775 that one state will not enforce foreign tax judgments.¹¹

R.J. Reynolds is one of two primary decisions concerning lost revenue and the jurisdictional issues of sovereignty. *United States v. Boots*¹² was not a conflict-of-laws or a revenue-rule case per se, but in it the First Circuit held that the United States’ enforcement of its own criminal prohibition of wire fraud¹³—in this case, wire fraud with the intent to sell cigarettes in Canada—would amount to the enforcement of Canadian customs and tax laws.¹⁴ In *Boots*, three Mohawk defendants were charged with devising a scheme (1) to use wires in interstate commerce to defraud Canada and the province of Nova Scotia regarding duties and taxes, (2) to deprive the Passamaquoddy reservation of the services of their police chief, and (3) to travel interstate to facilitate bribery.¹⁵ Like the Second Circuit in *R.J. Reynolds*, the First Circuit refused to implement Canadian laws, or rather, to collect taxes for Canada.¹⁶ In so doing, the court reinforced settler sovereignty—in an older, territorially based model—by not believing the argument that the defendants had been acting in good faith, based on their aboriginal right to trade, guaranteed to them by the Jay Treaty of 1794. Under the treaty, the defendants, as members of a “border tribe,” were legally allowed to trade across the border as long as their goods were intended for trade with another indigenous nation.¹⁷

In spite of the larger system of exchanges that created the societal problem of “smuggling,” namely tobacco corporations willfully circumventing the tax laws of Canada, it was indigenous traffickers who received relentless public scrutiny, even when they barely appeared in the suit or the decision. The RICO lawsuit proved that there was something much larger at work in 1993 than indigenous trafficking in cigarettes: different claims to sovereignty.

9. Department of Justice Canada, Government of Canada Launches Legal Action in Major Tobacco Smuggling Operation, http://canada.justice.gc.ca/en/news/nr/1999/doc_24494.html (last visited Jan. 23, 2008).

10. *R.J. Reynolds*, 268 F.3d at 131.

11. *Id.* at 108.

12. 80 F.3d 580 (1st Cir. 1996).

13. 18 U.S.C. § 1343 (1952).

14. *Boots*, 80 F.3d at 587.

15. *Id.* at 583–84.

16. *Id.* at 588–89.

17. Treaty of Amity, Commerce, and Navigation art. 3, Nov. 19, 1794, U.S.–Gr. Brit., 8 Stat. 116, 12 Bevans 13.

III

INDIGENOUS SOVEREIGNTY

The rights and sovereignty of the Iroquois, or Haudenosaunee (“People of the Longhouse”), are ensconced in their long history as indigenous peoples in what is now North America. Their own governmental systems, political theory, and law (or *Kaienerekowa*, “Great Law of Peace”), as well as treaty- and trade practices in what is now northeastern and southeastern Canada, buttressed and continue to buttress their understandings of territory. In spite of their longevity in their space as caretakers and sovereigns, their history, narration, and practice of this sovereignty were refracted in the 1990s through the prism of bourgeois capitalism. Social perceptions were filtered through a new understanding of government as an entity that accumulated surplus and distributed income accordingly. To this effect, documentaries and courts portrayed “rights” in a manner that wedded them exclusively to capital accumulation.

In the CBC’s documentary, *Troubled Waters*,¹⁸ which preceded *The Dark Side of Sovereignty*, an Iroquois interlocutor asked, “In today’s world, isn’t money sovereignty? In today’s world, isn’t money freedom?”¹⁹ His question provocatively summarizes distributive models of capital and social hierarchy and demonstrates that those relations of production may enable or disable modes of tolerance in neoliberal states. However, when the political subject is indigenous, citizenship takes on a temporal and economic form due to the societal expectation that Indians²⁰ belong in a certain relationship to capital accumulation, that they be *in another time* (while simultaneously being within this world), and that they be poor.²¹ This provocation, like those of other speakers in this documentary, exposes that very expectation as well as the legal proscription that Indians’ bodies and their activities be contained on reservations.

The historian Philip Deloria characterizes the structures of reservations, Indian agents, and the historical practices of state surveillance in these spaces as a form of societal expectation that still shapes social relations, as a historically

18. Canadian Broadcast Corporation’s Fifth Estate television broadcast, Sept. 28, 1993 (transcript on file with author).

19. *Id.*

20. This article is concerned with the sovereignty, trading activities, legal construction, and media representations of indigenous peoples in North America that have been understood at various times as “Savages,” “Natives,” “Aboriginals,” “Indians,” “Native Americans,” “First Nations” and various other, historically shifting categorical designations of their polities. Where possible their polities were identified with specificity, such as “Mohawks,” “Iroquois,” and in a manner that is consistent with their self-identification. For the purposes of clarity and in consistency with the colonial mapping of their bodies and their territories through law, the term “Indian” will be used, as this is the term that is deployed in the historical and mediated and legal “rights” literature on them. To be clear, this article is concerned with indigenous peoples of North America, and not the subcontinent of India.

21. Jessica Cattellino, *Tribal Gaming and Indigenous Sovereignty, With Notes from Seminole Country*, 46 AM. STUD. 193 (2005) (generally analyzing the forms of scrutiny that Seminoles are subjected to in American public culture because of the perceived incommensurability between wealth and indigenosity).

generated “colonial dream” in which “fixity, control, visibility, productivity, and, most importantly, docility” were realized.²² This dream was one of indigenous pacification, containment, and demobilization. In order to be actualized in the present, this dream requires that indigenous economic activities be watched, that there be a state-police presence in their community, and that Indians be passive in the face of this surveillance, regulation, scrutiny, and possible intervention. Consider here a response and a reflection on this expectation from a Mohawk named Kakwirakeron:

Are you talking about Canada, the RCMP, invading a sovereign Mohawk territory and using full violent force on the Mohawk? If you're talking about that, then they better think twice about that because the resistance here would be awesome. I think the people have really enjoyed prosperity for a long enough time and they have learned the lessons of Oka.²³

The narrative of the documentary *Troubled Waters* is dramatized by fears of Indian lawlessness:

Dust settles on the smuggling capital of Canada. Across the river, Loran Thompson is getting ready for another busy night. . . . Just across the river from Thompson's dock is Cornwall Island, located on the Canadian half of Akwesasne. Mohawks don't recognize the international border that cuts through the water. For them, it's all Indian territory and smuggling is a dirty word here. They call it sovereignty. They maintain a treaty signed almost 200 years ago [that] gives Mohawks the right to trade freely among themselves.²⁴

With this, the director de-historicizes the historical respatialization—or reconfiguring one's understanding of a particular space—of Akwesasne through colonial boundary making. He renders this respatialization a simple matter of the refusal of Indians to recognize what is apparent, an international boundary that has been drawn through the water, which is in the minds of *Akwesasnero:non* (people of Akwesasne) *their* water. Noting that they are legally divested of the water that belongs to them according to their understanding of territorial ownership then operates as a critique of their understanding of the space that they occupy. This becomes their “refusal to recognize.” If a refusal to recognize also involves using one's territory in a manner that is historically and philosophically consistent with what one knows, then it is an incident of failed consent: Mohawks, in this case, refused to consent to colonial mappings and occupations of their territory. Such refusals, or failures to consent, require a legal response to contain the refusers, a move that then incites settler anxiety about the containability of Indian bodies and practices. That the territory and the people of Akwesasne cross four state and provincial boundaries and jurisdictions as well as an international boundary line bifurcating their territory,²⁵ that this territory was divided without their explicit

22. PHILIP J. DELORIA, *INDIANS IN UNEXPECTED PLACES* 27 (2004).

23. *Troubled Waters*, *supra* note 18.

24. *Id.*

25. Akwesasne means “where the partridge drums.” LEWIS HENRY MORGAN, *LEAGUE OF THE IROQUOIS* 474 (1996). Akwesasne is a Mohawk reservation that is bifurcated by the international

consent, that their boundaries of this space are different than those mapped by relatively new nation-states and peoples, was not up for discussion or analysis. It is simply the Indians' perceived misrecognition of boundaries (and the inability to contain their trafficking and their economic practice) that was the issue.

