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Troubling Illegality: the (“illegal”) immigrant in law and in public debate

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Introduction

How we conceptualise illegality crucially depends on *why* we are conceptualising it. Are we concerned with counting numbers? In this case we'll need a definition that is susceptible to yes or no tick boxes. Or influencing policy? In this case we'll need a definition compatible with national legal systems of immigration control. Or changing public opinion? Then we'll need a definition that recognises that 'illegal immigrant' is a *normative* as well as a descriptive term. There is an additional and potentially ethical complexity raised by the fluidity and political nature of the definition: in researching illegality we are contributing to the making of it, in our dissemination and knowledge production we are reproducing it. Our definitions are not neutral, but contribute to shaping the category.

Let the starting point be that illegality is constructed, and most obviously it is legally constructed. For academic researchers it is useful to concentrate on the legal aspects because it ensures clarity of definitions that are necessary for a robust methodology and it also enables engagement with policy makers. However, the deployment of clear definitions, important as it is, can be limited in facilitating engagement in public debate, which is particularly important when it comes to matters of immigration, welfare and entitlement. This is a fundamental challenge to engaged researchers' attempts to reconcile affecting policy change on the one hand, and engaging with the politics of illegality on the other. The standard response to this difficulty has been to emphasise the human rights of migrants, and this has had some notable successes. However it also faces problems as we see in anti-trafficking responses, because the same body that is charged with enforcing rights, the state, is also the body that creates the immigration status that results in rights' breaches. More generally it appeals to a 'politics of pity' that brings with its own issues, and, perhaps more importantly for our purposes, potentially simply emphasises the flip side of the illegal immigrant as villain, which is the illegal immigrant as victim. Simply shifting more people from the villain to the victim category doesn't change the political terms of the debate.

In this paper I want to consider illegality as a social process, as permanently under construction, in order to help us think about how to engage in politics as well as policy. I will begin by focussing on illegality as constructed by law on the books, but also the need to account for law in practice and law in the mind. I will show how easy it is for non-citizens to slip into illegality, and that this is not simply a problem for migrants. I'll emphasise the importance of analysing illegality as a social process. This requires us to accept the fuzziness¹ of the term rather than seeking to clarify it, to examine what the fuzziness tells us about how illegality is imagined, to follow the connections that are assumed within the loose usage of the term and by the figure of the 'illegal immigrant' that may in fact offer clues that can enrich our analysis and our politics. I'll argue that as well as considering entitlement in terms of a legal community of formally recognised citizens, we need to understand how entitlement is

¹ I take the term 'fuzziness' from fuzzy logic, which rests on the Law of Incompatibility: *As complexity rises, precise statements lose meaning and meaningful statements lose precision*. This recognises the limits on precise analyses of complex systems and allows for the analysis of continuous rather than binary variables (McNeill and Freiberger, 1994)

constructed as going to the heart of *the nation* as a community of value and suggest that this can help as a basis for thinking about political engagement and illegality.

But first a word about language: The contested nature of the adjectives attached to migrants who are the subject of studies and policies – undocumented, irregular, clandestine, trafficked, *sans papiers* etc, is an indication of the intensely politicised nature of claims to knowledge and analysis. States, populist media, and the general public, tend to use ‘illegal’, thereby presenting it as a problem to be solved through borders and enforcement. Civil society groups and migrants’ organisations tend to prefer the term ‘undocumented’ and, while concurring that undocumentedness is a problem, do so on the grounds that it results in exploitation and lack of access to rights. Academics, often in an attempt to remain independent from particular positions, commonly use ‘irregular’ or ‘unauthorised’. For this presentation I am going to use the term ‘illegal’. I appreciate the power of the political consequences of this word so would not advocate its use thoughtlessly. Like many others I’ve problematized the usage of the terminology of ‘illegality’. However, in eschewing it completely we can overlook connections that will be important to my argument. Mobility has long brought with it associations of criminality. The term ‘illegality’ draws our attention to the state constructed nature of the category of illegal immigrant. In fact oftentimes the illegal immigrant is indeed a criminal, because increasingly migration laws are subject to criminal rather than civil prosecution. Of course while the illegal immigrant is so constructed by law, whether they are morally deviant is a different matter and not necessarily related. Indeed, and here perhaps is a deeper problem with the squeamishness over the term, the same is true of the ‘criminal’. So please imagine quotation marks over ‘illegal’ to differentiate the technical breach from the moral breach as it were, but I’m not going to express them.

