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978-1-107-04159-2 - Constructing Immigrant “Illegality”: Critiques, Experiences, and Responses

Edited by Cecilia Menjívar and Daniel Kanstroom

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I

Introduction – Immigrant “Illegality”*Constructions and Critiques*

Cecilia Menjívar and Daniel Kanstroom

The topic of “illegal” immigration has been a major aspect of public discourse in the United States and many other immigrant-receiving countries. From the beginning of its modern invocation in the early twentieth century (Ngai 2004), the often ill-defined epithet of human illegality has figured prominently in the media; vigorous public debates at the national, state and local levels; and in presidential campaigns. For more than a quarter century now, the term *illegal alien* has served as euphemism, placeholder, rallying cry, and Rorschach test despite (and, perhaps, because of) its multiplicity of meanings. Policy discussions that purport to focus on the impact that unauthorized migrant laborers may have on domestic workers, unemployment rates, the availability of finite social and economic resources for all who need them within a territory, and the impact of migration on the social and cultural fabric of the nation often invoke or critique the concept with an astonishing lack of focus or precision. Though rather technical legal constructs usually undergird such debates, public discourse routinely takes on a tenor of rough morality, differentiating behaviors and practices that should be rewarded, such as staying in the queue and entering the country legally, from those that presumably deserve penalty, such as “jumping the queue” and “sneaking” into the country “illegally.”

Illegality is a peculiarly powerful but amorphous legal concept. It marks a specific allegation by government enforcement agents, investigators, and prosecutors of a particular type of conduct. Allegations alone, however, cannot create illegality. As a technically precise legal conclusion, forensic illegality always requires legitimate processes and proof. A person arrested for an alleged crime will achieve a certain preliminary

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connection to illegality if there is some reasonable (or, as the legal system sometimes calls it “probable”) cause shown to justify the arrest. The results may surely be serious and wide-ranging (e.g., detention, loss of employment, loss of public housing, and ostracism) but they are deemed tentative.

Conclusive proof of illegal conduct requires considerably more than this. This is especially so when the allegation of a violation of law is deemed to be “criminal” or when the sanction is deemed to be “punishment.” (The precise line between the civil and the criminal or between the regulatory and the punitive is often a complex inquiry for constitutional and other legal purposes.) Every mature legal system, whether inquisitorial or adversarial, imposes the most elaborate procedures and the highest standards of proof on those who allege violations of laws that – if proven – can justify punishment. In the United States, as in most modern legal systems, these procedures and burdens of proof apply regardless of the status of the accused. It is conduct that counts, not legal status. In immigration law, however, the relationship between conduct and status is inherently quite complicated. Noncitizens (a legal status category) may face removal proceedings for conduct (e.g., for having crossed the border without proper documents or without legal inspection, or for having violated some other criminal or immigration law) or simply for lacking legal immigration status due to a wide variety of reasons, some having to do with affirmative conduct; not doing some required act (e.g., filing an application for status); or with simply being in the United States after having been brought to the country as children. Moreover, much public discourse and even some court decisions are unclear about whether deportation is punishment, even though deportation has been described as “a particularly severe penalty,” especially in cases of lawful permanent residents facing deportation.¹

In most other legal arenas, illegality is not generally understood as an existential condition. Outside of immigration law, one is hard-pressed to find examples, though such highly charged classifications as those of “sex offenders” provide a disturbing analogy. The reasons for this are deep and fundamental. To accept the idea of “illegal” people is inevitably to risk accepting problematic and dangerous forms of castes. As the Supreme Court noted in the 1982 case² that held that the undocumented children of undocumented noncitizens in Texas had a right to

¹ See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

² *Plyler v. Doe*, 457 U.S. 202 (1982).

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public school education, “sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens,” had led to the creation of a substantial “shadow population” within our borders. The Court recognized that this situation raised “the specter of a permanent caste of undocumented resident aliens” and that such an “underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”³

Once one accepts the existence of an “illegal” caste, the questions relevant to the broader society become distressingly simple and utilitarian: What are the appropriate forms of judgment, ostracism, and sanction? Such a model obviously contradicts important ideals of equality and human dignity that undergird the better traditions and most basic moral and legal principles of the country. Further, the U.S. legal system does not generally accept the idea of illegal conduct without possibility of redemption, except for the worst sorts of crimes. Even in such cases, many countries have deemed the death penalty and life without parole to be unduly harsh sanctions, beyond the pale of modern human rights understandings.