Discourses such as these obscured the much larger economic imperative of tobacco corporations that relied on the actions and public utterances of Iroquois traders to hide Big Tobacco's illegal trade activities. This reliance is revealed by the facts surrounding the protracted period of cigarette smuggling between 1989 to 2000 by Big Tobacco, as well as by later CBC attention,²⁶ police investigation, and the *R.J. Reynolds* decision. Mohawks and other Iroquois transporters had a much smaller role in this "problem" than was represented in these early documentaries. Their relative insignificance was demonstrated in the *R.J. Reynolds* lawsuit and made public through the Canadian Department of Justice website, which stated,

[T]he [members of the] Canadian Tobacco Manufacturers Council were also involved [and] were used to throw[ing] the Government of Canada off the smuggling trail. The government alleges RJR-Macdonald used the Council to blame organized crime while pretending it was trying to stop smuggling. At the same time it is alleged that RJR-Macdonald was setting up a shell company in the United States to deceive investigators.²⁷

Yet the overemphasis on Indian activities was important in solidifying the fragile sovereignty of a settler nation-state—a sovereignty that, it will be seen, requires, along with taxation, the vanquishing, through law, of indigenous sovereignties.

R.J. Reynolds appears unimportant relative to other revenue-rule cases such as *United States v. Pasquantino*,²⁸ in which the Fourth Circuit found that brothers from Niagara Falls used wires in their bid to willfully defraud the Canadian government of revenue through liquor smuggled from Maryland into Canada. *Pasquantino* "diminished the rule of settler sovereignty" by extending the redress for harm done to Canada into a U.S. court. Nonetheless, all revenue-rule decisions act to retrench settler sovereignty over borders and to efface indigenous sovereignty and histories. The images described in these cases criminalized and spectacularized Iroquois traders, and Mohawks in particular, and in doing so obscured the means of the production and reproduction of Big Tobacco's surplus. Disallowing the possible role of Indian political orders (for example, the legitimacy of the trading under the Jay Treaty) or of public argument about these issues, perpetuated the notion that there are actually only *two* legitimate political regimes in play—Canada and the United States. And

boundary line between Canada and the United States and is also surrounded by, or lies within, New York State, Ontario, and Quebec.

26. *The Smoke Ring* (Canadian Broadcasting Corporation's *The Fifth Estate* television broadcast, Jan. 20, 1998).

27. Government of Canada Launches, *supra* note 9.

28. 545 U.S. 1135 (2005).

the “extraterritoriality,” the cross-border question of the *R.J. Reynolds* case, which made the issue a choice-of-law matter, was simply a question of deciding, between the two countries, whose law would apply and which of these two unquestionably legitimate political regimes had incurred harm.

Mohawk and other Iroquois traders had their sovereignty and sovereign right to trade repeatedly criminalized and effaced by analyzing the issues as a “smuggling” problem. Their aboriginal right to commerce across borders under the Jay Treaty was ignored, as Mohawks and other Iroquois were arrested repeatedly during the 1990s for smuggling and for conspiracy to smuggle contraband cigarettes across the border. Shortly thereafter, in 2001, the aboriginal right to trade would be denied by the Canadian Supreme Court.²⁹

Indigenous “smuggling” was a sign of failed consent to recognize territorial designations by third parties, of settler fragility. “Sovereignty” is articulated differently by Mohawks in their traditional trade practice, a practice that necessarily involves a grounded knowledge and deep critique of settler law and that is misperceived as criminal, even when it is an explicit expression of treaty rights guaranteed to the Mohawks as a border tribe.

IV

CHALLENGES TO SOVEREIGNTY: LOST REVENUES AND HISTORIES OF FAILED CONSENT

A. The Problem of Lost Revenues

In both *Troubled Waters* and *The Dark Side of Native Sovereignty*, “the problem” was revenue lost to Canada. Canada raised the tax on cigarettes to combat teen smoking in 1989 and then in 1991³⁰ and saw a rapid increase in smuggling. By 1994, Canada estimated that it had lost \$2 billion (Canadian dollars) in revenue³¹ and consequently lowered the tax to combat smuggling. The public problem of cigarettes then morphed from a corporeal concern with the young citizen’s body to a public concern over the nation’s economy: “smugglers” were harming not only the former, but also the latter—the nation’s pocketbook.

In *R.J. Reynolds*, one nation-state (Canada) acted as a person and filed a civil-action suit against an amalgamation of business interests within another nation-state. The suit was filed in the defendants’ *own territory*, within their own legal system, in order to sue for damages under RICO for injuries incurred in Canada. Canada argued that an amalgamation of U.S. and Canadian cigarette traders willfully circumvented Canadian taxation by smuggling

29. *Mitchell v. M.N.R.*, 1 S.C.R. 911 (2001).

30. See Canada Border Services Agency, Summary of Allegations, <http://www.cbsa-asfc.gc.ca/media/release-communique/1999/0829ottawa-eng.html> (last visited Apr. 5, 2008) (providing a chronology of cigarette taxation between 1989 and 1991).

31. U.S. GEN. ACCOUNTING OFFICE TESTIMONY, CIGARETTE SMUGGLING: INFORMATION ON INTERSTATE AND U.S.-CANADIAN ACTIVITY 1 (2007)

contraband tobacco and cigarettes—via the Iroquois from reservation communities in the Northeast—from Canada, across the international boundary line for repackaging, and back into Canada, in order to evade Canadian taxation. In conspiring in these ways and in circumventing Canadian taxation, Canada argued, the tobacco company R.J. Reynolds and others “injured” Canadian property and caused additional damages and costs due to the necessity of investigation and legal proceedings. In ruling against Canada by upholding the revenue rule—which states that one country would not act as an enforcer of the other’s laws—the Second Circuit recognized the sovereign status of foreign nations.

R.J. Reynolds offers an occasion for insight into the legal process of how “empire” is negotiated, where legal and political territories are acquired and new boundaries and political subjects are decided through the space of courts. In doing so, the terms—and the process—of political recognition are laid bare for analysis. This is a case in empire-building because its complicated legal reasoning both responds to and effaces, again, indigenous people’s claims of their “aboriginal” right to trade, upholds and reinforces the singular forms of sovereignty (even where distributions in capital deterritorialize sovereignty *à la* Hardt and Negri³²), and disables the very possibility of indigenous participation in a contemporary trade network. In *R.J. Reynolds*, the possibility of a third legal system at work was not admitted into the analysis, thus solidifying settler sovereignty as normal, natural, and ultimately just.

B. Histories of Failed Consent

In contrast, Mohawks interviewed in the films spoke of an alternative mapping of territory. Consider this conversation on transport, place, and the law:

Victor Malarek: “So these boxes move out every night and they’re headed for the Canadian side, but look what it says here—‘Not for sale in Canada.’ Where are they sold?”

Loran Thompson: “Canuga Hogga territory, indigenous to the people of this country—the Americas.”

Victor Malarek: “But they end up in Canada.”

Loran Thompson: “Maybe to you they do, maybe to people like you they do, but to people like me, nationalists of my country and my government, that word Canada to me is Ganada—a village.”

Victor Malarek: “When you see this, ‘Not for sale in Canada,’ . . . you’re not breaking the law?”

Loran Thompson: “No.”³³

32. See MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000) (extensively analyzing this respatialiation of authority, sovereignty, and capital globally).

33. *Troubled Waters*, *supra* note 18.

Thompson's arguments speak from Haudenosaunee legal and experiential history, a history that is punctuated by such exchanges and differential understandings of place and territory. Consider the history embedded in these remarks:

You are a cunning People without Sincerity, and not to be trusted, for after making Professions of your Regard, and saying every thing favorable to us, you . . . tell us that our Country is within the lines of the States. This surprises us, for we had thought our Lands were our own, not within your Boundaries.³⁴

The white Man put that there, not us, I don't know why we have to put up with this bullshit.³⁵

More than two hundred years separate these utterances, yet not much seems to have changed in the Iroquois perspective concerning the border. The central point of each lament, although inflected differently, remains the same: the perception of territory that underpins Iroquois people's right to cross the border dividing the United States from Canada is radically different from that of either nation. These border utterances speak from the perception of the Northeast as a territory that belongs to the Iroquois, and as a place that was divided and is administered without their consent.

