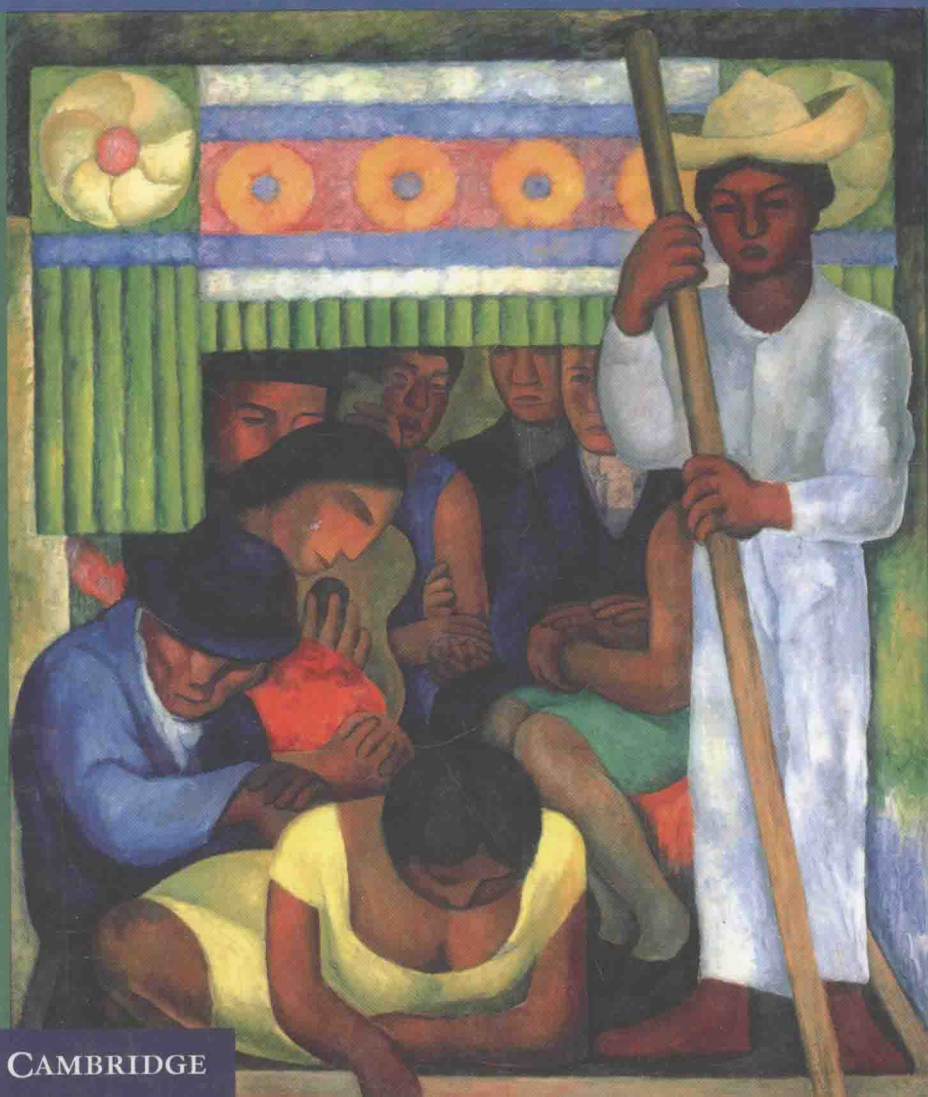


§Law in Context

CATHERINE DAUVERGNE

Making People Illegal

What Globalization Means for
Migration and Law



CAMBRIDGE

Making People Illegal

What Globalization Means
for Migration and Law

Catherine Dauvergne

University of British Columbia



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Making People Illegal

This book explores the relationship between illegal migration and globalization. Under globalizing forces, migration law has been transformed into the last bastion of sovereignty. This explains the worldwide crackdown on extra-legal migration, and informs the shape this crackdown is taking. Even as states ratchet up provisions to end illegal migration, the phenomenon becomes increasingly significant legally, politically, ethically, and numerically. This book makes the innovative argument that the current state of migration law is vital to understanding globalization. It shows the intertwining of refugee law, security, trafficking and smuggling, and new citizenship laws, with particular attention to how the United States and the European Union define and defy what counts as global. *Making People Illegal* evaluates why migration law in the twenty-first century is markedly different from even the recent past, and argues that this is a harbinger of paradigm shift in the rule of law.

