

Book Review: Making People Illegal: What Globalization Means For Migration and Law, by Catherine Dauvergne

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Book Review

**MAKING PEOPLE ILLEGAL:
WHAT GLOBALIZATION MEANS FOR MIGRATION
AND LAW, by Catherine Dauvergne¹**SEAN REHAAG²

IN THE TWENTIETH CENTURY, many of the leading jurisprudential debates swirled around the question of whether morally heinous and procedurally flawed Nazi dictates were deserving of the label “law.” In *Making People Illegal*, Catherine Dauvergne makes the fairly broad claim that immigration law may well be the equivalent site for debates about the rule of law in the twenty-first century.³

Dauvergne develops her argument that immigration law can teach us a great deal about the rule of law by using an adapted version of “the ice scientist’s methodology of core sampling.”⁴ Rather than offer a comprehensive review of immigration law in jurisdictions around the world, Dauvergne selects a small number of problematic areas of “illegal” migration,⁵ and examines how the rule of law and immigration issues intersect in these areas.

Dauvergne begins her analysis by making an empirical claim that is central to the rest of her argument: human rights norms, she tells us, have been largely

1. (Cambridge: Cambridge University Press, 2008) 216 pages [*Making People Illegal*].

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3. *Supra* note 1 at 38.

4. *Ibid.* at 3.

5. *Ibid.* at 9-19. Dauvergne intentionally uses the controversial terminology “illegal” migration, rather than “undocumented” or “irregular” migration, because she wants to focus attention on what the rule of law has to say about immigration laws that carve out a new category of person: illegal immigrants (or, as is increasingly common in the vernacular, simply “illegals”). I am not entirely convinced that the advantages of using this language outweigh the costs. I am especially mindful, in this regard, of the risk of legitimizing highly exclusionary language. Nonetheless, for the limited purposes of this review, I adopt Dauvergne’s terminology.

ineffective in ameliorating the lives of illegal migrants.⁶ To give some context to this claim, she examines the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers' Convention)*,⁷ an instrument hailed by Saskia Sassen as "one of the most important documents seeking to protect the rights of migrants."⁸ While this instrument reaffirms basic human rights enjoyed by all persons regardless of their immigration status, Dauvergne notes that it also insists in clear and strong language that sovereign states have the right (and the obligation) to detect and prevent unlawful migration. This, of course, is precisely what illegal migrants are most keen to avoid. As a result, Dauvergne contends that the attempt in the *Migrant Workers' Convention* "to make a discursive space for [rights claims by] illegal migrants is hemmed in by its reference to the sovereign power to make migration illegal."⁹

Next, Dauvergne argues that this equivocation in the *Migrant Workers' Convention* reflects a broader phenomenon, whereby "in the face of globalizing forces, migration is increasingly being transformed into the last bastion of sovereignty."¹⁰ This is problematic for her because, in any contest between the two, state assertions of sovereignty tend to trump human rights.¹¹ To provide her readers with examples of this phenomenon in action, Dauvergne proceeds to examine her core samples.

She begins by looking at extra-territorial border control strategies that affluent western states use to circumvent the human rights of asylum seekers, such as criminalizing asylum seeking and ensuring that asylum seekers are not able to reach their destinations.¹² She then analyzes laws that respond to human trafficking, but which serve not to protect the human rights of victims of trafficking, but to enhance the border control powers of states, in particular those of hegemonic states such as the United States.¹³ Next, Dauvergne focuses on

6. *Ibid.* at 9-28 (especially at 21).

7. GA Res. 45/158, UN GAOR, 45th Sess., Supp. No. 49A, UN Doc. A/45/49 (1990).

8. Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996) at 94, cited in *Making People Illegal*, *supra* note 1 at 25-26.

9. *Making People Illegal*, *ibid.* at 27.

10. *Ibid.* at 47.

11. *Ibid.* at 29-49 (c.3: "Migration in the globalization script").

12. *Ibid.* at 50-68 (c.4: "Making asylum illegal").