These narratives speak as well to the political relationships that underpin this territory, and to the difficulty that Iroquois people have had and still have in moving through the landscape of the Northeast in a manner that is consistent with their self-perception—and rights—as indigenous nationals of that territory. Why is there such a radical difference between their self-perception and the ways in which Iroquois border-crossings are administered? Why is there such incommensurability between Iroquois' perceptions of the treaty relationship and those of the regimes that now interpret it? What accounts, then, for the dissonance between Iroquois self-perception and state-perception?

There are several factors at work in these disjunctions. The most significant are the different understandings of the proper relations that Iroquois and settlers have brought to their interactions through the past two hundred years. These different interpretations are brought to the fore in Mary Druke Becker's important article on Iroquois sovereignty through time.³⁶ Iroquois chiefs deployed the language of treaty—with concomitant notions of "father" when regarding the British—but did so insofar as these terms furthered their notion of the relation between the two as one of equals.

Beginning in the late 1670[s], the English and French began seeking territorial domination over larger and larger areas of land vis-à-vis one another. Each nation

34. Alan Taylor, *Divided Ground: Upper Canada, New York, and the Iroquois Six Nations*, 22 J. EARLY REP. 66 (2002).

35. This quote is provided by the author from her personal experience of overhearing one Mohawk man speaking to another over dinner about border issues, at a Red Lobster in Lachine, Quebec, during the late 1990s. See Audra Simpson, *To the Reserve and Back Again: Kahnawake Mohawk Narratives of Self, Home and Nation 200* (unpublished Ph.D. dissertation, McGill University, August 2003) (providing greater discussion of this quote).

36. Mary Druke Becker, *We Are an Independent Nation: A History of Iroquois Sovereignty*, 46 BUFF. L. REV. 981–99 (1998).

argued with the other that the Iroquois had agreed to become their children or subjects. The Iroquois had agreed to use the Iroquoian term for “father” when addressing Euro-Americans. This term was used because within the matrilineal Iroquois society a father was an indulgent, not an authoritarian, figure. The term was commonly used among Iroquois nations and by other Iroquois with whom they were in alliance. It implied a reciprocal relation in which care and aid were provided. It was not one which implied subordination.³⁷

These understandings of the Iroquois and by the Iroquois are common to the different positioning and perception of Indians generally through time, and to settler-state formation and asymmetries of power that allow one perception of difference to become institutionalized through law, policy, and other forms of state practice. Indian tribes were first perceived as nations (hence the model of international treaty-making which marks the earliest period of their interaction with the Dutch, French, and English regimes) and were then perceived to be dependant wards who required protection from white unscrupulousness on the frontier.³⁸ Iroquois, in particular, have resisted their interpretive demotion in political affairs; yet, with the rise of the “welfare state,” many perceive Indians on the Canadian side of the border as clients (among many others) who need to be administered and managed.

With this transformation of legal perception in mind, what then is the basis in law for Iroquois self-perception, sense of jurisdiction, and movement across the border? It is largely the nation-to-nation, or “linking arms,”³⁹ metaphor of equality among people, reflective of the treaty relationship, that serves as an interpretive frame for Iroquois engagements with other nations, be they indigenous or nonindigenous.⁴⁰ This is a notion anchored historically in arguments and deployments of the Two Row Wampum Treaty between the Iroquois and the Dutch,⁴¹ manifest in reminders and interactions that have been issued in serial engagements in the national and international arenas over the

37. *Id.* at 988–89 (internal citations omitted).

38. *Id.* at 982, 992.

39. The notion of “linking arms together” is more than mere imagery or a discursive device. It is the narrative of the League and reflected in the Hiawatha belt that represents the confederation of six nations. Becker extends this notion of linking arms together to the “covenant chain” agreed to between the Iroquois and the English, a chain of friendship that recognized and then elaborated alliances between nations for the purposes of trade. These are the understandings of friendship between equals that the Iroquois would bring to the treaty-making process itself. *Id.* at 985–56; see also ROBERT WILLIAMS, *LINKING ARMS TOGETHER: AMERICAN INDIAN VISIONS OF TREATY AND PEACE* (1999) (providing a book-length treatment of the interpretive space of treaty).

40. *Cf.* Becker, *supra* note 36.

41. The Two-Row Wampum Treaty is a treaty of coexistence between the Dutch and Iroquois represented by a belt of purple and white wampum shells. There are rows of purple wampum parallel to each other, with white wampum between and around them. The white represents the sea of life that each row metaphorically shares. One purple row represents an Iroquois vessel and the other a European vessel. Although they share the same sea, they are separate and parallel; they should not touch or disturb each other or try to steer the other’s vessel even though they share the same space. Between the vessels are chains that connect them to each other; these are to be shined and maintained by one or the other vessel.

past three centuries. But the most important among these treaties for cross-border articulations is the Jay Treaty of 1794.⁴²

In 1794, the United States and Great Britain signed the Treaty of Amity, Commerce, and Navigation, commonly known as the Jay Treaty.⁴³ The U.S.–British boundary had been established in 1783 with the Treaty of Paris, and, as a creature of the post–Revolutionary War landscape, the Jay Treaty then sought to delimit and establish jurisdiction along the Treaty of Paris boundaries and to harmonize trade between the countries.⁴⁴ In a concession to Indian nations along those boundaries, the Jay Treaty acknowledged and, as in the case of all early colonial legislation, codified within a particular time and space—and with concomitant attitudes and flows of power—the rights of Indian nations occupying areas near the U.S.–Canadian border, among them the Iroquois Confederacy nations—the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora.

In the Jay Treaty, the right to traverse the boundaries of the U.S.–British divide freely and without levy was guaranteed for Indian people who were operating in what has been defined as their cultural traditional “nexus” of trade.⁴⁵ This is laid out explicitly in Article III of the Jay Treaty:

It is agreed that it shall at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of the said Boundary Line, freely to pass and repass by Land or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America. . . .

No Duty of Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing

42. Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.–Gr. Brit., 8 Stat. 116, 12 Bevans 13.

43. *Id.*

44. For example, Francis M. Carroll quotes the Northeast boundary as the following “From the NorthWest Angle of Nova Scotia, vs. That Angle which is formed by a Line drawn due North from the Source of the Saint Croix River to the Highlands along the said Highlands which divide those Rivers that empty themselves in to the River St. Lawrence, from those which fall into the Atlantic Ocean, to the Northwestern-most head to the Connecticut River.” He goes on to describe the ambiguities that attend to these descriptions, that these geographic features were not commonly known by all and that the boundaries remained into the 1800s with the Treaty of Ghent in 1815, providing for boundary commissions to survey and decide on the matter further. See Francis M. Carroll, *Kings and Crises: Arbitrating the Canadian-American Boundary Dispute and the Belgian Crises of 1830–31*, 73 NEW ENG. QUART. 179, 181–82 (2000). This rendering of space and place which privileges boundaries over sites is critical to the disembodiment of territories from Indian grasp. A full discussion of the failures of cartography as a site-specific process and the implications of this for nation-formation lies well beyond the horizon of this article; however, for an excellent discussion of this with reference to the predicament of Samuel Champlain's explorations in the St. Lawrence, see Kathleen Kirby, *Re-Mapping Subjectivity: Cartographic Vision and the Limits of Politics*, in *BODYSPACE: DESTABILIZING GEOGRAPHIES OF GENDER AND SEXUALITY* 45 (Nancy Duncan ed., 1996).