Catherine Dauvergne is Professor and Canada Research Chair in Migration Law at the University of British Columbia Faculty of Law. She is author of the book *Humanitarianism Identity and Nation: Migration Laws of Australia and Canada*, and is editor of *Jurisprudence for an Interconnected Globe*. She has published articles in the *Modern Law Review*, *Theoretical Inquiries in Law*, *Social and Legal Studies*, *International Journal of Refugee Law*, *Sydney Law Review*, *Melbourne Law Review*, *Res Publica*, and the *Osgoode Hall Law Journal*, among others.

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Continued after the index

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Catherine Dauvergne
Vancouver,
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CHAPTER ONE

Introduction

In any given week in 2007, newspapers around the world carried reports of “illegal” migration. This did not start in 2007. It is not poised to end any time soon. While many of the accounts are about the United States or the European Union, unauthorized migration is newsworthy in all corners of the globe. Russia has a large and growing extralegal population.¹ China stopped more than 2,000 illegal border crossers in 2006.² Thailand and Malaysia have launched a cooperative approach to their shared illegal populations.³ The Gulf of Aden is a key human smuggling route.⁴ South Africa is attempting to grapple with its unauthorized occupants.⁵ Morocco and Ethiopia face similar issues.⁶ Brazil both sends and receives extralegal migrants, as does Mexico.⁷ Illegal migrants come in droves to India, and in lesser

- 1 Biznes-Vestnik Vostoka, “Uzbekistan, Russia to Sign Agreements on Counteracting Illegal Migration,” *Nationwide International News* (June 28, 2007); “Over 230 Illegal Migration Cases Opened in Russia – Official,” *RIA Novosti [Russian News and Information Agency]* (November 17, 2005); “Improvement of Russian-Chinese Ties Gives Rise to Illegal Migration – Official,” *ITAR-TASS [Russian News Agency]* (December 7, 2005); Kirill Vasilenko, “Illegal Immigration on the Rise,” *Vremya Novostey [Russian Press Digest]* (January 27, 2006) 5.
- 2 “China Cracks Down on Illegal Migration, Cross-border Drug Trafficking,” *BBC Worldwide Monitoring* (January 24, 2007).
- 3 “Malaysia and Thailand to Cooperate in Managing Illegal Workers,” *Deutsche Presse-Agentur [German Press Agency]* (July 29, 2005).
- 4 “At Least 100 Reported Dead, Missing in Latest Smuggling Tragedy in Yemen,” *UNHCR Press Release* (March 26, 2007).
- 5 Ann Bernstein and Sandy Johnston, “Immigration: Myths and Reality,” *Business Day [of South Africa]* (May 11, 2006) 13; “Zimbabwe Migration Office Discourages ‘Border Jumping,’” *Voice of America News* (May 16, 2007).
- 6 “Ethiopia: Human Trafficking Rises at an Alarming Rate – Police,” *The Daily Monitor [of Addis Ababa, Ethiopia]* (August 15, 2005); “Feature: Illegals Brave Increasing Dangers to Enter Spain,” *Deutsche Presse-Agentur [German Press Agency]* (September 18, 2005); “Spain May Use Six Satellites Against African Illegal Immigration,” *Deutsche Presse-Agentur [German Press Agency]* (May 29, 2006).
- 7 “Brazil, Paraguay to Work on Border Disputes,” *Xinhua General News Service [of Shanghai]* (March 31, 2005); “Illegal Immigration: Removed from Reality,” *The [London] Guardian* (May 18, 2006) 36; Alan Clendenning, “Seeking Better Life Back Home, Brazilians Heading Abroad in Droves,” *The Associated Press* (July 30, 2005); Francis Harris, “Bush Under Pressure on Influx from Mexico,” *The Daily Telegraph [of London]* (August 17, 2005) 13; Alan Clendenning, “Brazilian Police Launch Crackdown on Illegal Immigration to U.S.,” *The Associated Press* (September 14, 2005); Ginger Thompson, “On a Border in Crisis, There’s No Bolting a Busy Gate,” *Josefa Ortiz de Dominguez Journal* (September 15, 2005).

