

Production of Ignorance and Co-Production of Resistance: Britain's Hostile Environment

Doctoral Thesis

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Lizzy Willmington

Cardiff School of Law and Politics
Cardiff University

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Abstract

Britain believes itself to be an open and tolerant country to migrants and refugees both now, and in the past. This thesis demonstrates how the immigration laws and policies themselves tell a different story. Contextualising the hostile environment in an understanding of Britain's colonial history can ground and support challenges to persistent colonialities. Because these colonialities are denied they maintain systems of ignorance and a persistent belief in the innocence of the law.

This thesis is organised in two halves, each of which adopts a different approach. The first half takes a broadly historical and international approach to understanding how UK immigration laws create and sustain processes of mobility, categorisation and segregation. Through these chapters techniques of fencing off and bordering are documented to demonstrate how unknowing and silence around violence and difference are produced and continually reproduced.

The second half builds on this historical and conceptual grounding to demonstrate how contemporary migration controls build on, and are continuations of, practices developed throughout the colonial era – both material and conceptual. Following my analysis of the production of ignorance, I examine its counterpart: the co-production of resistance. By employing a method of co-production I show how *The Hostile Environment Walking Tour*, which I produced in 2018, identified collaborative aspects of the hostile environment and understood them as spaces of accountability. This, it is argued, could weaken instances of implementation that are essential to its success and reframe them as opportunities of resistance and solidarity. It does this in two ways. It considered how participatory art practices can unpick, expose and pierce dominant narratives in the context of the hostile environment. It also suggests how participatory art practices can challenge acceptance and ignorance of, and apathy towards, the hostile environment and the harm it inflicts on people who are miss-documented and undocumented, through their exclusion from everyday society.

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Introduction

Britain and Migration

*Britain is an open and tolerant country which has a long history of welcoming migrants and the benefits they bring, as well as meeting our international obligations to refugees.*¹

1. Introduction

Britain sees itself as being an open and tolerant country to migrants and refugees both now, and in the past, as the quote above from the Government's 2018 Integrating Communities Strategy Paper indicates. Yet, the same year the strategy paper was published, a national scandal exposed the "hostile environment" immigration policies which had been introduced in 2012. A generation of British subjects, with legal rights and entitlements as Citizens of the United Kingdom and Colonies (CUKC), made their lives here and were now close to or of retirement age were caught up in these policies and were being denied access to the national health service, housing and the right to work, to name a few. Theresa May, the then Home Secretary and Prime Minister introduced the policy by stating, "The aim is to create here in Britain a really hostile environment for illegal migration".² The idea was to restrict access to the daily services needed to live for people who were considered not to have the legal right to be in Britain, as did happen to people of the Windrush generation. The "Windrush scandal", as it came to be known, was a decisive turning point in public opinion on the United Kingdom's (UK) immigration rules, exposing the contradictory, fickle and prohibitively administrative and expensive system. It exposed the uncompromisingly hostile nature of Whitehall, and brought questions of citizenship, colonialism, empire, belonging and Britishness into the public arena in a way that few other events had before.

¹ HM Government, 'Integrated Communities Strategy Green Paper' 20
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696993/Integrated_Communities_Strategy.pdf> accessed 27 June 2020.

² James Kirkup and Robert Winnett, 'Theresa May Interview: 'We're Going to Give Illegal Migrants a Really Hostile Reception' - Telegraph' (25 May 2012)
<<https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>> accessed 17 July 2018.

Far from being an unintended consequence, this was the hostile environment in action, the intended impact was on people who the immigration system deemed without entitlement to be in the UK. This scandal breached the acceptability of norms of violence on Black, Brown and migrant people and the palatability of this violence and called into question what was purported to be a tough but fair system.³ This transgression forced a roll back of some policies. However, rather than abolishing or comprehensively reforming the policies, they were rebranded as the “compliant environment” despite clear lineages being drawn between practices of compliance and empire, even within the House of Commons.⁴ But how much has the hostile environment really changed since 2018, and how did we get here?

Rather than an aberration, this thesis sets the Windrush scandal and hostile environment in a wider history of perennial hostilities and violence to people who are considered undesirable. The law has a long history of opening channels of mobility to some people, and at the same time closing them off to others. While there may have been periods of hospitality to refugees and migrants in Britain, it is only when interests converge. The focus on – and protection of – national interests has been prevalent throughout history and is still shaped by the formations of the nation, citizenship and the rights of man that were developed during the early Enlightenment and colonial period. These formations set the belief that immigration is a problem in and of itself, rather than a natural endeavour engaged in throughout human history. Immigration, and the right or need to protect the nation from influxes of “foreigners”, particularly the wrong kind of foreigner, also has a long history. This history is largely bereft of an awareness of the UK’s role in creating the very unliveable situations that people flee or migrate from, as well as the historic and contemporary ties that contribute to the reason many choose or happen upon the UK as their home. In fact, it is quite the opposite. Six years after the UK voted to leave the European Union (EU), with anti-immigration motivations deeply rooted in this choice, it is still a ferocious and toxic debate with very real impacts on people’s lives, including a rise in racism and hate crimes.⁵ In September 2021, immigration and asylum were the top concerns for Conservative Party voters and those who voted

³ Theresa May, ‘Speech by Home Secretary on Second Reading of Immigration Bill’ (*GOV.UK*, 22 October 2013) <<https://www.gov.uk/government/speeches/speech-by-home-secretary-on-second-reading-of-immigration-bill>> accessed 3 January 2022.

⁴ Owen Bennett, ‘Sajid Javid Echoing Slave Owners With His “Compliant” Immigration Policy, Claims David Lammy’ *HuffPost UK* (05 2018) <https://www.huffingtonpost.co.uk/entry/windrush-sajid-javid-david-lammy_uk_5ae9de7de4b00f70f0ee6078> accessed 8 August 2021.

⁵ UNHCR, ‘UN Rights Expert Hails UK for Anti-Racism Action but Raises Serious Concerns over Immigration Policy, Prevent Programme and Brexit’ (*United Nations Human Rights. Office of the High Commissioner*, 11 May 2018) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23074&LangID=E>> accessed 22 May 2019; Robert Booth, ‘Racism Rising since Brexit Vote, Nationwide Study Reveals’ *The Guardian* (20 May 2019) <<https://www.theguardian.com/world/2019/may/20/racism-on-the-rise-since-brexit-vote-nationwide-study-reveals>> accessed 22 May 2019.

to leave the European Union. They surpassed concerns over health, the economy and the environment during a global pandemic, economic decline and evidence of environmental catastrophe, keeping this issue firmly at the forefront of the Government's agenda.⁶ Meanwhile, proposals for free trade and movement between the UK and the white settler nations of Canada, Australia and New Zealand (CANZUK) have gained significant support.⁷ Renewed cases for colonialism have been made within academia⁸ and UK trade negotiations,⁹ while Prime Ministers have claimed that the time has come for the UK to stop apologising for its past and be proud of what British colonialism achieved.¹⁰

How then, in present day Britain, can the government both gloat in creating a hostile environment for migrants and claim Britain is an open and tolerant country? How did a contemporary understanding of Britain become so divorced from its colonial past? Did Britain ever really acknowledge its past, let alone apologise or atone for it? This thesis demonstrates how the immigration laws and policies themselves tell a different story. Britain's story of migration has been, and continues to be, carefully constructed to create a settled truth on a complex reality. To gain a contemporary understanding to this complex story, this thesis will analyse Britain's history of sanctioning and restricting mobility. As Patricia Tuitt argues, '[i]f the law that is operating in the present cannot be divorced from its contexts, then, equally, it cannot be divorced from its past.'¹¹ As such, this thesis sets the hostile environment within an understanding of Britain's colonial history. This contextualisation can ground and support challenges to persistent colonialities which are denied and maintain the systems of ignorance and innocence of the law.¹² This chapter will detail the background and context of contemporary migration controls. It will set up the organising ideas that shape the thesis and are taken up throughout. It will then identify the research questions and the methodological approaches I used to address them. This is followed by the structure of

⁶ YouGov, 'The Most Important Issues Facing the Country' (YouGov 2021) <<https://yougov.co.uk/topics/politics/trackers/the-most-important-issues-facing-the-country?crossBreak=conservative>> accessed 10 September 2021.

⁷ James Skinner, 'Polling Reveals Majority Support For CANZUK In UK Parliament' (*CANZUK International*, 20 January 2021) <<https://www.canzukinternational.com/2021/01/polling-reveals-majority-support-for-canzuk-in-uk-parliament.html>> accessed 19 September 2021.

⁸ See Bruce Gilley, 'The Case for Colonialism' [2017] *Third World Quarterly* 1; Ethics and Empire, a five year funded project at The MacDonald Centre, Oxford University

⁹ Sam Coates, 'Ministers Aim to Build "Empire 2.0" with African Commonwealth' *The Times* (6 March 2017) <<https://www.thetimes.co.uk/article/ministers-aim-to-build-empire-2-0-with-african-commonwealth-after-brexit-v9bs6f6z9>> accessed 10 April 2019.

¹⁰ "No UK Apology" for Colonial Past' (15 January 2005) <http://news.bbc.co.uk/1/hi/uk_politics/4176805.stm> accessed 10 April 2019.

¹¹ Patricia Tuitt, 'A Concise Note on Peter Fitzpatrick's "Racism and the Innocence of Law"' (2021) 17 *International Journal of Law in Context* 36, 39.

¹² Peter Fitzpatrick, 'Racism and the Innocence of Law' (1987) 14 *Journal of Law and Society* 119.

the thesis, and an explanation of what each chapter will address and how it will contribute to the thesis.

2. Contextualising Migration

The ability or inability to be mobile, to move within or between nations as you need or wish, is an area of intense debate, and one that affects us all. These uneven (im)mobilities are political choices and are legally regulated.¹³ Since 2013 the number of displaced people around the world has set new records.¹⁴ Developing countries host 86 percent of the world's displaced people, predominantly within the country as internally displaced peoples and in neighbouring countries.¹⁵ Meanwhile the global north tightens its external borders and creates internal borders to prevent unsanctioned arrivals of people and to remove people who they do not want to be there. Gurminder Bhambra, among others, argues for a contextualisation of the current “migration crisis” within an historical and colonial configuration. This configuration labels people ‘being in, or out, of place and their movements facilitated (as citizens) or constrained (as refugees or migrants) as a consequence’.¹⁶ The failure to do so has led to the construction of the movement of people fleeing war, famine and poverty as a crisis *for Europe* that needs to be managed. It has allowed for borders to be constructed at the edge of the EU and for EU aid funded deals with transition countries like Turkey and Libya to stop and turn back hazardous boats full of people seeking safety in order to prevent them from arriving at European shores, and for this to be deemed a successful approach.¹⁷

Bridget Anderson pinpoints restrictions on mobility as the key feature of migration control.¹⁸ However, this has been criticised for not highlighting the restriction on mobility

¹³ Mimi Sheller, *Mobility Justice: The Politics of Movement in an Age of Extremes* (Verso Books 2018).

¹⁴ United Nations High Commissioner for Refugees, ‘Figures at a Glance’ (UNCHR, May 2018) <<http://www.unhcr.org/uk/figures-at-a-glance.html>>; United Nations High Commissioner for Refugees, ‘Figures at a Glance’ (UNHCR, 18 June 2021) <<https://www.unhcr.org/figures-at-a-glance.html>> accessed 29 July 2021.

¹⁵ United Nations High Commissioner for Refugees, ‘Figures at a Glance’ (n 14).

¹⁶ Gurminder K Bhambra, ‘The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism’ (2017) 23 *European Law Journal* 395, 400; see also Nadine El-Enany, ‘Things Fall Apart: From Empire to Brexit Britain’ (*IPR Blog*, 2 May 2017) <<http://blogs.bath.ac.uk/iprblog/2017/05/02/things-fall-apart-from-empire-to-brexit-britain/>> accessed 7 November 2018; Nadine El-Enany, ‘Aylan Kurdi: The Human Refugee’ (2016) 27 *Law and Critique* 13; Stephen Small and John Solomos, ‘Race, Immigration and Politics in Britain: Changing Policy Agendas and Conceptual Paradigms 1940s–2000s’ [2016] *International Journal of Comparative Sociology*; Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (Rowman & Littlefield International 2017).

¹⁷ European Council, ‘EU-Turkey Statement, 18 March 2016 - Consilium’ (*The European Council*, 18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> accessed 29 March 2016; European Council, The President, ‘Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route’ <http://www.consilium.europa.eu/press-releases-pdf/2017/2/47244654402_en.pdf> accessed 22 June 2017.

¹⁸ Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP Oxford 2013).

historically falling sharply along racial lines.¹⁹ In contrast, white British people have long enjoyed freedom of movement, with legal restrictions of white settler mobility from the “old” commonwealth in Britain only occurring as a consequence of increased immigration restrictions aimed at those traveling from the “new” commonwealth in the late twentieth century. Seeing itself as a nation entitled to exploration and emigration, Britain was a country of emigration, with settler colonial and colonised nations the most popular destinations until 1979.²⁰ Between 1979 and 1993 the country oscillated between net immigration and emigration, and it was not until 1994 that the United Kingdom became a country of solely net immigration.²¹ This entitlement to emigrate from Britain served as a tool of territorial expansion of the British empire, and the movement and settlement of people around the empire is one of the lasting legacies that continue to shape the world today. The migration practices of empire shaped global and local racial segregation and exclusion, particularly during the nineteenth and twentieth centuries. This is a key argument of this thesis.

The production of “the citizen”, “the migrant” and “the refugee” is historical and political, in response to the process of decolonisation.²² To historicise these concepts within a national framework rather than one of empire detaches them from these historical and political origins. The purpose of this contextualisation is to understand the historical and political production of these categories, the work they do in attributing different controls on certain people’s mobility and different rights to people within a state. Restricting the conception of a political community to a national territory – and the rights that are entwined with that – is essential to Europe’s, and Britain’s, identity, purging itself from the shared and broader history of imperial communities.²³ Through this, there is an exclusivity of claim to the contemporary national territory that was enriched by its colonial exploits, and therefore an exclusivity to the advantages and accumulated wealth that have been maintained since transitioning from empire to nation.²⁴ Bhambra argues,

¹⁹ Bhambra, ‘The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism’ (n 16).

²⁰ Office of National Statistics, [ARCHIVED CONTENT] Long-Term Migration into and out of the United Kingdom, 1964-2014’ (*The National Archives*, 19 May 2016) <<https://webarchive.nationalarchives.gov.uk/20160519133304/http://www.neighbourhood.statistics.gov.uk/HTMLDocs/dvc123/index.html>> accessed 16 January 2019.

²¹ *ibid.*

²² Bhambra, ‘The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism’ (n 16). 403

²³ *ibid.* 404; Nadine El-Enany, (*B)Ordering Britain: Law, Race and Empire* (Manchester University Press 2020). For role of people in the French colonies in expanding and shaping the political ideals of citizenship and nationhood that were implemented and attributed at the metropole, as well as indentured labourers in providing the material conditions for these revolutionary demands see Laurent Dubois, ‘La République Metissee: Citizenship, Colonialism, and the Borders of French History’ (2000) 14 *Cultural Studies* 15; Lisa Lowe, *The Intimacies of Four Continents* (Duke University Press 2015).

²⁴ El-Enany, *Bordering Britain* (n 23).

‘such advantages no longer deserve to be called rights; rights that are not extended to the others are privileges’.²⁵

This historically sanitised framing shapes how the British population understands people who arrive to the UK from across the world.²⁶ The belief that immigration has been imposed on the British public, particularly affecting the “white working class”, and is resented as such is not new.²⁷ Vron Ware argues, ‘it is in this context that economic migrants, refugees and asylum seekers are liable to be seen as undeserving beneficiaries of social resources, claiming and receiving welfare entitlements at the expense of the majority (‘indigenous’) populations.’²⁸ This demonstrates a resentment to a perceived decline of racial privilege among the poorer social groups in predominantly white societies and homogenises the working class as white, erasing working class people of colour. Further, it legitimises resentment towards migrants as the cause of the genuine declining material conditions people face and the exclusive entitlement to these tangible and intangible privileges available within the borders of Britain to white Britains.²⁹ Claims of suppressing discussions on race blocks a more nuanced discussion around class and inequality and repudiates the continual discussion of race and immigration, including through racist legislative restrictions, and therefore removal of rights, to those who can claim British citizenship, as this thesis will demonstrate.³⁰

The centrality of race to my thesis is motivated by the understanding that ‘race is not of interest for what it *is* but what it *does*’.³¹ I understand race as a process; unstable and changeable regimes that are ‘ever-incomplete projects whereby colonisers repetitively seek to impose and maintain White supremacy.’³² According to Patrick Wolfe, race has two distinctive features. Through a hierarchy of racial difference, and the degree of racial difference from the white norm is defection. Further, it attributes moral, cultural and cognitive characteristics as inherent and therefore predetermined rather than ideological and negotiable.³³ This formed the backbone to social and economic organising as well as justification for exploitation during nineteenth century European colonialism. Racial systems continue through a resistant and replicating combination of

²⁵ Bhabra, ‘The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism’ (n 16) 404.

²⁶ Small and Solomos (n 16) 237.

²⁷ Enoch Powell, ‘Speech at Birmingham’ (*Enoch Powell*, 04 1968) <<https://www.enochpowell.net/fr-79.html>> accessed 7 November 2018; Vron Ware, ‘Towards a Sociology of Resentment: A Debate on Class and Whiteness’ (2008) 13 Sociological Research Online.

²⁸ Ware (n 27) para 5.8.

²⁹ El-Enany, *Bordering Britain* (n 23).

³⁰ Ware (n 27) para 3.6.

³¹ Alana Lentin, ‘What Does Race Do?’ (2015) 38 *Ethnic and Racial Studies* 1401, 1404.

³² Patrick Wolfe, *Traces of History: Elementary Structures of Race* (Verso Books 2015) 18–19.

³³ *ibid* 7.

fixity and fluidity throughout time and context.³⁴ As Wolfe argues, ‘race is colonialism speaking...races are traces of histories.’³⁵

2.1 A Global Control of Migration

While this thesis focuses on the current hostile environment policies in the United Kingdom, it is situated within a broader understanding that these policies are but one link in a chain of global and national regulation of migration. The UK government’s approaches have historically fallen into two positions; restrictions and controls at the external border of the territory, largely air, sea and land ports, and management and control within the territory. These restrictions were legislated though enforced in an ad hoc manner, if at all. Both approaches to regulation have accelerated with the increase of global mobility immediately after and since World War Two, with claims that the country is overcrowded and that immigration must fall in line with the economic needs of the country. However, these claims did not mirror the reality of legislative changes, with differences in treatment between “new” and “old” commonwealth countries, the lack of restriction on the high number of Irish nationals settling in Britain,³⁶ and the freedom of movement within the EU.

More recently expansion of immigration controls has expedited, with the two approaches subdividing into four. Focusing on the external border, the first stage is concerned with preventing people leaving their countries of origin or regions, with aid and development projects designed to prevent “push factors” from “source countries”.³⁷ The second stage is concerned with the protection of the physical frontier of Europe through the externalisation of border controls to third or transition countries, which also utilise defence and aid resources at an EU and member states level to prevent and reduce the number of people arriving to Europe, and then onwards to the UK.³⁸ The third approach, the hostile environment, is a collection of laws and policies which refuses access to everyday public services to people who are considered undocumented.³⁹ These measures have externalised immigration controls to private, public and third sector actors within the UK borders. The hostile environment actively creates an unliveable life for people in the UK who cannot present the documents to prove a legal right to remain, by restricted access to services

³⁴ Ann Laura Stoler, ‘Reflections on "Racial Histories and Their Regimes of Truth" (A. Stoler)’ in Philomena Essed and David Theo Goldberg (eds), *Race Critical Theories: Text and Context* (1 edition, Wiley-Blackwell 2001).

³⁵ Wolfe (n 32) 5.

³⁶ Small and Solomos (n 16) 247.

³⁷ DFID and HM Treasury, ‘UK Aid: Tackling Global Challenges in the National Interest’ (2015) Cm 9163 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/478834/ODA_strategy_final_web_0905.pdf>.

³⁸ European Council (n 17); European Council, The President (n 17).

³⁹ Immigration Act 2014 (c 22); Immigration Act 2016 (c 19).

to encourage voluntary returns and identify people for removal, voluntarily or forced. The fourth stage develops and increases the means to deport people from the UK easier and faster.⁴⁰

3. Organising ideas

This thesis analyses the regulation and control of people and personhood through the lens of migration. This necessitates an understanding of the international system as an established system of nation states and the rights of individuals through a national community of citizenship which is produced and reproduced through the law. Immigration laws, as this thesis will show, are a crucial arm of regulating who is in and out of place within domestic and international legal systems. The obfuscation of the colonial origins of law, specifically immigration and asylum law, uphold systems of ignorance which continue to be reproduced and legitimised through the law. Colonial anxiety and colonial violence are therefore justified and continued through migration regulation practices.⁴¹ The following section sets out a number of conceptual building blocks that the argument of this thesis is built on and develops throughout.

3.1 Technologies of Exclusion

The exportation of the English legal system around the empire was a key technique in and justification of the mission of empire. The law, it was claimed, brought ‘order to a disordered situation.’⁴² International, domestic and colonial laws were developed precisely as a response to, and legitimation of imperial expansion and differing treatment of people based on legal categorisations.⁴³ Law is a technology of regulation which creates borders of inclusion and exclusion along a hierarchy of personhood. Policing boundaries of belonging contains those within the boundary and excludes those considered Others outside which ‘assures the material basis for domination while enabling the members of the dominant group to define themselves.’⁴⁴ These boundaries are constantly challenged, redrawn and reaffirmed, becoming interwoven into formal

⁴⁰ GOV.UK, ‘CSSF Programme Summary. Reintegration and Support for Returnees Programme’ (HM Government 2019) DAC CODE 15190 CSSF-01-00005; Luke de Noronha, *Deporting Black Britons: Portraits of Deportation to Jamaica* (Manchester University Press 2020).

⁴¹ Natasha Carver, ‘The Silent Backdrop: Colonial Anxiety at the Border’ (2019) 32 *Journal of Historical Sociology* 154.

⁴² Peter Fitzpatrick, *The Mythology of Modern Law* (1 edition, Routledge 1992) 108.

⁴³ Barnor Hesse, ‘Racialized Modernity: An Analytics of White Mythologies’ (2007) 30 *Ethnic and Racial Studies* 643; Branwen Gruffydd Jones, ‘Definitions and Categories: Epistemologies of Race and Critique’ (2016) 19 *Postcolonial Studies* 173.

⁴⁴ Mary Louise Fellows and Sherene Razack, ‘The Race to Innocence: Confronting Hierarchical Relations Among Women’ (1998) 1 *Journal of Gender, Race and Justice* 335, 343.

and everyday practices and habits.⁴⁵ Social hierarchies and privileges are actively perpetuated and legitimated through the law's authoritative position. Divisions into legal and illegal spheres constitute subjects within these opposing realms of good and bad, desirable and undesirable. These binaries create a paradoxical interdependence and encourage an essentialised and othered understanding of the subject.⁴⁶ This process neutralises the complexity and difference of identity into one unified voice, which is usually assumed by and projected from the most privileged position.⁴⁷ This mapping of identities further reinforces and demarcates hegemonic identities, making those who are opposed to it hyper-visible and abnormal, erasing all those impossible identities and bodies who do not comply with these deviant categories.⁴⁸

It has been convincingly argued that the origins of law lie in the protection of property.⁴⁹ Lockean property theory states every person holds an inalienable property in themselves and can acquire property through their labour.⁵⁰ This is an extension of individual property, or an assertion of individual autonomy, to and in relationship with the external world.⁵¹ Rather than a thing owned, property is a 'socially permissible power exercised in respect of a socially valued resource'.⁵² It is a relative relationship which at its strongest can exclude the rest of the world. Critics argue property rights are a façade which successfully legitimise dominant systems of accumulating and maintaining power.⁵³ Property is therefore maintained and reproduced through social relations. If this is to be accepted, property is understood as being socially constructed but powerfully persuasive in

⁴⁵ Geoffrey C Bowker and Susan Leigh Star, *Sorting Things Out. Classification and Its Consequences* (The MIT Press 1999) 319.

⁴⁶ Patricia J Williams, 'On Being the Object of Property' (1988) 14 *Signs* 5.

⁴⁷ For works on the inherent sex and race bias see Ngaire Naffine, 'The Body Bag' in Rosemary J Owens and Naffine Ngaire (eds), *Sexing the subject of law* (LBC Information Services Sweet & Maxwell 1997); Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' 1989 University of Chicago Legal Forum; Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581.

⁴⁸ Sarah Lamb, 'Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse Raid' (2009) 18 *Social & Legal Studies* 111; Dean Spade, 'Keynote Address: Trans Law and Politics on a Neoliberal Landscape' (2009) 18 *Temple Political & Civil Rights Law Review* 353; Sarah Keenan, 'Safe Spaces for Dykes in Danger? Refugee Law's Production of Vulnerable Lesbians' in Sharron Fitzgerald (ed), *Regulating the International Movement of Women: From Protection to Control* (Routledge 2011).

⁴⁹ This will be discussed in again in Chapter One drawing on Bentham in Mary Warnock, *Critical Reflections on Ownership* (Edward Elgar Pub 2015); Carol M Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory' (1990) 2 *Yale Journal of Law & the Humanities* 37; BS Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' 14 *30*; Fitzpatrick, *The Mythology of Modern Law* (n 42).

⁵⁰ John Locke, 'Second Treatise of Government' [2008] www.earlymoderntexts.com ch 5.

⁵¹ Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Ashgate 2001) 4.

⁵² Kevin Grey and Susan Francis Grey, 'The Idea of Property in Land' in Susan Bright and John Dewar (eds), *Land law: themes and perspectives* (Oxford University Press 1998) 1.

⁵³ Marx and Tushnet in Carol M Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press Inc 1994) 2.

nature.⁵⁴ It is therefore more helpful, as Carol Rose argues, to move from an understanding of property-as-thing to property-as-relationship.⁵⁵ This shifts the focus of enquiry from material things to relational power, control and entitlement.