45. Bryan Nickels, *Native American Free Passage Rights Under the Jay Treaty: Survival Under United States Statutory Law and Canadian Common Law*, 24 BRIT. COLUM. INT'L & COMMON L. REV. 315 (2001) (“However, to claim the free passage right in Canada, a U.S. Indian has to demonstrate a cultural or historical “nexus” to the specific area in Canada he wishes to visit.”).

or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever.⁴⁶

This explicit right to pass, then, implicitly leaves the legal regimes of Canada and the United States with the power to define who those Indian nations are and how that right to pass shall be rendered and respected. As well, and very critically, the regimes of the United States and Canada were bequeathed the power to choose whom they would recognize as members of these communities. It is prudent now to map out how these longstanding forms of recognition then speak to local forms of recognition, and more critically, how they speak to indigenous notions of citizenship-formation and territory. Connecting these discourses illuminates how legal interests and designations not only affect the possibility of movement, but how these interests also work to define, through identification practices, their own territory and boundaries.⁴⁷ Such connections may illuminate as well how these identifications and legal and interpretive acts are reformulated in practice and how they are not only “resisted,” but circumvented, denied, or ignored.

V

BRUSHING UP AGAINST THE STATE: TRANSHISTORIC NARRATIVES OF HOME AND OF TREATY

What follows are ethnographic fragments of contemporary Mohawk interpretations of their sovereignty rights as they cross and recross the international boundary line in the Northeast. The legal history that informs their understanding of sovereignty comprises the rest of this section.

I was coming back [to Kahnawake] and after a four hour drive. I was daydreaming. When the border guard asked me first where I was from I said “Kahnawake.” He was puzzled; he then asked where do you live and who owns my car because of my New York plates. . . . I said “I live in Albany,” and “I own the car” then he asked why I was going to Kahnawake. . . . I said I was going HOME, then he said “why do you live in Albany[.]” I said that is where I work and that is where I live, and I also live in Kahnawake. He said I can’t live in two places and I told him I can live in as many places as I want!⁴⁸

When asked to declare his citizenship, Pronovost replied that he was from Kahnawake, was a North American Indian and a member of the Iroquois Confederacy. At the time, having neither a Confederacy issued “Red Card” nor a Canadian-issued Indian Status Card, Pronovost was told he had to go to Albany to produce an identification card verifying that he had [fifty] percent blood quantum.⁴⁹

46. Treaty of Amity, Commerce, and Navigation art. 3, Nov. 19, 1794, U.S.–Gr. Brit., 8 Stat. 116, 12 Bevans 13.

47. Cf. JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE CITIZENSHIP AND THE STATE* (2000).

48. This quote is provided by the author from her interview with a thirty-eight-year-old Mohawk man from Kahnawake while researching Mohawk nationhood and citizenship. See Simpson, *supra* note 35 (providing greater discussion of this quote).

49. Ross Montour, *US Tax Court Declares “No Jurisdiction” Over Kahnawake Resident*, <http://www.easterndoor.com/archives/12-20/12-20.htm#stb> (last visited Apr. 4, 2008). Louis Pronovost is

I was flying back to New York and this guy at the airport wanted to know my blood quantum. I said 100%. He said, “do you have a green card?” I said “I don’t need one[.] I am a North American Indian.” He asked for proof of my blood quantum. I said, “[L]ook at my Indian card,⁵⁰ I am an Indian that is why I have one.” He made me go to INS [the Immigration and Naturalization Service] . . . the next day in New York City, and I was really mad but I went. This is the first time this happened to me in all these years. I went there and the guy said “you are an Indian you don’t belong here, I am closing this case.” I knew I didn’t belong there. I went to the lawyer at the American Indian Community House the next day and I got a copy of the Jay Treaty. Now I carry that and my Indian card with me whenever I cross.⁵¹

The Jay Treaty got its first test of indigenous mobility and citizenship with the case of *United States ex rel Diabo v. McCandles*⁵² in 1927.⁵³ With the passage of the Indian Citizenship Act of 1924,⁵⁴ Indians in the United States were made citizens of the United States,⁵⁵ and those in Canada who travelled and worked within the United States were rendered “aliens.” Although the Citizenship Act may have been regarded by some First Nations and Native Americans in the United States as an affirmation of their equal place within the United States, the Act was regarded by other highly independent, self-ruling communities, such as Hopi, Onondaga, and Akwesasne, as the imposition of a foreign form of citizenship and governance.⁵⁶ Citizenship criteria determined by the Act omitted Canadian forms of recognition that afforded rights to Indians in Canada. Nonetheless, because Iroquois on both sides of the border had histories of crossing the border⁵⁷ and knew that this passage was a right recognized by the Jay Treaty, they believed that they had a right to pass through the Canadian–U.S. border as indigenous nationals rather than as “aliens.”

a Kahnawake resident who argued in this taxation case that he was a Mohawk citizen and not a U.S. or Canadian citizen for taxation purposes.

50. Indian status cards are sometimes referred to in everyday speech of community members as “Indian cards.”

51. This quote is provided by the author from her interview with a sixty-eight-year-old Mohawk man. See Simpson, *supra* note 35 (providing greater discussion of this quote).

52. 18 F.2d 282 (E.D. Pa. 1927).

53. See Gerald F. Reid, *Illegal Alien? The Immigration Case of Mohawk Ironworker Paul K. Diabo*, 151 PROC. OF THE AM. PHIL. SOC’Y 61–78 (2007) (offering a recent historical reconstruction of this event).

54. 8 U.S.C. § 1401 (1924).

55. For a discussion of the effects of this Act on the sovereignty of Native American nations in the United States and, in particular, for his discussion of the resistances against this Act by Iroquois and other peoples, see Robert Porter, *The Demise of the Ongwehonweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107–83 (1999).

56. For a perspective on Mohawk citizenship, sovereignty and borders from Akwesasne, see Michael Mitchell, *Akwesasne: An Unbroken Chain of Sovereignty*, in DRUMBEAT: ANGER AND RENEWAL IN INDIAN COUNTRY 105–36 (1988). For a treatment of the perspective of Native Americans generally, see VINE DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES 18–19 (1974); Eileen M. Luna-Firebaugh, *The Border Crossed Us: Border Crossing Issues of the Indigenous Peoples of the Americas*, WICAZO SA REV. 159 (2002); Alexandra Witken, *To Silence a Drum: the Imposition of United States Citizenship on Native Peoples*, 21 HISTORICAL REFLECTIONS 353, 379 (1994). For a discussion of the Iroquois perspective, see Porter, *supra* note 55, at 127, 159–61.

57. See BETH LADOW, THE MEDICINE LINE: LIFE AND DEATH ON NORTH AMERICAN BORDERLAND (2001) (detailing the history of the U.S.–Canadian border from the Gros-Ventre, Blackfoot, and Settler vantage points).

Diabo was, by all legal reports, one hundred percent Iroquois, indigenous, and not, therefore, an “alien,”⁵⁸ except, of course, under the terms of the Citizenship Act. More specifically, he was a Mohawk ironworker from Kahnawake who traveled down to the United States to work, as did many other men from the community. He had worked on and off in the United States for ten years and had both passed through the border and worked in the United States with no difficulty. Yet he suddenly found himself arrested and deported in 1925 as an illegal alien. Diabo petitioned for a writ of habeas corpus on the ground that, as a member of a North American Indian tribe, he was exempt from immigration laws as guaranteed under Article III of the Jay Treaty. The United States District Court for the Eastern District concurred and held that the right to cross the border was in fact an aboriginal right, a right that was inherent—one recognized and confirmed (not created) by the treaty:⁵⁹

[T]he rights of the Indians are [not] in any way affected by the treaty, whether now existent or not. The reference to them was merely the recognition of their right, which was wholly unaffected by the treaty, except that the contracting parties agreed with each other that each would recognize it. . . . *From the Indian view point, he crosses no boundary line. For him this does not exist.*⁶⁰

The court’s decision was confirmation throughout Iroquois country that Iroquois rights were legally recognized, affirmed, and active, in spite of the major setback that the Citizenship Act posed for the particular form of recognition that they desired—that of sovereign nations.

Both the Citizenship Act and the Johnson-Reed Immigration Act of 1924, which included exclusionist measures against both Native Americans and Asians, were especially onerous for the Iroquois because they represented the twin imposition of alien status with its difficulties for Iroquois travelers and workers from Canada and of foreign citizenship with its links to foreign-governance structure. These laws, as well as band-council governance⁶¹ were resisted in Iroquois communities on both sides of the border, since any form of foreign citizenship meant the dissolution of traditional governance and membership and the growing power of the settler state *within* Iroquois communities.