numbers to Pakistan.⁸ Whatever term we choose, extralegal migration is a global phenomenon.

The rise of the moral panic that accompanies this phenomenon is a marker of the twenty-first century. At the outset of the twentieth century, migration was in the process of becoming “legalized.” It was not until early in that century that a robust system of passports and visas was fully established to regulate border crossing.⁹ The great waves of migration of earlier eras took place largely without the framework of migration laws, fostered instead by the legal structures of colonial empires and the image of great unpopulated spheres of the globe.¹⁰ In contrast with the legalization of migration that took place at the outset of the previous century, we are currently witnessing the “illegalization” of migration. This is made up in part of the increasing regulatory focus on extralegal migration, in part by the rhetoric and hyperbole of constructing the accompanying moral panic, and in part by the migration flows themselves. It is a potent mixture. The border control imperative has become a headline maker around the globe, and is a vital domestic political issue in all prosperous Western states, and elsewhere as well.

This book examines the relationship between globalization and illegal migration, arguing that the worldwide crackdown on extralegal migration is a reaction to state perceptions of a loss of control over policy initiatives in other areas. One response to this loss of control is a reinterpretation of the highly malleable concept of sovereignty. In contemporary globalizing times, migration laws and their enforcement are increasingly understood as the last bastion of sovereignty. This shifts their character, their content, and their politics. Because of this shift in importance of migration laws, these legal texts become an ideal site to observe key aspects of the debates within globalization theory. Migration laws function almost as a laboratory setting for testing globalization’s hypotheses. That is, migration law presents a response to questions like: Is the demise of the nation-state inevitable? Is globalization primarily or exclusively an economic force? Is globalization merely Americanization? Can globalization be resisted? The dilemmas of illegal migration offer a detailed engagement with each of these debates.

8 “India Proposes High-level Meeting on ‘Illegal’ Bangladesh Migration,” *Agence France Presse* (August 6, 2005); “Steps Being Taken to Check Illegal Immigration – Kasuri,” *Pakistan Press International Information Services* (December 28, 2005); Sanjoy Hazarika, “North by North East Ticket to Ride but No Law,” *The Statesman [of India]* April 17, 2006; “India to Increase Outposts along Bangladesh Border,” *The Asian Age [of India]* (April 26, 2006).

9 Ann Dummett and Andrew Nicol, *Subjects, Citizens, Aliens, and Others: Nationality and Immigration Law* (London: Weidenfeld and Nicolson, 1990). John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge: Cambridge University Press, 2000) makes the important point that the use of passports began as early as 1669 and evolved gradually as a mechanism of state surveillance. The twentieth-century marker is tied to the global use of this technique and the concomitant closing of borders in response.

10 The doctrine of *terra nullius*, dating from the 1600s, was instrumental in European colonization and subsequent migration as it established that indigenous people did not have ownership of the land they inhabited. This facilitated the establishment of settler societies in the United States, Canada, and Australia, all key destinations in contemporary migration and migration mythology.

To make the most compelling version of the argument that migration law informs debates about globalization, the book has an ambitious breadth. Taking unauthorized migration as its starting point, the argument proceeds by considering the categories and mechanisms used to identify and construct extralegal migration. The book examines labor migration, trends in refugee law, trafficking and smuggling of human beings, the migration security nexus, and shifts in citizenship law. Every one of these areas is itself the subject of entire scholarly literatures. This argument, however, focuses on the way these topics are intertwined. Using the dilemmas of globalization theory, I aim to develop the story that emerges from combining these areas of study rather than analytically separating them. In that sense, the book works to make the points so often confined to introductory or concluding remarks as being “beyond the scope of this study” or “analytically distinct.” The central argument is the parallel arguments in each of these areas, and the insights that come from a focus on similarities of this sort.