To this end, the protection of the fundamental rights to life, liberty and property, as delineated by Locke,⁵⁶ not only determines who does and does not qualify as the legal subject but also determine the foundation of nation making and imperial expansion. When placed within its context of colonisation and the control of people's (im)mobility and treatment by the law the material and symbolic violence of property can be identified.⁵⁷ The relationship between property, borders and violence has always been prevalent, and is a defining feature of coloniality. Through material and symbolic production of exclusion, use and transfer of people and land – the foundation of property rights – it is important to ask what are the relationships of systems and networks that are in place to support this regime, who are the beneficiaries and what is the connection between the two? The production of knowledge and narratives that surround immigration and border controls are held up by a common 'belief, understanding and culture that hold property regimes together'.⁵⁸ In this way, 'people have talked themselves into those understandings',⁵⁹ or been talked into them by the centuries of accumulative affirmation of certain stories and narratives, and the erasure of other stories and narratives. Relationships support the space for dominant stories and their tellers to be seen as the natural version of events.⁶⁰ However, this regime of dominant power can only continue with a collective common belief in it.⁶¹

Law as a technology of exclusion is a central theme of this thesis. This is understood in two ways. Firstly, by understanding immigration controls as a method of physical and material segregation, which will be argued through a documented genealogy and a legal analysis of immigration laws throughout the thesis. Secondly, by furthering the argument that property regimes are held together through the production of ignorance rather than knowledge. This in turn denies counter stories or challenges to the dominant narrative of property. The final section will argue for creative and critical interventions as an avenue for counter stories to challenge the exclusionary nature of immigration law and the ignorance that surrounds it.

⁵⁴ Rose (n 53).

⁵⁵ *ibid* 5.

⁵⁶ Locke (n 50).

⁵⁷ Nicholas Blomley, 'Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid' (2003) 93 *Annals of the Association of American Geographers* 121.

⁵⁸ Rose (n 53) 5.

⁵⁹ *ibid* 6.

⁶⁰ *ibid* 39.

⁶¹ *ibid* 5.

3.2 The Production of Ignorance

In 2014 a surveyed majority of the British population thought the empire is something to be proud of. Almost half thought the countries colonised are better off because of the British empire and a third thought that Britain should still have an empire.⁶² When repeated in 2019, there was a significant drop in support, however, a new option of neutrality or indifference⁶³ took a significant portion of the responses.⁶⁴ While not unique, Britain's pride and belief in the benefit of its empire to those colonised is among the highest of old imperial nations⁶⁵ and only surpassed by the Netherlands.⁶⁶ This indifference is not new, with 'everyday lives infused with an imperial presence' during the days of empire, Catherine Hall and Sonya O Rose argue the general population was 'probably neither 'gung-ho' nor avid anti-imperialists'.⁶⁷ The constant presence, woven into the fabric of everyday life, ensured a familiarity and commonplaceness to empire without drawing great attention to it, creating a banal rather than overt attachment to and reproduction of imperialism, empire and nation.⁶⁸ But banality is not benign.⁶⁹

Edward Said argues imperialism is a '*distribution* of geopolitical awareness into aesthetic, scholarly, economic, sociological, historical, and philological texts' that 'creates and maintains' a distinction between two worlds from the perspective of and for the imperialist.⁷⁰ It is a discourse that shapes and is shaped by uneven interactions with political, intellectual, cultural and moral powers.⁷¹ Power operates both institutionally and through the systems that create and continue it.⁷² These systems become a complex structure and logic of Western knowledge of imagined subjects and spaces, which develops its own epistemology. Though a refined and complex epistemology, it is one of fiction, one of ignorance.⁷³

⁶² YouGov, 'British Empire Polls & Survey 2014' (YouGov 2014) <http://cdn.yougov.com/cumulus_uploads/document/6quatmbimd/Internal_Results_140725_Commonwealth_Empire-W.pdf> accessed 29 January 2015.

⁶³ 'Neither something to be proud nor ashamed of' / 'Neither better nor worse off'

⁶⁴ YouGov, 'British Empire Polls & Survey 2019' (YouGov 2020) <https://yougov.co.uk/topics/politics/explore/topic/British_Empire?content=all> accessed 28 July 2021.

⁶⁵ YouGov, 'Empires Attitudes (International)' (YouGov 2020) <https://yougov.co.uk/topics/politics/explore/topic/British_Empire?content=all> accessed 30 July 2021.

⁶⁶ For a detailed account of colonial ignorance in the Netherlands see Gloria Wekker, *White Innocence. Paradoxes of Colonialism and Race* (Duke University Press 2016).

⁶⁷ Catherine Hall and Sonya O Rose (eds), *At Home with the Empire: Metropolitan Culture and the Imperial World* (Cambridge University Press 2006) 2.

⁶⁸ John L Hennessey, 'Imperial Ardor or Apathy? A Comparative International Historiography of Popular Imperialism' (2019) 17 *History Compass*; Michael Billig, *Banal Nationalism* (SAGE Publications Ltd 2010).

⁶⁹ Billig (n 68); Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin 2006).

⁷⁰ Edward W Said, *Orientalism* (Penguin Books India 1995) 12. Emphasis in original.

⁷¹ *ibid.*

⁷² Abdelmajid Hannoum, 'Translation and the Colonial Imaginary: Ibn Khaldûn Orientalist' (2003) 42 *History and Theory* 61.

⁷³ Said (n 70) 62.

Understanding ignorance as an absence or even innocence of knowledge ‘fails to recognize the connection between what we know and the interests we protect through our ignorance.’⁷⁴ It therefore may be productive to consider ways in which ignorance is itself produced and what effects it can have. Gayatri Chakravorty Spivak explains ‘the mainstream has never run clear... [the] art of mainstream education involves learning to ignore this absolutely, with a sanctioned ignorance.’⁷⁵ Here Spivak charges an intentional refusal to engage with that which does not ‘run clear’, that which challenges or is uncomfortable knowledge to the mainstream, and importantly holds institutional support to do so. Rather than mutually exclusive, Alex Sharpe argues ‘we might view ignorance as a form of knowledge, rather than its absence.’⁷⁶ She argues the learning of ignorance is a learning to not see or to not know that which is visible. It is those who have learnt to not see and know who can ignore that which confronts the mainstream who, Eve Kosofsky Sedgwick argues, hold an ‘epistemological privilege of unknowing’.⁷⁷ This approach challenges not ignorance or innocence itself but fights ‘against the killing pretence that a culture does not know what it knows.’⁷⁸ Therefore there is a wilful ignorance in order to leave the dominant viewpoint which society is structured around unchallenged, which for this context, is a Eurocentric and white viewpoint.

Charles Mills argue there is an epistemology of white ignorance.⁷⁹ As with knowledge production, ignorance is systemically produced and developed through frameworks of understanding the world. These purposefully and structurally produce misunderstandings of the world order to be able to accept the racial inequalities as they are today. It is through these structures of ignorance that certain stories become established histories or truths which allow us to understand the present; ‘the mystification of the past underwrites a mystification of the present’.⁸⁰ In Mills’ words, white ignorance is ‘*a pattern of localized and global cognitive dysfunctions (which are psychologically and socially functional), producing the ironic outcome that whites will in general be unable to understand the world they themselves have made.*’⁸¹ Through the stories that are supported and sanctioned, and those which are suppressed, denied or ignored, knowledge and ignorance are produced, reinforcing and generating power relations between those involved or omitted. It is this intent

⁷⁴ Fellows and Razack (n 44) 338.

⁷⁵ Cited in Lucy Mayblin, ‘Never Look Back: Political Thought and the Abolition of Slavery’ (2013) 26 Cambridge Review of International Affairs 93, 98.

⁷⁶ Alex Sharpe, ‘The Ethicality of the Demand for (Trans)Parenthood in Sexual Relations’ (17) 43 Australian Feminist Law Journal 161, 5.

⁷⁷ Eve Kosofsky Sedgwick, *Tendencies* (1 edition, Routledge 1994) 24.

⁷⁸ *ibid* 51.

⁷⁹ Charles W Mills, ‘White Ignorance’, *Race and Epistemologies of Ignorance* (State University of New York Press 2007).

⁸⁰ *ibid* 31.

⁸¹ Charles W Mills, *The Racial Contract* (Cornell University Press 1997) 18. Emphasis in original.

which creates a racial aphasia, a purposeful forgetting and denial of certain knowledge, rather than an amnesia which is unintentional.⁸²

The production of ignorance, or the intention of its production, are of course denied. Saree Makdisi argues denial ‘is a form of foreclosure that produces the inability—the absolutely honest, sincere incapacity—to acknowledge that a denial and erasure have taken place because that denial and erasure have themselves been erased in turn and purged from consciousness.’⁸³ Ignorance and the denial of ignorance therefore create a sincere refusal to be blamed – and therefore a refusal to be held accountable – and an unshakable, even aggressive conviction of innocence. Gloria Wekker speaks to the function of innocence, in obscuring and perpetuating the privileges and harms it produces while also being ‘strongly connected to privilege, entitlement, and violence that are deeply disavowed.’⁸⁴ Wekker identifies that not understanding or knowing and not *wanting* to understand or know shows ‘innocence is not as innocent as it appears to be’.⁸⁵ Mary Louise Fellows and Sherene Razack also recognise that in viewing ‘ourselves as innocent, we cannot confront the hierarchies that operate among us.’⁸⁶ They argue other people’s experiences of oppression and violence can be delegitimised to preserve our own innocence in their subordination as well as obscure our own cooperation with systems of violence.⁸⁷

The production of ignorance and denial of Britain’s past and insistence of innocence in the present clarifies domestic debates on immigration. Nadine El-Enany explains, ‘this rhetoric is entirely divorced from an understanding of British colonial history, including the country’s recent imperial exploits, which have destabilized and exploited regions and set in motion the migration of today.’⁸⁸ Here El-Enany demands a broader engagement and understanding of current cross-border migrations and the needs behind them by bridging history and the present, the international and the national. Without a comprehensive history and knowledge of British colonialism, institutionalised white ignorance will prevent Britain’s ability to understand the world they themselves have made through a ‘deliberately educated ignorance’, a point identified by W.E.B. Du Bois over a century ago.⁸⁹ Understanding ignorance as produced, through intentional and sanctioned means, exposes a system or structure of racial ignorance and colonial aphasia. Placing

⁸² Debra Thompson, ‘Through, against and beyond the Racial State: The Transnational Stratum of Race’ (2013) 26 *Cambridge Review of International Affairs* 133, 135.

⁸³ Saree Makdisi, ‘The Architecture of Erasure’ (2010) 36 *Critical Inquiry* 519, 554.

⁸⁴ Wekker (n 66) 18.

⁸⁵ *ibid.*

⁸⁶ Fellows and Razack (n 44) 335.

⁸⁷ *ibid.* 340.

⁸⁸ Nadine El-Enany, ‘The Iraq War, Brexit and Imperial Blowback’ (*Critical Legal Thinking*, 14 July 2016) <<http://criticallegalthinking.com/2016/07/14/iraq-war-brexit-imperial-blowback/>> accessed 13 July 2017.

⁸⁹ WEB Du Bois, ‘The Souls of White Folk’, *Darkwater: Voices from Within the Veil* (Verso Books 2016) 23.

present day policies towards migration and immigration laws within this system of production and denial, as this thesis does, helps place contemporary inequalities and violence within a continuum of structural racism, oppression and domination of colonialism.⁹⁰ Ruth Gilmore Wilson's explanation of racism is useful to think through how race functions; '[r]acism, specifically, is the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death.'⁹¹ The state justifies and legitimises race and racism, specifically through law, for '[i]t is through legal narrative that colonising 'fictions' hallowed over time in legal precedent'.⁹² This thesis argues that the law, as a technology of exclusion which has created and continues to create a segregated world through immigration laws is a fundamental method in the production of ignorance and innocence, as well as the denial of it.

3.3 Critical and Creative Interventions

Critical and creative interjections are invaluable in developing a more complex understanding through an analysis of systematic injustices, inequalities and oppressions.⁹³ They situate current turmoil within a broader historical context and deeper political comprehension.⁹⁴ Official truths are exposed, opening opportunities for subversion and alternative accounts.⁹⁵ This is a radical endeavor in and of itself, but exploring political upheavals through the creative can also bring opportunities to imagine beyond these points rather than be restricted within them.⁹⁶ Davina Cooper argues that '[c]ritical work doesn't just show what is wrong, it also scoops out space (destabilises a settled landscape) for other kinds of work as well'.⁹⁷ This also allows for a space to

⁹⁰ Thompson (n 82) 135.

⁹¹ Ruth Wilson Gilmore, *Golden Gulag* (First Edition, University of California Press 2007) 28.

⁹² Patricia Tuitt, *Race, Law, Resistance* (1 edition, Routledge 2004) xi.

⁹³ The Aboriginal Tent Embassy is based opposite Parliament House in Canberra. It has been a permanent occupation since it was established in 1972, demonstrating the claim Australia was unoccupied is false, that the land was never ceded, and demanding full sovereignty over Native land and communities. See Irene Watson and Isobell Coe, 'The Aboriginal Tent Embassy: 28 Years after It Was Established.' (2000) 5 *Indigenous Law Bulletin* 17.

⁹⁴ *First Fall of the European Wall* replaced commemorative symbols of the border wall, placing the history of segregation in Germany in inconvenient parallels the technological surveillance at the border of the European Union and highlight the rising deaths caused by methods of exclusion. See Center for Political Beauty, 'First Fall of the European Wall' <<https://politicalbeauty.com/wall.html>> accessed 17 September 2021.

⁹⁵ A public reading of the Nauru Files – leaked medical records from the offshore detention centre – were read for a whole day outside the entrance to the Australian Embassy in London to challenge the Australian Government's official stance on offshore detention and refusing to engage with the horrific abuses taking place. See Nadine El-Enany and Sarah Keenan, 'From Pacific to Traffic Islands: Challenging Australia's Colonial Use of the Ocean through Creative Protest' (2019) 51 *Acta Academica: Critical views on society, culture and politics* 28.

⁹⁶ In 'CUT UP THE LAW' the Art/Law Network used William Burroughs' 'The Cut-Method' to cut up laws, rearrange and bring into conversation different relationships to and between law, see Art/Law Network, 'AntiUniversity: Intersections of Art, Law and Protest' (*Art/Law Network*) <<https://artlawnetwork.org/antiuniversity-intersections-of-art-law-and-protest/>> accessed 17 September 2020.

⁹⁷ Davina Cooper, 'Can Projects of Reimagining Complement Critical Research?' (*social politics and stuff*, 20 April 2018) <<https://davinacooper.wordpress.com/2018/04/20/can-projects-of-reimagining-complement-critical-research/>> accessed 21 June 2018.

investigate the transformative potential of law and politics, among others, where a utopian vision of the future can be explored.⁹⁸ The opportunity to participate in the development of critical and creative endeavours must be an open one. Those normally excluded can offer alternative and grounded viewpoints⁹⁹ which can challenge sanctioned ignorance around migration and expose the exclusionary nature inherent in immigration law.

Critical and creative methods and spaces can allow an imagining of what is possible – creatively, politically and democratically – when such possibilities appear determinedly foreclosed.¹⁰⁰ David Graeber argues, ‘[i]t’s not so much a matter of giving ‘power to the imagination’ as recognising that the imagination is the source of power in the first place’.¹⁰¹ Rather than perpetuating a false dichotomy between art and law, a convergence of ‘art/law’ can be a method and tool of navigation which create ‘catalytic ways of seeing, knowing, being and learning’.¹⁰² Lucy Finchett-Maddock argues art/law is a ‘simultaneous reunion of law, art and resistance as one’¹⁰³ and provides an opportunity to hold uncertainty and change, as well as criticisms of art and law together rather than dismissing them. It is these methods and spaces which create and generate the messy and difficult, which encourage sitting with, pushing forward or dissecting the contradictions and uncomfortableness. This is the point, ‘the beauty is in the incompleteness’.¹⁰⁴ These spaces can provide important sites of critique; capture moments and enhance movements of civil disobedience; and model new forms of participation and being together.¹⁰⁵ Art, in its broadest sense, has the power to *empower* and ‘expand... consciousness and

⁹⁸ *ibid*; Mari Matsuda, ‘Looking to the Bottom: Critical Legal Studies and Reparations Minority Critiques of the Critical Legal Studies Movement’ (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323.

⁹⁹ Matsuda (n 98); Mari Matsuda, ‘When the First Quail Calls: Multiple Consciousness as Jurisprudential Method. A Talk Presented at the Yale Law School Conference on Women of Color and the Law, April 16, 1988’ (1989) 11 *Women’s Rights Law Reporter*; Richard Delgado, ‘Storytelling for Oppositionists and Others: A Plea for Narrative’ (1989) 87 *Michigan Law Review* 2411; Dianne Millen, ‘Some Methodological and Epistemological Issues Raised by Doing Feminist Research on Non-Feminist Women’ (1997) 2 *Sociological Research Online* 114; Sandra Harding, *Feminism and Methodology: Social Science Issues* (Highlighting edition, Indiana University Press 1988); Audre Lorde, *Sister Outsider* (Random House 1984).

¹⁰⁰ A coalition of activists put the Home Office on trial in a performance outside the department building. See *End Deportations, People’s Trial of the Home Office* (2019)

<https://www.facebook.com/watch/live/?v=568286317007697&ref=watch_permalink> accessed 31 May 2019.

¹⁰¹ David Graeber, ‘On the Phenomenology of Giant Puppets’ in Gavin Grindon and Catherine Flood (eds), *Disobedient Objects* (1st edn, V&A Publishing 2014) 77.

¹⁰² Lucy Finchett-Maddock, ‘Forming the Legal Avant-Garde: A Theory of Art/Law’ [2019] *Law, Culture and the Humanities* 1, 2.

¹⁰³ *ibid* 1.

¹⁰⁴ *ibid* 23.

¹⁰⁵ Examples include I.M.E.L.D.A. in Ruth Fletcher, ‘Cheeky Witnessing’ (2020) 124 *Feminist Review* 124; Tatyana Fazlalizadeh, ‘Stop Telling Women to Smile’ <<http://stoptellingwomentosmile.com/>> accessed 16 September 2021; ‘Scottish Feminist Judgments Project Artists’ (*Scottish Feminist Judgments Project*) <<https://www.sfjp.law.ed.ac.uk/artists/>> accessed 16 September 2021; Detained Voices, ‘Detained Voices’ <<https://detainedvoices.com/>> accessed 16 May 2021; Lucy Finchett-Maddock and Eleftheria Lekakis (eds), *Art, Law, Power: Perspectives on Legality and Resistance in Contemporary Aesthetics* (COUNTERPRESS 2020); Yasmin Begum, ‘Cardiff’s History of Migration Inspired Me to Live-Tweet the 1919 Race Riots’ (*gal-dem*, 5 November 2019)

create'.¹⁰⁶ Utilising the tools provided in creative practices hold the potential for a less restrictive and more imaginative development of this process. This in turn offers an opportunity to push the structures of what is possible while working together in new ways.

There are overlapping skills between legal and creative approaches. Amanda Perry-Kessaris identifies three overlapping skills between lawyers (in a broad sense to include legal researchers and legal activists, and therefore myself) and designers, 'a commitment to communication; a need for/ability to create structured freedom; and a need/ability to be at once practical, critical, and imaginative.'¹⁰⁷ She argues these skills-in-common encourage lawyers to see their work as sites of possibility, rather than finished products¹⁰⁸ and to make their work 'visible and tangible'.¹⁰⁹ Creative approaches to and with the law can bring about new imaginative possibilities through collaborative practices of co-production and inclusion. Communicating the hostile environment policies through the structured freedom of an art project can make them visible and tangible through a new creative language to new audiences, as this thesis will show.

4. Reflections on Research Process

The research process for this thesis has been an evolving one, developing through conceptual and practical engagement and co-production between academia, activism and creative resistance. Three key events took place between February and May 2018 which brought the hostile environment in to sharp focus and compelled me to reconceptualise my initial research questions. Firstly, in February and March, the *Hunger for Freedom* strikers took part in an all-out strike to 'protest against some of the more offensive practices of the Home Office'.¹¹⁰ I supported the strikers during the month-long strike daily as well as in its aftermath. Secondly, stories of people from the Windrush generation caught up in the hostile environment policies were being regularly published in the news and in April and May it became a national scandal. This was a period of intense research and engagement due to the centrality of the hostile environment to my thesis. Thirdly, I was planning a participatory art project, *The Hostile Environment Walking Tour*,¹¹¹ part of the *Who Are We? Project*

<<https://gal-dem.com/cardiffs-history-of-migration-inspired-me-to-live-tweet-the-1919-race-riots/>> accessed 16 September 2021.

¹⁰⁶ bell hooks, *Art on My Mind. Visual Politics* (The New Press 1995) 7.

¹⁰⁷ Amanda Perry-Kessaris, 'Legal Design for Practice, Activism, Policy, and Research' (2019) 46 *Journal of Law and Society* 185, 192.

¹⁰⁸ *ibid* 189.

¹⁰⁹ *ibid* 190.

¹¹⁰ Detained Voices, 'Yarl's Wood Detainees Began a Hunger Strike' (*Detained Voices*, 21 February 2018)

<<https://detainedvoices.com/2018/02/21/yarls-wood-detainees-began-a-hunger-strike/>> accessed 3 March 2018; Detained Voices, 'The Hunger Strikers' Demands' (*Detained Voices*, 22 February 2018)

<<https://detainedvoices.com/2018/02/22/the-hunger-strikers-demands/>> accessed 4 June 2018.

¹¹¹ 'Who Are We Project' <<https://whoareweproject.com/>> accessed 16 September 2021.

over this period and the exhibition was held at the Tate Exchange, Tate Modern between 22 – 27th May.

These commitments and events contributed significantly to the intellectual formation of the project. They led both to a period of personal burnout and a conceptual and practical reevaluation of my research. Rather than asking people to speak who were already speaking so much of their mistreatment, such as through interviews, my focus moved towards thinking through ways of engagement between people who were experiencing detention or caught up in the hostile environment with those who were not. This was an academic, ethical and personal decision. I refocused the planning of *The Hostile Environment Walking Tour (THEWT)* towards the generative opportunity of the arts and of creative resistances within the broader contexts of the *Hunger for Freedom* strike and Windrush scandal. By this I mean I wished to draw on my doctoral research to contribute to destabilising the dominant thinking of immigration and detention in the UK and to develop grassroots knowledge and resistances to it.¹¹² For example, I was able to apply my academic research to respond to the theme of the *Who Are We? Project (WAW?P)*, the ‘production of people and place’ within an understanding of migration, belonging, identity and citizenship. What I did not anticipate was how unfamiliar many gallery visitors who joined *THEWT* were to the *Hunger for Freedom* strike and Windrush scandal despite being so recent and ongoing. This demonstrated to me both an ignorance and apathy to large scale and high-profile incidences of state violence through immigration and citizenship laws as well as the importance of utilising the opportunity of the *WAW?P* to engage with and challenge this widespread ignorance and encourage accountability to its perpetuation. In doing so, I developed the following research questions:

How do UK immigration laws create and sustain processes of mobility, segregation and categorisation?

How is ignorance of these processes produced and accountability obscured?

What function can creative resistances have in making visible the violence of immigration laws and thereby challenging ignorance and accountability to it?

Rather than a parallel project, *THEWT* became integral to the development and methodology of my research questions. It is through *THEWT* that I evolved my understanding of the approach I was taking towards challenging ignorance to and accountability of the hostile environment within the public domain. It allowed me to see a new way of grounding my research; through my own participation within the art project and engagement with those who participated. This approach,

¹¹² Cooper, ‘Can Projects of Reimagining Complement Critical Research?’ (n 97).

as opposed to interviews or an ethnographic approach, allowed me to gain a broader understanding of how the hostile environment is perpetuated and therefore how it can be resisted, namely by bringing together those who are required to collaborate and implement immigration laws through their work and involvement in society as well as the people who are finding themselves increasingly locked out of society by the hostile environment. Rather than treating these approaches as two separate techniques, *THEWT* allowed me to bring them together as a common understanding and therefore common resistance. Through this iterative process I was able to ‘hatch’ new methodologies, perspectives and theories.¹¹³

The first question is a historical and analytical enquiry, requiring a legal analysis of immigration laws as well as historically situating the hostile environment within a colonial understanding. The second and third questions are evaluative, with the second seeking to understand the permissibility and acceptability of violence through immigration and border controls while the third seeks to highlight methods of resistance to these processes of mobility, segregation and categorisation, and evaluate the role of critical and creative interventions to apathy and ignorance of violence. The motivation behind these questions is to understand and challenge the continuation of colonial violence through the hostile environment. The contribution this thesis makes is to address the lack of accountability for this violence and identify potential challenges through demonstrating what roles grassroots and non-legal methods of redress can have.

In responding to these research questions, this thesis situates contemporary UK immigration laws within a global and historical understanding. It aims to identify processes that generate and perpetuate ignorance and denial to the harm caused by technologies of controls, in this case immigration laws. The motivation in this enquiry is to gain a more nuanced understanding of how immigration regimes function. In seeking to understand this I wish to contribute to the undermining, rather than the supporting, of the system of white supremacy, which was built on and continues to subjugate people who are excluded from whiteness. This is especially important to understand as white supremacy and racial subjugation is so inbuilt to everyday structures that people can, and do, support it without even realising.¹¹⁴

4.1 Situated Scholarship

I was involved with Counterpoints Arts and the *Who Are We? Project (WAW?P)*¹¹⁵ before I began my thesis project through my interest and experience in grounding legal considerations within

¹¹³ Agnette Weis Bentzon and others, *Pursuing Grounded Theory in Law. South-North Experiences in Developing Women's Law* (University of Michigan 1998) 18.

¹¹⁴ Mills (n 81).

¹¹⁵ ‘Who Are We Project’ (n 111).

grassroots and creative activism. The *WAW?P* was a three-year project which reflected on broad conceptions of identity, belonging, migration and citizenship. It consisted of a one week exhibition each year in the Tate Exchange, Tate Britain between 2017 – 2019 as part of a programme which was ‘shaped by co-creation, co-production and exchange among artists, arts and culture organisations, audiences, activists and academics’.¹¹⁶ The project was led by Counterpoints Arts, a leading art and migration network who work in collaboration and co-production to support, produce and promote the arts by and about migrants and refugees. A key purpose for the network is the belief that art and collaborative methods can enable and inspire social change and hold transformative power.¹¹⁷ Their methods of working enable practitioners to network, develop and showcase their work, producing works with ‘new ways of seeing and questioning’ which can ‘surprise, move, provoke, befuddle and delight us’ across different art forms and facilitates peer to peer learning.¹¹⁸ They work nationally and internationally bringing artists, arts, cultural and educational organisations and civil society activists together. The Open University,¹¹⁹ a university founded on the principles of the accessibility and power of learning which was set up to establish new and innovative ways of working, was a key partner for the *WAW?P*. I worked with the Counterpoints Arts team on the first and second years of the *WAW?P*. During a planning meeting for the second year I raised the importance and impact of the hostile environment when thinking about migration, both domestically and internationally. As a result, I was invited to lead on the hostile environment theme in the exhibition space.¹²⁰ Part of the intention behind this invitation was to share access to the elite space of the Tate Modern with people who have experienced the hostile environment and are resisting it. My involvement in detention abolition activism enabled me to bridge the spaces of the *WAW?P* and grassroots activism.