58. *Diabo v. McCandless*, 18 F.2d 282, 283 (E.D. Pa. 1927).

59. *Id.*; Sharon O’Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 *FORDHAM L. REV.* 315 (1984).

60. *Diabo*, 18 F.2d at 283 (emphasis added).

61. Band Councils are the administrative governments authorized by the government of Canada on Indian reserves to administer The Indian Act, “[a]n Act respecting Indians.” The Indian Act is an overarching piece of legislation enacted by the Parliament of Canada in 1876 that recognizes certain indigenous peoples in Canada as “status” Indians who then have rights and provisions based on this recognition as legal wards of the state. Band Councils supplant indigenous forms of governance and have been vigorously contested for this. John Tobias argues that the Act was conceived to “protect, civilize and assimilate” Indians in Canada. It also laid the foundation for all further legislation regarding the lives of Indians which were in the cases of Western Indians and others, rejected. John Tobias, *Protection, Civilization and Assimilation*, in *SWEET PROMISES: A READER IN INDIAN-WHITE RELATIONS* 132–33 (J. R. Miller ed., 1991).

These resistances to, and struggles with, state forms were not limited to a few periods and places—they had also been felt in Kahnawake in 1884, with petitions against the Canadian Indian Advancement Act of 1884;⁶² in Akwesasne in 1899, when the traditional chief Jake Fire was shot and killed by Royal Canadian Mounted Police for demanding their removal from the community in respect for traditional Mohawk governance;⁶³ then at Six Nations, for the imposition of an electoral band council in 1924; and the American side of Akwesasne in 1924, with the United States' Indian Citizenship Act.⁶⁴

The Indian Defense League of America (IDLA) was formed at Tuscarora in 1926 by Clinton Rickard specifically to address the cross-border rights of Iroquois peoples.⁶⁵

The IDLA was inspired by the work of the Deskaheh⁶⁶ (Levi General) at Six Nations and embodied the effort to assert Iroquois sovereignty and to affirm Iroquois treaty rights. Deskaheh worked tirelessly to get Six Nations recognized as a member nation within the League of Nations. But, in 1924, Canada began to forcefully enforce its Indian Act of 1876 (whose imposition at Six Nations was avoided because of the Indians' "civilized status" relative to other Indians), supplanting the traditional chiefs and band-council forms of governance in his community,⁶⁷ and seizing the wampum belts.⁶⁸ When Deskaheh's struggle to gain international recognition failed, he made a radio address explaining the Iroquois position vis-à-vis land and sovereignty, exhorting Americans to "know their history" and argued for an understanding of citizenship as a colonizing technique. Of this he argued,

Your governments have lately resorted to new practices in their Indian policies. In the old days, they often bribed our chiefs to sign treaties to get our lands. Now they know that our remaining territory can easily be gotten from us by first taking our political rights away in forcing us into your citizenship, so they give jobs in their Indian offices

62. The Indian Advancement Act of 1884 replaced traditional governments with electoral systems understood as "band councils" on reservations. GERALD F. REID, *KAHNAWAKE: FACTIONALISM, TRADITIONALISM, AND NATIONALISM IN A MOHAWK COMMUNITY*, LINCOLN: NEBRASKA 70 (2004).

63. Mitchell, *supra* note 56, at 118.

64. The Indian Citizenship Act (Snyder Act) of 1924 granted citizenship to all Indians in the United States and was signed into law by President Calvin Coolidge on June 2nd of that year.

65. JOLENE RICKARD, *THE INDIAN DEFENSE LEAGUE OF AMERICA* 48 (1995).

66. "Deskaheh" is a hereditary chief of the Iroquois Confederacy. Levi General was a Cayuga from Six Nations who occupied the title of Deskaheh until his death.

67. Deskaheh, Levi General, *An Iroquois Patriot's Fight for International Recognition*, in *BASIC CALL TO CONSCIOUSNESS* 41–47 (Akwesasne Notes, ed. 2005).

68. Wampum belts are belts that are representations of law and agreements between parties that are made from wampum shell, a form of valued shell and in some cases, currency used by Indians and settlers in the sixteenth and seventeenth centuries. These belts are the authoritative basis for governance and treaty for some Indigenous people in the Northeast, and especially the Iroquois (for a brief history of wampum belts and Iroquois generally, see TEHANETORENS, *WAMPUM BELTS OHSWEKEN* 47–48 (1983). The Royal Canadian Mounted Police forcefully "seized the wampum [belts] used to sanction council proceedings and other council records," and the traditional government in place at Six Nations was forcibly disbanded. Sally M. Weaver, *The Iroquois: The Grand River Reserve in the Late Nineteenth and Early Twentieth Centuries, 1875-1945*, in *ABORIGINAL ONTARIO: HISTORICAL PERSPECTIVES ON THE FIRST NATIONS* 248 (Edward S. Rogers & Donald B. Smith, eds. 1994).

to the bright young people among us who will take them and who, to earn their pay, say that your people wish to become citizens with you and that we are ready to have our tribal life destroyed and want your governments to do it. But that is not true.⁶⁹

He died days later in the home of Clinton Rickard on the American side of the border on the Tuscarora Indian Reservation. The circumstances of his death were symbolic of his struggle and for the struggle of Iroquois peoples at the time: he died on the Tuscarora reservation, exhausted and sick from the struggle in Geneva and with the medicine being delivered to him from Six Nations unable make it across the border because of immigration restrictions.⁷⁰ His final words were to “fight for the line,” meaning fight for the border and Iroquois people’s right to cross.⁷¹

In the fifty years following Deskaheh’s death, the Immigration and Naturalization Service, the courts, and the border guards variously interpreted Jay Treaty rights and applied law to indigenous and nonindigenous peoples who crossed the border. Citizenship Act interpretations were at times in direct confrontation with Canadian forms of recognition. In 1933, Canada adopted more political forms of recognition at the border, with its own terms of Indian admissibility. These forms of recognition in Canada confounded border guards as they dealt with individuals that were non-Indian and had Indian status conferred upon them by the Canadian state, such as non-Indian women who married Indian men; they likewise applied a separate set of rules for Indian women who married non-Indian men. In a series of interesting situations, predicaments, and decisions, border guards and the Immigration and Naturalization Service then had to stretch immigration law and the Jay Treaty to deal with white women who had Indian cards and wanted to cross;⁷² Indian women who did not have Indian status in Canada and wanted to stay within the United States;⁷³ and in one the of the earliest test cases of the Jay Treaty, with two nonindigenous Canadians.⁷⁴

69. Deskaheh, Levi General, *The Last Speech of Deskaheh*, in BASIC CALL TO CONSCIOUSNESS 48–54 (Akwasasne Notes, ed. 2005).

70. RICKARD, *supra* note 65, at 48.

71. *Id.* at 51.

72. For historical and personalized accounts of these struggles during and before the amendment to the Act, see generally Janet Silman, ENOUGH IS ENOUGH: ABORIGINAL WOMEN SPEAK OUT (1994); Lynn Gehl, “*The Queen and I: Discrimination in the Indian Act Continues*,” in CANADIAN WOMAN STUDIES 64–69 (2000).

73. *Goodwin v. Karnuth*, 74 F. Supp. 660 (W.D.N.Y. 1947).

74. *Karnuth v. United States*, 279 U.S. 231, 233 (1929) (stating that, while Antonio Danelon and Mary Cook both lived on the Canadian side of the border of Niagara Falls, “[n]either . . . [was] a native of Canada.”)

VI

BORDERS OF BLOOD

With the passage in 1934 of the Indian Reorganization Act, blood became a legal marker of Indian identity in the United States at the federal level⁷⁵ and the INS determined that the amount of Indian blood that Indians from Canada had to possess was fifty percent in order to gain passage into the United States.⁷⁶ At the border, this requisite was largely ignored in favor of more political forms of recognition, in line with Canadian practice. This persisted until the case of *Goodwin v. Karnuth* in 1947.