With this breadth of potentially distinct topics, the narrative challenge then becomes how to avoid superficiality, the potential pitfall of presenting an analysis that merely skates across the surface of neighboring ponds but that fails to hold together because the ice cracks under the slightest pressure arising from a more detailed engagement with what lies below. The countermeasure applied in this analysis is to adapt the ice scientist’s methodology of core sampling. To understand the layers, the scientist extracts a narrow sample that contains a trace of each element under examination. This is the antidote to breadth. Core sampling in the context of my argument means drilling into each topic under consideration to extract a sample that in key ways reveals something about the whole. Some sampling choices are easier than others, but they are all choices. The book does not, therefore, aspire to be a comprehensive source of information about any of the diverse topics it addresses. It does aspire to select sample instances for analysis that offer original insights regarding each of these areas. The persuasive effects of these choices will be one of the crucial ways to assess the book.

The final element in understanding the book’s logic is to recall that it is about law and that its author is a legal scholar. This makes sense of its broad ambitions and of the way the core is sampled. The overarching story of the book is that of how globalizing forces align with particular shifts in migration law. Within this story is a jurist’s desire to situate law within theoretical accounts of globalization. For this reason, each case study addresses one part of the story of law in globalizing times. In the final chapter I gather these strands together into a commentary on the place of law within analyses of globalization. This considers the consequences for law of transforming control over migration into the last bastion of sovereignty. It also aims to disturb the view that law is a mere tool that can be applied in a straightforward way to dilemmas of the global; that it can be deployed to either facilitate global forces or shore up states against them. Instead, the evidence from migration law shifts shows that law has consequences independent of state aims. In particular, the ideological commitment of rule of law gives legal

changes independent and sometimes unpredictable force. Migration law, with its international and domestic elements, constructs an important platform from which to observe the internationalization of nation-bound legal principles and to consider the increasingly law-like character of international law. In this sense, the central argument of the book takes up the challenge issued by Boaventura de Sousa Santos to investigate at an empirical level the question of law's potential for progressive social transformation.¹¹ To unfairly paraphrase Peter Fitzpatrick, the vantage point constructed here offers a glimpse of the new gods he conjured for international law.¹² Any such sighting brings a test of faith. Part of my jurisprudential aspiration is to consider how migration law's authority is surviving this test.

Given all of this, the easiest way to convey the book's method is to introduce the stories recounted within each of its chapters – the core samples that are woven together in the overall story of globalization and illegal migration. The book begins by considering illegal migration broadly. “Illegal” is one of the most derogatory terms applied to the type of border crossing I am concerned with here. My choice to use it in spite of this is deliberate. A number of other terms are used synonymously in popular and scholarly literature: unauthorized, undocumented, clandestine, irregular, and more. My first reason for using “illegal” in contrast to all of these is that it directly implicates the law. The role of the law in constructing illegality is essential to this study and I keep a close focus on it throughout. A related second reason for this selection is that the term “illegal” with its reference to the law has an allure of crisp precision. In the early twenty-first century, xenophobic paranoia thrives. Many foreigners are undesirable and law-abiding folk in many Western states yearn for simpler, exclusionary times. The laws of migration run through the middle of those who are targeted by this exclusionary impulse. Their status within the texts of migration law is vital to how xenophobia and racialization are enacted upon them, and vital to the analysis I want to make. Finally, I choose the term “illegal” because of its broad popular and political currency. I want to consider this popularity, and to use the language that has the most traction in naming it. The opening chapter, “On Being Illegal,” takes up this challenge. It introduces the range of phenomena under the illegal migration umbrella and looks at how and why the label “illegal” works. The chapter then turns to the relationship of illegal migration and the law through analyzing the fledgling International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹³ This analysis reveals the reciprocal relationship of illegality and sovereignty.