Illegality as a legal construction: policy engagement

“Illegality” is an inevitable feature of border controls and nation state organised citizenship. There will always be non-citizens who, whether in error or deliberately, break the laws attached to entry and residence, and the legislation, however well drawn and sophisticated, can never cover all permutations and eventualities. Huge numbers of court judgements, lawyers and advice sessions, tell us that, whatever the claims of politicians and the media, deciding who is illegal and who is not, is not straightforward. Arguments at borders are all part of the active contestation and constitution of borders and illegality. However, while illegality is produced by borders, it is not necessarily produced at what are conventionally imagined as territorial borders. For a start these borders are elastic and can extend well outside the state’s territory through for example, the deployment of carrier sanctions. A person can be prevented from boarding a plane in Bombay on the grounds that they are intending to enter the UK illegally for instance.

But what is it, to enter a country illegally? While it is often imagined as the clandestine crossing of borders, but also of course one can cross using fake documents. Both these forms of entry are, in theory, possible to detect with sufficient resources, though in practice the resources required are massive, and would require substantial infringements of rights of citizens. We have seen this at the UK border, with four hour waiting queues and consequent concerns about public order and health and safety at Heathrow because of the enforcement of biometric passport checks. There are other forms of illegal entry that are not possible to detect and that are far more nebulous however. People can pretend they fulfil entry requirements when they don’t – if their visa requires them to be single with no dependants for instance, when in fact they are married. Or they can mislead about their intentions so for example, those who are entering as spouses may be principally motivated by the possibility of employment and detest family life. When entering illegally is a question of motivation, intention and desire it is far harder to police – though attempts are made to do so.

In fact illegal entrance is in states like the UK is probably a relatively unusual means of becoming an illegal immigrant. Far more typical is entering legally as a visitor for example and overstaying.

Overstaying emphasises that migration is a temporal as well as a spatial process, and it adds a further layer of analytical complexity to illegality through highlighting its processual nature. Migrants can move in and out of a range of legal statuses. For example, a person can enter a country illegally, but then regularise their status, by applying for asylum or entering a regularisation programme, or they can move from semi-compliance to compliance and back again depending on their employment status. The mechanisms which enable this vary from state to state, but the move is rarely simply the one way legal to overstayer route that is imagined.

Overstayers, those crossing without papers or with false documents, are all ‘illegal residents’, but illegal residency is not the only way that migrants become illegal. Borders are not simply geographical, they also follow people and surround them as they try to access paid labour, welfare benefits, health, labour protections, education, civil associations and justice. They are inevitably inscribed ‘inside’ as well as ‘outside’ of any given national state. As Etienne Balibar puts it, borders exist not only ‘at the edge of the territory, marking the point where it ends’ but ‘have been transported into the middle of political space’. Non-citizens who are granted legal entry to a state are faced with a barrage of restrictions on their behaviour that go way beyond simply obeying the law. Some are forbidden to access the labour market, or can only access certain sectors, employers, or for certain hours. Some are not allowed to claim benefits or health care. Some are not allowed to marry in country and so on.

Semi-Compliance

The complex web of borders created by the many different types of restrictions that vary by immigration status mean that a non-citizen can be residing legally within a state, but render themselves liable to removal on the grounds that they have broken their often very complex conditions of entry – a situation that Martin Ruhs and I have described as ‘semi-compliant’. We contrast this with ‘non-compliance’ which is when people are residing illegally as well as breaking conditions, and distinguish both from compliance, when migrants are legally resident and working in full compliance with the employment restrictions attached to their immigration status. Semi-compliance indicates a situation where a migrant is legally resident but has or is violating the restrictions attached to their status, whether through taking work, leaving an employer or spouse or claiming welfare. In contrast to the strictly defined situations of compliance and non-compliance, the category of semi-compliance is extremely broad and captures a range of violations of conditions. Consider the case of four full-time students all of whom have the right to reside in the UK and are legally allowed to work 20 hours a week in term time and full-time in the holidays. They are working 20, 21, 25 and 40 hours per week respectively. We would describe the first student as compliant, and the other three as semi-compliant. But there is a substantial difference in terms of the degree of violations between the student who works 21 hours and the student who works 40 hours. The distinction between compliance and semi-compliance is highly politicised and often rests on personal judgement. Different actors may draw the line in different places. Even then with the most legally robust of instrumentalizations then, illegality is socially constructed.