Dorothy Karnuth was a full-blooded Upper Cayuga from the Six Nations Reserve near Brantford, Ontario, who was disenfranchised from her Indian status due to her marriage to a white man:⁷⁷ she did not have the political recognition that was necessary for her to remain in the United States, according to immigration practices. In her case the courts gave the concept of Indians born in Canada a racial connotation. The INS soon revised its immigration manual:

The words "American Indians born in Canada" . . . must be given a racial connotation. Thus an alien born in Canada who is of American Indian race is entitled to the immunities of this section regardless of membership in an Indian tribe or political status under Canadian law.⁷⁸

This blood-quantum requirement was hardened into INS policy in 1952 with the Revised Citizenship Act of that year and then upheld in *Akins v. Saxbe*.⁷⁹ The blood-quantum requirement was not consistent with Canadian forms of recognition, forms that were based on the preexisting and somewhat sanguine model of the Victorian bourgeois family, but it was clearly consistent with the racialization of identity that had long been occurring in the States and was hardening around issues of immigration.⁸⁰

75. The Indian Reorganization Act (Wheeler-Howard Act) was enacted in Congress on June 18, 1934. Section 19 defines "Indian" in three terms, the final term being related to blood quantum: "The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all person[s] who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation, and shall further include all other persons of one-half or more Indian blood."

76. 48 U.S.C. § 206 (1934).

77. She was disenfranchised according to the Indian Act of Canada, which stated, "[a]ny Indian woman who marries any person other than an Indian, or a non-treaty Indian, shall cease to be an Indian within the meaning of this Act." *Id.* at 661 (quoting the Indian Act of Canada, R.S.C., ch. 98, § 14 (1927)).

78. Marian L. Smith, *The INS and the Singular Status of North American Indians*, 21 AM. INDIAN CULTURE & RESEARCH J. 131, 147-48 (1997).

79. 380 F. Supp. 1210 (D. Me. 1974).

80. For greater discussion of immigrant groups and notions of permissible citizenships, see Mae M. Ngai, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF AMERICA (2004). For a treatment of the experience of indigeneity at the border, see Smith, *supra* note 78, at 146-49 (providing a more nuanced account of the interpretive tensions between political forms of recognition at the border and more racialized interpretations between 1928 and 1952).

The racialization of Indian identity in the United States correlates to the differing conceptions of Indian relationships to the state and to Indian citizenship through time. These were conceptions of recognition that moved Indian tribes away from the semisovereign status of “domestic and dependent nations” and into the conceptual and legal ambit of racialized minorities. Much like the East Indians who immigrated to Canada,⁸¹ Indians in the United States and Canada appear completely outside of the frame of U.S. citizenship, from which the U.S. Constitution excluded them by virtue of their perceived incapacity for civilization and taxability.⁸² However, unlike the East Indians in Canada, indigenous peoples within the United States were not geographically distant people, or foreign people who represented reprehensible or anxiety-provoking cultural differences to the American or Canadian legal eye; they were, from their earliest moments of interaction, recognized and indigenous sovereigns, not foreigners seeking to immigrate, nor citizens.

This initial exclusion, which was based on the semisovereign status, or “independent” status of Indians and the taxable standard of citizenship, was in contrast to the deliberate exclusion of African Americans and Asian Americans in that it was not yet based on racialized criteria.⁸³ However this nonracialized standard of difference and recognition for Indians would soon change.⁸⁴ Since Indian exemption from the more racialized ambits of exclusion was most likely in reference to their “nontaxable status” within the geographical parameters of the United States as people possessing membership within internal nations, the diminution of their separate status—and concomitant political authority and recognition—was directly related to the application of more racialized forms of recognition and to U.S. citizenship.

This diminution began with the Dawes Severalty Act of 1887, which granted U.S. citizenship to Indians who rescinded their tribal membership and their aboriginal rights to land and who accepted the apportioning of their land into fee-simple plots.⁸⁵ During this important transitory period, tribal membership was maintained as important, but in the space of “neither this nor that,” or between the legal categories of citizen and ward in the courts:

81. For a greater treatment of this subject, see generally Radhika Vyas Mongia *Race, Nationality, Mobility: A History of the Passport*, 11 *PUB. CULTURE* 527, 527–56 (1999).

82. See Smith, *supra* note 78, at 133.

83. *Id.* at 135.

84. *Id.* at 136.

85. The Dawes Severalty Act of 1887 is much more complicated than the above sentence indicates. Converting from communal forms of ownership (or stewardship) to individual forms of property required much more than a shift in territorial boundaries. The Dawes Severalty Act served to consolidate State power through its expropriation of massive amounts of land and the apportioning of land, based on Western notions of private property, appropriate ownership, and land tenure. The Dawes Severalty Act also instituted an astonishing twenty-five-year wait for allottees to qualify for ownership while they were required to pay rent on their land. After that time, they finally owned their land, or “qualified,” according to the civility standards of the local Indian agent, for the actual ownership of their land.

In the 1885⁸⁶ case *Elk vs. Wilkins*, the Supreme Court maintained the opinion that American Indians were born into allegiance to their tribe and therefore were not U.S. citizens. The court reinforced this position in the 1898 *U.S. vs. Wong Kim Ark* opinion, adding that though Indians born in the United States were subject to the United States, they were not born into allegiance to the nation and could not be considered U.S. citizens. This decision rendered American Indians not only non-citizens within the United States, but also, being subject to United States jurisdiction, rendered them non-alien as well.⁸⁷

Citizenship is, in this rendering, a political identity rather than a racial one, and, as such, Indians were citizens only in geographic “spots.”⁸⁸ More racialized forms of recognition began in part with *Mosier v. United States*,⁸⁹ which acknowledged blood to be the proper form of identification for Indians.⁹⁰ This passage regarding the illegal sale of liquor to the Osage Hazel Gray evinces the ways in which citizenship, guardianship, and tribal membership are worked out in legal reasoning. In this formulation, blood, or race, is ascendant.

The question, then, to be decided on this branch of the case is: Does the mere fact of citizenship destroy the allegation of the indictment that Hazel Gray was on December 28, 1909, an Osage Indian under the charge of an Indian superintendent, and an Indian over whom the government, through the Interior Department, exercised guardianship? There is certainly nothing inconsistent in being an Indian and a citizen of the United States at the same time. *The word “Indian” describes a person of Indian blood.* The word “citizen” describes a political status. If as a matter of law and fact the government is exercising guardianship over an Indian who is also a citizen, it is not for the courts to say when the guardianship shall cease.⁹¹

In this decision, blood took precedence over other forms of recognition that were at work—and at work simultaneously—in the United States at this time: wardship, citizenship, tribal membership, and, during the twenty-five-year waiting period mentioned above, allotment and aptitude.⁹² The American recognition of blood or quantifiable notions of race (or difference) was not completely consistent with Canadian forms of recognition, but was consistent

86. This was two years before the Dawes Severalty Act.

87. See Smith, *supra* note 78, at 134.

88. In the United States, there is no overarching form of policy regarding membership in an Indian tribe or nation, as in Canada. The process of determining membership occurs through the implementation of the Dawes Severalty Act, which first created membership lists for the allotment of land and did so according to the subjective tests of civility and, at times, the astonishing physical anthropology administered by Indian Agents or anthropologists, who allotted Indians land based on their reading of Native peoples’ bodily characteristics. These characteristics—curly hair, big feet, straight hair, et cetera—were read as indexes of racial purity and thus, cultural purity. The purer a person was in indigenous culture, the more likely he was to be deemed less competent and less able to hold land in private ownership. David L. Beaulieu, *Curly Hair and Big Feet: Physical Anthropology and the Implementation of Land Allotment on the White Earth Chippewa Reservation*, 8 AM. INDIAN QUART. 281, 281–314 (1984).

89. 198 F. 54 (8th Cir. 1912).

90. *Id.* at 57.

91. *Id.*

92. During this qualifying period for allotment, individuals were assessed for their degree of aptitude and other evidence of civilization and “waited” for their certificates of competency and thus their possession of land. The recognition of blood over other identifying and recognizable criteria would be affirmed in the Citizenship Act of 1924, the Indian Reorganization Act of 1934, and then in the the INS immigration policy of 1952.

with the racialization of identity that had long been occurring in the United States through the legacy of slavery and through the courts.