13. *Ibid.* at 69-92 (c.5: "Trafficking in hegemony").

anti-terrorism immigration procedures, which do little to prevent human rights violations that result from terrorist activities. Rather, she contends, such laws recast border control as a site where human rights norms ought to be relaxed to ensure the ability of states to protect national security.¹⁴ She also examines citizenship laws, which aim to foster democratic participation. Citizenship laws are accommodating towards long-term legal residents but—when combined with highly restrictive (and gendered) immigration laws—serve to entrench not only global inequalities, but also inequalities between legal and illegal migrants.¹⁵ For her last two core samples Dauvergne focuses on the European Union (EU) and the United States.¹⁶ She sheds light on the robust mobility rights regime in Europe for EU nationals, which arose at the same time that migration policy vis-à-vis non-EU nationals—and in particular, towards asylum seekers—was hardening.¹⁷ Finally, she points to the curious overlap between the emergence of large social movements seeking regularization programs for illegal immigrants in the United States, on the one hand, and the increasingly militaristic programs to control migration across the country's southern border, on the other hand.¹⁸

What all these core samples show, according to Dauvergne, is that wherever non-citizens make human rights claims against affluent western states, there is an accompanying pushback from these states in the name of sovereignty. This pushback not only indicates that immigration law has become a key site for reaffirming state sovereignty in a globalizing world, but also suggests that we should not expect human rights norms to be especially useful for illegal immigrants, who are the main targets of these reassertions of sovereignty.¹⁹

While Dauvergne gives us reason to doubt the usefulness of human rights norms for illegal immigrants, she nonetheless suggests one alternative with more promise. That alternative is to couch legal arguments on behalf of illegal immigrants not in terms of human rights norms but in terms of the rule of law. And, indeed, through an examination of recent immigration law cases, Dau-

14. *Ibid.* at 93-118 (c.6: "The less brave new world").

15. *Ibid.* at 119-41 (c.7: "Citizenship unhinged").

16. *Ibid.* at 142-62 (c.8: "Myths and Giants: The influence of the European Union and the United States").

17. *Ibid.* at 142-54.

18. *Ibid.* at 154-62.

19. *Ibid.* at 170.

vergne demonstrates that procedural and due process arguments have been more successful for illegal migrants opposing detention and deportation than have substantive human rights claims.²⁰

In my view, Dauvergne is correct on this point, at least with respect to Canadian immigration and refugee law. A quick perusal of the leading Canadian cases indicates that substantive human rights norms—in particular equality norms mandated by section 15 of the *Canadian Charter of Rights and Freedoms*²¹—have been of little use to non-citizens.²² On the other hand, due process norms found in both administrative²³ and constitutional law²⁴ have been more helpful.

The possibility that rule of law arguments may have traction where human rights norms are less successful tells us a great deal about the nature and importance of the rule of law. And this may be the key contribution of *Making People Illegal*, especially if the book is read by scholars of constitutional law and legal theory, two fields which have recently rediscovered immigration law as a result of the increasing prominence of anti-terrorism and national security issues. These scholars have thus far focused largely on obvious legal monstrosities, such as

20. *Ibid.* at 169-90.

21. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

22. *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 (holding that deporting long-term permanent residents due to criminality does not meaningfully engage section 15 equality rights, because section 6 authorizes differential treatment as between citizens and non-citizens); *Lavoie v. Canada*, [2002] 1 S.C.R. 769 (rejecting a section 15 equality rights challenge to legislation limiting non-citizen access to public sector jobs, partly on the grounds that citizens and non-citizens can legitimately be treated differently as shown by section 6).

23. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (holding that heightened standards of procedural fairness apply to administrative immigration determinations that have a significant impact on a person's life, including requests for exemptions from regular immigration requirements on humanitarian and compassionate grounds).

24. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 (holding that refugee claimants are entitled to a refugee determination process that complies with norms of fundamental justice); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (holding that non-citizens who allegedly pose national security threats and who are at risk of deportation to face torture are entitled by principles of fundamental justice to know the case against them and to respond to that case); and *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (holding the then-existing security certificate process unconstitutional because it violates fundamental justice to use secret evidence without a reliable procedure to test that evidence).

indefinite preventive detention and extraordinary rendition. Although these procedures deserve attention and critique, the problems they pose for the rule of law are all too familiar for immigration law scholars and practitioners. *Making People Illegal* can encourage broader attention to immigration law beyond national security and anti-terrorism matters. After all, as Dauvergne persuasively demonstrates, immigration law is riddled with deep procedural irregularities—irregularities that rule of law arguments might help us to address.