11 *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. (London: Butterworths LexisNexis, 2002).

12 Peter Fitzpatrick “‘Gods Would Be Needed . . .’: American Empire and the Rule of (International) Law” (2003), 16 *Leiden Journal of International Law* 429.

13 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res. 45/158, UN GAOR, 45th Sess., Supp. No. 49A, UN Doc. A/45/49 (1990) 261 (entered into force July 1, 2003).

The following chapter, “Migration in the Globalization Script,” extends the analytic platform of the central argument in two directions. First, this chapter situates migration and law within the “stock story” of globalization. It sets out how accounts of globalization typically talk about migration. It also looks for traces of the law in renditions of globalization. Talk of legal globalization clusters in two areas. First, there is a focus on the rapid expansion of human rights. Second, there is intense interest in the spread, over multiple sites of norm creation, of economic law. Migration law is a challenge on both these fronts. It has proven extraordinarily difficult to meaningfully extend human rights norms to those with an “illegal” status. Similarly, economic discourse has made very little space for extralegal migrants, despite the compelling evidence that they provide vital support to prosperous economies. The chapter also considers elements of the debates that form the core of what can be called “globalization theory.” In doing this it builds the argument that a close reading of contemporary migration law reveals something about these debates. Together, these two chapters ground the core sampling that follows.

The first core sampling case study comes from the domain of refugee law in the chapter “Making Asylum Illegal.” The central concern of this chapter is the damage done to refugees, and to refugee law, by the global crackdown on illegal migration. The tightening of migration restrictions makes refugee law a more important constraint on sovereignty than ever before. It is also the case that over the last decade or so, refugee law is becoming more law-like in character, in part because of the global spread of human rights norms. Ironically, the increasing importance of human rights to refugee law is vital to states’ desire to narrow the constraint on sovereignty to the smallest point possible. This chapter canvasses recent state moves to restrict refugee protection while expanding refugee rhetoric. What these shifts reveal about refugee law’s relationship with both human rights law and migration law is the key contribution of this chapter. They also show a key transformation of sovereignty under global pressures.

“Trafficking in Hegemony” situates human trafficking and the rapid rise of law regarding it within the overall argument. My focus here is on the annual United States’ *Trafficking in Persons Report*.¹⁴ Important aspects of the story of international law in global times can be gleaned from considering the United States’ role in developing international legal instruments in this area and then turning away from those instruments to instead take up a foreign policy initiative

14 U.S. State Department, *Trafficking in Persons Report 2000* (U.S. State Department, 2000); U.S. State Department, *Trafficking in Persons Report 2001* (U.S. State Department, 2001); U.S. State Department, *Trafficking in Persons Report 2002* (U.S. State Department, 2002); U.S. State Department, *Trafficking in Persons Report 2003* (U.S. State Department, 2003); U.S. State Department, *Trafficking in Persons Report 2004* (U.S. State Department, 2004); U.S. State Department, *Trafficking in Persons Report 2005* (U.S. State Department, 2005); U.S. State Department, *Trafficking in Persons Report 2006* (U.S. State Department, 2006); U.S. State Department, *Trafficking in Persons Report 2007* (U.S. State Department, 2007). Subsequent references will provide the title and date of the report. All other publication data remain the same.

in the form of the annual report with its ranking and sanctioning of nations. I am particularly interested in the way this story is illuminated by looking at how the *Trafficking in Persons Report* is illustrated. The photographs of real and pretend trafficking victims, taken consensually and nonconsensually, reflect and refract the contours of the debate and also tell us something about its intractability. To round out the argument, the chapter concludes by considering the intertwining of trafficking and smuggling and how and why the law seeks to police this boundary. This chapter contributes an understanding of the feminization of trafficking law and the consequences of this for law and sovereignty.