My involvement in the *Hunger for Freedom (HfF)* strike was through the Detained Voices Facilitation Collective, which I have been part of since 2015. Detained Voices is a site which platforms stories, experiences and demands by people held in UK Immigration Detention Centres, and the facilitation collective speak with people in detention, transcribing statements they would

¹¹⁶ ‘About Who Are We? – Who Are We Project’ <<https://whoareweproject.com/home-with-may-2019-programme/about-us>> accessed 16 September 2021.

¹¹⁷ ‘Counterpoints Arts. Core Beliefs’ (*Counterpoints Arts*) <<https://counterpointsarts.org.uk/about/core-beliefs/>> accessed 13 September 2021.

¹¹⁸ *ibid.*

¹¹⁹ The Open University, ‘Mission’ (*About The Open University*, 22 November 2017) <<https://www.open.ac.uk/about/main/strategy-and-policies/mission>> accessed 9 August 2021.

¹²⁰ There was also a panel discussions and films that took place in a side room of the exhibition space and was organised by academic partners, see Who Are We Project, ‘A Guide to the Hostile Environment’ (2018) <<https://whoareweproject.com/2018-programme/learning-labs-seminars-talks/a-guide-to-the-hostile-environment>> accessed 17 July 2018.

like to be published.¹²¹ During the *H/F* strike anti-detention groups outside of detention worked with those striking through a collaborative relationship based on anti-detention activism.¹²² The strikers demands and statements were published on Detained Voices throughout the strike and the facilitation collective and SOAS Detainee Support supported with striking tactics including assessing the safety and risks involved, emotional and legal support, coordination between media requests and strikers, urgent targeted and broader efforts to stop the deportations of strikers as well as ongoing scribing and publishing of testimonies. These organising practices centre collaboration and solidarity and have been developed over years of organising together,¹²³ and were central to the approach I took to *THEWT* and the people who I invited to collaborate with me on the project.

The *WAW?P* was a public event. I wanted *THEWT* to be ‘based in the reality of human life’¹²⁴ and respond to relevant events which were happening in the public domain. This iterative process is supported by grounded research, ‘in which data and theory, lived reality and perceptions about norms are constantly engaged with each other to help the research decide what data to collect and how to interpret it. The interaction between developing theories and methodology is constant’.¹²⁵ This process exemplifies the conceptual and methodological co-creation and co-development of the thesis, activism and art project. My thesis research and activism generated the art project, which responded to and developed my own understanding of my research questions. Through the engagements, the project evolved and with it my own intellectual development and formation of not only these events, but how they were received and understood by people who did not have experience of the hostile environment, or at least not knowingly. Therefore, the art project was the result of co-production between different activists, artists and academics, and my own conceptual development was shaped through my own co-production between these three events, forming the methodology of the thesis. I was comfortable moving through these different domains because of my own background in fine art and history of art as well as experience of legal community engagement through art and legal academic research.

¹²¹ Detained Voices is a website which platforms stories, experiences and demands by people held in UK Immigration Detention Centres, this group developed out of and still work with SOAS Detainee Support (SDS), an abolitionist visiting group based at School of Oriental and African Studies, University of London. There is no vetting over what people say, and who gets to speak as this is an online space intended for people who experience detention to tell their stories, particularly people who do not fit media or campaign narratives. Detained Voices, ‘Detained Voices’ (n 105).

¹²² For insight into collaborative anti-detention work between detained and non-detained people see Tom Kemp, ‘Solidarity in Spaces of “Care and Custody”: The Hospitality Politics of Immigration Detention Visiting’ [2019] *Theoretical Criminology* 1362480619887163.

¹²³ Again, for collaborative anti-detention work see *ibid*.

¹²⁴ Bentzon and others (n 113) 25.

¹²⁵ *ibid* 18.

The location, event and materials of *HEWT* brought law and society into engagement with art. *The Hostile Environment Walking Tour (2018)* was a participatory art project. Through a participatory art practice the project sought to dispel the separation between art and spectator and encourage participation to generate new knowledge and understanding of the hostile environment and its implementation. It therefore also exposed spaces of challenge and resistance.¹²⁶ *Liberty's A Guide to the Hostile Environment*¹²⁷ had recently been published, and the human rights organisation had agreed to participate in the project. We took *Liberty's Guide*, complimented by Corporate Watch's *The border controls dividing our communities – and how we can bring them down*¹²⁸ as our starting point, and developed ways to bring these guides to life. Therefore, the conceptualisation of the exhibition was initiated from an activist and legal campaigning starting point. The exhibition project comprised of three aspects; the physical exhibition made up of plinths, with information about the hostile environment policies on top of the plinths, the group walking tour, which took place two times over the weekend, and poster making workshops which ran after the group walking tours and once in the week.

The exhibition demonstrated how services we interact with daily have become sites of the border and have created a web of immigration controls and surveillance in daily life. Through the information on top of the plinths, the hostile environment policies were placed under scrutiny. This information explained how the Immigrations Acts of 2014 and 2016 legally require people to act as border guards who provide services incorporated in the hostile environment. I drew from the two reports to write the plinth tops. The plinths or “sites” of the hostile environment were connected with hazard tape, demonstrating how these measures are all interwoven. *Liberty's Guide* set out the hostile environment across ten key areas of society or sites of contact between people and immigration controls. These became the ten plinths of the exhibition. Each of these sites were partnered with an organisation or grassroots group within that sector which was working to oppose the hostile environment, which we directed participants to. I primarily worked with Counterpoints Arts Co-Director Áine O'Brien and curator Justin O'Shaughnessy on the project's creative and curatorial development and set three times in the week to invite artists, activists and

¹²⁶ Sarah Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 *Social & Legal Studies* 423.

¹²⁷ Liberty, 'A Guide to the Hostile Environment. The Border Controls Dividing Our Communities - and How We Can Bring Them Down' (Liberty 2018) <<https://www.libertyhumanrights.org.uk/sites/default/files/HE%20web.pdf>> accessed 17 July 2018.

¹²⁸ Corporate Watch, 'The Hostile Environment: Turning the UK into a Nation of Border Cops' (Corporate Watch 2017) <<https://corporatewatch.org/the-hostile-environment-turning-the-uk-into-a-nation-of-border-cops-2/>> accessed 17 July 2018.

agitators¹²⁹ to help facilitate the workshops. This is not to say the exhibition was a static or finished process, it was very much an evolving project with the ideas of walking tours and bus stop posters developing during the first workshop. These developments arose because of the participation of those invited and set a very different approach for the remaining days of the exhibitions, workshops and afterlife of the exhibition.

The *HEWT* is an example of law in action and art in society.¹³⁰ While I draw on socio-legal scholarship which explores the role, application and impact of the law within society I situate this thesis within critical legal scholarship because it follows in the approach of rejecting the dominant positivist tradition of law, interrogates areas of substantive law and seeks to ‘develop radical alternatives’.¹³¹ Critical legal scholarship intends to destabilise settled truths, exposes systematic reproduction of power and oppression and contextualises issues within broader historical, political and economic contexts.¹³² This approach contributes to addressing the disparity between what law says and what law does, or the appearance and reality of law.¹³³ Therefore, this thesis employs critical legal methods to interrogate and destabilise key concepts, systems and structures that are used to organise our world today and make the hostile environment not only possible, but permissible. The ‘conceptual apparatus’ of theory, analysis and practice are equally important approaches.¹³⁴ Mari Matsuda argues for further engagement between critical legal and critical race scholarship so that ‘adopting the perspective of those who have seen and felt the falsity of the liberal promise can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.’¹³⁵ While this thesis sits within the critical legal tradition, critical race is central to grounding the understanding and development of this thesis topic within a continuum of colonial processes and violence. This analysis grew out of lived experience and situated understandings. As such Mari Matsuda argues for an expansion of enquiry, much like the feminist methods of grassroots consciousness raising,¹³⁶ to ask questions about the law rooted in experience rather than abstraction.¹³⁷ In doing so scholars broaden the recognition of experiences and knowledge, of whose experiences should receive attention and how we generate knowledge;

¹²⁹ This is an open term used by the Art/Law Network to encourage anyone who wishes to critically engage in the area of art/law who are not artists or lawyers. See Art/Law Network, ‘Migrants in Art’ (21 July 2021) <<https://artlawnetwork.org/migrants-in-art/>> accessed 1 January 2021.

¹³⁰ *ibid.*

¹³¹ Peter Fitzpatrick and Alan Hunt, ‘Introduction Critical Legal Studies’ (1987) 14 *Journal of Law and Society* 1, 2.

¹³² Matsuda (n 98); Cooper, ‘Can Projects of Reimagining Complement Critical Research?’ (n 97); Alan Thomas, ‘Critical Legal Education in Britain’ (1987) 14 *Journal of Law and Society* 183.

¹³³ Thomas (n 132) 185.

¹³⁴ *ibid* 186.

¹³⁵ Matsuda (n 98) 324.

¹³⁶ Matsuda (n 98).

¹³⁷ *ibid* 359.

our citation policy is political.¹³⁸ I therefore draw from a broad range of disciplinary scholarship and sources to address my research questions, including traditional sources such as legislation, case law, government reports, parliamentary debates and questions as well as media reports, grassroots activism, artistic theory, practices and works, including *THEWT*, to expand my own legal, theoretical and creative imagination.¹³⁹

The purpose of this exhibition was to inform and raise questions about how the hostile environment impacts people who are undocumented and miss-documented, but also how those in attendance are potentially collaborating with the hostile environment in their places of work, for example, and how they might resist this collaboration. The term miss-documented acknowledges that people can be considered undocumented and therefore treated as ineligible to be in the UK through an error or miss-documentation by the Home Office or by being priced out of visa and status renewals. This empirical approach of the *HEWT* offers ‘complementary methods of interrogation of substantive law’.¹⁴⁰ It grounds my research questions within a present day understanding and interaction into how people’s lives are affected by the hostile environment, if and how they interact with it in their everyday and whether this participatory art project could bring about an understanding to challenge the hostile environment. It also enabled a practical mobilisation of critical legal, critical race and feminist methods of interrogation of the law through experience within the context of a participatory art practice. The two walking tours were led by the then Advocacy Director at Liberty, Corey Stoughton, and “Y” and myself. Y had been in Yarl’s Wood detention centre until just before the exhibition and we had met through the *Hunger for Freedom* strike.¹⁴¹ The leadership of someone who had been subject to the hostile environment policies and detained because of them is supported by critical race and feminist scholarship that argues that counter narratives can challenge systematic oppression, and challenges to systematic oppression should be rooted in real life experience and understanding.¹⁴² The poster making workshops were facilitated by a collective of grassroots detention abolition activists and artists and offered an opportunity to engage their understanding in political action. An in-depth analysis of this project will be given in Chapter Six.

THEWT was run by The Hostile Environment Collective, a fluid group of activists, artists, and academics with longstanding grassroots collective activism and artistic practice already active

¹³⁸ *ibid* 344; Sara Ahmed, *Living a Feminist Life* (Duke University Press 2017).

¹³⁹ Matsuda (n 98) 344.

¹⁴⁰ Fitzpatrick and Hunt (n 131) 3.

¹⁴¹ Detained Voices, ‘The Hunger Strikers’ Demands’ (n 110).

¹⁴² Matsuda (n 98); Delgado (n 99); Catharine A MacKinnon, ‘Feminism, Marxism, Method, and the State: An Agenda for Theory’ (1982) 7 *Signs* 515.

in resisting the hostile environment who I brought together for this project. People were from the Detained Voices Facilitation Collective,¹⁴³ SOAS Detainee Support (SDS),¹⁴⁴ Protest Stencil - a subversive artist,¹⁴⁵ the Art/Law Network,¹⁴⁶ and “Y”, a *Hff* striker who had recently been in Yarl’s Wood detention centre.¹⁴⁷ Rather than objective or impartial, this group’s knowledge was gained through embodied and located experience of grassroots resistance to the hostile environment. While much empirical research takes great effort to ensure impartiality or unbiased research, critical legal scholarship and therefore this thesis is unambiguous in its political nature. By transferring skills from abolition activism, *THEWT* was clear in its intention to challenge the hostile environment. As Howard Becker argues, there is no need to choose between objective research or value laden research, as all research is influenced by personal and political persuasions.¹⁴⁸ It is therefore a decision about *which* personal and political persuasions to follow. The groups experiences and practices also ensured the centrality of our ethical obligations to the people we worked with. For example, through an ongoing process of scrutiny and reflection of oneself as well as the project, or ‘reflexivity as a resource’.¹⁴⁹ Part of this reflexivity was a practice of embodied thoughtfulness which shifts the focus from a first person perspective – the I and the eye – and beyond what is said to encompass the moods, feelings, atmosphere, interactions, intuition and sense.¹⁵⁰ This can enable a ‘hesitancy as ethics’ approach; through a suspension of reactive action by the researcher, which may hold ‘embedded normativities and judgements’, a response can be collectively generated through embodied thoughtfulness by those present.¹⁵¹ This also meant that the organisers were open to learning from the participants’ contributions too, to build our understanding of the hostile environment and different perspectives in how it works and why.

¹⁴³ Detained Voices is a website which platforms stories, experiences and demands by people held in UK Immigration Detention Centres, this group developed out of and still work with SOAS Detainee Support (SDS), a abolitionist visiting group based at School of Oriental and African Studies, University of London. There is no vetting over what people say, and who gets to speak as this is an online space intended for people who experience detention to tell their stories, particularly people who do not fit media or campaign narratives. Detained Voices, ‘Detained Voices’ (n 105).

¹⁴⁴ SDS is a visitor’s group to people in detention with view to break down the isolation of detention and support people in taking control of their own cases and resistance to their imprisonment and deportation. SOAS Detainee Support, ‘What We Do | SOAS Detainee Support’ <<https://soasdetaineesupport.wordpress.com/mission-statement-and-what-we-do/>> accessed 16 May 2021.

¹⁴⁵ ‘Protest Stencil’ <<https://www.instagram.com/proteststencil/>> accessed 13 September 2021.

¹⁴⁶ ‘Art/Law Network – Artists. Lawyers. Agitators. Collaborating for Change.’ <<https://artlawnetwork.org/>> accessed 18 July 2021.

¹⁴⁷ Detained Voices, ‘Yarl’s Wood Detainees Began a Hunger Strike’ (n 110).

¹⁴⁸ Howard S Becker, ‘Whose Side Are We On?’ (1967) 14 *Social Problems* 239.

¹⁴⁹ Marilyns Guillemin and Lynn Gillam, ‘Ethics, Reflexivity, and “Ethically Important Moments” in Research, Ethics, Reflexivity, and “Ethically Important Moments” in Research’ (2004) 10 *Qualitative Inquiry* 261, 262.

¹⁵⁰ Jette Kofoed and Dorthe Staunæs, ‘Hesitancy as Ethics’ (2015) 6 *Reconceptualizing Educational Research Methodology* 28; Les Back, *The Art of Listening* (Goldstone Books 2007).

¹⁵¹ Kofoed and Staunæs (n 150) 25.

As with art/law and legal design, discussed in section 3.3, this research project and art project aim to bring about new imaginative possibilities through collaborative practices of co-production between the two projects as well as within them. Communicating the hostile environment policies through the structured freedom of an art project was an evolving process of visibility and tangibility to all those who participated, especially myself as I have been involved in both projects from start to finish. We learnt through the participation of each other, contributing to, questioning and encouraging each other's understanding. This entwining of disciplines employed by art/law and legal design is similar to the approach taken throughout the intellectual journey of the thesis, as well as the *HEWT*, and as such contributes to the growing field of art and law.

As detailed above in Section 3, this thesis develops a theoretical framework to consider material and symbolic implications of immigration laws and through a property law framework, namely the right to exclude. The purpose of this framework is to 'construct a map of reality within which to locate law'.¹⁵² Rather than a discovery of a new positivist truth or a purely academic pursuit, I draw on critical legal scholarship as a method of subversion to transcend legal technologies of domination.¹⁵³ This scholarly subversion informs subversive action. These approaches are essential in pushing the boundaries of understanding through contextualising present-day inequalities and demonstrating the possibility to create space for an imagining of alternative modes of being and thinking. I employ an interdisciplinary mixed methods approach to consider my research questions, namely doctrinal, historical, theoretical and empirical approaches. While this thesis sits within the discipline of law, it seeks to go beyond it to understand how law functions, namely in continuing the colonial project. My concern with the hostile environment does centre legal concerns, namely around access to rights and entitlements, however, it is a social-legal enquiry into law – how and why the law does what it does, rather than an enquiry of law.¹⁵⁴

A doctrinal approach is necessary to understanding the specific legal implications of laws. As my concern is with the hostile environment, this requires doctrinal analysis of the Immigration Acts of 2014 and 2016 which make up the hostile environment policy, but also an analysis of key domestic legislation from 1948 to the hostile environment which set the groundwork to the 2014 and 2016 Acts. To understand the legislation from 1948 onwards; what motivated it, the political context which birthed it, the legal borrowing which underpinned it, demands a wider scope than

¹⁵² Thomas (n 132) 186.

¹⁵³ *ibid* 188.

¹⁵⁴ The distinction between research on law and research in law is discussed in Paul Chynoweth, 'Legal Research' in Andrew Kinght and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29–31.

doctrinal analysis to include a historically informed analysis. British nationality legislation, as the 1948 Act was, is not only an enquiry into domestic legislation but also domestic political considerations, which therefore includes legislation and politics of the British empire. To my mind, I cannot understand the British empire without understanding how race and property were utilised as both justification and motivation to gain control of and exploit people and land across the globe, which requires a theoretical analysis. The hostile environment, and immigration law generally, is a complex field. While it is implemented through law and policy, it is part of a much bigger and more complex network of implementation than a single discipline can address.¹⁵⁵ Finding ‘common ground’ among distinctive fields is an interdisciplinary technique which can bring new and innovative insights to a point of enquiry because of its interdisciplinary approach, as well as challenge assumptions within disciplines.¹⁵⁶ Therefore to adequately address my research questions I draw from a range of disciplines.

This thesis follows scholarship that argues for a global understanding of Britain’s history, rather than a national one. This is not an effort to place Britain at the heart of this global history, but a contribution to the academic efforts to destabilise its central and inward perspective.¹⁵⁷ Rather than a singular direction, this thesis understands the ‘connected histories’ of empire, as a network or web of influence and exchange that has had considerable impact on Britain.¹⁵⁸ This expands the already expansive temporal and spatial network of empire, to incorporate both ‘mobile imperial histories and histories of imperial mobility’.¹⁵⁹ Thinking spatially and temporally can be helpful in understanding where and when people and places are located and how these locations are produced, regulated and maintained.¹⁶⁰ This is exemplified in the kinetic approach of the thesis, moving between historical and geographical analyses to understand the interconnected movement between sites of empire, whether through the migratory routes of people or governance approaches as well as the persistence of colonial practices in contemporary regulations of

¹⁵⁵ Allen F Repko, *Interdisciplinary Research - Process and Theory 3-4* (Second, SAGE Publications Ltd 2012) 3; Allen Repko, ‘Integrating Interdisciplinarity: How the Theories of Common Ground and Cognitive Interdisciplinarity Are Informing the Debate on Interdisciplinary Integration’ (2007) 25 *Issues in Integrative Studies* 1, 2.

¹⁵⁶ Repko, ‘Integrating Interdisciplinarity: How the Theories of Common Ground and Cognitive Interdisciplinarity Are Informing the Debate on Interdisciplinary Integration’ (n 155).

¹⁵⁷ Bhambra, ‘The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism’ (n 16); Tony Ballantyne, *Webs of Empire: Locating New Zealand’s Colonial Past* (UBC Press 2014); El-Enany, ‘Things Fall Apart’ (n 16).

¹⁵⁸ Gurminder K Bhambra, *Rethinking Modernity - Postcolonialism and the Sociological Imagination* (Palgrave Macmillan); Ballantyne (n 157).

¹⁵⁹ Tony Ballantyne, ‘Race and the Webs of Empire: Aryanism from India to the Pacific’ (2001) 2 *Journal of Colonialism and Colonial History* 19.

¹⁶⁰ Sarah Keenan, ‘Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration’ (2017) 28 *Law and Critique* 87; Renisa Mawani, ‘Law as Temporality: Colonial Politics and Indian Settlers’ (2014) 4 *UC Irvine Law Review* 65; Renisa Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Duke University Press 2018).

migration. Seeing the hostile environment in the UK within the context of Britain's expansive control over people's mobility and processes of segregation and categorisation helps to understand the normalisation of these patterns. By mapping out these patterns, across both time and space, a layered understanding of how these processes are produced as well as obscured can be developed. This process is both a mapping and an 'unmapping' of these legal landscapes.¹⁶¹ Unmapping, according to Razack, is an approach to 'uncover the ideologies and practices of conquest and domination' which are hidden through the production of white innocence.¹⁶² This thesis aims to map out the legal terrains relevant to navigating the present-day hostile environment, while also unmapping the ideologies and practices of conquest and domination which have normalised and set precedent to these hostilities.

5. Thesis Structure

This thesis is organised in two halves which adopt different approaches. The first half, Chapters One, Two and Three, take a broadly historical and international approach to understanding how UK immigration laws create and sustain processes of mobility, categorisation and segregation. Through these chapters techniques of fencing off and bordering are documented to demonstrate how unknowing and silence around violence and difference are produced and continually reproduced. The second half, Chapters Four, Five and Six, builds on the historical and conceptual grounding of the first half to demonstrate how contemporary migration controls build on and are continuations of practices – both material and conceptual – developed throughout the colonial era. This half addresses the research to questions of accountability and ignorance, both as negative examples of obscuring and production as in Chapters Four and Five, as well as positive examples of revealing and accounting for through participation and dialogue in Chapter Six.

To gain insight into the introduction and maintenance of the hostile environment, Chapter One identifies key concepts, systems and structures that are used to understand and organise our world today, historically contextualising them and identifying the role of law within them. This chapter first introduces debates of ignorance and resistance that will be threaded and developed throughout the thesis. Drawing on the work of Hannah Arendt and Linsey McGooey, the understanding that harm and violence can be perpetuated and normalised through ignorance, both thoughtlessly and strategically. Through this normalisation harm can be downplayed and denied. Resistance to these patterns and systems of ignorance, I argue, can be disrupted through critical engagement. The chapter then goes on to analyse the creation and nationalisation of the white

¹⁶¹ Sherene H Razack, *Race, Space, and the Law: Unmapping a White Settler Society* (Between the Lines 2002).

¹⁶² *ibid* 5.

legal subject through a critical race and property analysis before theorising how law creates and maintains its own myth of beginning and innocence, through a separation from the material world. The chapter concludes by returning to contemporary debates on migration and belonging. It does so by applying the theoretical and historical analysis onto seemingly open and aspiring notions of tolerance and hospitality, arguing that they require and perpetuate an exclusionary dynamic within them. This chapter unsettles accepted norms of the nation state and legal status from which a critical understanding of the hostile environment can develop throughout the thesis.

Migratory routes established throughout the development of empire are still well trodden today, as demonstrated in Chapter Two. Firstly, the emigration of people from Britain outwards across the empire are traced. Secondly, the different modes of movement of people around the empire are outlined. Through this approach the free movement principle within the empire is thought through, with a focus on how this principle was upheld or challenged depending on who was moving. This chapter details examples of law and policy developments in “new” and “old” commonwealth countries, making the link with contemporary migration laws, particularly with the removal of rights of certain subjects. Drawing on critical settler colonial literature, this chapter focuses on the restrictions of non-white settlement and legislating policies of global racial segregation and how this not only impacted legislation in Britain but contributed to the weakening grip of Whitehall. This provides an understanding of immigration advances and restriction around the empire which created a template for restrictions within Britain, which are detailed in the next chapter.

The understanding of British subjecthood and British citizenship transformed during the twentieth century. Through a detailed overview of legislative developments between 1945 and 1981, the first half of Chapter Three demonstrates the restrictions on entrance and settlement in Britain during the tail end of the empire, including restrictions and removal of citizenship to people previously entitled to it. It demonstrates how these changes disproportionately impacted people of colour and how Britain’s position as the heart of empire influenced and were influenced by these changes. The second half of the chapter gives a thematic overview of the development of asylum law and how it is merged with immigration, both legislatively and politically. This develops the argument that immigration and asylum legislation has developed a domestic segregation for social services based on immigration status. The framing of migration within a contemporary understanding of exclusionary practices addresses the increasing practices of segregation on a global scale, which is addressed in the next chapter.

Developments in technology have enabled extra-territorial controls on people’s mobility, pre-emptively ensuring regional and domestic exclusion. Chapter Four argues these practices are

a contemporary re-globalising of Britain's border which overlay and develop from colonial practices of control, categorisation and segregation. Understanding the migration journey in three stages – departure, transition and return – this chapter identifies how aid funded projects are implementing this exclusion. These examples are contextualised within a history of development projects and funds being utilised for national interests. This chapter argues that the use of development aid obscures accountability to harsh immigration controls which are excluding people from migrating and seeking refuge in Europe. These tactics lay the groundwork to understanding the role of ignorance in avoiding accountability in the next chapter.

The relationship between thoughtlessness and harm is developed in Chapter Five. After a legal analysis of the Immigration Act 2014 and 2016 this chapter details the domestic political origins of the hostile environment policy. This chapter argues that rather than being fanatically ideological and intentionally hateful, the majority of public and private sector workers who are now legally required to perform immigration checks do so out of ignorance or thoughtlessness over their actions and the consequences of them. Further, it considers how ignorance can be strategically employed to avoid accountability. These examples are presented to argue for a critical engagement, and a refusal of apathy and ignorance. Critical engagement can be a radical act among a moderate majority and if engaged, the implementation of the hostile environment could be in jeopardy. This argument for critical engagement provides grounding for oppositional voices, which is taken up in the final chapter.