Much legal, historical, and sociological scholarship in recent years has sought to explain some of the technical complexities of “illegality” in this context, as well as to demonstrate how migrants may encounter legal complexities in a wide variety of settings that contradict the simple notion of purposeful border crossing (see, e.g., Ngai 2004; Martin 2005). Moreover, as Hiroshi Motomura (2008) has shown, immigration law consists not only of enforcement mechanisms, but also of the ways in which we choose not to enforce legal restrictions. In this regard, “illegality” should be considered in light of the U.S. economy’s long-standing reliance on undocumented workers and deep historical patterns of movement and recruitment. However, as several chapters in this volume make clear (see, e.g., De Genova, Chapter 2; Heyman, Chapter 5; Hing, Chapter 15), active profiting and recruitment have also long been part of the story of “illegal” immigration in the United States.

Despite the long and complex history of immigrant “illegality,” current discussions of legalization and amnesty frequently ignore the historical permeability of the line between “legal” and “illegal” categories. The various forms of discretionary relief from removal, and types of legalization and amnesty – such as asylum, suspension of deportation, cancellation

³ *Id.* at 218–19.

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of removal, Temporary Protected Status, the Violence Against Women Act, the Cuban Adjustment Act, the Nicaraguan Adjustment and Central American Relief Act, and the Haitian Refugee Immigration Fairness Act – continue to blur these lines today, so that many immigrants with these dispensations may find themselves straddling both, in in-between statuses or in liminal legality (Menjívar 2006).

CONSTRUCTIONS OF “IMMIGRANT ILLEGALITY”

This book, in brief, seeks to develop an interdisciplinary critical interrogation of the category of “immigrant illegality,” focusing on the condition and production of illegality, so as to denaturalize it and to shed light on its complexity.⁴ As matters of immigration are by their very nature interdisciplinary, contributors range from the fields of anthropology, law, political science, religious studies, and sociology to examine how the law makes and unmakes immigrant “illegality” and how this category is deployed and its power wielded. Through analyzing and dissecting this category (if not debunking it) its constructed nature and the nuances and complexities it involves are exposed.

Let us be clear: it is not our aim in this volume to settle immigration policy debates about admissions, removals, state enforcement, or legalization plans conclusively. We do suggest, however, that this widely deployed concept of immigrant “illegality,” often used liberally and carelessly in uncritical fashion, is in need of thorough, sustained critique and that such careful analysis will aid policy discussions. The chapters in this volume shed light on the detrimental short- and long-term effects for immigrants who now live in spaces of illegality, for their families and communities, and for the country as a whole.⁵ Our examination therefore can help policy makers to think carefully about the kind of immigration policy the country needs. Thus we confront the category of “immigrant illegality” directly, critically, and holistically.⁶ Such analysis

⁴ Ackerman (2012) traces the term *illegality* to efforts of progressive civil society organizations to distance themselves from problematic images of immigrants and to government bureaucracies’ interests, thus presenting an alternative examination to the state-centered approach that we follow in this volume.

⁵ See Garth and Sarat (1998) and Sarat (1990) for sociolegal arguments that underscore how lives are shaped by law.

⁶ We are not referring to the pejorative, offensive term *illegal immigrant* because the focus of this entire volume is to scrutinize the *category*, not the individuals who have been pushed into these spaces of illegality.

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must include the concept’s history, various meanings, often-tortured constructions, various expressions, and the ideological work that maintains it. Importantly, though, we must also consider its effects on those who live in this category, as well as the development of organized resistance to it. A critical examination of how this category has emerged, is used, constructed, lived, and resisted should not be seen as reifying it. This is a dynamic inquiry, which must evolve with the times and with the fluid (if often distressing) movement of public discourse.