“The Less Brave New World” considers the security turn in migration discourse and its consequences for migration law. These consequences are closely linked to the breadth of discretion that has traditionally been associated with migration decisions and the consequently large scope for unchecked executive action in the area of migration. Securitization is increasingly global and its discourse is shifting the us-them line that was once such a close fit for the national boundary. In this chapter I examine the use of migration laws to achieve the indefinite detention of terror suspects. These unlaw-like spaces within migration law texts are presently being examined by courts in many liberal democracies and found lacking. This is in no small part due to the fact that the legal fiction of using migration laws to achieve criminal law ends is fracturing. This is important to contemporary reconceptualization of migration laws and to the exception and exclusion that have been their mainstay since their inception.

The final migration law subject area that I take up is citizenship. In talking of illegal migration, it is impossible to avoid slipping over into the plane of citizenship discourse. This is true both in terms of formal legal citizenship and in terms of the broader understanding of citizenship as social inclusion, robust participation, and rights entitlement. These themes are addressed in “Citizenship Unhinged” by considering the role that amnesties play in state responses to illegal migration. Amnesties construct a bridge across the citizenship law–migration law dichotomy. Reflecting contemporary pressures, the pillars of such bridges are changing. As citizenship laws are transformed to open additional avenues of inclusion, the increasing illegalization of migration ensures that exclusion is also multiplied. Citizenship law stands as the final circle of inclusion when read as a migration law text (a one-dimensional reading to be sure). Changes in these laws conform to the broader argument of the book that migration law is emerging as the center of sovereignty. New citizenship laws, forged as part of the global crackdown on illegal migration, show this transition clearly.

Following these core samples from a series of migration law topics, the book turns to situating these within globalization theory and to examining what they reveal about law in a global era. The “Myths and Giants: The Influence of the European Union and the United States” chapter does this by looking directly at the European Union and the United States. In accounts of the global, both of these geographies loom large. Europe does so because it stands as a beacon of

cooperation and human rights, and unending peaceful expansion. Particularly for legal scholars, the legal innovation that is Europe holds endless fascination. Situating this fascination within the globalization script is crucial. I do this through a consideration of Europe's journey toward harmonization of migration laws, and why this is stalled at the crossroads of asylum and illegality. The United States is an equally important avatar of globalization. American economic hegemony is an enormous part of the substance of globalization. Indeed there is contestation about whether the phenomenon should be known simply as Americanization. The American economy is a huge draw for migrants of all sorts, including those outside the law. The notion that illegal migration strikes at the heart of sovereignty needs to be confronted squarely on this terrain. Why does the most powerful nation of the global era tolerate such an enormous illegal population? The response to this begins in economic terms, but cannot end there. It also involves understanding the laws and myths of migration and what they mean to the state and the nation. The contrast between how these strands of analysis are situated in the European Union as compared to the United States contributes another piece to our understanding of globalization.

This contrasting view of the giants of the global narrative takes the book to its culminating chapter, "Sovereignty and the Rule of Law in Global Times." In these global times, the United States and the European Union have emerged as twinned loci of power. Their responses to illegal migration both reveal something of how contemporary power makes and uses sovereignty, and of how important migration laws are to this function. The final chapter begins at this point and gathers the insights of the core samples to create a full picture of the intertwining of migration law and sovereignty at the outset of the twenty-first century. Drawing on this picture, I then turn to the law.

The shifting parameters of our economic and social boundaries have deep consequences for the law, which throughout the modern era has been inextricably linked to national spheres. Considerable work has been done to demonstrate how this linkage is degraded by contemporary eruptions of law in both local and supra-national spheres. The work in this book is distinct from both these trends. Instead, it looks at that law which is quintessentially national – as migration law is at its core a border construction site – and considers how this nationally bound law is affected by global trends. Migration laws have become a site of contestation, in which nations inscribe their resistance to human rights norms and global convergence trends. This inscription, however, encounters the partial and constrained autonomy of law, revealing both that law has some immunity from pure political control, and thus is a sometimes valuable resistance strategy, and also that law continues to reflect national aspirations even as these are losing their meaning across many other spheres.