The example of *The Hostile Environment Walking Tour (2018)* is given to develop an argument for the role of thoughtfulness and action in Chapter Six. This participatory art practice is an example of collective resistances to punitive immigration policies. By demonstrating existing resistance to the hostile environment, this chapter argues for the role of creative and grassroots activism as a method of resistance by challenging ignorance and accountability through participation and critical engagement.¹⁶³

Chapter One

Legal Terrains

*We are like travellers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are traveling on, the world society of states, has changed, our normative map has not.*¹⁶⁴

1. Introduction

Many of the key concepts, systems and structures that are used to understand and organise our world today have a history in empire and colonialism. Theories of race, concepts and formations of the nation state, the international state system, citizenship and modern patterns of mobility share a genesis with this history and are vital to understanding the hostile environment. As Seyla Benhabib quote above suggests, the map used to navigate around contemporary migration is no longer capable of functioning in this contemporary terrain, if it ever was. The “old map” was drawn at a time of and in response to Eurocentric and colonial concepts, systems and structures. The cartographers were colonial Europeans charting the world’s terrains. These maps developed the global and national formations, constructing them as natural and truthful. They also set out the philosophical terrain, mapping the conceptual framework of humanity, which gave birth to theories of the rights of man, race and a hierarchy of civilisation. The development of the modern world was designed around the needs and ideologies of Europe. Far from simply exporting this Eurocentric map into the colonies already fully drawn, the map was drawn not only in conjunction with colonialism, but through a deep exchange that fundamentally formed and shaped these key features of modernity. Rather than incidental, this chapter will argue the roots of colonialism, property, the rights of man and self-government were established together, entwining and stabilising each other.

This chapter will frame the normative map within a theory of ignorance. The purpose of this is to enable a deeper understanding of the hostile environment and suggest a path of resistance to it. It will begin by developing the debates of ignorance set out in the Introduction. In doing this

¹⁶⁴ Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004) 6.

is will demonstrate how ignorance, both thoughtlessly or strategically, can cause and perpetuate harm while being underplayed and negated. It will then argue how ignorance enables the progression and maintenance of the normative map. Drawing on critical race and critical property theory, the individual and autonomous legal subject will be understood through a racialised property analysis. It will then apply this understanding through the example of the right to self-government, namely through the rights of (white) Englishmen and development of legal status in America. This is understood in relation to the exclusion of those who are not white autonomous individuals from the right to self-government and legal status. The next section theorises the power of storytelling in creating and stabilising mythical beginnings. Property, law and racism are argued as the juncture of this beginning. This analysis will lead to the demonstrating how the law upholds the status quo and maintains its innocence through an analysis of the *Somerset* case. Finally, the chapter closes with a discussion on the contemporary implications of individual liberalism, nations and race on migration and mobility through a discussion of tolerance and hospitality within migration debates. This chapter provides the conceptual groundwork from which the rest of the thesis will build on. It corroborates with Mill's argument that white ignorance of the frameworks of white social, cultural and legal systems create a world which does not make sense but is legitimised and maintained.¹⁶⁵

2. Ignorance and Resistance

A key feature of the hostile environment is that the primary actor in the immigration regime, namely the Home Office, outsources considerable responsibility of enforcement to public and private actors. These actors are obliged to carry out immigration checks within their roles, either legally or administratively, as part of their job responsibilities. These obligations further imbalance power between an employer and an employee or a landlord and tenant and can generate oppositional ill-feeling between the two groups. Further, the health care professional or landlord may fear prosecution and follow the law to protect themselves from financial or criminal penalties. The teacher may fear reprisals for not carrying out the new tasks in their workload. However, *just following the law* can also be an avoidance of a broader understanding of the consequences of one's actions beyond oneself, and responsibility of these actions, both knowingly and unknowingly. It can put faith and responsibility in the immigration and legal system which creates and perpetuates the dynamics identified above. This draws us back to the

¹⁶⁵ Mills (n 81) 18.

question raised by Fellows and Razack; what interests are we protecting through our ignorance?¹⁶⁶ Further, what role does the law play in protecting and perpetuating these interests?

One line of enquiry might be whether the system operates through thoughtlessness and ignorance. Rather than being fanatically ideological, or possessed by an exceptional evil, Hannah Arendt puts forward the argument that the failure to think, to critically engage with the tasks and one's own role in fulfilling these tasks contributes to and therefore is, an evil in and of itself. Thoughtlessness, she argues, can and does wreak havoc at a greater scale than intended evil.¹⁶⁷ This is its banality. The nature of the role does not obscure the person fulfilling it from the violence they participate in, even when the person can easily be replaced rather than a driving force of the violent ideology. Responsibility and accountability of that role must be taken, even if the person is not the one physically meting out violence. Violence takes many forms. The inability or unwillingness to think from outside one's own position demonstrates, according to Arendt, a lack of imagination as to the wider context and consequences of one's actions.¹⁶⁸ A critical examination, a reflection or even the introduction of doubt, would provide a 'disruptive opening' from which the blindly following of bureaucratic rules and parroting of stock phrases that can define a person in such roles, as it did Eichmann, can begin to thaw.¹⁶⁹

In her trial report of Adolf Eichmann, Arendt demonstrates 'the strange interdependence of thoughtlessness and evil'.¹⁷⁰ During his pre-trial and trial questioning Eichmann displayed a complete lack of awareness and concern over the consequences of his actions, only focusing on his own personal and professional progression, or frustration lack thereof. This did not demonstrate stupidity or an inability to think, but an 'utter ignorance of everything that was not directly, technically and bureaucratically, connected with his job'.¹⁷¹ Eichmann's role was to ensure the routes and timeliness of the trains that transported hundreds of thousands of Jewish people to concentration camps. He took responsibility, even pride, in doing his job well. He refused, however, to take any responsibility for what happened to people once they arrived at the camps, namely the purpose and role of the camps in the genocide of the Jewish people. It was not a hatred of the Jewish people, collectively or individually, but his obedience to rules that resulted in crimes against humanity. He argued his obedience was a virtue and had been taken advantage of, and it is for this reason he deems himself a victim.¹⁷²

¹⁶⁶ Fellows and Razack (n 44) 338.

¹⁶⁷ Arendt, *Eichmann in Jerusalem* (n 69) 288.

¹⁶⁸ *ibid* 287.

¹⁶⁹ Valerie Hartouni, *Visualizing Atrocity: Arendt, Evil, and the Optics of Thoughtlessness* (University Press 2012) 80.

¹⁷⁰ Arendt, *Eichmann in Jerusalem* (n 69) 288.

¹⁷¹ *ibid* 54.

¹⁷² *ibid* 247.

In her reading of Eichmann, Arendt identifies how thoughtlessness enables ordinary people to engage with violence or behave violently in banal ways. It also provides insight into how people who enact violence believe themselves not only as innocent, but as victims of a violent system rather than perpetrators or benefactors of it. Considering the hostile environment and immigration law more broadly within a reading of Arendt's argument, I argue, allows a critique of violence carried out by ordinary people in ordinary places, rather than exceptional or spectacular violence enacted by villains. The lack of motive Eichmann demonstrated shifted the capability of such evil from a monster to a man. While the extremity of thoughtlessness Arendt found in Eichmann is not commonplace, I argue thoughtlessness as to the consequences of one's actions on another is commonplace and sanctioned within the hostile environment. Rather than a unique feature of the hostile environment, this thesis places this critique of violence within the colonial origins of global migration, race and immigration law. It highlights how violence has been downplayed, denied and justified through ignorance, both thoughtlessness and strategic, from white colonial migration as a tool of colonial expansion to the official narrative of "civilising" or "helping" those considered less developed.

The insulation of thoughtlessness, through a genuine disengagement with the impact of one's action is, I argue, one element of how ignorance protects interests and enacts violence. The strategic use of ignorance to deflect accountability is also worth considering regarding the functioning of the hostile environment. Far from an entirely thoughtless system, the denial of harm, intended or otherwise, serves to legitimise the hostile environment and the immigration system in the UK. Linsey McGoey argues the denial of knowledge serves a usefulness to the person or institution claiming not to know. This denial can deflect blame or accountability for the knowledge of harmful actions or the inaction when knowledge of harm comes to light. She calls this a strategic unknowing, or strategic ignorance.¹⁷³ How this differs from controlling information, McGoey argues, is the need for and appearance of transparency. The appearance of transparency obscures the interests that are being concealed.¹⁷⁴

In offering these two critiques of ignorance, I hope to contribute to challenging the 'killing pretence that a culture does not know what it knows' with regards to the hostile environment.¹⁷⁵ I also hope to contribute to an understanding of how harm is perpetuated yet downplayed and denied. Further, by reframing how and where violence is perpetuated and

¹⁷³ Linsey McGoey, 'Strategic Unknowns: Towards a Sociology of Ignorance' (2012) 41 *Economy and Society* 1; Linsey McGoey, 'On the Will to Ignorance in Bureaucracy' (2007) 36 *Economy and Society* 212.

¹⁷⁴ McGoey, 'On the Will to Ignorance in Bureaucracy' (n 173) 216–217.

¹⁷⁵ Sedgwick (n 77) 51.

experienced, I argue an opportunity for challenging and disrupting violence is unfurled. The complete absence of any questioning or doubt over his actions renders Eichmann thoughtless. However, Arendt is explicit in stating this extremity of thoughtlessness, his ‘remoteness from reality’, is not common.¹⁷⁶ It is these more common points of doubt, that I argue provide opportunity to disturb the system of harm embedded within the hostile environment and confront one’s own ignorance to it.

The imagination, Arendt argues, enables a ‘dialogue of understanding’ both within our own perspective as well as perspectives outside our own.¹⁷⁷ She explains its importance:

Imagination [or representational thinking] alone enables us to see things in their proper perspective[,] . . . to put that which is too close at a certain distance so that we can see and understand it without bias and prejudice, to be generous enough to bridge certain abysses of remoteness until we can see and understand everything that is too far away from us as though it were our own affair. This distancing of some things and bridging of others is part of the dialogue of understanding, for whose purposes direct experience establishes too close a contact and mere knowledge erects artificial barriers.¹⁷⁸

Through an engagement with the imagination, one can begin to develop multitudinous understandings; to suspend one’s own sense of reality and imagine another’s. This is perhaps the imagination as a ‘source of power’ Graeber identifies, to imagine something beyond ourselves.¹⁷⁹ The importance of being able to think beyond one’s own position is, for Arendt, to enable critical judgement and self-examination. The dialogue of understanding is a critical dialogue with oneself, to confront and be answerable to oneself for oneself. As Valerie Hartouni explains, critical thinking involves ‘dismantling and renarrativizing my life and history and the assumptions and convictions that structure both’.¹⁸⁰ This approach contextualises oneself, one’s life and history, within a personal and cultural comprehension, thus understanding oneself within the broader normative framework. It is this broader normative framework that this thesis takes effort to contextualise the collaboration of society within the implementation of the hostile environment, as well as resistance to it.

¹⁷⁶ Arendt, *Eichmann in Jerusalem* (n 69) 288.

¹⁷⁷ Hartouni (n 169) 75.

¹⁷⁸ Arendt in *ibid.*

¹⁷⁹ Graeber (n 101) 77.

¹⁸⁰ Hartouni (n 169) 76.

There is a danger in this, however. The imagination is not immune from causing harm and violence. ‘To think with an enlarged mentality,’ namely to make critical and political judgements, Arendt ‘means that one trains one’s imagination to go visiting.’¹⁸¹ The imperial dynamics of imposing explanations, viewpoints and narratives could be replicated through this exercise, and arguably in Arendt’s only exercise in ‘visiting’ the Black American experience, did so.¹⁸² This is especially concerning considering Arendt argues to ‘think by yourself.’¹⁸³ While this point was articulated to distinguish between theory and practice, or thinking and acting, and was balanced with the view that we ‘act in concert’,¹⁸⁴ thinking by yourself to understand another’s point of view maintains the two worlds of imperialism as explained by Said.¹⁸⁵ Both are for the understanding of and from the perspective of the thinker, which has traditionally been from a white European standpoint. As such, I argue for both thinking and action to develop in concert with people from a range of perspectives, experiences and standpoints. This enables a guidance and an opportunity to push and harness the imagination together, rather than for other people. It also encourages the possibility of challenging our self-perspectives and perspectives of other people and experiences and the social power that manifests within these collective engagements.¹⁸⁶

The rest of this chapter starts to unpick the normative map from which mobilities across the empire and the genealogy of immigration law were made possible. This will be applied through a historical analysis in the following chapters. Chapter Five will discuss the two analyses of ignorance regarding the hostile environment in depth while Chapter Six will detail the possibility of resistance to collaboration of the hostile environment through critical engagement with it.

3. Creating and Nationalising the White Legal Subject

This section will engage with a historical unmapping¹⁸⁷ of the normative map that shapes the UK’s approach to immigration controls. The purpose of this exercise is to unsettle accepted structures and practices from which the current hostilities can be better understood. When thinking about the role of law in protecting and perpetuating dominant interests and its

¹⁸¹ Hannah Arendt, *Lectures on Kant’s Political Philosophy* (Ronald Beiner ed, The University of Chicago Press 1992) 43.

¹⁸² Ringo Rösener, ‘Little Rock Revisited – On the Challenges of Training One’s Imagination to Go Visiting’ (Inter-University Centre for Advanced Studies (IUC) 2022).

¹⁸³ Hartouni (n 169) 64.

¹⁸⁴ *ibid.*

¹⁸⁵ Said (n 70).

¹⁸⁶ Lorde (n 99); Millen (n 99); Donna Haraway, ‘Situation Knowledge: The Science Question in Feminism and the Privilege of Partial Perspective’ (1988) 14 *Feminist Studies* 575.

¹⁸⁷ Razack (n 161) 5.

relationship to ignorance, it is important to understand how the law developed in conjunction with the British empire. As set out in the Introduction, I argue that law is a technology of exclusion which creates and polices boundaries of inclusion and exclusion. With property at law's genesis, the maintenance and protection of property rights as a relative relationship are considered with regards to the who and what that is protected by law.

This section will detail the interplay between the law and property, rights of man and self-governance. Embedded in legal thinking and action, it will argue how key concepts of English property gave English law a global reach. This process, I argue, established a racialised understanding of who the legal subject is. It will then demonstrate how the rights of Englishmen were asserted in building the thirteen colonies into a new nation. In this assertion, the rights of those who the English settlers dispossessed are absent. This duality will be analysed through the self-possessive individual, race and legal status. This analysis is important to draw out the philosophical underpinnings of the liberal individual, who this does and does not include and the dynamic of discipline and control which proceeds from this.

3.1 The White Legal Subject

John Locke is firmly established as a leading writer of property and liberalism, whose work is still relevant today.¹⁸⁸ His philosophies have had significant influence within liberalism, parliamentary democracy and property, both at the time of his life and subsequently. Lockean property theory, developed during the beginning of the British empire, is fundamental to the justification of colonial settlement and the implementation of an English property system across the globe.¹⁸⁹ For Locke, there are three inalienable natural rights; life, liberty and property. His central argument asserts that each person has property in themselves, to protect property is to protect life, liberty and possessions. By extension of property in oneself, through labour, one can lay rightful claim to food, land or other material things.¹⁹⁰ The influence of the Lockean property model is beyond doubt. It shaped and continues to shape much of the contemporary normative map.¹⁹¹ 'It was the liberalism of Locke, founded on the idea of the sovereign self', Bridget Anderson argues, 'as much

¹⁸⁸ Mills (n 81) 67; Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press 2018); Nicholas Blomley, 'The Territorialization of Property in Land: Space, Power and Practice' (2019) 7 *Territory, Politics, Governance* 233.

¹⁸⁹ Legal scholars have often summarised the influence of Locke's on colonial settlement. See Bhandar (n 188); Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge 2014); Robert Bernasconi and Anika Maaza Mann, 'The Contradictions of Racism: Locke, Slavery, and the Two Treatises' in Andrew Valls (ed), *Race and Racism in Modern Philosophy* (Cornell University Press 2005).

¹⁹⁰ Locke (n 50) s 35.

¹⁹¹ Benhabib (n 164) 6.

as the Treaty of Westphalia, that installed the ideology that continues to inform ideas about labour, property, mobility, and belonging today.¹⁹²

The violence encapsulated in conquest is palpable when thinking of the history of tangible property and land appropriation,¹⁹³ but what about when considering the property in oneself, the genesis of Locke theory? The argument for the inalienable right to property in oneself is, Mary Warnock argues, an effort to evoke an understanding of property prior to positive law and civil society.¹⁹⁴ It generates an understanding that these personal characteristics can work as tangible property.¹⁹⁵ In this way, characteristics can be given value and can be used, transferred and excluded which is protected through the law.¹⁹⁶ In the Lockean property model, mixing labour with land allowed access and claims to the ownership of that land as private property. By acquiring property in oneself, mixing one's labour with an external thing to claim ownership in that thing, it individualises and depoliticises the accumulation of property and in turn freedom. This understanding, removes systemic support and therefore systemic advantage from consideration, presenting the individual as 'naturally the sole proprietor of his own person and capacities'.¹⁹⁷ A self-made man. Conversely, it obscures any structural or material handicap in the inability to accumulate property. Those without property, or wage labourers, are reliant on the property-owning class for their livelihood. This inequality not only presents itself through material difference, but also in terms of freedom and liberty. Furthermore, this inequality is built into the system. For certain men to be free, it almost necessarily meant that others would have to be subservient to them. One can begin to see how this dynamic has travelled through different systems of progress and oppression, including race.

The basis of natural law for Locke is that one has jurisdiction over oneself, not over other people and not from other people.¹⁹⁸ Yet non-property-owning people lose their full proprietorship, as they are dependent on the will and property of other people. Furthermore, this unfreedom is in both the material and political sense since suffrage was linked to property ownership. Materially and politically, those without property could not better their own situation through labour, capital or political engagement.¹⁹⁹

¹⁹² Anderson (n 18) 20.

¹⁹³ Locke (n 50); Yves Winter, 'Conquest' Political Concepts: A Critical Lexicon <<http://www.politicalconcepts.org/issue1/conquest/>> accessed 29 April 2020; David Armitage, 'John Locke, Carolina, and the Two Treatises of Government' (2004) 32 *Political Theory* 602; Bernasconi and Mann (n 189).

¹⁹⁴ Warnock (n 49).

¹⁹⁵ *ibid* 23–5.

¹⁹⁶ Cheryl I Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review* 1707.

¹⁹⁷ Crawford Brough Macpherson and Frank Cunningham, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press 1962) 231.

¹⁹⁸ Locke (n 50) s 4.

¹⁹⁹ Macpherson and Cunningham (n 197) 231.

This conceptualisation naturalises and neutralises inequality and oppression economically and politically, but also racially. Conquest dispossesses Indigenous populations from their lands, the process of which ruptures the old and installs a new system.²⁰⁰ Through dispossession from their land Indigenous populations are subjects *of* not subjects *in* the new legal and governance systems of their own lands.²⁰¹ This process of conquest, through property rather than traditional religious or sovereign decrees, offered the most viable justification.²⁰² Yve Winter argues '[c]onquest, we may say, has been privatised: it involves no longer the lawful subjugation of an entire population, but the enslavement of individuals and the appropriation of land lying to waste.'²⁰³ This individualisation or privatisation dismantles the collective strength of resistance of those who are subjugated, as well as obscuring the systematic violent nature of conquest allowing instances of overt violence to be understood as exceptions rather than by design.

Crawford Macpherson describes society as 'relations of exchange between proprietors' by which '[p]olitical society becomes a calculated device for the protection of this property and for the maintenance of an orderly relation of exchange.'²⁰⁴ By understanding identity characteristics, such as race, as property it develops an understanding as to how racialised properties are supported and protected by political and legal systems and how they work in relation to one another. While a strong claim, leading theorists have employed this framing to highlight the connection between law, property and race.²⁰⁵ Their work demonstrates the extent of legal protection to identity characteristics which have been attributed social value or privilege, simultaneously denying that protection to identity characteristics which have been refused social value or attributed disadvantage.²⁰⁶ This framework also provides an explanation as to how race can be attributed a value and thus commodified and exchanged.

As with tangible property, racial privileges or disadvantages can be inherited through protective legal regimes. Cheryl Harris develops this conceptualisation in her defining work *Whiteness as Property*.²⁰⁷ The core of proprietary rights ensures the right to exclude others, to possess and use and transfer property. Harris explains how property and whiteness share a 'conceptual

²⁰⁰ Winter (n 193).

²⁰¹ *ibid.*

²⁰² Armitage (n 193) 618.

²⁰³ Winter (n 193).

²⁰⁴ Macpherson and Cunningham (n 197) 3.

²⁰⁵ Harris, 'Whiteness as Property' (n 196); Aileen Moreton-Robinson, *The White Possessive. Property, Power, and Indigenous Sovereignty*, vol 17 (University of Minnesota Press 2015); Peggy McIntosh, 'White Privilege: Unpacking the Invisible Knapsack' [1989] *Peace and Freedom Magazine* 10; Keenan, 'Subversive Property' (n 126); Bhandar (n 188).

²⁰⁶ Harris, 'Whiteness as Property' (n 196).

²⁰⁷ *ibid.*

nucleus' with the right to exclude.²⁰⁸ By attributing certain identities to ideological notions of entitlement and belonging, and those without, the limitation of legal protection, commodification and trading of human lives becomes permissible.²⁰⁹ Social understandings of whiteness have been constructed synonymously with freedom and property ownership, while Blackness has been construed with servitude and commodifiable as property rather than owners of it.²¹⁰ This understanding conveys the ability to hold property in oneself, and therefore to self-govern is not only compatible with whiteness but a property of it. The inability to hold property in oneself, or at least not in the right way, becomes a property of those who are not white and therefore can be governed by those who can. The ability to own property, as argued above, is the purpose of law. Free and property-owning people, for the two are synonymous, can enter freely into systems of law and political organising to protect their property. The establishing of the nation as a political organisation is bound with property. Therefore, those who possess property are the subjects of national laws, to protect their property.

When applying this racialised logic to the social contract, the legal subject is a white subject, and legal systems are for the protection of white property. Harris argues, 'the concept of whiteness was premised on white supremacy rather than mere difference',²¹¹ as such, the exclusionary nature of whiteness was what made it superior, and the superiority of whiteness is what made it exclusive. Racially distinguishing people, specifically apart from whiteness, has been a key modality of colonialism and racialised group identity is heavily guarded through extensive arrays of legislative actions.²¹² The logic of racialised property is obscured through its co-constitution, creating a white ignorance and thoughtlessness to its production and the interests which are protected through this system. The next section will demonstrate how the racialised legal subject is imbedded in the creation and building of the nation.

3.2 Nationalising Rights

Newly acquired territories beyond Britain and Ireland were distinct and dependent dominions. While they were part of the realm of England with the legal and governing systems authorised by and subject to the crown, they were separate corporate bodies.²¹³ Hierarchies between England and the rest of the empire were protected by a complex and legally pluralistic system of law. These

²⁰⁸ *ibid* 1714.

²⁰⁹ Harris, 'Whiteness as Property' (n 196).

²¹⁰ *ibid*.

²¹¹ *ibid* 1737.

²¹² Harris, 'Whiteness as Property' (n 196).

²¹³ Jack P Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788* (University of Georgia Press 1986) 10.

were outside of international law, and as such did not gain the scrutiny of the system, nor did the colonies meet the normative sovereign equality of international law. Treaties, domestic and local laws were developed in response to an expanding empire and peoples who found themselves in it; 'hybridity was the rule'.²¹⁴

Expansion and occupation had been authorised by English law or crown charters. Therefore, occupied lands were governed through an extension of authorising crown powers. Any conflicts or questions over exceeding the stipulated chartered mandate were resolved with a newly issued charter either affirming or extending the crowns rights.²¹⁵ The charters which established the colonies also granted the rights of the settlers or evoked through 'the 'ancient liberties' of Englishmen'.²¹⁶ This insured loyalty to the metropole. The development of laws outside of England began with colonial representative assemblies in the thirteen colonies and the Caribbean, with the first in Virginia in 1619.²¹⁷ These assemblies defended their right to legislate, a right that was based on the 'traditional rights of Englishmen to rule themselves'.²¹⁸ The assemblies replicated the English parliament and they considered their colonial laws as in line with the common law of England.²¹⁹ Across the territories this replication varied greatly, adapted in line with the cultural and geographical makeup of the province. The self-legislation of colonial law across the provinces was established and resistance to political control from Westminster and the crown grew.²²⁰ English settlers believed their rights as colonialist were also their rights as English men and their dependency as the former did not contradict the latter, both were inherited from royal charters.²²¹ These rights included those protected in the Magna Carta and Petition of Rights, as had been declared in Jamaica in 1677.²²²

Within the colonies The Glorious Revolution of 1688 was seen as 'a common struggle to secure the rights of Englishmen both in the centre and the peripheries of the English-speaking world'.²²³ Notwithstanding the irony of basing the social and economic development of the colonies on Native land and the extensive labour of the unfree and the enslaved, the protections of 'English liberties and privileges' were claimed and legislated through the colonial assemblies. The crown rewrote charters to try to reclaim private and self-governing colonies as royal colonies.

²¹⁴ Martti Koskenniemi, 'Colonial Laws: Sources, Strategies and Lessons?' (2016) 18 *Journal of the History of International Law / Revue d'histoire du droit international* 248, 250.

²¹⁵ *ibid* 271.

²¹⁶ *ibid* 265.

²¹⁷ *ibid* 271.

²¹⁸ *ibid*.

²¹⁹ *ibid*.

²²⁰ Greene (n 213) 14.

²²¹ *ibid* 15.

²²² *ibid* 25.

²²³ *ibid* 16.

This was an effort to create a more dependent, and therefore more compliant relationship to the crown and had varying success.²²⁴

Growing autonomy through trade and commerce prompted Westminster to try and reinstate metropolitan power and secure distant territories within its authority. In the second half of the seventeenth century legislative attempts were made to quell trade between the colonies and rival colonial powers to secure primacy of England as the superior authority with the colonies as its dependence. Compliance, however, was not guaranteed. The Lords of Trade was established in 1675 and tried to implement Poyning's Law in the royal colonies of Virginia and Jamaica. It would ensure that the approval from the crown was required before any legislation was passed. This law had previously applied in the Irish Parliament. It was, however, unsuccessful in its application to the Americas.²²⁵ The case of *Dutton v Howell* [1694] established that the inhabitants of new settlements, rather than conquered land, retained their privileges as Englishmen through their birth rights rather than through the monarch.²²⁶ The Privy Council later affirmed this opinion in 1772. Uninhabited countries, as they had been claimed to be, settled by the English fell under the jurisdiction of England.²²⁷ By the late eighteenth century, white English-speaking people had settled in across the globe as part of British colonial expansion and brought with it an international allegiance to the crown.²²⁸ Before national boundaries were drawn, these settlements were part of an active network of people and ideas to such an extent Stuart Banner describes them as a region.²²⁹ Further still, they were 'international before [they] became national'.²³⁰

As Jack P Greene argues, this dependence and subordination of the colonies to the superiority of England and the crown is the underlying conflict within the push and pull of colonial governance and hierarchy. The themes Greene highlight are similar in later colonial expansions and settlements, the dependency of the colonies on the crown. This relationship is one in need of protection and obliged to obedience of behalf of the colonies, like that of the dependent child to the parent.²³¹ While there was a duality of obligation between the two, the colony's purpose and even existence was for the benefit of the crown. In doing so it affirmed the dominance of Westminster and the crown and establishes the hierarchy of and between two governments.²³²

²²⁴ *ibid* 17.