Thus we emphasize that our examination focuses on this category today, as the law has moved to encompass increasingly more individuals under this category, affecting a wider range of groups in society. With the increasing coupling of immigration matters with criminal law (see Stumpf 2006), the effects for individuals living in this category today may differ significantly from experiences of the past. For these reasons, rather than circumvent it or examine it only indirectly through the effects that legal status may have on immigrants’ lives, we make this category the focus of examination. Our hope is that this direct approach will contribute theoretically to our understandings of immigrant illegality/legality and the ideological constructions that underpin the contemporary immigration regime (see Rodriguez and Paredes, Chapter 3), which at the same time can help to develop a more solid basis for a serious conversation about true immigration reform. For this reason, each chapter contains a section on reflections for future research.

We are not the first to call attention to the “constructedness” of the category of “illegality” (see, e.g., Ackerman 2012; De Genova 2002). In recent years an important body of work on migrant illegality has emerged in various immigrant-receiving countries. These new approaches focus, as we do, on illegality as historically and legally produced and changeable (Goldring, Berenstein, and Bernhard 2009; Moloney 2012).⁷ Some scholars have thus sought to interrogate the category by critically examining its roots, focusing on how legal structures produce categories of illegality and on the experiences of those who live in these spaces in various national contexts, groups, and historical periods. Importantly, much of this new scholarship has called for a shift in focus from individuals as “bearers of illegality” to the laws that create these legal categories and *produce* “illegal aliens” (Ngai 2004) and the sociopolitical contexts within which these existential allegations of illegality are constructed (Massey, Durand, and Malone 2002; Sassen 2002).

⁷ For a review of the scholarship on historical changes in unauthorized migration as well as contemporary differences across national contexts, see Donato and Armenta (2011).

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Important work also has focused on the relationship between mass incarceration, penal severity, and immigration enforcement (Inda 2006; Inda and Dowling 2013; Mele and Miller 2005; Miller 2002, 2010). As scholarship has highlighted the increasing convergence between the immigration and criminal justice systems, legal scholars have focused on questions about constitutional standards, as well as norms of proportionality (Kanstroom 2000, 2011; Meissner et al. 2013; Stumpf 2006, 2009), and social science scholars have called attention to the broader consequences of this confluence on the lives of immigrants (Dowling and Inda 2013; Dreby 2012; Gonzalez and Chavez 2012; Hagan, Castro, and Rodriguez 2010; Kubrin, Zatz, and Martinez 2012; Menjívar and Abrego 2012).

This growing literature comes from research conducted in major immigrant-receiving countries in the world. Some scholars have examined the production of illegality through the law among Mexican immigrants in the United States (De Genova 2002, 2004) and how formal processes that “irregularize” African immigrants in Italy and Spain exacerbate their vulnerabilities as workers (Calavita 2005). Emerging scholarship also has unveiled the embodied experiences and subjective meanings of living in illegality and the “interiorized mode of being” (Peutz and De Genova 2010: 14) that living in illegality can produce, such as the phenomenology of undocumented Latin American immigration in Israel (Willen 2007); the embodiment of experiences of “illegality” among Africans, Eastern Europeans, Brazilians, and Turks in Great Britain (Sigona 2012); how Mexican immigrants learn to “live as illegal aliens” in the United States (Chavez 1998; Gonzales 2011; Gonzales and Chavez 2012); the duality that Salvadoran immigrants experience in the United States as being physically present but legally absent (Coutin 2000); and the suspended experiences of living in in-between legal statuses, in “liminal legality,” that Guatemalan and Salvadoran immigrants experience in the United States (Menjívar 2006).

VARIATIONS IN EXPERIENCES OF “ILLEGALITY”

Recent social science scholarship on immigrant illegality highlights in particular the conditions created by legal structures. Migrants living in illegality, especially as the targets of new policies of deterrence in various immigrant-receiving contexts, experience the effect of law in various ways in a wide range of activities and with varying degrees of intensity, from highly constrained labor market opportunities and employment (Calavita 2005; Menjívar, Zotova, and Agadjanian n.d.; Takei,

Saenz, and Li 2009; Willen 2007), to limited access to public and social services (Capps et al. 2007; Geddes 2003; Goldring et al. 2009) often to avoid authorities and officials (Yoshikawa 2011), to restrictions on accessing housing (McConnell and Marcelli 2007; van Meeteren 2010) and education (Gonzales 2011), and even constraints on social activities and friendships (Sigona 2012). This scholarship also has pointed to the long-term consequences that irregular statuses impose on the life prospects of immigrants in the host society (Bean et al. forthcoming), effectively constituting new axes of stratification (Abrego and Gonzales 2010; Friedmann Marquardt et al. 2011; Menjívar and Abrego 2012; van Meeteren 2010), a situation that has spurred calls for more theoretical attention to legal status in patterns of immigrant incorporation or assimilation (see Kasinitz 2012).