Semi-compliance has tended to be overlooked in studies of illegality though numbers of semi-compliant migrants are likely to be substantial. In research conducted with Martin Ruhs in 2004 we found (for a non-representative sample) that some types of visas were correlated very highly with semi-compliance. By far the majority of au pair visa holders for example were semi-compliant, as were student visa holders. There was differentiation on the part of migrants between types of illegality and working in breach of certain conditions was not considered ‘really’ illegal by many of our sample (Ruhs and Anderson, 2010). We found that while illegal entry, overstaying and working on false documents or on a visitor’s visa were generally perceived to be unambiguously illegal, including by those who were themselves in this situation, beyond this the picture became more nuanced. Active attempts were made to be in a position that migrants interpreted as bending rather than breaking the

immigration rules. They switched and re-entered to move from one type of semi-compliance (working on a visitor’s visa for instance) to another (working full time on a student visa). Moreover, it was not only migrants making this kind of distinction. We found that host families were almost without exception encouraging their au pair to take on bar work and informal cleaning jobs. Their use of social connections to find their au pair temporary work was not imagined by them as facilitating illegal employment even though in fact this is what they were doing.

While policy and press tend to present legal and illegal as a straightforward binary, in practice the distinction between compliance and semi-compliance is far from straightforward. It is further complicated by the fact that the semi-compliant migrant does not necessarily know that they are in breach of conditions. In the student example, they may not know the rules, or they may not have kept a close count of their hours. Even then with the most legally robust of instrumentalizations, illegality is socially constructed. Spaces of semi-compliance are created by law and leave considerable room for personal judgment, not just for migrants and employers (both of whom of course may have their own reasons for interpreting how rules are bent rather than broken) but also crucially for enforcement officers. The grey area and possibilities of discrimination indicates a potential relationship between the ways in which illegality is imagined and consequences for particular groups of migrants. As much for research as for enforcement agencies and the tabloid press, the wealthy and the white rarely figure as migrants, let alone illegal migrants. They are the highly skilled, the expats, the brightest and the best, the holidaymaker and exchange student. Attempts to regulate some forms of semi-compliance can require heavy handed monitoring and enforcement, but nevertheless there have been increasing attempts to do so, and a move away from the view that certain types of semi-compliance are relatively unharmed (Ruhs and Anderson 2010: 206). The danger with the escalation of enforcement is that it effectively increases the visibility of illegality, as more and more grey practices are subject to a punitive regulatory regime, and detracts from the credibility of enforcement as it appears more and more of a difficult job.

These kinds of issues were nicely summed up in a communication from the personnel department of Oxford University in late 2011. We were informed that the practice of inviting speakers who were passing through to give one off seminars was now subject to regulation. While they might not be residing illegally, the UKBA would treat such an individual as an illegal migrant if ‘found on University property’ without ‘an appropriate visa’. Some dons reacted with derision to ‘this interference with our academic affairs’ (Richard Boyd, letter to the editor, Oxford Magazine fifth week, michaelmas Term, 2011). Indeed how many academics have given papers in states where they are not citizens, and put down that they are ‘tourists’ on their visa forms? This reveals firstly how ‘illegal immigrants’ are Othered and underpinned by ideas about class as well as race. It is this that makes applying the term ‘illegal immigrant’ to people engaged in academic presentations rather than fixing the plumbing or pulling the carrots seems so inappropriate that the response can be not to take it seriously. It also demonstrates the lack of fit between immigration rules and regulations and the kind of economic and social relations that characterise contemporary working lives. Not only does are populations imagined as homogenous, static, and countable, but work is firmly contractual, conducted within formal employment relations, with countable hours and within a public rather than a private sphere. There are many types of employment that do not fit this model and groups such as artists and entertainers have been particularly hard hit with reports of non-EU musicians, artists and actors finding it increasingly difficult to enter. This applies even if they are not planning on working. One artist described how she was only permitted to enter the UK with a severe warning, as she had a visitor visa but was carrying watercolours in her bag, and might, therefore, be thinking of ‘working’ (<http://www.manifestoclub.com/artist-testimonies> last accessed 23rd November 2011). However, even those who are not working in the creative or knowledge industries are often not in conventional employment relations as discussed in chapter x. The kind of work that non-citizens do is often precarious, insecure and marginalized. The world of work as imagined by immigration controls is the

world of work of professionals and often very different from the world of work as it is experienced, and this is an important way in which semi-compliance is produced.