²²⁵ *ibid* 14.

²²⁶ *ibid* 24.

²²⁷ *ibid*.

²²⁸ Hannah Weiss Muller, 'Bonds of Belonging: Subjecthood and the British Empire' (2014) 53 *Journal of British Studies* 29, 2.

²²⁹ Stuart Banner, *Possessing the Pacific Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press 2007) 1.

²³⁰ This quote is with regards to the pacific region, but I would argue it also applies to the Americas, including the Caribbean. David Iglor in *ibid*.

²³¹ Greene (n 213) 18.

²³² *ibid*.

What is particularly interesting is how the *rights of Englishmen* challenged metropolitan power over the colonies. By ensuring that the individual rights of life, liberty and property were maintained across the empire, the core of Lockean principles were central to demonstrating the incompatibility colonial rule and the universal rights that Englishmen saw for themselves on account of being English, wherever they were in the world and however they got there. *The Rights of the Colonialist* was written by Samuel Adams four years before independence in 1772. It detailed the rights of the colonialists as Christians and subjects of the British crown. The text is heavily influenced by Locke, with the right to life, liberty and property of primary concern.²³³ Equality before the law was seen to be ‘self evident’ by Adams and Thomas Jefferson who was also influenced by Locke’s writings a century later.²³⁴ While the nation was being built on Native land and with the labour of the unfree and enslaved, these rights of Englishmen were universalised, or rather nationalised, for all free men in the *Declaration of Independence*. Those who were not free, were not included in the establishment of the nation or its laws. This dynamic was repeated in the late nineteenth and early twentieth centuries among the white dominions of the empire, who asserted their equal rights to self-government. It is interesting to consider then what happens when the concept of the *rights of Englishmen* is redefined to *British subject*, and how the conceptual and material rights incorporated within this equalising status are realised. This will be discussed in Chapter Two.

The ability to exercise self-autonomy and self-governance in other parts of the empire were starkly different. The crown asserted sweeping administrative powers and control over “foreign lands” through the Foreign Jurisdictions Act 1890. English law became the basis of administration where the English held jurisdiction, displacing local customary legal systems. This included those the crown held treaties with. It equalised colonial control over territories to the maximum, whether ‘Her Majesty had acquired that jurisdiction by the cession or conquest of territory’.²³⁵ The crown held authority to claim any waste or unoccupied land in protectorates with no settled government, local sovereign or individual owners of land.²³⁶ To affect this, the British colonial authorities in Africa swiftly declared there to be no settled government and no sovereign to hold title in many of the colonies.²³⁷ While apparently a response to curtail and control against crimes committed by

²³³ Samuel Adams, ‘The Rights of the Colonists’ (*Bill of Rights Institute*) <<https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-rights-of-the-colonists/>> accessed 3 May 2020.

²³⁴ Warnock (n 49) 27.

²³⁵ Foreign Jurisdiction Act 1890 s 1.

²³⁶ The 1980 Act was effected through an advisory opinion handed from the Law Officers of the Crown on December 13, 1899, See HWO Okoth-Ogendo, ‘The Tragic African Commons: A Century of Expropriation, Suppression and Subversion’ (2002) 24 Land reform and agrarian change in southern Africa An occasional paper series 110.

²³⁷ *ibid.*

English men against the local population,²³⁸ it had another significant outcome. HWO Okoth-Ogendo explains the effect was to ‘completely appropriated the African Commons to the imperial power.’²³⁹ Radical title to the commons was moved from Indigenous communities to the imperial sovereign.²⁴⁰ This land became crown land and could be allocated to colonial settlers. It effected the doctrine of *terra nullius* across the British overseas possessions and extended the dominance of English law across the empire. It had a particular focus on criminal jurisdiction,²⁴¹ therefore congealing criminality and those who could not self-govern.

This distinct difference in approaches between these two examples hold within them Lockean racialised concepts of property. The white possessive individual articulated by MacPherson’s reading of Locke is the embodiment of the English colonial settler. Locke believes one leaves the state of nature and becomes part of political or civil society by consenting to membership of a body politic under one government. Consent is given to the government to make laws to protect property and the powers of war and peace, both with the aim to keep the peace and punish those who do not.²⁴² According to Locke, one is still in a state of nature when bound by an absolute monarch, but worse, one is enslaved without rights or judgement.²⁴³ The hierarchy between the crown and metropole, and the colonies was a limitation of self-government and an enslavement of the English colonists. The recognition of equal rights among Englishmen was a recognition for legal status and the privileges and protections which were bound up with it. As Brenna Bhandar argues, ‘status has functioned both as a designation of legal standing and as a form of property in itself’ and is ‘rooted in racial and gendered ontology’.²⁴⁴ The self-possessive white individual is set against the unsettled Native American or enslaved Negro.²⁴⁵ They are two distinct forms of uncivilised and unfree peoples who remain in the state of nature and therefore in the premodern time, rather than the civilised and modern time of the English male colonist. The white self-possessive settler could therefore cultivate and own property, as well as participate and gain status in the legal system in order to protect it. This status became nationalised when

²³⁸ Koskenniemi (n 214) 275.

²³⁹ Okoth-Ogendo (n 236) 110.

²⁴⁰ Okoth-Ogendo (n 236).

²⁴¹ Koskenniemi (n 214) 275.

²⁴² Locke (n 50) ss 88–89.

²⁴³ Locke was greatly influenced by the English civil war, with his father serving for the Parliamentarians. He was anti-royalist and did not believe in the absolute power of the monarch over their subjects but favoured political or civil society that one consents into to protect the natural equality of inalienable natural rights. This is the foundational work of Locke’s social contract. *ibid* 91.

²⁴⁴ Bhandar (n 188) 152 and 153.

²⁴⁵ *ibid* 157.

America became a republic, with the conferring of racialised citizenship to the nation.²⁴⁶ With the extension of status and rights to the white English autonomous man, the non-white and non-autonomous were excluded from this status and rights. As with land, people in the state of nature were ‘deemed... to be waste and in need of improvement’.²⁴⁷ Legally sanctioned methods of control and coercion were developed to manage those who were subjects *of* law by those who held no rights bearing status in the legal system.²⁴⁸ Thus establishing a relational and racialised control between those with legal status and those established to be without.

While America achieved independence from the British empire, this history is still relevant to foreground events of other white settler nations around the turn of the twentieth century. In their efforts for equality and ultimate independence from the empire, British subjecthood was overshadowed in favour of national citizenship. The purpose of this was twofold, first equality among Englishmen for self-government and second, the exclusion of this legal status and access to territory of racialised British subjects. This will be discussed in the next chapter.

4. Law’s Innocence

This section will argue that law holds self-protection within its function and tradition. Far from being natural, as I have argued above, the legal system was designed to protect property and whiteness. A way of understanding how this myth of legal beginning has survived it through storytelling. This is an example of the harmful potential of the imagination and imaginative thinking. It will then go on to demonstrate how litigation in England externalised the presence and therefore responsibility of slavery within England through the *Somerset* case. The law is considered through its role in nation making and regulating people, their rights and mobility and asserting its own position and that of England as innocent and fair. This example gives insights into the role of the law in constituting and upholding the division between freedom and unfreedom while denying its own role through a mythical legal narrative.

4.1 The Myth of Beginning

While diverse and often contradictory, the theories of difference outlined above were supported and used to justify a ‘cultural supervision and improvement’ of those considered less civilised

²⁴⁶ For details of American citizenship as racially exclusionary see Harris, ‘Whiteness as Property’ (n 196) 1744–1745; Marilyn Lake, ‘From Mississippi to Melbourne via Natal: The Invention of the Literacy Test as a Technology of Racial Exclusion’ in Ann Curthoys and Marilyn Lake (eds), *Connected Worlds: History in Transnational Perspective* (ANU Press 2005).

²⁴⁷ Bhandar (n 188) 35.

²⁴⁸ Winter (n 193).

through missionary conversions and imperial expansion.²⁴⁹ Charles Mills argues that if the social contract has liberalism and progress at its foundations, then not only are women and people of colour excluded from this, but in fact their subjugation and oppression in order to achieve this progress lies at its foundation.²⁵⁰ Mills argues, '[f]rom the inception, then, race is in no way an "afterthought," a "deviation" from ostensibly raceless Western ideals, but rather a central shaping constituent of those ideals.²⁵¹ Race was utilised to justify expansion and progress, the violence that was enabled in the name of this progress and to 'reserve the innocence of Enlightenment'.²⁵² Racial discrimination and prejudice, or racism, explains the inherent contradiction of progress and liberty of man. Not only were these rights denied to others, but in fact these rights were built on and progress "achieved" because of the violence, enslavement and dispossession of people who were not white. "The *Racial Contract* is thus the truth of the *social contract*."²⁵³

The privileging of European knowledge as the only valid or true form of knowledge invalidates histories, cultures and forms of knowledge produced outside of Europe.²⁵⁴ The denial of Native American systems of governance, economies and land practices are a consequence of this thinking. This process completed the contradictory two phases of conquest; violent disruption of the existing political order and instalment of a new political order that appears old and stable. As Winter argues, 'the success of a conquest is predicated on the denial that a conquest happened.'²⁵⁵ Here, history is rewritten to legitimate the present through a new false past and a denial of the old. Within this process ignorance is not only produced but woven into the mythical beginnings of "the new world", and the freedom of the white colonists with it. The denial of Indigenous land systems and implementation of the English property system into conquered land is but one example of colonial thinking. This system originated from a specific European locality yet was implemented across the globe as though generally applicable, becoming the 'universal truth for humanity'.²⁵⁶ Understanding this process gives insight into the homogenising force of colonialism, liberalism and the law.

²⁴⁹ Jane Samson, *Race and Empire* (Pearson/Longman 2005) 40.

²⁵⁰ Mills (n 81).

²⁵¹ *ibid* 14.

²⁵² Peter Fitzpatrick, 'The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment Dossier: Lumieres - Revolution - Post-Modernisme' (1989) 13 *Droit et Societe* 343, 348.

²⁵³ Mills (n 81) 64. Emphasis in original.

²⁵⁴ Walter D Mignolo, 'Coloniality at Large: Time and the Colonial Difference' in Saurabh Dube (ed), *Enchantments of Modernity: Empire, Nation, Globalization* (1 edition, Routledge 2010) 3; Dipesh Chakrabarty, *Provincializing Europe Postcolonial Thought and Historical Difference* (Princeton University Press 2000).

²⁵⁵ Winter (n 193).

²⁵⁶ Fitzpatrick, 'The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment Dossier: Lumieres - Revolution - Post-Modernisme' (n 252) 345.

The enforcement of a universal truth is part of the second phase of conquest Winters describes above; the denial that the conquest has happened.²⁵⁷ To achieve this, Carol M Rose turns to storytelling to help explain how we understand present inequalities. Rose argues classic property theories, such as Locke's, engage with narrative to set the scene of a rationally or naturally occurring private property regime.²⁵⁸ Locke explains the development from the plentiful state of nature into fenced off individual private property through one's labour. Through the accumulation of the material profits of one's labour, one can trade to grow one's profits or wealth through an extension of their labour. This system of trade and accumulation leads to a system of governance and protection of property through laws that not only shape human behaviour, but also leads to the emergence of a state vested in creating conditions by which it can flourish.²⁵⁹

Story telling techniques, such as these, centres the role and the need for property through distinct and easy to understand examples. An example of this is finding and picking berries to eat in order to live, which exemplifies the desire for property for oneself in order to fulfil ones wish to live.²⁶⁰ Perishable items can be traded for non-perishable items, which exemplifies an extension of one's labour. Rose argues Locke's story requires an 'imaginative reconstruction' to accept the plausibility of property regimes, and this acceptance allows his story of property to become seen as the natural and settled way and therefore this regime of property is conformed to.²⁶¹ Mary Warnock concurs; 'myths need not be literally true to be useful'.²⁶² Building on existing stories, Locke focuses on the concurrent development of civil society and conceptions of ownership and property. This was crucial in aiding and expanding British colonial powers across the world.²⁶³ The protection of one's property is the purpose of social contract, as are the systems of governance that developed from it for the purposes of legally 'protect[ing] what you have accumulated'.²⁶⁴ Lockean notions of property, then, were to ensure exclusive possession of accumulated wealth and power as well as systems of organising and value.

The importance of property at the genesis of law is evident in leading legal thinkers across the legal spectrum since Locke;²⁶⁵ property is so fundamental to law that Jeremy Bentham argues '[p]roperty and law are born together, and die together. Before laws were made there was no

²⁵⁷ Winter (n 193).

²⁵⁸ Rose (n 49).

²⁵⁹ Locke (n 50) ch 5; Rose (n 49).

²⁶⁰ Rose (n 49) 41–2.

²⁶¹ *ibid* 53.

²⁶² Warnock (n 41) 22; See also Peter Fitzpatrick, *The Mythology of Modern Law* (1 edition, Routledge 1992).

²⁶³ Warnock (n 49) 22.

²⁶⁴ Mills (n 81) 52.

²⁶⁵ For an analysis of property, territory and law prior to the Lockean era, see Dora Kostakopoulou and Robert Thomas, 'Unweaving the Threads: Territoriality, National Ownership of Land and Asylum Policy' (2004) 6 *European Journal of Migration and Law* 5.

property; take away laws, and property ceases.²⁶⁶ Peter Fitzpatrick writes that '[p]roperty was the basis of law' and further makes the connection between property, law and violence.²⁶⁷ Blomley asserts, '[t]he establishment of a Western liberal property regime was both the point of these violences and how violent forms of regulation were enacted and reproduced.'²⁶⁸ He explicitly states, 'violence was not only an *outcome* of law, but its *realization*'.²⁶⁹ This is consistent with Locke's thinking, who argues that retributive violence for the violation of one's property was entirely rational and justified. Fitzpatrick argues, '[l]aw becomes generally and integrally associated with the mythic settling of the world'.²⁷⁰ The myth, or 'convenient ignorance',²⁷¹ of the waste lands and wilderness of the Americas was appropriated to legitimise conquest. For Locke, the appropriation of this waste land was not only a fulfilment of the Godly duty of the colonialists, but failure to do so would be akin to going against God. Therefore, the appropriated land was both virtuous and coercive, a dynamic that is considered again in Chapter Four.²⁷² Hence, in Lockean notions of property, necessary violence was justified, virtuous violence accepted, and most violence simply written out of the story to support the myth of the beginning of the new world.

4.2 The Separation of Law

This section will analyse the role of law in maintain itself and its exclusionary nature through the *Somerset* case [1772]. It is important to consider how the law does this, even in seemingly liberatory moments. People who were enslaved held the legal status of property belonging to someone else. Those who owned an enslaved person legally held complete control over them. Enslavement is the most extreme non-autonomous state.²⁷³ Despite being heavily involved since the early sixteenth century, as will be detailed in the next chapter, Britain does not readily associate itself with it. Legal sanctions from the King legitimised slavery and plantations in the Caribbean.²⁷⁴ Domestic law made in Westminster had implications across the empire were the legislative changes made to the slave trade and involving the conditions of enslaved people. Planters and slaveowners were property owning and rights bearing English subjects and a violation of these rights would go

²⁶⁶ In Chimni (n 49) 29.

²⁶⁷ Fitzpatrick, *The Mythology of Modern Law* (n 42) 82.

²⁶⁸ Blomley (n 57) 129.

²⁶⁹ *ibid.*

²⁷⁰ Fitzpatrick, *The Mythology of Modern Law* (n 42) 83.

²⁷¹ *ibid.* 82.

²⁷² Desmond Manderson, *Danse Macabre: Temporalities of Law in the Visual Arts* (Cambridge University Press 2019) 92.

²⁷³ Brenna Bhandar, 'Property, Law, and Race: Modes of Abstraction' (2014) 4 UC Irvine Law Review 204.

²⁷⁴ The first such charter is believed to be the 'Royal Charter Granted to Royal African Company of Merchant Adventurers by Charles II' (1663) <<https://www.bl.uk/collection-items/charter-granted-to-the-company-of-royal-adventurers-of-england-relating-to-trade-in-africa-1663>> accessed 1 February 2022.

against the core of English law and justice. Abolition would cause economic harm to Britain. The protection of property rights had legal precedent, whereas the rights of enslaved people did not.

The case of *Somerset v Stewart* [1772] was heard in the English courts, but its impact was felt on both sides of the Atlantic. It established that there was no legal precedent for the capture and extradition of an enslaved person from England in English law. The law of the colonies, in this case American law as this is where James Somerset had been purchased, was being applied to seize, hold and remove the enslaved Somerset from England to Jamaica for sale. The court found that colonial law could not hold jurisdiction in England and that there was no English legal authority to hold him. As such Somerset was granted the petition of *habeas corpus*.²⁷⁵

The case is often mistakenly cited as abolishing slavery in England.²⁷⁶ Lord Mansfield made no attempts to further the liberty of enslaved Black people in England. This was outside the legal question – the jurisdiction of colonial law in England. In fact, Lord Mansfield explicitly stated, ‘[t]he setting 14,000 or 15,000 men at once loose by a solemn opinion, is very disagreeable in the effects it threatens.’²⁷⁷ Thus, his judgement focused on the reinforcement of English sovereignty.²⁷⁸ However, the case held great significance for other reasons.²⁷⁹ While the judgment did not settle the argument of English involvement in slavery or the slave trade at home or across the empire, it did distance the ideology and practice of slavery from the heart of empire to the colonies, coupling liberty with England.²⁸⁰ Lord Mansfield stated, “The air of England is too pure for a slave to breathe. Let the black go free.”²⁸¹ This quote does much to help understand the English position of wilful ignorance and self-declared innocence. John Harrington and Ambreena Manji argue the judgment sets a moral hierarchy; ‘while slavery may be acceptable in far-flung colonies it cannot be tolerated in the mother country.’²⁸² By connecting purity with the English air and denigrating a slave unfit to breathe it, the metaphor marks the pure freedom of England incompatible with slaves and slavery.

The judgment simultaneously marked out and erased the 14,000 – 15,000 people who were enslaved within England and remained so until 1833.²⁸³ In fact, Cheryl Harris argues, it places the slave as the dangerous contaminator of pure England and thus the Black presence in England,

²⁷⁵ Cheryl I Harris, ‘Too Pure an Air: Somerset’s Legacy from Anti-Slavery to Colorblindness’ (2006) 13 Texas Wesleyan Law Review 439, 440.

²⁷⁶ For example, see Koskenniemi (n 214) n 102.

²⁷⁷ Transcript. The Somerset Case 1772 20.

²⁷⁸ Harris, ‘Too Pure an Air’ (n 275) 440.

²⁷⁹ For the impact within the enslaved communities see *ibid* 3.

²⁸⁰ John A Harrington and Ambreena Manji, ‘Mind with Mind and Spirit with Spirit: Lord Denning and African Legal Education’ (2003) 30 Journal of Law and Society 376, 398.

²⁸¹ Though this metaphor did not originate from the judgement, it has become synonymous with it. Quoted in *ibid*.

²⁸² *ibid*.

²⁸³ Slavery Abolition Act 1833.

who must be slaves, as polluting.²⁸⁴ Legally, only foreigners could be enslaved in England, citizens could not.²⁸⁵ The Black presence in England was therefore marked not only by a foreignness, but also an enslavability. Harris further argues this marking bares the impurity and degradation of slavery as an institution onto the slave, rather than as one who is subjected to injustice and ‘worthy of empathy’.²⁸⁶ This, importantly, ‘collapses the distinction between antipathy to flawed social institutions and antipathy to its victims.’²⁸⁷ Far from emancipating those enslaved in England, further control and containment of those enslaved were required to protect England from the ‘polluting effects of slavery’.²⁸⁸ In this way, England extended its control of the Black population in England and distanced itself from the institution of slavery. This took effect within England as well as the ‘economic, social and legal entanglement between the empire and slavery’.²⁸⁹ This effected a denouncement of slavery only insofar as it is intolerable – not illegal and all but erased – in England, while allowing it to continue in the colonies.

The non-repugnancy doctrine meant England could have gone against slavery throughout its empire.²⁹⁰ This was a standard clause in crown charters which allowed relative freedom to the colonial administrators in new territories, while maintaining a clause of control to ensure laws were established in line with English laws.²⁹¹ However, it chose not to. Similarly, Mansfield walked a narrow line with his judgment to prevent resistance against the crown if it interfered with matters in the colonies, while ensuring English law was not undermined by the colonies.²⁹² It was more than thirty years before the abolition of the slave trade in the empire was legislated for and a further thirty years for the ownership of enslaved people within the empire to be outlawed.²⁹³ The abolition campaign ran during the late seventeenth and early eighteenth centuries. It was a time of debating the rights of man, as well as colonial expansion and settlement. The campaign created a public debate as to the inclusion or exclusion of people of colour within this rights discourse, a challenge signifying the first reframing of the rights of the ‘other’ in British law.²⁹⁴ This not only necessitated a reevaluation of the parameters of humanity, justice and duty but also pushed the boundaries of who was entitled to the consideration of British law and justice. Lucy Mayblin argues, the campaign to abolish slavery and consequent legislations was a brief interruption of hostility towards

²⁸⁴ Harris, ‘Too Pure an Air’ (n 275) 444.

²⁸⁵ Transcript. *The Somerset Case* (n 277).

²⁸⁶ Harris, ‘Too Pure an Air’ (n 275) 444.

²⁸⁷ *ibid.*

²⁸⁸ *ibid* 444 and 448.

²⁸⁹ *ibid* 443.

²⁹⁰ Koskenniemi (n 214) 274.

²⁹¹ *ibid* 270.

²⁹² Harris, ‘Too Pure an Air’ (n 275) 441.

²⁹³ Slave Trade Act 1807 (c 36); Slavery Abolition Act 1833.

²⁹⁴ Mayblin (n 16) 63.

“outsiders”.²⁹⁵ However, Harris argues that the conflation between antipathy toward the repugnant institution and antipathy towards those degraded by it seen as repugnant was evidenced in the abolition debates.²⁹⁶ The freedoms and rights of Englishmen were set against enslavability, regulation and control, racialising them and ‘forging and critical connection between Black racial subordination and citizenship.’²⁹⁷

The abolition of slavery and its trade came with huge concessions and contradictions. Both the right to liberty of enslaved people and property rights were upheld. £20million (£1.2billion in present day money) was paid out in compensation to the legal owners of those enslaved for loss of property.²⁹⁸ Additionally, the material reality of liberty in the plantations meant most people were not actually free. An apprenticeship system was in place for four or six years after abolition. The scheme was a transitional period to ‘ease the burden of mass emancipation’ through gradually acquainting newly free people with their freedom for low wages under their old masters.²⁹⁹

What this section has highlighted is that even moments which have typically seen as celebration within abolition and racial justice movements have enabled the state to maintain its exclusionary character through the law. The success of implementing the rule of law across the empire was central to the empire’s mission and seen as part of its civilising role.³⁰⁰ This rationalisation process ultimately takes on a disciplinary nature, a forcible compliance. Law sanctions, rationalises and normalises violence within its realm.³⁰¹ Both compliance and non-compliance demonstrate a need for law, and for more law. As Keally McBride explains,

If the rule of law failed because of abuses by local officials or policemen, it demonstrated the need for the British oversight to continue. If the rule of law failed to prevent criminality by the native population, it demonstrated the lawlessness inherent in the indigenous culture, once again underscoring the need for outsiders to import the principle.³⁰²

²⁹⁵ *ibid* 4.

²⁹⁶ Harris, ‘Too Pure an Air’ (n 275) 444.

²⁹⁷ *ibid*.

²⁹⁸ See ‘Legacies of British Slave-Ownership’ (*Legacies of British Slave-ownership*) <<https://www.ucl.ac.uk/lbs/>> accessed 29 August 2019.

²⁹⁹ James Latimer, ‘The Apprenticeship System in the British West Indies’ (1964) 33 *The Journal of Negro Education* 52, 52.

³⁰⁰ ‘The patent explained that colonisation had become necessary because of overpopulation in England but it also advertised the King’s ‘anxiety to propagate the Christian faith’ and, quite interestingly, to ‘secure the wealth, prosperity and peace of the native subjects.’ Koskenniemi (n 214) 269.

³⁰¹ Fitzpatrick, ‘The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment Dossier: Lumieres - Revolution - Post-Modernisme’ (n 252) 347.

³⁰² Keally McBride, *Mr. Mothercountry: The Man Who Made the Rule of Law* (Oxford University Press 2016) 16.

Law was used as a corrective force. It brings order to what is deemed disorderly. Peter Fitzpatrick argues that ‘racism is compatible with and even integral to law’.³⁰³ In doing so he integrates both imperialism and racism with the law. To take an example from *Somerset*, “Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law”.³⁰⁴ Here Lord Mansfield separates the law from compassion or consequence, from material life.³⁰⁵ In doing this Mansfield is positioning the law, and himself as its arbiter, as impartial and above politics, morality or emotion. Fitzpatrick, however, argues it is this very separation that is evidence of law’s racism. ‘An immediate problem is the powerful closure erected around liberal legality.’³⁰⁶ In this separation the law prioritises legal rational above the material life it regulates but is not part of. Further, ‘racism marks constitutive boundaries of the law’, which in turn sets the limits to any remedy or consequence to come from it.³⁰⁷ As detailed above, the institution of slavery was not questioned in *Somerset*. This is because it was not the specific legal question of the case, the sovereignty of English law within England was and it was this which was upheld, not an enslaved man’s right to freedom. To give the fuller quote from the judgment,

Every man who comes into England is entitled to the protection of English law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin. The air of England is too pure for a slave to breathe. Let the black go free.³⁰⁸

This statement suggests that British justice is too virtuous and impartial to withhold itself from anyone not English and not white. The unification of England and justice in this instance asserts England as the protector of those who have faced oppression, while obscuring itself as the same legal system that has perpetrated oppressions in need of remedying. It ‘asserts its universal inclusiveness, transcending and ordering material life’ while at the same time setting the terms for inevitable exclusion.³⁰⁹ It is in this way the law can claim its innocence.