The landscape in Canada was, and still is, different than that in the United States; but in some respects, it is quite similar. Unlike the racialized interpretation of crossing in the United States, Canada would take an extreme culturalist position in interpreting the Jay Treaty.⁹³ When Akwesasne Grand Chief Mike Mitchell tested Jay Treaty going “the other way”—from the United States to Canada—to renew trade relations with the Mohawk reserve community of Tyendinaga, his rights to trade within Mohawk territory were not respected. In his trial, archaeological evidence was used to deny the Mohawk claim to an aboriginal right to travel and to trade with other Mohawks and trade north of the St. Lawrence River. Based on the culture test laid out in *Van der Peet*, this trade north of the St. Lawrence was deemed *not* to be a significant part of Mohawk culture and thus not a right to be upheld by the Supreme Court of Canada:

In *Mitchell*, . . . the Supreme Court insisted on the idea that, in order to found a right, a practice does not have to be absolutely unchanging over time: it is allowed to have changed so as to remain relevant to its time, but it must demonstrate a definite continuity. . . . In *Mitchell*, however, the border marked by the Saint-Lawrence River is absolute: while changes to the way trade is carried out are permitted, the Court explicitly refuses to apply the same dynamic reasoning with regard to the territory on which such trade takes place.⁹⁴

These different interpretations regarding boundaries and territory are part of an interpretive process in Canada of using especially static and culturalist methodology to mete out recognition. Culture *is* allowed to change, but elements within it must maintain the same value and meaning through time. The practice must remain evident to the juridical eye and to the expert eyes of archaeologists, historians, and anthropologists, and it must be evident through time. This expert juridical frame for recognizing rights to territory has real implications, as well, for the ways in which Indians born in Canada exercise

93. This extreme culturalist position was laid out in Canadian law in 2001. *Mitchell v. M.N.R.*, 1 S.C.R. 911 (2001). The legal strategy of Akwesasne had moved from a Treaty-rights argument to an aboriginal-rights argument. The Treaty-rights approach failed with *Francis v. The Queen*, S.C.C. (1956), which denied Jay Treaty rights to the Akwesasne Mohawk Lewis Francis, who was transporting consumer goods from the United States to Canada for his own use. The court denied Francis' Treaty rights, reasoning that Britain, not Canada, was a signatory to the Jay Treaty. In a 1988 test case, Mike Mitchell brought goods from the United States' side of the border into Canada, for delivery to the Mohawk community of Tyendinaga, northwest of Akwesasne. He was charged with violating the Customs Act by not paying a duty. The appellate court upheld his Jay Treaty rights. However, by the time the case got to the Supreme Court of Canada in 2001, the arguments were no longer about the Treaty, but about aboriginal rights to trade, generally, because Mitchell's act was framed as the exercise of his traditional and cultural right to trade within the territory belonging to Mohawks. This argument accorded with the definition of aboriginal rights laid out in the Constitution Act of Canada, which affirms “existing aboriginal treaty rights of Canada.” The argument also fleshed with aboriginal rights as defined in *R. v. Van der Peet*, 2 S.C.R. 507 (1996). There they are considered cultural rights, which are defined as such because they are tied to cultural practices that were in play prior to settler occupancy.

94. Claude Denis, *Indigenous Citizenship and History in Canada: Between Denial and Imposition*, in *CONTESTING CANADIAN CITIZENSHIP: HISTORICAL READINGS* 113, 123 (Robert Adamoski et al., eds. 2002).

their rights to cross back to Canada and to conduct more contemporary forms of trade. It is a constant form of contention between Iroquois and all settler regimes that they encounter.

VII

THE REVENUE RULE AND STATE SOVEREIGNTY

R.J. Reynolds treated RICO-suit taxation as a reflection of state sovereignty; hence the revenue rule was treated as a universal rule of law that, absent a specific treaty, would defer to another state's sovereignty (or extend the other state's sovereignty beyond its territorial limits). That is, nation-states do not collect taxes for other nation-states, because to do so is to impede the sovereignty of the other state and to diminish one's own jurisdiction over territory. Once *R.J. Reynolds* was filed, it became a conflict-of-laws issue because the court needed to determine which nation's law would be applied to the dispute—U.S. or Canadian law—whose jurisdiction would be upheld, and which body politic had suffered harm. Thus, the question was also whether the revenue rule applied to one nation-state's trading activities in the territory of another. In this case of "smuggling," the injury of lost revenue was to the national economy of Canada. Thus, this case had "extraterritorial" dimensions, because although the harm was to Canada, the injury had been committed elsewhere.

The visibility of Indian governmental bodies through the form of arrests and through the nationally televised documentaries of *Troubled Waters*, in 1993, and *The Dark Side of Native Sovereignty*, in 1996, served as spectacles that would obscure the larger modes of production and exchange at work. These larger machinations were tobacco conglomerates willfully circumventing the law in order to derive surplus from the sale of untaxed cigarettes. The lost revenue and associated law-enforcement costs then traversed the boundaries of provinces, states, and then nation-states, begging the question of whose law applied. These are issues that begin with the territorial premise of sovereignty as dominion over a place and people, but that, more specifically in this case, are applied extraterritorially through the form of revenue and in particular, the revenue rule.

Although the revenue rule stated "that one sovereign will not enforce the tax judgments or claims of another sovereign,"⁹⁵ the problem was not cast in these terms because the problem, in the early and mid-1990s in Canada, became something else through the focus on Indians as the visible smugglers. The role of Big Tobacco was yet to be revealed and remained invisible, unnoticeable in the earliest public scrutiny of tobacco smuggling. Iroquois nationals and, in particular, Mohawks—and their sovereignty—were, by contrast, very visible.

95. Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 106 (2002) (overruled on other grounds).

Consider here the Canadian Border Service Agency's summary of the events leading up to *R.J. Reynolds*:

While Canada knew that smuggling was occurring along its borders, it was not aware of Defendants' [Big Tobacco's] participation in smuggling. Canada recognized the devastating impact upon Canadian society and the integrity of the Canadian regulatory framework. Thus, Canada augmented efforts to control tobacco smuggling and embarked upon an almost decade-long effort to eliminate the growing smuggling problem.⁹⁶

Perhaps because of an unawareness of the corporate defendants' position, the "smuggling problem" in an earlier iteration was conflated with indigenusness, and indigenusness with Mohawks. Mohawks were then equated with lawlessness, and lawlessness with indigenous sovereignty.

Indigenous sovereignty carried the residue of savagery. As Aristotle and others who have relied upon his reasoning have argued, savagery is a condition of beast-like association that is defined as being without law.⁹⁷ As the discussion and analysis of public texts on smuggling illustrated, it was Mohawk invocations of sovereignty and the *practice* of sovereignty through their exercising of the Jay Treaty right to cross that made their move toward "savagery" and "lawlessness" possible in the public mind. This representational chain of equivalencies and confluations reduced sovereignty to aboriginality and in this, to racialized and temporalized bodies and locales. These bodies were reduced to entities that were legally confounding and spectacular; the entities became newsworthy in their failure to conform to economic norms and to consent to citizenry by conforming to taxation regimes.

To be taxed is to be a citizen;⁹⁸ to evade this is to be a savage, improper, or lawless citizen. The publicizing of this "lawlessness," as with the nationally televised documentaries discussed above, incited national anxieties and fiduciary norms around taxation that then took the shape of public concern. However, to be an indigenous person in Canada is also to occupy a different space for citizenship, one that from its inception "evades" taxation because of the legally defined status of "wardship" that recognized Indians occupy. This legal status has been called "citizens plus" in liberal policy,⁹⁹ a naming that sought to capture the perceived duality of their legal category: they were citizens of a "first nation" (the aboriginal one) and also citizens of the nation-state that now frames that first nation (the settler society). This policy did not

96. News Release, Canada Border Services Agency, Case Summary: Attorney Gen. of Canada v. R.J. Reynolds et al. (1999) (on file with author).