While this varied literature has identified the deep and broad effects of “illegality” for individuals and families, it does not assume that these experiences are homogenous, static, and undifferentiated, as “they vary significantly along social cleavages” (Sigona 2012: 51). For instance, gender differences and legal statuses interact, so that women and men experience illegality in dissimilar ways (Salcido and Menjívar 2012; Schmalzbauer 2011). Similarly, stages in the life cycle shape how individuals experience illegality. The young and the old, and immigrants of different generations experience it in quite different ways (Abrego 2011; Abrego and Gonzales 2010; Gonzales 2011). Young undocumented students may only “become illegal” (or recognize themselves in this way) after finishing high school and attempting to enter either higher education or the labor force (Dreby 2012; Gleeson and Gonzales 2012; Gonzales 2011), but remain fully aware of the stigma attached to this status (Abrego 2011). Legal status can also affect developmental outcomes, as illegality has been identified as a measurable risk that threatens the well-being of children and youth in significant ways (Santos, Menjívar, and Godfrey 2013; Suárez-Orozco et al. 2011; Yoshikawa 2011). The physical context in which individuals live can also mold experiences of illegality (Schmalzbauer n.d.), as state and local laws can vary within the same national context (see Armenta 2012; Boushey and Luedtke 2011; Steil and Vasi n.d.; Stewart 2012; Stewart and Quinn 2012) and thus individuals living in different states will experience illegality dissimilarly. Finally, social cleavages shape not only how individuals experience illegality but how they have responded, organized, and mobilized to lobby for regularization efforts and to address to the predicament in which they find themselves (Hondagneu-Sotelo 2008; Nicholls 2013; Pantoja, Menjívar, and Magaña 2008; Voss and Bloemraad 2011).

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FOCI OF THE BOOK

The present volume builds on this rich literature to examine a wide range of aspects of immigrant illegality – how it has been defined, redefined, produced, and maintained. The contributors also consider what it means to live in categories of “illegality” in the U.S. context today as well as its contradictions. For instance, in the first years of the Obama administration, the numbers of deportations have risen dramatically, even as enforcement has shifted from visible workplace raids targeting undocumented workers to so-called criminal aliens (another complex and potentially misleading category). And whereas it is critical to investigate the effects of the law on individuals’ experiences, we must also examine the forms of resistance that develop out of these conditions (see Chavez, Chapter 4). As Michel Foucault (1979) asserted, not only are examinations of the power of the law most fruitful at the level of lived experiences, but also it is here that key sites of resistance develop, as “power can produce the very thing that comes to resist it” (Pickett 1996: 458). Thus contributors to this volume also focus on the various forms of resistance and responses to the current legal system. This broad approach allows us to add theoretical nuance and methodological innovation to the study of this phenomenon and to critically analyze it (and debunk it). It also permits us to identify practical, policy-relevant implications. Although cases from various other national contexts (or from different historical periods in the United States) are useful as comparative background, in this volume we focus on the contemporary case of the United States so as to set precise analytical parameters for a coherent presentation and to provide an in-depth case examination that will likely be relevant elsewhere. Thus we do not simply ignore similar issues arising in other major immigrant-receiving countries or different experiences in other historical or contemporary contexts. Keeping in mind that the category of “illegality” is flexible and fluid and that it can be lived and defined differently across time and space (cf. Ackerman 2012), our main goal in this volume is, nevertheless, domestically focused.