5. Exclusionary Dynamics of Tolerance and Hospitality

As indicated in the previous section, the Lockean notions of property and liberalism have had, and continue to have profound implications, as this section will detail. The autonomous white legal subject is still central to the nation and who belongs to it in contemporary migration regulation.

³⁰³ Fitzpatrick, ‘Racism and the Innocence of Law’ (n 12) 119.

³⁰⁴ Transcript. The Somerset Case (n 277).

³⁰⁵ Fitzpatrick, ‘Racism and the Innocence of Law’ (n 12) 121.

³⁰⁶ *ibid.*

³⁰⁷ *ibid* 122.

³⁰⁸ Quoted in Harrington and Manji (n 280) 398.

³⁰⁹ Fitzpatrick, ‘Racism and the Innocence of Law’ (n 12) 130.

As Bhandar explains, '[t]his ideology of improvement is one that binds together land and its populations'.³¹⁰ Anderson argues notions of value and labour are imbedded within the regulation or coercion of mobility.³¹¹ Improvement and cultivation of individual and national resources are at the heart of fears around not contributing to or taking from the state. The distinction between those who must move to work (those within the nation who are reliant on the state) and those who cannot move to work (the migrant) is made.³¹² The citizen and the migrant are therefore competing for labour while navigating conditions on mobility. The first is punished if they do not move for work while the second is punished if they do so.³¹³ Anderson explains that migrancy is 'above all a crime of *status*, of refusing to accept one's position.'³¹⁴ Migrants are cast as being in the wrong place, in the wrong nation.³¹⁵ Anderson explains, '[t]he Lockean individual is tied in the first instance, not to a plot of land, nor a master, but to a nation state.'³¹⁶ Through the nationalisation of rights and status belonging is tied to the nation, and therefore exclusion also. There is a perceived unity within borders which is formalised through the principal category of membership into the modern nation-state system, national citizenship.³¹⁷ It is inherently exclusionary, developing a relationship between the nation and the peoples bounded within it.

States hold rights and responsibilities to the citizens of the state. Those who enter the state either temporarily or on a more permanent basis do so with authorisation from the state and with certain rights and responsibilities between the individual and the state. Unsanctioned migration on the other hand is seen as challenging the integrity of the state, as a legal person, its territory and sovereignty as well as the wellbeing of the population. This is evocative of the contaminating effect of the presence of enslaved people analysed above. The response to unsanctioned entry is also in line with the Lockean model, violence for this violation is seen as both rational and justified.³¹⁸ Catherine Dauvergne argues, '[c]ontrol over the movement of people has become the last bastion of sovereignty'.³¹⁹ While her argument is in relation to three forms of movement; the refugee, the "illegal" migrant and the economic or skilled migrants, the 'rhetorical focus on 'illegals' shifts the

³¹⁰ Bhandar (n 188) 36.

³¹¹ Anderson (n 18).

³¹² *ibid* 1.

³¹³ *ibid* 27.

³¹⁴ *ibid* 25. Emphasis in original

³¹⁵ *ibid* 27–28.

³¹⁶ *ibid* 28.

³¹⁷ Benhabib (n 164) 1.

³¹⁸ For a feminist analysis to the bounded legal subject and sovereign nation see Naffine (n 47); Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press Melland Schill Studies 2000).

³¹⁹ Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 *The Modern Law Review* 588, 600.

boundaries of exclusion.³²⁰ As finance and trade have become increasingly globalised, Dauvergne argues that nations are exerting their sovereignty through the control of people. This reasserts the nation as well as people as nationals to a nation.³²¹

There are international and regional mechanisms for legal protections for refugees, particularly international human rights mechanisms as well as declarations that have expanded the understanding of a refugee.³²² Even so, the definition is still stringent and does not account for the wide realities of people who need to leave their countries or consider the consequences of colonialism on reasons needed for fleeing or of migratory routes and destinations. The guarantee of rights is dependent on the duty – rights-based relationship between the state and its citizens, as opposed to ‘the right of every individual to belong to humanity’.³²³ National rights, Arendt argues, strips the inalienable relationship of these rights and ensures its dependency on the nation.³²⁴ Far from being inalienable to the individual, the removal of an individual from their political community, or nation state, removes any guarantee of rights protection. Therefore, the ‘right to have rights’ is a necessary precondition to those yet to be or removed from a political community.³²⁵

This dynamic is seen within contemporary immigration discussions, which often invoke a discourse of hospitality and tolerance.³²⁶ These two words are strategic; they seek to place Britain in a positive position by suggesting that these characteristics are in our history and in our character. However, the act of hospitality and tolerance, whether rhetorically or materially, is not as positive or even banal as it appears. The two terms take slightly different forms to perform a similar function, I will explore the ‘myth of British hospitality and tolerance’³²⁷ each in turn.

In 2006 Tony Blair described the nation’s approach to tolerance clearly. ‘Our tolerance is part of what makes Britain, Britain. So, conform to it; or don’t come.’³²⁸ To understand tolerance,

³²⁰ *ibid* 601.

³²¹ *ibid* 594.

³²² Universal Declaration of Human Rights 1948 (General Assembly resolution 217 A) s 14; Convention and Protocol Relating to the Status of Refugees 1951; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis-Ababa, 10 September 1969; Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, ‘Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama’ (Cartagena, Colombia, 19 November 1984).

³²³ Hannah Arendt, *The Origins of Totalitarianism* (Penguin UK 2017) 391.

³²⁴ Arendt, *The Origins of Totalitarianism* (n 323).

³²⁵ *ibid* 391.

³²⁶ HM Government, ‘Integrated Communities Strategy Green Paper’ (n 1) 20; David Cameron, ‘David Cameron’s Immigration Speech’ (*GOV.UK*, 25 March 2013) <<https://www.gov.uk/government/speeches/david-camerons-immigration-speech>> accessed 17 July 2018.

³²⁷ Sarah Gibson, ‘Border Politics and Hospitable Spaces in Stephen Frears’s “Dirty Pretty Things”’ (2006) 20 *Third Text* 693, 698.

³²⁸ Maya Goodfellow, *Hostile Environment: How Immigrants Became Scapegoats* (Verso Books 2019) 115.

we can return to the writing of John Locke. Written in the context of near civil war from religious differences in England, Locke wrote his *Letter of Toleration* in exile in 1685. He proposed a toleration of some religious sects who dissented from but did not undermine the national church and the shared beliefs and practices that bound the national population.³²⁹ Inherent within Locke's proposal is a limitation within tolerance. As detailed in above, Locke's preoccupation was the protection of life, liberty and property. His proposition here does not suggest full liberty to dissenters from the head of state, merely tolerance. It is not part of Locke's doctrine of natural equality and liberty but a conditional permission from a higher power which may or may not be granted to a lower subject.³³⁰ This demonstrates two modes of hierarchy, firstly the granting or denying of tolerance from the powerful to the less powerful, and second the 'superior and more righteous' character of the powerful in that they are right, but also generous enough to tolerate those who were not.³³¹ By understanding tolerance as dynamics of power, it highlights what is happening within the dynamics of who tolerates and is tolerated. Only then can it be understood that '[t]olerance is a strategy of domination presented as a form of egalitarianism in the dominant liberal discourse.'³³² The language of shared values, beliefs and practices of citizenship serves a normative function within an increasingly diverse social context where more diversity is seen as a need to navigate it.³³³ These values set the limits to tolerance and demand compliance.

Since 2006, shared British values have been legislated in the Government's counter-terrorism strategy, Prevent, and is promoted in schools and colleges to combat radicalisation in Britain's young and vulnerable people. The strategy defines terrorism as 'vocal or active opposition to fundamental British Values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs.'³³⁴ These values, or rather Britain's claim to them, have a long history, as has been shown in this chapter. Local authorities, police, prisons, the NHS and education institutions at all levels are all required to report people who fit this definition. As with the hostile environment, this policy relies on collaboration with different arms of the state, rearticulating the duties of a new citizenship required to keep the nation safe from a perceived external threat that is embedded inside the nation. Setting the limits of tolerance through the law positions the law as an arbiter of justice and re-centres law, one of the great British values, as

³²⁹ Georgie Wemyss, *The Invisible Empire: White Discourse, Tolerance and Belonging* (Routledge 2016) 130.

³³⁰ *ibid* 131.

³³¹ *ibid*.

³³² *ibid* 132.

³³³ Gail Lewis, 'Welcome to the Margins: Diversity, Tolerance, and Policies of Exclusion' (2005) 28 *Ethnic and Racial Studies: Migration and Citizenship* Guest Editors: Gail Lewis and Sarah Neal 536, 544.

³³⁴ HM Government, 'Prevent Duty Guidance: A Consultation' 9

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388934/45584_Prevent_duty_guidance-a_consultation_Web_Accessible.pdf>.

measure of tolerance. Differences accounted for within the law will and must be tolerated, but that which falls outside the law are not to be tolerated. This is an esteemed measure of fairness which in reality reproduces hierarchies of belonging and obscures both historical and contemporary relational power that led to people falling in or outside of the law. There is therefore a justification to exclude those who fall outside of the law, which can be clearly seen with immigration law and the Prevent duty.

As with tolerance, I argue, hospitality is both conditional upon complying with a set of normative rules of acceptability by the host and establishing a hierarchy of belonging to the place where one has been invited, granted or seeking hospitality. The position of host is created, from which hospitality is extended. How far it extends depends on the host. ‘The host is someone who has the power and property to give to the stranger while remaining in control.’³³⁵ This power and control is what establishes the inequality of the relationship, and the possession of the right to use and exclude. It is this possessive relationship I will explore further. By extending an offer of hospitality to another, one must first have a claim from which this invitation can be extended. Therefore the ‘host’ must have a relationship with, or control over a thing, in this case the legal right to live in a state.³³⁶ The strongest of these is the right of citizenship, which asserts the ‘sovereign power of the host’ as national subject.³³⁷ One could draw on the Derridean concept of conditional hospitality to articulate the uneven power relation between the host and the guest. The host has the right to exclude, place conditions and limitations on the guest’s entrance and stay. Unconditional hospitality removes the initial position of hosts power in their ability to choose and set rules and conditions, this leads to the host being overtaken by whomever comes into the home, or nation, without limitation and losing their sovereignty or property in it. In both scenarios there is exclusion and consequently violence, first in asserting this property right, and secondly in losing it.³³⁸ Immigration, asylum and citizenship laws are a conditional hospitality. The ability to assert a conditional invitation comes from the existing sovereignty, or property in Lockean terms, in oneself and one’s home. It is this right which it can be extended from. Without this foundational right there can be no right from which to extend.³³⁹ As with property and whiteness, a legal right to remain grants rights, duties and obligations, and also sets a settled expectation of legally protected privileges, as argued above. Value is placed on these rights as well as social relations and expectations developing from them. Who has access to this then, is heavily guarded.

³³⁵ Gibson (n 327) 695.

³³⁶ Grey and Grey (n 52).

³³⁷ Avril Bell, ‘Being “at Home” in the Nation: Hospitality and Sovereignty in Talk about Immigration’ (2010) 10 *Ethnicities* 236, 251.

³³⁸ *ibid* 241.

³³⁹ In *ibid* 240.

This section has demonstrated the continuities between the exclusionary principles of property, the nation and rights of man within the contemporary migration rhetoric. It demonstrates the limited approaches within the normative framework of migration and belonging and the norms of violence embed within them.

6. Conclusion

As Benhabib shows, the reality of our world has changed, but our normative map for navigating it has not. This chapter has shifted the terrain of some of the key concepts, systems and structures that shape our understanding of how our world is organised. This shifting is necessary to begin the process of contextualising the current hostile environment in a historical and global understanding. The survival and durability of both race and imperialism is its ability to trans morph over time and in different geopolitical contexts. This enables its development to stay powerful, but also unaccountable. The role of law is central to this, as my analysis of *Somerset* demonstrates. Despite acknowledged commonalities between regulatory and organising systems in the colonies and England, law was held not only as the ‘preserve of England’,³⁴⁰ but the gift that England could bestow on the colonies and later new countries of the commonwealth.³⁴¹ This legal force ‘sought to reproduce a specific national consciousness in alien surroundings’³⁴² even after decolonisation. Thus, establishing a global reach of English law and its embeddedness within the contemporary international system of law and governance. Charles Mills states,

The social contract is (in its original historical version) a specific discrete event that founds society, even if (through Lockean theories of tacit consent) subsequent generations continue to ratify it on an ongoing basis. By contrast the Racial Contract is *continually being rewritten* to create different forms of the racial polity.³⁴³

This chapter takes these seemingly discrete events and puts them at the forefront of its analysis. It introduces ignorance, both thoughtlessness and strategic ignorance, as a framework to understand how and where harm and violence are perpetuated yet denied and downplayed. It is a starting point for halting the continual ratification of the racial contract, which is necessary to an analysis of the hostile environment and understanding how such a policy has been in place for a decade. Here I have shown that the conceptual origins of freedom and domination lie in the liberal project’s development of property, law and the rights of man and continue within liberal migration

³⁴⁰ Antony Anghic, *Imperialism, Sovereignty and the Making of International Law* (University Press 2005) 61.

³⁴¹ Harrington and Manji (n 280) 379.

³⁴² *ibid* 393.

³⁴³ Mills (n 81) 72. Emphasis in original

discourses of tolerance and hospitality. In what follows, I will build on this analysis to show how these controls and liberties manifest through the enabling and disabling of mobilities. The next chapter provides an overview of the migratory routes of empire and the impact increasing regulations of these had within the heart of empire.

Chapter Two

Migratory Routes of Empire

*As a form of property, patriarchal whiteness is a valuable possession warranting protection.*³⁴⁴

1. Introduction

There were significant movements of people during the British empire, particularly between the eighteenth and twentieth centuries. Their movement and settlement are one of the lasting legacies of empire that continue to shape the world today. The reasons, means and methods of movement varied greatly, but can broadly be categorised into two modes; “free” movement and “unfree”, movement. I will give a brief overview of each in turn.

“Free movement”, refers to when people had at least an element of choice in their decisions to migrate and the vast majority of whom were from Europe, or more specifically Britain. There was considerable migration from Britain and Ireland during the seventeenth and eighteenth centuries, which increased significantly during the nineteenth and twentieth centuries. They were the largest national group to leave Europe between 1815 and 1930.³⁴⁵ Those who emigrated from Britain did so for employment opportunities or the chance to own land and property that would not have been available to them in Britain. Class and wealth were significant factors in how and why people migrated and for what opportunities. These migrations were undertaken without consideration to the Indigenous peoples who were dispossessed from their land in order for white migrants to relocate and settle, and the harm and violence which was central to this. Therefore, the thoughtlessness of ordinary British people who migrated for their own betterment was utilised as a tool of empire and supported by the colonial system of empire in the dispossession of Indigenous peoples and land expansion.

In addition to people choosing to move, there was “unfree” or forced migration which took several forms. There was forced white migration. For example, due to overcrowding in jails people were banished to the colonies of Canada and Australia when found guilty, often for petty

³⁴⁴ Aileen Moreton-Robinson, *The White Possessive. Property, Power, and Indigenous Sovereignty*, vol 17 (University of Minnesota Press 2015) 66.

³⁴⁵ Marjory Harper and Stephen Constantine, *Migration and Empire* (Oxford University Press 2010) 1–2.

crime.³⁴⁶ Unmarried pregnant women, the children of unmarried women and orphans were also sent to these colonies until as recently as the 1950's.³⁴⁷ Significant Irish emigration followed the clearances of the Highlands and famine in Ireland. These forced migrations were also part of the policy of white settlement in these "newly settled" nations, which over generations contributed to the permanency and development of these white settler nations. When territories were occupied, Indigenous and local populations were displaced from their lands to less fertile and less desirable areas within the territories. This dispossession of Indigenous peoples from their land is an essential component of 'settler communities' and has been maintained since they were established. Indigenous resistance to these land occupations and claims to their land is ongoing. The variations in rights that Indigenous people have to their land is traceable to the methods of land acquisition during the British empire.³⁴⁸ The vast majority of forced migration though, were people from colonised territories. From as early as 1562 Britain was involved in the forced migration and trade of enslaved people, though involvement was much more prolific between around 1640-1807.³⁴⁹ Once arrived, the trade and purchase of enslaved people meant forced movement within the colonies as well as across the empire, including Britain.

The abolition of slavery did not apply to the territories governed by the East India Company, which controlled much of the Indian subcontinent, Burma, Ceylon and Saint Helena.³⁵⁰ The British were also involved in the slave trade across the Indian Ocean, which set patterns for indentured labour migration, the system which replaced slavery and expanded plantation societies across the empire. Indentured labour had always been strong in the colonies, with predominantly white labour, often from those convicted or poor, prior to enslaved African labour.³⁵¹ After slavery was abolished, indentured labour was once again prominent. Most indentured labourers were from India, with sizable populations from China and Polynesia. They were transported across the empire to South and East Africa, Polynesia, Caribbean and Southeast Asia on work contracts that bound them to an employer.³⁵²

Both the free and forced movement of people around the globe were a method of territorial expansion of the empire. These were orchestrated through white emigration and

³⁴⁶ *ibid* 2 and 3.

³⁴⁷ *ibid* 8.

³⁴⁸ Banner (n 229) 4.

³⁴⁹ The National Archives, 'Britain and the Slave Trade' <<http://www.nationalarchives.gov.uk/slavery/pdf/britain-and-the-trade.pdf>> accessed 17 September 2020.

³⁵⁰ Gurminder K Bhambra, 'Accounting for British History' (*Discover Society*)

<<https://discoversociety.org/2020/07/01/focus-accounting-for-british-history/>> accessed 7 July 2020.

³⁵¹ See generally PC Emmer (ed), *Colonialism and Migration; Indentured Labour Before and After Slavery*, vol 6 (Martinus Nijhoff Publishers 1986) pt Two.

³⁵² See generally *ibid* Three.

settlement rather than through ‘classic wars and conquest’,³⁵³ as well as engineering racialised migration ‘in the interests of predominantly white colonial powers.’³⁵⁴ Strategic ignorance, as well as the thoughtlessness of ordinary white migrants whose migration supported the establishment and continuation of white settler communities, were essential to the success of the empire. For example, through the indentureship system as a continuation of slave like conditions and economies. Building on W. E. B. DuBois’ argument, Marian Lake and Henry Reynolds’ argue that during the late nineteenth to early twentieth centuries whiteness developed into a form of racial identification, becoming the ‘basis of geopolitical alliance and a subjective sense of self.’³⁵⁵ It also developed as a defence to rising challenges from those who were not racialised as white. The British empire had divided its global population between rulers and the ruled, and now this emerging global order was being distinguished between those who could and could not self-govern. Both these approaches starkly divided the world along racial lines, though it shifted during the late nineteenth century from a scale of races and civilisations to a binary between white and non-white. This latter approach challenged the supposed equality of the British imperial subject.³⁵⁶ Self-government was understood as individual freedoms of men, as well as national governance, as discussed in Chapter One. An essential form of exercising this in settler nations was the implementation of immigration restrictions which opposed free movement of some British subjects.³⁵⁷ Self-governing peoples, it was increasingly being argued, should be able to decide who could and could not enter the community, and thus the issue became a differentiating exercise of power between self-governing dominions and colonies ruled by the British.³⁵⁸ These developments were not individual territorial developments that occurred in tandem, but were interconnected and succeeded because of, and in support of, one another across the white settler world.³⁵⁹ This, in turn, weakened Westminster’s hold over the dominions and hastened independence.

This chapter will detail how migration practices of the British empire shaped global racial segregation through thoughtless and intentional ways, particularly during the nineteenth and early twentieth centuries. It will set out the legal terrain that enabled and hindered the lives of people across the empire, and how these developments impacted the introduction of legislation in Britain.

³⁵³ Tuitt in El-Enany, *Bordering Britain* (n 23) 41.

³⁵⁴ *ibid.*

³⁵⁵ Marilyn Lake and Henry Reynolds (eds), *Drawing the Global Colour Line: White Men’s Countries and the International Challenge of Racial Equality* (Cambridge University Press 2008) 3.

³⁵⁶ *ibid.* 5.

³⁵⁷ Lake and Reynolds (n 355); Lake (n 246); Radhika Vyas Mongia, ‘Race, Nationality, Mobility: A History of the Passport’ in Antoinette M. Burton (ed), *After the imperial turn: thinking with and through the nation* (Duke University Press 2003).

³⁵⁸ Lake and Reynolds (n 355) 8.

³⁵⁹ Lake and Reynolds (n 355).

These migratory routes are significant legacies of the empire, and this chapter seeks to bring them together to argue that controls on free and unfree migration lead to development of state-controlled migration and differentiated rights once in a territory. This chapter details the genealogy of contemporary migration regulations in the UK in an effort to challenge the colonial aphasia,³⁶⁰ or wilful ignorance of the colonial and racially exclusionary foundations of the contemporary hostile environment.

Some key themes of the thesis are drawn out in this chapter. Overall, the aim is to demonstrate how the migration practices of empire shaped global racial segregation and exclusion during the nineteenth and twentieth centuries. It will do this by detailing how immigration laws around the self-governing nations exposed the lie of equality of British subjects through the demand for the right to exclude based on race. These demands jeopardised the core principle of equality among British subjects, and thus exposed the reality of racial hierarchy of rights within this status. This will be explained in Section 2.1. The right to exclude was argued for through concepts of nationhood and the sovereignty of self-governing dominions, meaning an increasing independence from the crown and empire. Despite crown resistance, the right to exclude materialised ever more concretely through immigration controls, initially through seemingly covert racial exclusion and then based on nationality.

This chapter starts with an overview of British subjecthood, detailing its origins and initial complexities which shaped the exportation and latter developments with this status. Following patterns of migration, Section 2 continues to give a short overview of white migration from Britain across the empire to show the reach of white settlement and territorial control. These methods of settlement determined different legal governance and controls as well as relationships to, and displacement of, the Indigenous populations. With settlement and commercial developments came forced and indentured migration, which are explored in Section 3. The law controlled the lives of both enslaved and indentured people. Different legal classifications determined the rights and mobility that were permitted. Increasing free migration and settlement by those who had previously been enslaved and indentured populations became more common. The response by governed, but particularly self-governed states, was to develop the idea of the right to exclude along a global colour line, and so immigration laws developed. This is detailed in Section 4.

2.1. British Subjecthood

British citizenship came into being after the union of England and Scotland through the 1707 Act of the Union. Prior to this there were English subjects and Scottish subjects. Wales was annexed

³⁶⁰ Thompson (n 82).

to England through the Laws of Wales Act 1535 and 1542, with Wales under English legal jurisdiction from this point. There was separate Irish and British citizenship until the Act of the Union 1801, which formed the United Kingdom. Anyone born within Britain, which included England, Scotland and Wales, was considered a British citizen or subject, through the process of *jus soli*, or right of the soil. Anyone born outside of Britain to a British man within marriage could also claim British citizenship through *jus sanguinis*, or right of the blood. This could be claimed to two generations back. Devyani Prabhat explains this was a decisive act; '*Jus sanguinis* was used to supplement *jus soli* in order to expand British citizenry.'³⁶¹ Citizenship was operated through subjecthood, which was granted through the crown and required loyalty and allegiance to the crown. Everyone within the realm of the British empire was a subject of the British crown, without choice. However, in the seventeenth and eighteenth centuries claims to political rights within Britain were unequal, largely along lines of religion and place of birth. This had ramifications across the empire, impacting the boundaries of legal subjecthood.³⁶²

This definition was also pushed and adapted within the colonies, both for the convenience of the colonial administration as well as the subjects themselves.³⁶³ Prabhat argues this had two equalising factors, in theory at least. Firstly, it offered a transnational citizenship. Secondly, every person was equally a subject of the crown.³⁶⁴ However, this did not bear out in practice. Not only were these freedoms and privileges utilised unequally, but a hierarchy of subjecthood was enacted socially, culturally and legally throughout the empire. The distinction between aliens and subjects was also an evolving one which was not always stable or even clear. The two were often understood in opposition to each other; British subjects were subjects of the crown, and aliens were not. However, what was meant by both terms, how they were institutionalised and the impacts they had on British subjects, as well as aliens, were applied with 'flexibility and fluidity' across the empire.³⁶⁵ Subjecthood was both an inclusive and porous term, allowing the rights that could be claimed and responsibilities of the British crown to evolve and be applied differently across different territories and time periods of the empire.³⁶⁶

This arrangement was reinforced by case law. *Calvin v Smith* [1608] established that those born within the King's dominion were subjects of the crown, rather than aliens, and had the same

³⁶¹ Devyani Prabhat, *Britishness, Belonging and Citizenship: Experiencing Nationality Law* (Policy Press 2018) 9.

³⁶² For examples in India see Sudipta Sen, 'Imperial Subjects on Trial: On the Legal Identity of Britons in Late Eighteenth-Century India' (2012) 45 *Journal of British Studies* 532.

³⁶³ Hannah Weiss Muller, *Subjects and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire* (Oxford University Press 2017).

³⁶⁴ Prabhat, *Britishness, Belonging and Citizenship* (n 361) 10.

³⁶⁵ Weiss Muller (n 363) 9.

³⁶⁶ *ibid.*

rights – therefore an equality of rights – as those born in England.³⁶⁷ This applied to conquered territory and only if rights were extended by the crown.³⁶⁸ The ruling was specific to Scotland however, and did not provide clarity beyond this jurisdiction. Further, it specified ‘that they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, and no aliens’.³⁶⁹ This case determined three requirements to be met; a geographical and timely necessity, as well as ‘actual obedience’ of the parents.³⁷⁰ Subjecthood was thus made a passive obedience to the sovereign that could not be circumvented, rather than a relationship of rights and obligations from both crown and subject.³⁷¹ As such the rights attributed to subjecthood were an eligibility to privileges that were ‘subject to the whim of Parliament...these rights were neither automatic nor inalienable; they derived from Parliament’s gift.’³⁷² After the failed revolution against the monarch in 1649 and the Glorious Revolution in 1688, sovereign power was vested in Parliament, and later the House of Commons, not with the people.³⁷³ This established the peoples’ will to parliament, and parliament’s ability to give or remove rights through legislation. There was a vulnerability to British subjecthood, rather than inalienable rights of the people that would be granted through the French and American revolutions.³⁷⁴

Property rights were central during this period. In fact, these rights were the bedrock of the expansion of crown control and the creation of Britain, as detailed in the previous chapter. Dispossession of the Irish from their land to the crown began from the Elizabethan era and was completed by 1688. Irish land was given to the Ulster Scots to develop settlements by James I, establishing territorial expansion and control through migration and settlement which would be mirrored around the empire. Aliens were not entitled to own property in England, and the 1705 Alien Act classed the Scottish as aliens in England, thereby seizing control of Scottish owned property. Further, the English Navigation Acts excluded Scotland from England’s colonial trade. The Act of the Union in 1707, which dissolved the Scottish Parliament, returned property ownership rights and access to colonial trade to Scotland.³⁷⁵ Subsequent case law and legislation during the seventeenth and eighteenth centuries extended crown control and allegiance

³⁶⁷ For a detailed analysis of the impact of *Calvin v Smith* on rights within England and Scotland see Jeremy B Bierback, *Frontiers of Equality in the Development of EU and US Citizenship* (Asser Press 2017) s 2.2.