97. See, e.g., ARISTOTLE, POLITICS 11 (Ernest Baker trans., Oxford Univ. P. 1995) ("Man, when perfected, is the best of animals; but if he be isolated from law and justice he is the worst of all.").

98. Ensin F. Isin & Bryan S. Turner, *Investigating Citizenship: An Agenda For Citizenship Studies*, 11 CITIZENSHIP STUDS. 5, 5 (2007).

99. This was first coined in the Hawthorn Report in Canada in 1966. A SURVEY OF THE CONTEMPORARY INDIANS OF CANADA: A REPORT ON THE ECONOMIC, POLITICAL, EDUCATIONAL NEEDS AND POLICIES 13 (H. B. Hawthorn, ed. 1966), available at http://www.ainc-inac.gc.ca/pr/pub/srvy/sci3_e.html (last visited May 29, 2008) ("Indians should be regarded as 'citizens plus;' in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community.").

take into account the way the category of “citizens plus” also signified to Indians an executive or settler fiat: the recognition, in Hegelian terms, was a one-sided recognition, a legal event ensconced in time and in law that signaled the descent of their ability to be recognized as Indians and the strangulation of their governmental systems. Indigenous governmental systems were not recognized; what was recognized was the differentiation of those systems according to criteria defined by first Britain, and then Canada.

The conservative Canadian think tank The Mackenzie Institute examined the issue of cigarette smuggling. Its researchers derived their concern over cigarette smuggling from these histories of spatial and legal containment of Indians. They asked questions and sought to find their own answers, answers that lay within indigenism itself, particularly within Iroquois indigenism, as the main Indian protagonists in this issue who possessed special rights guaranteed to them as a border tribe exercising distinct aboriginal (cultural) and treaty rights¹⁰⁰ Of this issue the Mackenzie Institute wrote,

While smoking for pleasure was practiced by other Natives and Europeans, this would have been seen by many [eighteenth-c]entury members of [the] Confederacy as vaguely sacrilegious. Leaf tobacco is still used for traditional purposes. When the Jay Treaty was signed in 1794 to allow Natives to bring goods across the border without paying taxes, king size, filter-tipped menthol flavoured cigarettes were a long way off.

The MacKenzie researchers’ questions and answers animated a volley of conflations and representations and added to the anxieties in Canada about the sincerity of indigenous culture, about the North American Free Trade Agreement—taken together, these seemed to induce a panic. Anthropologist Elizabeth Povinelli attributes the panic to the temporal precariousness of settler nations, the demands that the politics of recognition place upon settlers and indigenous peoples vis-à-vis the history and the courts.¹⁰¹ Although she does not note that precariousness is also the work of settler sovereignty, she warns that the panic signaled the potential for that sovereignty to be undone.

VIII

IMPLICATIONS OF THE INDIGENOUS SMUGGLING CRISIS

So, in the context of one settler society—Canada—indigenous trade practice, predicated upon indigenous historical and legal experiences in territories the Canadians claim as their own, became “smuggling,” and smuggling had to be contained immediately through representational practice, such as the media, but representational practice that mirrored the law. What the media images did was remove “sovereignty” from the domain of the currently conventional sovereign, from the boundaries of the nation-state in which the

100. For an example of a perspective that is skeptical of aboriginal claims to tobacco trade, see John Thompson, *Sin Tax Failure: The Market in Contraband Tobacco and Public Safety* (2006), available at <http://www.mackenzieinstitute.com/1994/sin-tax-failure4.htm> (last visited Jan. 24, 2008).

101. ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM* 2–4 (2002).

practice of smuggling presumably occurred, and conflated it with aboriginality, and with indigeneity, in the public eye. Thus, sovereignty appeared not to belong to the state, but to belong instead to those who worked within and through settler-state borders through criminalized trade. The sovereignty of the nation-state under which such trading practices occurred is never discussed explicitly, for to do so would reveal its fragility. Focusing upon indigenous trade practices, however, reveals that fragility; but these trade practices must be stripped of their historical place and criminalized, so as not to reveal the temporal dimension of conquest.

To speak of indigenesness is to speak of aboriginality, a form of (recognizable) identity that is predicated upon a *temporal* relationship to land and to others. The benchmarks and tests of aboriginality reside, however, not in the self-designation of the indigenous group or in its own legal histories or mappings, but in the settler state itself, structured always through the frame of settler law. Thus, to speak of aboriginality is to speak comparatively, a logos that might go something like this: “If this is aboriginal, then this is not.” The difference is a certain relationship to time,¹⁰² and to articulate this logos, at any moment, is to run the risk of revealing the comparative youth and fragility of settler nation-states. This youth and fragility is dealt with in law and managed through decisions on indigeneity, and this sustains the settlers’ condition of being, because to live fully aware of the youth and fragility of settler nation-status might very well incite a moral panic. This panic could be the “crisis in reason” that Povinelli documents and theorizes from, a space fraught with impasses that this consciousness produces.¹⁰³ If the law is not upheld and maintained, then chaos will, or might, ensue. So, order requires that the modalities and practices of indigenesness “trade” or “commerce” be conflated with “smuggling” and that Indian recognition be closely regulated so that the temporality and justness of their claims are adjudicated not by Indians, but by those who now occupy their space. Law is the primary means through which that process occurs and, in law, settler colonialism maintains itself.

Events leading up to *R.J. Reynolds* were sieved through media representations that fomented this anxiety and fear of uncontainment. The images of criminal “warriors” were set side by side with *contraband* cigarettes, cigarettes that were contraband because they eluded being taxed, they were not providing revenue for Canada, and, as such, they were themselves the synecdoche for unsettling settlement, the unbounding of the place of Canada, as Canada itself—a claim of property, of seizure through law and citizenship without consent. Indigenous trade and traffic in cigarettes thus agitated the

102. See, e.g., *R. v. Van der Peet*, 2 S.C.R. 507 para. 47 (1996) (proffering a test for identifying aboriginal rights: “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right,” and then the court determines whether that right is tied to distinctive cultural practices that were defined *prior* to contact).

103. ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM* 33 (2002).

foundation of nation-state formation as a form of property, the indigenous' actions, which the Iroquois argued were an exercise of *their sovereign* right to trade in their territories, questioned not only the claiming of a settler state, but of citizenship itself. The exercise of their own sovereignty then revealed the fragility of the sovereign status of the settler state, which had never achieved a proper or robust form of consent from the indigenous political subjects themselves, who refused to act as subjects and be contained, or to be taxed.

IX

CONCLUSION

The representational history of Indian “lawlessness” does not have its beginning with cigarette “smuggling” in the 1990s. Its genealogy extends back to the earliest moments of recorded encounter, when Indians appeared to have no law, to be without order, and thus, to be, in the colonizer’s most generous articulation of differentiation, in need of the trappings of civilization. “Law” may be one instrument of civilization, as a regulating technique of power that develops through the work upon a political body and a territory. Designating “savagery” was required for the forceful imposition of law, as was designating brutishness. So the law in Canada—and to a less-focused and less-encompassing extent, that in the United States—has attempted to define and regulate Indian behavior, to protect, and, in different iterations, to confine and contain the indigenous in certain spaces. The 1876 Canadian Indian Act, when compared to the 2,500 pieces of legislation that comprise the rubric of federal Indian law in the United States, is a uniform body of law that has sought to do all of the above. It is very much about achieving a state of lawfulness and containment, which is an ontological state of political subject-hood that is highly regulatory and does significant legal work upon the territories, bodies, and cultures of Indians in Canada. Its structuring presupposition is that Indians reside somewhere between ward, citizen, and people presumed to be savage who must have their savagery recognized first, in order to be governed. *R.J. Reynolds* and related decisions revealed the ways in which law regarding Indians was a failed episode of consent, consent to a form of sovereignty that is clear and that unambiguously accords with territories of conquest. It also fails to regulate fears of lawlessness while uncovering the role that “indigenous savagery” has had in furthering settler capitalism. Finally, it diminishes indigenous rights to trade and to act as sovereigns in their own territories.