Migration laws are solidifying. Even very recently, migration laws of prosperous Western states functioned primarily as sieves through which the shifting whims of national policy could be poured and made law in short order. Migration laws have

typically been marked by high degrees of discretion, conflicting objectives, and direct political control over key elements such as quotas. The inherent flexibility of migration laws has made them an ideal border for the nation because of their capacity to maintain a fixed and law-like appearance while also being infinitely malleable. They provided both the appearance of a boundary and the convenient absence of fixity, like melting and refreezing ice sheets. This is changing. Migration laws are now imbued with more rule of law character. The speed of this change, happening almost exclusively since the early 1990s, is instructive regarding contemporary globalization. This shift reveals how global forces limit the border construction role of migration laws. This in turn highlights why the migration law battleground is so crucial to understanding whether and how globalizing forces are a threat to nation-states, and how states are responding to these threats.

Illegal migration and the laws that construct and confront it are vital political currency at present. This phenomenon has much to tell us about the forces that define our present, and about directions for the future. The movement of states to make people themselves illegal shifts understandings of criminality and raises the stakes for all rights arguments. This book aims to make sense of the forces behind this illegality and to consider options for strategizing against it. Echoing the concerns of globalization theorists, the book considers, from several vantage points, the question of whether illegal migration is simply inevitable given the vast disparities of wealth around the globe. Illegal migration is largely invisible. This invisibility serves the interests of states, of the migrants themselves, and of complacent populations. It also facilitates dehumanizing the people whose lives are shaped by the contours of migration law. More than any other phenomenon, illegal migration points up the immense and arbitrary privilege of birth in a prosperous state. The currently popular strategy of building bigger fences quite literally uses might to construct rights. This book is devoted to exploring other alternatives, and to arguing in support of a progressive direction to emerge in the global paradigm shift that is already in train.

CHAPTER TWO

On being illegal

In September 2003, five Britons released their “No One Is Illegal!” manifesto.¹ With the opening salvo, “For a world without borders! No Immigration controls!” they called for the elimination of all border controls, for opposition to all deportations and for a massive trade union campaign to organize undocumented workers. Their opposition to border controls is grounded in a conviction that immigration laws cannot be “reformed” in a way that will meaningfully sever them from what they label racist and fascist origins. The “No One Is Illegal” manifesto asserts the impossibility of grounding thoroughgoing reform in compassionate exceptions to the immigration laws, and the inability of liberalism to do more than reinforce a demarcation between inclusion and exclusion. Beginning in 2002, “No One Is Illegal” groups began to make their voices heard in a number of Canadian cities.² The Canadian groups identify themselves as a “campaign” and, in a perhaps typically Canadian political posture, take a less ideologically articulated position than the British group. The Canadian groups do not, for example, highlight an opposition to all forms of immigration control. They instead focus on a broad integration of social justice issues:

The No One Is Illegal campaign is in full confrontation with Canadian colonial border policies, denouncing and taking action to combat racial profiling of immigrants and refugees, detention and deportation policies, and wage-slave conditions of migrant workers and non-status people.

We struggle for the right of our communities to maintain their livelihoods and resist war, occupation, and displacement, while building alliances and supporting indigenous sisters and brothers also fighting theft of land and displacement.

Similarly named groups have appeared in other European nations over the past few years, including *Kein Mensch Ist Illegal* in Germany, *Ninguna Persona Es Illegal* in Spain, *Ingen Manniska Ar Illegal* in Sweden, *Geen Mens Is Illegal* in Holland, and

1 Steve Cohen, Harriet Grimsditch, Teresa Hayter et al., “Our Manifesto: No One Is Illegal!” on-line: No One Is Illegal, UK, www.noii.org/no-one-is-illegal-manifesto.

2 In Canada, “No One Is Illegal” is organized city by city in Montreal, Ottawa, Toronto, and Vancouver, and is poised to expand.