³⁶⁸ Greene (n 213) 24.

³⁶⁹ *Calvin’s Case* [1608] English Courts 7, 77 Coke Rep 377, 383.

³⁷⁰ *ibid* 339.

³⁷¹ Ann Dummett and Andrew GL Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfeld and Nicolson 1990) 62. This was the case until the Naturalisation Act of 1870 (s6), which stated voluntary naturalisation to another state made British subjects aliens 87.

³⁷² Kathleen Paul, *Whitewashing Britain. Race and Citizenship in the Postwar Era* (Cornell University Press 1997) 10.

³⁷³ Dummett and Nicol (n 371) 63.

³⁷⁴ *ibid* 63–4.

³⁷⁵ Anderson (n 18) 31.

extraterritorially. This is evident in cases such as *Craw v Ramsey* [1669], which established that subjects naturalised in the colonies were not subjects of England, but those naturalised in England were subjects in the colonies. This was due to the jurisdictional limit of the law in the colonies, as was seen in the *Somerset Case* in Chapter One, as well as the subordination of the colonies to England.³⁷⁶ This jurisdictional advantage helped maintain supremacy of England, and now Britain, through the empire. However, rights and relationship to British subjecthood were inconsistent across the thirteen colonies and Caribbean, as they were locally developed and granted.³⁷⁷ The consequence was myriad rights and statuses all under the name of British subjecthood.

2.2. White Settlement and Indigenous Dispossession

Land acquisition varied considerably around the empire and was carried out on an ad hoc rather than coordinated basis. Initial expeditions were made by traders, then missionaries, then white settlers.³⁷⁸ Indigenous populations ‘determined not only how many arrived and settled but what was their function.’³⁷⁹ An understanding of property rights of Indigenous populations was also central to how land was acquired. Though formally recognised in the case of Native Americans, property rights were not always respected. In practice and Indigenous land was trespassed, covertly purchased, acquired through weak treaties or the landscaped derogated by nearby white settlements which encouraged Native Americans to sell and vacate.³⁸⁰ The British colonial government recognised Native Americans property rights and bought land from them, along with white settlers. Until the claim of *terra nullius* in Australia, even though many were conducted dishonestly, there had always been some acknowledgement of proprietary rights with transactional exchange of land. Australia, and later British Columbia, were considered *terra nullius*, land belonging to nobody, and therefore were claimed outright rather than through treaty negotiations or purchase from the Indigenous populations. The Indigenous population of Fiji and Aotearoa (New Zealand) were recognised as the owners of their land by the British, who transformed the land tenure system into recognisable English property systems. A treaty was made between the Māori of Aotearoa and the British, but it handed the British much of the land. Hawai’ians, supported by white advisors, transferred their land tenure systems which facilitated a considerable sale of that land to white people, while Tongans prevented any of their land being sold. With independence, the United States continued to expand territorial control beyond the thirteen colonies through similar

³⁷⁶ Dummett and Nicol (n 371) 76.

³⁷⁷ Hannah Weiss Muller (n 228) 31; Anderson (n 18) 30; Dummett and Nicol (n 371) 76.

³⁷⁸ Banner (n 229) 7.

³⁷⁹ Harper and Constantine (n 345) 113.

³⁸⁰ Banner (n 229) 11–12.

methods. Alaskans held some form of land rights and land was purchased through treaties with the Indigenous tribes in present day Oregon and Washington. However, California was later treated as *terra nullius* by the United States.³⁸¹ This all took place through different legal means throughout the eighteenth and nineteenth centuries.

To ensure white ownership of land, the Indigenous populations needed to be removed from their lands. Failed attempts of annihilation lead to assimilation policies, and classifications through blood quantum were practiced. This neutralised Indigenous sovereignty and enabled the taking possession of land in settler colonies.³⁸² Assimilation practices included removing people from their land to reservations or missionaries, removing Indigenous children from their families and forced miscegenation. Consequently, Indigenous peoples' cultures, languages, traditions and knowledge were lost to a considerable degree. This weakened Indigenous land claims, which secured white land claims.

Migration from Britain to the dominions was considered mutually beneficial for Britain and the receiving country to boost the economy in the dominions and therefore trade with Britain. This was encouraged through government schemes into the twentieth century, such as the Emigration Settlement Act 1922 and 1937, which offered up to £3million and £1.5million within a fifteen-year period of financial support to people wishing to emigrate from Britain to the dominions. Schemes were set up when there was high unemployment to emigrate the surplus population.³⁸³ However, these were not particularly successful, and the Great Depression limited economic opportunity and therefore migration. Further, birth rates were falling in both Britain and the dominions, and so the reduction in population would be harmful to Britain.³⁸⁴ In 1938, the Overseas Settlement Board recommended the dominions look beyond Britain for emigration, but 'preferably from those countries whose inhabitants are sprung originally from the same stock as ourselves and who have our outlook in many directions'.³⁸⁵ Failing this, 'assimilable types' from northern Europe, opening imperial migration up to the – white – international arena.³⁸⁶ Immigration laws were in place to ensure selective white immigration and settlement into the dominions. This will be discussed in detail in Section 4.2.

³⁸¹ *ibid* 2–5.

³⁸² Alana Lentin, 'A Process, Not an Ontology; a Structure, Not an Event: Race, Coloniality and Property' (*Alana Lentin.net*, 10 September 2018) <<https://www.alanalentin.net/2018/09/10/a-process-not-an-ontology-a-structure-not-an-event-race-coloniality-and-property/>> accessed 28 October 2020.

³⁸³ D. P. E. and G. L. G., 'Migration within the Empire' (1945) 22 *Royal Institute of International Affairs* 3.

³⁸⁴ *ibid* 4.5.

³⁸⁵ *ibid* 8.

³⁸⁶ *ibid*.

There was not only white migration to the ‘settler’ territories, but also to the colonies which failed to become lasting self-governing white territories. There is often a distinction made between settler colonial states and colonies with settlers, but as Wolfe argues, ‘invasion is a structure not an event’, and the process of invasion and domination of governance, law, land and labour was continually structured throughout the British empire, and continues to be after its demise.³⁸⁷ While Indigenous elimination and assimilation to weaken land claims and take land was the mode of operation in the larger settler colonies, the smaller white settler colonies in Africa, Polynesia and the Caribbean relied on the labour of the Indigenous or migrated populations and set up segregated systems of labour and home. The white populations were predominantly government officials, businessmen or contracted workers who were there to work rather than settle.³⁸⁸ Though settler populations did grow, they never became the majority. While extractive trading in Africa had been in place for two centuries, it was not until the late nineteenth and early twentieth centuries that Britain held political control in the African British protectorates, and with it came some white migration. While the white settlement was for a relatively brief period, the impact of it was utterly transformative. The British government made farmland in Uganda and the Kenyan uplands exclusively available to white migrants, particularly returning service men after World War One. There was also government encouragement for white settlement in South Rhodesia, with the empire Settlement Act securing financial support for suitable settlers which had only been emigrees to the dominions till 1925.³⁸⁹ Southern Africa had the largest white settlement, with indentured migrants from Scotland settling in the Cape in South Africa from 1817. To outnumber and gain more power than the Boer, the British government increased migration to South Africa.³⁹⁰ Areas of settlement became strategic posts in the empire, such as the Cape, to travel to the dominions rather than settle there. Through British government emigration assistance white migration peaked and waned, along with the opportunities of the extraction industries. There was always a challenge to white rule, and independence in these colonies was achieved before substantial white settlement, which led to its significant decline.

As well as employment segregation of white management over Black labour, living quarters and civil rights were segregated through racial categorisation. A ‘spatial reordering’ was established when land was claimed by the crown.³⁹¹ Indigenous sovereignty and land rights were denied and

³⁸⁷ Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Events* (304th ed. Edition, Continuum 1999) 2; Chris Youé, ‘Settler Colonialism or Colonies with Settlers?’ (2018) 25 *Canadian Journal of African Studies / Revue canadienne des études africaines* 69.

³⁸⁸ Harper and Constantine (n 345) 111.

³⁸⁹ *ibid* 117–119.

³⁹⁰ *ibid* 123.

³⁹¹ Patrick McAuslan, ‘Property and Empire: From Colonialism to Globalization and Back’ (2015) 24 *Social & Legal Studies* 339, 345.

occupation was licenced back at the will of the crown. White settlers were granted stronger land rights through freehold or long-term leasehold. This prevented access into the new foreign land market, and determined where Indigenous populations could live, meaning this spatial reordering, or segregation, took place along racial lines. In Singapore, for example, the best land was reserved for European traders and the rest of the population was contained within racially divided allotments in the city. Each group was appointed a Captain and assistance to represent and stabilise the group on behalf of the government. This became the basis for indirect rule, which was imported to Malaya (Malaysia) and in some parts of Africa.³⁹² While everyone within a territory would have to abide by European laws, as the Indigenous laws and institutions were not recognised, ‘only those “civilized” would have access to European rights.’³⁹³

The term *settlement* suggests a gentle and a concluded process. It does not acknowledge the violent removal of Indigenous peoples from their homelands, dispossessing and replacing entire systems of sovereignty, governance and law while populating the land with white migrants to hold control.³⁹⁴ That is, if Indigenous people are part of the colonial and national narrative at all. As Aileen Moreton-Robinson explains, a narrative of victimisation unfolds in colonial Britishness. It is the landscape that must be ‘conquered, claimed, and named’ by the settlers, who are victims of the brutal and harsh landscape.³⁹⁵ In this telling, the methods of white possession of the land are a valorised tale from which the Indigenous peoples are absent. This is prevalent in colonial Britishness as well as the discourse around nation making of white colonial settlements. Yet the white possession and the Indigenous dispossession of that same land cannot be seen as separate in the making of these settler nations.³⁹⁶ This is evidence of a racial aphasia, which ‘disavows intent’, and moves towards a strategic unknowing by obscuring knowledge, racial literacy and the contemporary relevance of what has come before.³⁹⁷ It is a production of an ignorant history with denial at its core. By omitting Indigenous dispossession, settler societies minimised or denied the bloody beginnings and shaky foundations on which they were built, creating a new national narrative.

Indigenous populations in Australia were either initially or subsequently ascribed as being in a state of nature. By being part of nature Indigenous peoples could not and did not possess

³⁹² Robert Home, *Of Planting and Planning: The Making of British Colonial Cities* (Taylor & Francis Group 2013) 129.

³⁹³ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (First Edition, James Currey 1996) 16.

³⁹⁴ Razack (n 161) 2.

³⁹⁵ Aileen Moreton-Robinson, *The White Possessive. Property, Power, and Indigenous Sovereignty*, vol 17 (University of Minnesota Press 2015) 29.

³⁹⁶ Moreton-Robinson (n 205).

³⁹⁷ Thompson (n 82) 135; Sedgwick (n 77); Ann Laura Stoler, ‘Colonial Aphasia: Race and Disabled Histories in France’ (2011) 23 *Public Culture* 121.

nature and therefore could not trade or negotiate with the white man.³⁹⁸ Locke's influence is evident in this dynamic. As Moreton-Robinson argues, this is evidence of patriarchal white possession. Subjective possession occurs through an individual functioning as a legal subject, citizen or in the market economy. In doing so, one can extend possession over that which does not demonstrate, and therefore hold, its own will and can therefore be possessed. This internalised understanding of both individual possessiveness, as well as externalising property rights through oneself comes from a white subjecthood developed in Britain in the early colonial period, as discussed in Chapter One.³⁹⁹ By not recognising Indigenous sovereignty, colonial Britain exercised white possession over Indigenous land and people. Moreton-Robinson argues this is the basis for the claim of *terra nullius* in Australia in 1770. I argue that this analysis supports my critique of Locke and the centrality of property within the legal subject as well as territorial expansion. The next section will argue how British subjecthood fractures along racial lines and country of origin. It will do this through an analysis of unfree migration. This will demonstrate how the law enables and disables mobilities of British subjects around the empire and in Britain.

3. Unfree Migration

Indentured workers from England were sent or contracted to the Americas for plantation work at the beginning of the plantation industry. Australia was initially intended as a penal colony, where not only surplus populations were to be sent, but also the most unwanted. Despite the expulsion from Britain, their whiteness prevented them from being the most rejected by the new society. 'Colonies elevated the European proletariat to the property of whiteness by making at least the semblance of privileges and power, customs and behaviour available to them.'⁴⁰⁰ Forced exportation of white people convicted of vagrancy, theft and prostitution meant 'the poor could be turned into the building blocks of Empire'.⁴⁰¹ However, the vast majority of forced migration was through the capture, purchase and transportation of people from Africa around the European empires. The trade in enslaved people was a key building block in the economy and trade of these empires, for example in supplying labour in plantations. With the abolition of slavery across the British empire, excluding the territories controlled by the British East India Company, an alternative was needed to maintain these economies, which meant the plantations, of the colonies. The British East India Company recommended a system of indentured labour. Clear distinctions needed to be made between enslaved African labour, and indentured labour, given its very recent

³⁹⁸ Moreton-Robinson (n 205) 117.

³⁹⁹ *ibid* 113.

⁴⁰⁰ David Theo Goldberg, *The Racial State* (Blackwell Publishers 2002) 172.

⁴⁰¹ Anderson (n 18) 31.

abolishment. Bonded labourers were recruited and shipped to the colonies where they worked on a plantation for a set number of years. In return they were promised wages, a small bit of land and/or return to their place of origin.

Research has focused on the Atlantic slave trade route from West Africa to the Americas, and indentured labour from India and China. However, the slave trade was global with routes transporting people both in and out of different regions, particularly in the Indian Ocean. Further, Indian indentured labour was foreshadowed by Indian slavery to other territories in South and South East Asia as well as East and South Africa. This section will touch on this broader overview of the slave trade, and what happened after the abolition of slavery and introduction of the indentured system in the British empire. It will show in detail the legal developments which enabled differing treatments of people based on race, an insight into how racialised people were treated in the metropole and the fracturing of British subjecthood. The purpose of this is to demonstrate there is a genealogical connection between the mobilities and legislations of the unfree labour of the empire and the mobilities and legislations which developed in Britain in the twentieth century, which will be detailed in the next chapter.

3.1. Slavery

As a conservative estimate, England is thought to have transported 10,535-12,539 people across the Indian Ocean between 1629-1789 and 3.1 million Africans across the Atlantic between 1640-1807.⁴⁰² Due to the horrendous conditions it is estimated 2.7 million arrived in the British administered Americas and Caribbean.⁴⁰³ Neither the enslaved nor their children were recognised as subjects or aliens and could not be naturalised. Enslaved people were legally treated as objects or chattel, with the exception under criminal law when treated as a legal person.⁴⁰⁴ As with convicted white people, criminality was often a cause for forced migration. People from the Indian subcontinent with criminal convictions were enslaved and forcefully migrated by British authorities during the eighteenth and early nineteenth centuries, predominantly to British possessions across the Indian Ocean.⁴⁰⁵ People were captured and kidnapped, sold and transported in horrendous conditions from West Africa across the Atlantic Ocean to the Caribbean and thirteen colonies, later the United States, but also internally within British controlled Africa, across the Indian Ocean from East Africa to South Asia, from South and South East Asia to East and

⁴⁰² Richard B Allen, 'Satisfying the "Want for Labouring People": European Slave Trading in the Indian Ocean, 1500-1850' (2010) 21 *Journal of World History* 45, 63-64; The National Archives (n 349) 4.

⁴⁰³ The National Archives (n 349).

⁴⁰⁴ Dummett and Nicol (n 371) 74.

⁴⁰⁵ An estimated 90,000 Indians were transported as convict labour during this time period. See Allen (n 402) 69.

South Africa, as well as within South and South East Asia. They were bought to work as sailors, on plantations, in domestic service and factories.

The inevitability between Blackness and slavery was not so entrenched at the beginning of the British colonies in America.⁴⁰⁶ From 1619 West Africans and Europeans worked and lived alongside each other as bonded labourers and indentured servants to pay off their debt and passage.⁴⁰⁷ The first comprehensive slave code was legislated in Barbados in 1661, which established a distinction between Christian servants and Negro slaves and thus consolidated the racial property of the enslaved.⁴⁰⁸ Jamaica borrowed from Barbados for their slave code, and South Carolina from Jamaica.⁴⁰⁹ By as early as 1630 the treatment and punishment of African workers in Virginia was worse than that of their white counterparts. In 1661 slavery was legally institutionalised and in 1662 children born to enslaved women inherited their status. In 1669 enslaved Africans were legally defined as property, and in 1680 freedom of assembly and mobility was denied.⁴¹⁰ ‘The dominant paradigm of social relations, however, was that although not all Africans were slaves, virtually all slaves were not white. It was their racial otherness that came to justify the subordinated status of Blacks.’⁴¹¹ Thus, colour of skin and country of origin became determining factors in social and legal systems of classification. It became the signifier for owning or being property, of freedom or enslavability.⁴¹² As these freedoms and unfreedoms became more tightly demarcated, physical and cultural descriptors set about ensuring these boundaries became entrenched along racial lines, as did the policing of these differences.⁴¹³

Initially favoured as it was cheaper, white indentured labour was reduced, creating a greater reliance on enslaved Africans and the transatlantic system to grow the plantations. This was in part due to the threat posed to the elite social order by white indentured workers who, freed at the end of their contracts, allied themselves with Black exploited workers and slaves.⁴¹⁴ In withdrawing this specific exploitation of white indentureship the white elites could evoke the shared ancestral rights of Englishmen among white colonists in the eighteenth century.⁴¹⁵ With this, the universal rights that developed first in Virginia were made possible as universal white rights because the white

⁴⁰⁶ Harris, ‘Whiteness as Property’ (n 196) 1716–1717.

⁴⁰⁷ J Kēhaulani Kauanui, ‘Tracing Historical Specificity: Race and the Colonial Politics of (In)Capacity’ (2017) 69 *American Quarterly* 257, 259.

⁴⁰⁸ Edward B Rugemer, ‘The Development of Mastery and Race in the Comprehensive Slave Codes of the Greater Caribbean during the Seventeenth Century’ (2013) 70 *The William and Mary Quarterly* 429, 431.

⁴⁰⁹ For details of the 1684 Jamaica Slave Act see Rugemer (n 408).

⁴¹⁰ Kauanui (n 407) 260–262.

⁴¹¹ Harris, ‘Whiteness as Property’ (n 196) 1717.

⁴¹² *ibid.*

⁴¹³ Wolfe (n 32) 65.

⁴¹⁴ *ibid* 67; Kauanui (n 407). for example of the Bacon's Rebellion.

⁴¹⁵ Wolfe (n 32) 67.

proletariat were not so severely punished. That was reserved for those subjected to the system of slavery.

During the War of Independence (1775-1783) the English promised freedom to those who ‘desert[ed] their rebel masters’ and fought with the English, though not to those already owned by English loyalists.⁴¹⁶ After losing the war, the newly freed formerly enslaved men were left to negotiate their fate. Around 14,000 travelled to the Caribbean, Canada and England where they were greeted with poverty and destitution. Although in England they were able to access support for their loyalty during the war, as refugees, few were able to avail from it and the literacy requirement excluded many.⁴¹⁷ Many were forced into homelessness, and those who were not were treated as such due to their race.⁴¹⁸ Initially to support East Indian seamen, but realising the ‘Black poor’ were greater in number, the Committee for the Relief of the Black Poor was set up. With little economic opportunity in England, and therefore no way out of destitution the committee, heavily supported by the government, turned to their deportation to Sierra Leone or Barbados. This was not the first effort to deport Black people from Britain. As early as 1601 Queen Elizabeth I declared a ‘negro problem’ and issued a proclamation for deportation of ‘negroes and Blackmores’.⁴¹⁹

Rather than easing the difficult realities of settlement, either in England or once removed, more attention was given to the removal of the increasing number made eligible for deportation. This included considerable funds which were made available. For example, limited consideration was given to the threat of re-enslavement at either of the deportees proposed destinations. Sierra Leone was promoted as a self-sufficient African settlement colony for ‘black persons and people of colour, Refugees from America, disbanded from his Majesty’s Service by sea or land, or otherwise distinguished objects of British humanity’.⁴²⁰ This broadened the scope from the Black poor to anyone not white. There were 20,000 people eligible for deportation under this scheme, including ex-soldiers and sailors, runaway and former slaves, musicians and domestic servants who were Indian as well as Black.⁴²¹ Those onboard included “undesirable” white women, who were most likely prostitutes, and were drunkenly married to Black men on the ship, forcefully on both sides.⁴²² Threatened with the Vagrancy Act, and therefore prison, the first boats set sail to Sierra

⁴¹⁶ Gretchen Gerzina, *Black London. Life before Emancipation* (Dartmouth College Library 1995) 134.

⁴¹⁷ For individual accounts see *ibid* 5.

⁴¹⁸ *ibid* 138.

⁴¹⁹ Vilna Bashi, ‘Globalized Anti-Blackness: Transnationalizing Western Immigration Law, Policy, and Practice’ (2004) 27 *Ethnic and Racial Studies* 584, 587.

⁴²⁰ Gerzina (n 416) 147.

⁴²¹ Dummett and Nicol (n 371) 79.

⁴²² Gerzina (n 416) 160.

Leone with 643 people in 1787. The conditions were likened to those of slave boats, and many did not make the journey due to the conditions and death by suicide. Only two thirds of people survived beyond three months after settlement.⁴²³ Despite this, those who had travelled to the British territory of Nova Scotia after the War of Independence, still having not received their promised allotment of land, travelled to London, and then went on to join the settlement shortly after.

Atlantic slave trading extended to East Africa and plantations were established in the southern Indian Ocean islands.⁴²⁴ Enslaved men, freedmen and freemen from India, East Africa and Arab coasts worked together on trading ships leaving these ports. Despite this, clear distinctions were evident in the forced mobility of those enslaved and the re-enslavement of those freed. Those enslaved were made to be flexible and mobile as domestic and commercial workers as well as skilled sailors, adding value for those who owned them.⁴²⁵ This lasted well beyond the abolition of slavery in the British empire.⁴²⁶ Other European empires were also heavily involved in the slave trade, and when territories were acquired by different empires, such as the islands of Mauritius and Réunion from France to Britain in 1814, the 133,000 population of enslaved people were part of the possession transfer.⁴²⁷ Richard Allen argues that the pattern of slavery routes developed across the Atlantic and Indian Oceans lent themselves to routes for indentured labour that took over plantation labour.⁴²⁸ This will be discussed in the following section.

3.2. Indentured Labour

The trading of enslaved people was abolished in 1807, but until slavery as a system was abolished in 1833 the people already enslaved could remain so.⁴²⁹ After abolition the engagement of people from the African continent was greatly reduced, though not entirely stopped. British run colonies were bound by the abolition, though territories under control of the East Indian Company were not. The plantations needed labourers to maintain the flow of trade and capital that was dependent on the industry of slavery. The workers on the plantations were either those now freed from slavery, or increasingly newly indentured, or contracted people from India and China, and to a

⁴²³ Bashi (n 419) 588; Gerzina (n 416) 165.

⁴²⁴ Janet J Ewald, 'Crossers of the Sea: Slaves, Freedmen, and Other Migrants in the Northwestern Indian Ocean, c. 1750-1914' (2000) 105 *The American Historical Review* 69, 77.

⁴²⁵ *ibid* 90.

⁴²⁶ Enslaved sailors maned boats from the Jidda port until 1923, which was a British Protectorate after the signing of the Treaty of Darin in 1915. See *ibid* 79.

⁴²⁷ Allen (n 402) 56.

⁴²⁸ *ibid* 70.

⁴²⁹ Slave Trade Act; Slavery Abolition Act 1833.

lesser extent from West Africa and the Pacific.⁴³⁰ Indentured labour replaced the slave labour of the plantation systems and is largely considered an extension or new kind of slavery.⁴³¹ The indentured system was implemented more broadly than plantation slavery had been and included establishments in Malaya, Mauritius, Fiji, Natal, Kenya, Tanzania, Uganda and Queensland. It was made possible by creating an exception within, or dividing British subjecthood to legislate the mass movement of “free” labour, as opposed to the unfree labour of slavery.⁴³²

Though Africa was ‘off-limits’ for indentureship, when illegal slave ships were intercepted by Atlantic patrollers after abolition the people enslaved were not returned home, but transported to British dependencies in the Caribbean, South Africa, Mauritius and the Seychelles till as late as the 1860s.⁴³³ Due to the decline in productivity in the Caribbean, Britain went back on the decision to not recruit from Africa. Sierra Leone was considered a place of liberated Africans due to its destination for those “freed” when intercepted on the slave ships and for those deported from England, as detailed above. It was reconsidered as a place of recruitment to the sugar plantations. This was justified as an opportunity for emigration that would offer education in advanced agricultural techniques and Christianity, as well as opportunities for Black agency when those who emigrated returned to Africa and spread their learnings. It also hoped to reduce the financial burden of Sierra Leone on Europe as well as prove a decisive rupture from the slave trade and demonstrate the British sugar colonies as ‘tropical showpieces’.⁴³⁴ However, Sierra Leoneans were not motivated by this, given the country’s new establishment and strong ties among the new communities in the country. Scepticism of the opportunities presented by the British also prevailed.⁴³⁵

It was for this reason that from 1834 attentions refocused to India, where people had been emigrating from in increasing numbers. Between 1834 and 1920 1,474,740 people were recruited through the indentured scheme and laboured across the British empire, with Indian workers making up 85 percent.⁴³⁶ The first legislation to regulate the mass movement of Indian indentured workers was ratified in 1838 by the British parliament, crossing over tightly with the end of the

⁴³⁰ Emmer (n 351).

⁴³¹ Hugh Tinker, *By Hugh Tinker A New System of Slavery: Export of Indian Labour Overseas, 1830-1920* (New edition, Hansib Publications 2011).

⁴³² Mongia (n 357) 197.