There is, nonetheless, one feature of the book that may prove problematic for a dialogue between immigration law scholars and constitutional law scholars and legal theorists. Dauvergne uses the term “rule of law” loosely, and never attempts a definition. Moreover, in discussing the rule of law she draws unevenly on theorists with varying—and perhaps conflicting—approaches.²⁵ In keeping with Dauvergne’s core sample methodology, consider an example of imprecision with respect to the rule of law. In a chapter about anti-terrorism procedures, Dauvergne draws an analogy between states that may be tempted to depart from standard legal norms in order to secure the safety of citizens when faced with exceptional threats: “I like to think that faced with a serious threat to one of my children I would act with utter disregard to the law.”²⁶ The example is problematic for at least three reasons.

Firstly, this is a curious example. In most imaginable circumstances, it seems likely that the law is one of the most powerful tools that a law professor could deploy in the event that her child was threatened. In contrast, the question of whether to resort to the law poses a heart-wrenching dilemma for illegal immigrant families for whom invoking the law—complaining to the police about a threat to one’s child, for example—means exposing the family, including the child, to the risk of deportation.

Secondly, it is not entirely clear what “law” Dauvergne proposes to disregard here. Surely not, for example, family law, without which the expression

25. Dauvergne, it should be noted, explicitly acknowledges this imprecision in a passage that draws on certain aspects of the work of theorists such as Peter Fitzpatrick, Boaventura de Sousa Santos, and William Twining. *Making People Illegal*, *supra* note 1 at 41:

[A] qualifier to all of this must take the form of an apology to both Boaventura de Sousa Santos and Peter Fitzpatrick for invoking their work in pursuit of a project that follows only part of the paths each has marked. Alternatively, I could offer a straightforward apology for what may possibly be viewed as diletantism but which I hope is instead an applied engagement with this theoretical debate that is grounded in the area of migration law[].

26. *Ibid.* at 105.

“my children” becomes problematic. It would be helpful to know more details about what types of law Dauvergne feels could pose an impediment to addressing threats to a child. This would allow the reader to evaluate whether she is in fact right to imply that disregarding the law is the right thing to do in her hypothetical example.

Thirdly, and I think most importantly, Dauvergne’s notion of “acting with *utter disregard* to the law” is under-theorized. Does she mean that she would entirely ignore the law? If so, would such a stance not be counterproductive? For example, if driving one’s child to the hospital, it would seem unwise to ignore laws regulating traffic (*e.g.*, laws that lead us to expect that cars generally proceed in Canada on the right side of the road), even if one chooses to break those laws. So if she does not mean that she would ignore the law, then what does she mean? It may be that she means that, where expedient, she would feel free to act in a manner that is contrary to the law. But this stance, too, raises tricky questions. Is there a general obligation to obey the law in the first place? If so, what is the source of this obligation? Are there exceptional circumstances in which this obligation is relaxed, and if so, what types of circumstances, and with what limits? It seems to me that in a book that attempts to draw lessons about the rule of law, these types of questions should be addressed.

I hope I am not being unfair by focusing on this example, and I acknowledge (as does Dauvergne)²⁷ that the issue of representativeness poses a challenge for core sample methodologies. Still, as a general matter, Dauvergne’s analysis of the rule of law is left at a fairly high level of abstraction throughout the book. Given the central role the concept plays in the book, some readers may find this frustrating.

In the end, however, the core samples that Dauvergne explores in *Making People Illegal* offer one of the best accounts currently available of the troubling pattern whereby human rights norms are consistently and systematically breached by states seeking to assert their sovereignty vis-à-vis non-citizens. Moreover, these core samples show that procedural arguments couched in rule of law terms present a promising means of addressing this troubling pattern. As such, the book offers a compelling invitation for a broad conversation about migration and the rule of law, a conversation that should include not only immigration law scholars, but also constitutional law scholars and legal theorists. I hope that many readers take Dauvergne up on this invitation.

27. *Ibid.* at 3.