Along these lines, this volume considers closely the following aspects of immigrant “illegality”:

First, we recognize that the binary categories of “undocumented” and “documented” or “authorized” and “unauthorized” often used to study the effects of legal status on immigrants’ experiences have become

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problematic in contemporary analyses of the experience of illegality/legality.⁸ Not only do they reify bureaucratic classifications that often fail to match lived experiences,⁹ but such dichotomies also fall short when applying them to national contexts with different modes of legal entry and policies, as in the case of Canada (see Goldring et al. 2009). In this light, we would like to remind the reader of the blurring of strict demarcations between these binaries, which in themselves are the result of legal and political constructions of immigrant illegality. Thus we give primacy to experiences of “liminal legality” (Menjívar 2006), “precarious statuses” (Goldring et al. 2009), or “permanent temporariness” (Bailey et al. 2002) to highlight the blurring of these legal categories. Recognizing these in-between, gray zones of illegality helps us to capture today’s experiences, question taken-for-granted dichotomies that grow out of political maneuvers, and problematize – following Bosniak (2000) – approaches that seek to clearly demarcate citizenship (and belonging) and alienage. Questions about belonging, citizenship, and rights to territorial presence are key axes of analysis in this volume because illegality can only be understood in relation to citizenship and belonging.

Second, and related, an important aspect of our approach is to decouple the common (and often simplistic) association between the category of “illegality” and undocumented status. The current immigration regime creates a welter of “in-between” legal statuses and deports tens of thousands of permanent legal residents (green card holders) each year, including army veterans,¹⁰ as well as many people with temporary visas, such as students and temporary workers. The current immigration regime has made possible shifts into categories of “illegality” and a progressive erosion of rights among a larger group, beyond undocumented immigrants. It also renders millions of U.S. citizens – spouses, partners, parents, and children of potential and actual deportees – uncertain of where they will live or with whom. Thus we also consider the effects of deportation on U.S. families and communities. For instance, the Pew Hispanic Center estimates that approximately 4.5 million children of undocumented parents are U.S. citizens (Passel and Cohn 2011). With increased deportations in recent years, tens of thousands of these children have seen their families

⁸ For a review of the category of “semilegality” that seeks to bridge U.S. and European analyses, see Kubal (2012).

⁹ Brubaker’s (2013) differentiation between categories of analysis and categories of practice and his call for reflection when using categories of analysis is relevant here.

¹⁰ See <http://www.banishedveterans.info/> (accessed December 21, 2012).

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split or have experienced the effective deportation of the entire family to what, for them, are foreign countries (see Medina 2011). The harm to a U.S. citizen child in these circumstances has been well described as “palpable and long-lasting” (Kremer, Moccio, and Hammell 2009). And as Yoshikawa (2011: 2) observes, “[m]illions of the youngest citizens in the United States, simply by virtue of being born to a parent with a particular legal status, have less access to learning opportunities that are the building blocks of adult productivity.”

Thus, whereas we may think of undocumented persons as the only ones living in this alleged condition of illegality, the current legal regime has made it possible for millions of “documented” individuals and U.S. citizens to either experience the effects of the conditions that illegality imposes or to be directly included in this category (Hagan, Rodriguez, and Castro 2011). This is particularly the case of permanent legal residents who have lived most of their lives in the United States and are deported to a country they hardly know because at some point in their lives they committed a crime (Golash-Boza, Chapter 9; Kanstroom 2007, 2012). Indeed, the threat of deportation (see De Genova 2002) has been used with unprecedented vigor in the past few years to make even permanent legal residents vulnerable to deportation (Kanstroom 2007, 2012). Although precise numbers are not known, researchers have estimated (from Department of Homeland Security [DHS] data) that some eighty-eight thousand lawful permanent residents were deported for criminal convictions from 1997 to 2007 (Baum, Jones, and Barry 2010). Human Rights Watch (2009) has concluded that nearly 70 percent of such deportations were for relatively minor, nonviolent offenses. In 2011 alone, some 188,000 “known criminal aliens” were removed from the United States, many of whom were lawful permanent residents and were in the “criminal alien” category only because they had been prosecuted for immigration violations that in prior years were routinely handled through civil deportation processes.¹¹

Current laws also make it possible for a wide swath of the U.S. citizen population to feel the effects of stringent immigration laws, particularly deportation. For instance, as the Obama administration has deported more immigrants per year than any other administration in U.S. history, around four hundred thousand per year, new programs under Immigration and Customs Enforcement (ICE) Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) have created systems by which U.S. citizens may also be detained and questioned (Kohli, Markowitz,

¹¹ For an in-depth discussion of “criminal aliens” see Rosenblum and Kandel (2012).