Deportability

As far as immigration law is concerned if they are breaching conditions of entry then they may be deported, and they are, to use de Genova's term 'deportable'. When examining the impacts of illegality, deportability is critical. For every single person that is actually deported the consequences are magnified by the feelings of deportability that are induced (REFS). It is not simply deportation itself, but anxiety about deportation that has a significant effect on the quality of life of migrants, on their perceived universe of constraints and opportunities and on the practical likelihood of their claiming the most basic of rights (Krause 2008, Talavera et al, 2008, Gibney, 2011). Anxiety about deportation is clearly partly related to personality, but also to consequences of deportation: an asylum seeker from Congo or a single mother with dependent children is likely to be more concerned about deportation than an Australian gap year backpacker for instance. Considering deportability rather than 'illegality' allows for the subjectivity of the various actors, and suggests a range rather than a straight yes or no answer.

The perceived probability of deportation is also likely to be a factor in people's experiences of deportability, and while perception matters, there are some groups who are more likely to be deported than others. Enforcement must necessarily be prioritized. Given that the estimated number of illegal residents in the UK is between X and Y, and the cost of removal is Z it is simply not possible to deport everyone immediately. The importance of prioritizing was highlighted in the 2007 five year enforcement plan, which set its priorities in terms of harm, and distinguished between those whose breaches caused the greatest harm (traffickers and terrorists), through the intermediate, to those who caused the least harm, which was defined as 'undermining the integrity of the system'. This meant that while for instance U.S. and Australian nationals were thought to comprise a significant proportion of visa overstayers, yet these were not deemed an enforcement priority in practice:

From our analysis of detected overstayers, some may be doing so inadvertently, of whom many are thought to be young and from countries with reasonably high GDP per capita and perhaps with high levels of education. Anecdotal evidence suggests that these groups do not intend to stay long term in the UK and require low levels of encouragement to return home. Some groups overstay deliberately as a way of evading immigration controls and some of these may then go on to make an unfounded asylum claim

Enforcing the Rules chapter 1 paragraph 11.

As previously noted, 'poor countries' and countries whose citizenry are black are strongly likely to coincide. There are also some groups that are more likely to be targeted in practice. Enforcement data suggests that there are certain sectors that are particularly likely to be the subjects of successful workplace raids, and particular countries of origin that are subject to removal. Certain individuals and groups are constructed as more suitable for expulsion than others, with criminality, race and gender being key (De Genova, 007; Boswroth, 2008, Weber and Bowling, 2008).

The lens of deportability rather than the legal/illegal binary also enables us to link the situations of legal and illegal migrants who find that they are constrained because of immigration status. As discussed in chapter x, migrants on temporary visas are likely to be more compliant and less challenging of their employers because they are dependent on them for renewal, and for their residence in the UK. The consequences of this dependence can be such that for some the relative freedom to move within (low waged) labour markets offered by illegality, may be preferable to being tied to employers. Moreover, deportability makes the non-citizens an 'eternal guest' (Kanstroom, 2007) in that their residence is always contingent on certain requirements, most obviously not being

found guilty of a crime. This goes beyond deportation as a tool of border control, and uses it to affirm the political community's view of what membership is. The nation is both protected and worth of protection.

Citizens and Deportation

Citizens are definable by their exemption from expulsion. While a citizen who has been criminalized may be denied the right to vote, to freedom of movement or association, or to welfare support (Wacquant), they may not be deported from their state of citizenship². They can be stripped of their citizenship in order to be deported, providing this does not leave them stateless, but qua citizens, they cannot be expelled or detained. Conversely, all non citizens are deportable, but some are more deportable than others. In the UK, EU citizens have greater protections against expulsion than other non UK nationals, and conviction of a serious crime is, in contrast to other non-citizens, not sufficient grounds to enforce a deportation order against an individual. The individual must be shown to present a continuing threat to the society in question (Clayton, 2006).

While citizens are not deportable, this does not mean that they cannot be expelled or detained by mistake. This has been the subject of some concern in the USA, and there have also been examples in the UK – the case of X for example. The exception to exemption from expulsion is of course the case UK national children who are detained and removed from the UK with a parent.

Most citizens however are not subject to deportation powers themselves, but nevertheless they are increasingly aware of such powers. While citizens cannot be deported, they can be charged with civil and criminal offences related to the illegal immigration of a non-citizen. For example, there has been a massive increase in workplace raids and in the penalization of employers. Employers have been required to check the employees' right to work since 1997, when it became a criminal offence to take on someone who did not have permission to work. They were however able to provide a statutory defence against the £5,000 fine if they had taken copies of specified documents. However enforcement against employers who employ migrants illegally was very low. Between 2001 and 2006 only 50 employers were proceeded against for illegally employing migrants, of whom 28 were found guilty. This began to change with the implementation of the Immigration, Asylum and Nationality Act of 2006 which came into force in 2008. This raised the penalty for employers who fail to check their workers' entitlement to work in the UK to a maximum of £10,000. Employers are required to re-check the documents of those who have a temporary right to work every 12 months to ensure that they are still eligible for employment. Employers who knowingly employ a worker who does not have permission to work can be found guilty of a criminal offence and incur an unlimited fine and a two year prison sentence. Those who cooperate with immigration authorities on the other hand can have their fine reduced. The UKBA publicizes data about employers who are served with penalty notices – though they have been criticized for not including in their estimates of fine income fines that have been reduced or dismissed on appeal.

Illegality race and class

But this case also demonstrates a facet of illegality and immigration controls that I think should be the concern of us all, and that is the ways in which 'good citizens' are required to police controls, both formally and informally. In the case of the UK we are required, informally to police controls by being encouraged to report on suspected concerns about exploitation – if we notice people in our neighbourhoods working odd shifts, eating a lot of takeaways for example (sounds like students to me) – then we should report it to our Local Immigration Team because it might be a case of trafficking. We have even an infotainment documentary series that follows UKBA as they raid workplaces and affect deportations. We are required formally to police controls by for example

² Criminals are, in any account, routinely refused access by states where they do not have citizenship.

checking the passports of all successful job applicants to ensure they have the right to work, or by reporting to immigration overseas students who have missed regular contact hours or assignments. As the law is becoming more severe and more harshly policed, not only is the space for semi-compliance more restricted, but citizens cannot avoid becoming complicit. Now I have seen this circular, do I check the immigration status of my overseas seminar speakers? Or do I risk fines and even a possible prison sentence, not to mention dismissal for bringing University of Oxford into disrepute by not bothering? It is not only migrants who are criminalised through immigration controls.

Of course, in practice at the moment it is still largely migrants who suffer the direct brunt of illegalisation. UKBA publishes the names of all employers who have been found employing illegal immigrants, their business, how many illegal migrants they employed, and what the fine issued is. It is striking that of the approx. 300-400 individuals and businesses named monthly, almost without exception their names suggest that they are of migrant background, and that they are running small catering businesses, or sometimes car valeting services. Of course, these are the businesses that are the easy wins: small (without large personnel or legal departments), visible (on the high street) and high employers of migrant labour (because of the economics of their industry and their personal networks). So far Oxford University has not been raided – but it could. And let's face it, numbers of their students are likely to be working in excess of the hours permitted, not to say the numbers of staff who have made a mistake in the completion of their visa application that means they are technically in breach.

Conclusion

Having robustly instrumentalised the definition of illegality for the purposes of research and analysis, the problem is how to deal with the fact that most people – and certainly the tabloid press – have not done this. It is hard to move beyond complaining that the numbers are inflated, that most illegal immigrants don't commit crime or claim benefits. It also misses the point that however many illegal immigrants there are, there are still too many of them, and however rare abuse, it must still be stamped out. The Illegal Immigrant is a 'folk devil', facilitating 'moral panics' that the state is then obligated to 'do something about it' in deference to the mobilized opinions of common sense. To the extent that the figure gives rise to *moral* panics the arguments continue impervious to challenges of definitions and numbers: as definitions are made more robust, exaggerated claims as to numbers may be rebutted, but however few they are, however deviance is 'amplified' they are still too many, justifying a further punitive response.

Conceptualising and researching illegality is not only about instrumentalising good definitions, and it requires that we think through and take the politics of immigration seriously.