⁴³³ William Greene, ‘Plantation Society and Indentured Labour: The Jamaican Case, 1834-1865’ in PC Emmer (ed), *Colonialism and Migration; Indentured Labour Before and After Slavery*, vol 6 (Martinus Nijhoff Publishers 1986) 167; Monica Schuler, ‘The Recruitment of African Indentured Labourers for European Colonies in the Nineteenth Century’ in PC Emmer (ed), *Colonialism and Migration; Indentured Labour Before and After Slavery*, vol 6 (Martinus Nijhoff Publishers 1986) 128; Allen (n 402) 71.

⁴³⁴ Greene (n 433) 170.

⁴³⁵ See Schuler (n 433).

⁴³⁶ Harper and Constantine (n 345) 150.

abolition of slavery and apprenticeship system. There was no legal precedent for the regulation of movement of free subjects, but parliament felt it must take interest in the ‘well-being of those who might be tempted to try their fortune by engaging as labourers in other countries’, especially given the ‘class of persons so engaging themselves’.⁴³⁷ This was regulation disguised as paternalism, with the motivation being to regulate poorer British subjects who were exercising their free movement to other parts of the empire, and to ensure the regulated maintenance of the plantation economies. This regulation created an exemption or exception to British subjecthood and the equal free movement entailed within it, enabling extreme control over the movement between territories as well as within territories during the indentured period.

Concerns over the transparency of the recruitment process meant measures were put in place to try to ensure a free and informed choice was made by the prospective emigree from India. However, threats, coercion and misinformation about travel, pay and labour conditions were stronger methods of recruitment. Labourers often did not know where they were going or how long it would take before they set off. Land theft, famine, debt, lack of employment opportunities and caste discrimination were behind peoples’ decisions to leave.⁴³⁸ In the former slave plantations, such as Jamaica, attitudes and practices largely remained, with cramped living quarters and white overseers. Morale was low with alcoholism and suicide prevalent among indentured labourers, which eased when a higher quota of women were recruited. Mobility was restricted on the island through a pass system which was enforced through fines, imprisonment and violence.⁴³⁹ New plantations were not drastically better, with the Raj banning recruitment to multiple destinations due to the working conditions there. For example, a ban on recruitment to Natal in 1872 was only lifted after it outlawed flogging, legislated better medical provisions and appointed a protector for the indentured workers.⁴⁴⁰ This suggests a tension between the treatment of subjects and the economic needs of the British administrations of different colonies.

The plantation economies of British Guiana (Guyana) and Trinidad were sustained by Indian and Creole contract labour after abolition. Mauritius was also a plantation island with 6,000 enslaved people in 1800 and 25,468 indentured Indian labourers in 1834, making the island the dominant sugar exporter in the empire.⁴⁴¹ While indentureship was initially used on existing sugar plantations, new sugar plantations grew threw this scheme. Indian indentured labour established

⁴³⁷ Mongia (n 357) 197.

⁴³⁸ PC Emmer, ‘The Meek Hindu; the Recruitment of Indian Indentured Labourers for Service Overseas, 1870-1916’, *Colonialism and Migration; Indentured Labour Before and After Slavery*, vol 6 (Martinus Nijhoff Publishers 1986); Harper and Constantine (n 345) 161.

⁴³⁹ Harper and Constantine (n 345) 163.

⁴⁴⁰ *ibid* 164.

⁴⁴¹ *ibid* 152.

sugar plantations in Fiji and Natal as well as tea plantations, mines and railways in South and East Africa, tea and coffee plantations in Ceylon (Sri Lanka), rubber farms in Ceylon and Malaya (Malaysia) and rice mills and field labour in Burma (Myanmar).⁴⁴² New South Wales' request for indentured labour from India was vetoed by the Colonial Office, and so it turned to the Pacific Islands.

Despite the transformative potential of abolition, the plantation society model continued as the method for achieving the empire's view of commercial progress. This was supported by colonial reformers and abolitionists alike. To ensure both the economic advantages as well as the cultural and religious paternalism, the 'concentration of colonial populations and the maintenance of hierarchical social and economic order' was seen as the way to proceed, including the English system of private property.⁴⁴³ Jamaica was a testing ground for what would come after abolition. The recruitment of labour on different schemes and contracts was also racialised. Europeans were recruited as tradesmen, engineers and managers to oversee the plantation workers who were Black freedmen from the islands and the United States, as well as indentured workers from India.⁴⁴⁴ They were also recruited to effect land segregation through land occupation and limiting labourers' movement. For example, in Jamaica white settlers inhabited vacant highlands where freedmen would hide to flee plantation labour.⁴⁴⁵

It was not until the Indian Emigration Act XXI 1883 that a definition of emigration or to emigrate was legislated and it did so narrowly. "Emigrate" and "emigration" denote the departure by sea out of British India of a Native of India under an agreement to labour for hire in some country beyond the limits of India other than the island of Ceylon or the Straits Settlements'.⁴⁴⁶ This labour was interpreted as manual, and therefore meant for a particular class.⁴⁴⁷ Again, this created a category apart from British subjecthood which could be restrictively controlled in order to maximise capital output and minimise personal civil and economic potential. This was the definition of emigration until 1915. Recruitment under indentured contracts ended in 1916 due to domestic pressure. It had become part of a broader point of national pride tied up with the exclusion of free Indian migration to white settler nations, where wages were higher, through specifically targeted immigration policies.⁴⁴⁸

⁴⁴² *ibid* 153.

⁴⁴³ Greene (n 433) 164.

⁴⁴⁴ *ibid* 168.

⁴⁴⁵ *ibid*.

⁴⁴⁶ Indian Emigration Act 1883 s 6(1).

⁴⁴⁷ Mongia (n 357) 198.

⁴⁴⁸ Emmer (n 438) 188.

In addition to indentured emigration, South Asian sailors, or lascars, were also defined in British legislation in a way that limited their entitled rights as British subjects. Maritime labour was more heavily regulated by Westminster and legislation was passed to limit the population of people of colour from across the empire in British port cities.⁴⁴⁹ The Merchant Shipping Act 1823 obliged employers to repatriate Indian contracted sailors under their employment, putting the responsibility on the shipping companies to ensure the return of their Asiatic employees. Companies had to first provide a list of all the Asiatic sailors to the customs authorities and were liable to fines if their employees did not return. The East India Company was granted authority from the British government to hire sailors on Asiatic Articles, which gave different employment agreements to European sailors. This included lower wages and employment for a term of years rather than by voyage, meaning they were unable to remain in Britain.⁴⁵⁰ The East India Company was responsible for the repatriation of the Asiatic sailors, and the shipping company was charged a levy for this.⁴⁵¹ Following the Registration of Aliens Act 1836, aliens needed identification upon arrival and masters of vessels needed to provide a list of aliens on board their vessels. While the Act did not prevent entry or place any further restrictions beyond port of entry, the intention of the Act was for the collection of immigration data.⁴⁵²

More broadly, in 1888 the Select Committee on Emigration and Immigration (Foreigners) was appointed and commissioned to investigate laws restricting destitute immigration in the United States and other nations, and the extent, effect and desirability of similar laws in Britain.⁴⁵³ Legislation was recommended, but it was put forward that it may become necessary in the future. The Committee concluded that ‘the better class of immigrants only arrive in transit to other countries, but the poorest and worst remain here’, and noted the lack of accurate data.⁴⁵⁴ The latter concern led to the enforcement of lists and registration of port arrivals as per the 1836 Act, but again it was not implemented fully and records were only kept for five years, causing confusion rather than accurate data.⁴⁵⁵

The blurring between subject and alien was furthered with the Special Restriction (Coloured Alien Seaman) Order 1925. The Act placed the burden of proof through documentation on Black and Asiatic seamen. The likelihood of them holding documentation was very low, which

⁴⁴⁹ Ewald (n 424) 75.

⁴⁵⁰ *ibid* 76.

⁴⁵¹ Ian RG Spencer, *British Immigration Policy Since 1939: The Making of Multi-Racial Britain* (1 edition, Routledge 1997). 5

⁴⁵² Alison Bashford and Catie Gilchrist, ‘The Colonial History of the 1905 Aliens Act’ (2012) 40 *The Journal of Imperial and Commonwealth History* 409. 412

⁴⁵³ *ibid*.

⁴⁵⁴ *ibid*.

⁴⁵⁵ *ibid*. 413

was of course the point. Without proof, the rights and privileges entitled through subjecthood were refused, meaning subjects were barred from entry and settlement in Britain and if found to do so were subject to deportation.⁴⁵⁶ Blurring between subjects and aliens was an effort to keep Britain white and restrict access to welfare.⁴⁵⁷ These legislations fractured British subjecthood through the legalised exceptions and exclusions from equality of entry and settlement of racialised subjects in Britain. Outside of these exceptions people from governed territories could move freely around the empire, though they were small. This was becoming a problem for the self-governing territories and restrictions were developed and implemented more wholesale.⁴⁵⁸

4. The Contradiction of Free Migration within the Empire

Formally, equality of subjects was a core principle of the British empire, as detailed in Section 2.1. While the Colonial Office oversaw the whole empire, different territories had different levels of oversight. The belief was self-governance was only possible by the white race, and the non-white races needed religious and civic tutelage to work towards becoming civilised societies. However, it was thought there would always be difference, and as such, multi-racial societies were not possible. This was the white man's burden.⁴⁵⁹ After the end of explicit systems of management and control of people from governed territories, as demonstrated through the analysis of slavery and indentureship above, the disparate realities and contradictions found within British subjecthood meant that its exceptionalism became hard to maintain. Free movement around the empire was possible outside of the indentured system, and not just for Europeans. However, it became increasingly limited for subjects of colour. It was not supported by government subsidies and treatment in the receiving territories could vary drastically depending on race and country of origin. This was also the case for people who were not repatriated after their indentured contracts ended. As such, self-governing white territories legislated their own immigration laws for the purposes of keeping the territories white.

This section will discuss how treatment of people differed when they migrated or settled in another country depending on their country of origin, and how mobility and country of origin became further entwined. This will be briefly discussed within governed or dependent territories, and then more thoroughly within self-governed territories. This is due to the development of immigration laws and the impact these laws had on the global racial order as well as in Britain,

⁴⁵⁶ El-Enany, *Bordering Britain* (n 23) 67.

⁴⁵⁷ *ibid* 68.

⁴⁵⁸ Mongia (n 357).

⁴⁵⁹ Rudyard Kipling, 'The White Man's Burden' [1899] *McClure's Magazine*.

which will be discussed in the second section. That the colonial office held and exercised the power to veto who could enter and settle in the self-governing territories was seen as contradictory to the equality of British subjecthood, specifically the equality of rights of (white) Englishmen to self-govern.⁴⁶⁰ The development of laws of to internal and external border controls of British territories will be argued as an exercise of white sovereign control and the large-scale development of immigration laws.

4.1. Restriction of Free Movement

Dominion status was afforded to the British North American provinces in 1867, through the British North America Act passed in London. This brought about the federation of Canada. The Australian identity became a more cohesive and independent identity by the late 1800s and became a federation in 1901. While not gaining federal independent status until later, New Zealand and South Africa were also self-governing dominions. This meant they had less oversight from the Colonial Office than governed dominions, however, legislation still had to be approved by Westminster. When it came to exercising sovereign control over immigration, the dominions were united in challenging colonial authority and exerting independence from London.

Free Indian emigration was again the most prominent, following the same routes and destinations as their indentured predecessors to South and South East Asia, South and East Africa as well as the Caribbean. While most indentured workers were entitled to a return passage home, planters would encourage further contracts to avoid the cost of new labour migration and their obligation to funding the return of labourers. Many remained after their contracts expired and some were able to become independent small holders, particularly on sugar plantations. Almost all free Indians in Fiji, Mauritius and Trinidad had been indentured labourers.⁴⁶¹ Some who remained in Fiji were able to gain land and manage small holdings due to bankruptcies in the 1880s, producing 30 percent of the islands sugar by 1918. The Indian population was level with the Fijian population, though relations were tense.⁴⁶² As free people, the Indian population was governed strictly with pass laws, vagrancy laws and high taxes. Former contractors were liable for a monthly tax if unemployed and were imprisoned if it went unpaid in Mauritius.⁴⁶³ Outside of the indentured system, free Indians were seen as competition within business and these laws were a

⁴⁶⁰ Lake and Reynolds (n 355) 124.

⁴⁶¹ Harper and Constantine (n 345) 156–7.

⁴⁶² *ibid* 165.

⁴⁶³ *ibid* 164.

means to reduce the competition, keep free subjects within the indentured system or to return to them to India.

In Natal the white population were terrified of the possibility of India rule over them, and therefore of unindentured, free Indian migration to the country.⁴⁶⁴ While the two populations were almost even in 1893, the Indian population was legally suppressed to stop any perceived threat.⁴⁶⁵ Initially arriving through indentured contracts, after five years of indentureship in Natal a labourer could remain as a free Indian, and from 1894 Indian labourers could apply for a grant of crown land from the governor of Natal after ten years of labouring in the colony.⁴⁶⁶ The Indian population defied official resistance to their settlement through a ‘refusal to be temporary’ and remained despite limited access to education, housing, mobility, marriage and a £3 tax from 1895.⁴⁶⁷

Around this time legislative measures were being pushed to further restrict the rights of free Indians. The Franchise Law Amendment Bill intended to remove the voting rights of anyone who had not held the right of self-government, meaning elected democracies, in their country of origin. The effect of this would be the removal of voting rights of the Indian community in Natal as India was ruled by the British Indian government.⁴⁶⁸ Mahatma Gandhi led the Indian community in resistance to the Bill, highlighting the hypocrisy in a letter to the Viceroy of India that ‘any British subject having the proper property qualifications is entitled to vote irrespective of caste, colour or creed’ in England.⁴⁶⁹ Gandhi’s campaign against this Bill held the principle of equality of British subjects, irrespective of race, at its centre, quoting this promise in Queen Victoria’s Proclamation of 1858, also known as India’s Magna Carta.⁴⁷⁰ The Colonial Office made it clear that self-government for all was never the intention of the empire’s promise, never mind collaborative or mixed rule.⁴⁷¹ The belief that self-government was not only the privilege of European communities, but that they were the only community capable of it held and the Bill passed in 1896.⁴⁷² Renisa Mawani argues that despite their own active resistance, the removal of voting power and weighing down with tax foreclosed their effort of settlement. By limiting their ability to democratic and economic participation, the free Indian settlers were being frozen out of the long-

⁴⁶⁴ Lake and Reynolds (n 355) 118.

⁴⁶⁵ Mawani, ‘Law as Temporality’ (n 160) 83.

⁴⁶⁶ Harper and Constantine (n 345) 152.

⁴⁶⁷ Mawani, ‘Law as Temporality’ (n 160) 84.

⁴⁶⁸ Lake and Reynolds (n 355) 119.

⁴⁶⁹ Gandhi in *ibid* 119–120.

⁴⁷⁰ *ibid* 121.

⁴⁷¹ In *ibid* 122.

⁴⁷² *ibid* 122–3.

term vision of the territory and temporariness was enforced, in line with the design of indentureship.⁴⁷³

With the rights of free Indians restricted within Natal, the government wanted to restrict any further Indian migration into Natal. The Australian colonies had agreed to extend existing restriction on Chinese nationals, to people of ‘all coloured races’, irrespective of their British subjecthood, and Natal intended to follow suit.⁴⁷⁴ The Colonial Office reserved the New South Wales legislation on this point. The Colonial Office expressed their insistence that the legislation did not restrict explicitly on the basis of colour or race, but rather against ‘impecunious and ignorant immigrants’.⁴⁷⁵ It was therefore a question of how it was stated, rather than the intent.

This was reaffirmed later the same year when the question of immigration controls on racialised British subjects was addressed while heads of all self-governing dominions were in London to celebrate Queen Victoria’s Diamond Jubilee in 1897. Joseph Chamberlain, the Colonial Minister (1895-1903), attempted to continue the balancing act between upholding the concept of equality for all British subjects, irrespective of race while also heeding the demands of the self-governing white nations. This was not well received by the colonial Prime Ministers and Premiers or in Indian, whose population these restrictions were largely aimed at. This arguably demonstrates the diminishing role of the heart of empire, as well as a lack of understanding over the role race played in the white colonies.⁴⁷⁶ In trying to give the self-governing white colonies what they wanted, the British had deserted every racialised British subject. ‘The Colonial Secretary had made it clear that an Indian, as soon as he left his homeland, ceased to be a British subject.’⁴⁷⁷ The idea of the British subject was selective and rhetorical rather than universal and material, and even then, ‘the idea of the British subject was fading more and more every year’ giving way to the global colour line.⁴⁷⁸

This was not only a problem from the perspective of Natal, but any place where there was an Indian population as well as in India itself. ‘What was at stake in the eyes of many colonialists was their status as white men and their equality of status with Englishmen at home.’⁴⁷⁹ Many of the white settler nations were more democratic than Britain, with more representative governments and full suffrage, rather than just property-owning men and eventually some women having the

⁴⁷³ Mawani, ‘Law as Temporality’ (n 160) 85.

⁴⁷⁴ Lake and Reynolds (n 355) 126.

⁴⁷⁵ Colonial Office in *ibid* 128.

⁴⁷⁶ *ibid* 132.

⁴⁷⁷ *ibid*.

⁴⁷⁸ *ibid*.

⁴⁷⁹ *ibid* 123.

right to vote, as it was in England until 1928.⁴⁸⁰ With the memory of the American revolt and subsequent independence, the ‘wave of illiberality’ that swept over the white colonies was not overtly challenged by the Colonial Office, but was somewhat managed.⁴⁸¹

As I have shown, there was constant management of racialised populations across the whole of the British empire, with the methods of control and management shared and replicated to suit the local situations. The self-governing white colonies looked to the United States, as well as each other, in exercising self-governance. This was particularly the case with immigration controls. The state of Mississippi in the United States used a comprehension test to suppress Black voting after doing so on the basis of race had become unconstitutional.⁴⁸² Literacy requirements were already in place in Massachusetts and Connecticut since 1857 and 1855, before the Civil War, but the Mississippi Constitution 1890 was the first that was explicit in its intention to disenfranchise the new Black vote.⁴⁸³ A number of southern states followed suit, as did Cape Colony in South Africa with the Franchise and Ballot Act 1892.

The shift to immigration restrictions on both race and literacy as a means of racial exclusion also has an American history. Prior to the Civil War Amendments in 1870, racial exclusion was explicit. Naturalised citizenship was the reserve of ‘all free white persons’ in 1790, allowing for free mass migration from anywhere in Europe. From 1880, who qualified as white was redefined in order to exclude southern and eastern Europeans.⁴⁸⁴ This developed into literacy qualifications for citizenship, as ‘[l]iteracy was fundamental to the citizen’s capacity for self-government and only Anglo-Saxons were blessed with that capacity,’ or rather it was known that there was a low level of literacy among the populations desired for exclusion.⁴⁸⁵ Despite the law never formally passing in the United States, it did so across the British empire. The Natal Act of 1897 legislated that applicants could be asked to write in any European language, rather than their own language to exclude racialised British subjects who spoke English and include European allies in.⁴⁸⁶ Other restrictions included the reduction of the age of majority from 21 to 16 which impacted family reunification in 1903.

⁴⁸⁰ In Britain, all men over the age of twenty-one received the right to vote in Representation of the People Act 1918, irrelevant of property ownership. Women over the age of thirty, property owning women, wives of property-owning men or university graduates also received the right to vote in the Act. It was not until the Representation of the People (Equal Franchise) Act 1928 that women received an equal right to vote with men; everyone over twenty-one years.

⁴⁸¹ Lake and Reynolds (n 355) 128.

⁴⁸² Constitution of the United States 1789 14th and 15th Amendments.

⁴⁸³ Lake (n 246) 215.

⁴⁸⁴ *ibid* 217.

⁴⁸⁵ *ibid* 219.

⁴⁸⁶ Natal Act 1897 s 3.

The new Commonwealth of Australia followed suit with an explicitly white Australia policy enshrined in its constitution, allowing for special laws to be made for people of any race, as well as for immigration and emigration.⁴⁸⁷ Prime Minister Deakin made clear that this meant the prevention of migration into the country and detainment within the country along racial lines.⁴⁸⁸ This was realised with the Immigration Restriction Act 1901, which cited the Natal Act 1897, Western Australia Act 1897 and New South Wales Act 1898 for the definition of ‘prohibited immigrants’, and Pacific Islands Labourers Act in 1901, which allowed the mass deportation of Pacific Island labourers, who had come to Queensland as indentured labourers.⁴⁸⁹ Despite protestations by Pacific Islanders, between 1906-1908 5,000 of the 7,500 population were deported to their countries of origin.

Following suit, New Zealand introduced a dictation of one hundred words in 1907. The First World War interrupted immigration controls in 1914, but the Immigration Restriction Bill of 1920 stated only people of British birth and parentage could enter New Zealand freely, everyone else must have a permit.⁴⁹⁰ The Bill also made clear the definition of British was a British born person or of British parentage, not naturalised and not an ‘aboriginal Native or the descendent of an aboriginal native’ other than New Zealand.⁴⁹¹ Anyone who was not British by this definition had to apply to the Minister of Customs from their country of origin or abode for one year.⁴⁹² The Minister had complete discretion.⁴⁹³ So while race is not mentioned, beyond Indigenous populations, the free movement of people to New Zealand was in effect limited to those who were white British. New Zealand was still a dominion of the British empire until its independence, granted in 1931 and ratified in 1947, and New Zealand citizenship existed from 1948. The immigration restrictions therefore broke with the ‘Natal compromise’ of 1897.⁴⁹⁴ The definition of British used in the legislation demonstrated the continuous fracturing of this supposedly unifying status. This provided the president for Canada to introduce the Immigration Restriction

⁴⁸⁷ Commonwealth of Australia Constitution Act 1901 s 53(14) & (15). s51(14) was amended to exclude in Aboriginal population in 1967. Repealed 1959

⁴⁸⁸ Lake (n 246) 225.

⁴⁸⁹ Immigration Restriction Act 1901 s 2; Pacific Island Labourers Act 1901. Both repealed 1959

⁴⁹⁰ Immigration Restriction Amendment 1920 (11 GEO V) s 5(1).

⁴⁹¹ *ibid* 5(2) ‘A personal shall not be deemed to be of British birth and parentage by reason that he or his parents or either of them is a naturalized British subject, or by reason that he is an aboriginal Native or the descendent of an aboriginal Native of any dominion other than the Dominion of New Zealand or of any colony or other possession or of any protectorate of His Majesty.’.

⁴⁹² *ibid* 9(1).

⁴⁹³ *ibid* 9(3).

⁴⁹⁴ Lake and Reynolds (n 355) 317.

Act of 1923 in which complete discretion for entry of applicants was given to the Minister of Immigration.⁴⁹⁵

Prior to this, Canada had explored and implemented a range of methods to restrict Indian migration. Anti-Indian sentiment, which was being expressed through immigration legislation was creating very tense situations in both Canada and Natal, as well as India. Despite requests from the self-governing dominions India could not place emigration restrictions on the those wishing to leave as they fell outside the narrow definition of emigration. The mood of independence and self-government within India meant the Indian government could not agree to the measures put forward by self-governing territories to clearly restrict Indian migration into the dominion.⁴⁹⁶

Canada had proposed either the possession of \$200 or a passport as requirements for entry in 1907, with the issuing of passports carried out selectively.⁴⁹⁷ With the majority of immigration coming through Hong Kong or after indentured contracts elsewhere, Canada introduced a requirement for a passenger to travel directly from their country of birth or citizenship, which limited almost all Indian migration to Canada, and prevented those who had already bought their ticket from entry.⁴⁹⁸ The consequence of starting a journey to Canada from elsewhere was deportation, though after some embarrassment with French and Russian nationals being caught out, the language added discretion stating the traveller *may* be deported. The effect was a race neutral law that limited the entrance of people of colour. Some high-profile attempts to subvert these restrictions humiliated Canada.⁴⁹⁹ Consequently immigration was brought under state control and the introduction of a passport allowed restrictions on both exit and entry of the territory. Membership of the British empire therefore was reinterpreted to exclude absolute free movement. For example, leaving India without a passport was criminalised.⁵⁰⁰ The passport became a state document which ascribed a national identity, making it appear universal despite restrictions on the movement from the governed territories being more exercised, as was its purpose.⁵⁰¹ This bound state sovereignty (through the exercise of immigration controls), state security (emphasised because of World War I) and the immigration of people of colour together.

The Canadian passport solution was an appeal to the national, ascribing nationality in leu of a racial identity. This allowed the supposed race neutrality of immigration restrictions to be

⁴⁹⁵ *ibid.*

⁴⁹⁶ Mongia (n 357) 200.

⁴⁹⁷ *ibid.*

⁴⁹⁸ *ibid* 202.

⁴⁹⁹ See Mawani, *Across Oceans of Law* (n 160).

⁵⁰⁰ Mongia (n 357) 209–210. Defence of India (Passport) Rules in the Defence of India (Criminal Law Amendment) Act 1915

⁵⁰¹ *ibid* 210.

extended through the passport system, while implementing restrictions explicitly through racial exclusions. The passport, Radhika Viyas Mongia argues,

“nationalized” the migrant, which entails a yoking together of “nation” and “state” on the terrain of race. The development of modern racism and the modern state are thus coproduced in such a way as to nationalize state-territorial boundaries, which are explicitly raced.⁵⁰²

A passport became a requirement for national subjects who engaged in sanctioned and legal migration, and those who cannot fulfil this become tethered to their territory and barred from the future of emerging national dominions.

Immigration legislation amongst the white self-governing world inspired, propelled and emboldened each other to turn away from the requirements made by the Colonial Office and explicitly state or practice the exclusion of people who were not white whether they were British subjects or not. The particular motivation was to exclude people from Asia, including the Japanese, who took great offense at being excluded from the highest class of race and being considered on the same terms as the non-white populations.⁵⁰³ Claims to equality came from those who were colonised, to be able to exercise their equal status as man and British subject. One of these was through freedom of movement. Various methods of segregation or controlled movement both internally and between territories were devised but migration and settlement were a challenge to this. It drove the facilitation of the nation and the demise of the empire.

4.2. Impact on the Heart of Empire

While there were no domestic immigration laws in Britain, there were laws and schemes that targeted specific people to ensure they were not able to disembark and remain in Britain, and if they did, that they were removed. The idea that the air of England is too pure for slaves to breathe,⁵⁰⁴ the establishment of a new African sovereign colony through the deportation of the Black poor, and the abolition of slavery instilled in England a misplaced innocence and virtuosity. Seen as a place that brought emancipation, even though it would financially harm the country has allowed the narrative of benevolence to this day.⁵⁰⁵ It also plays into the notion that slavery happened outside of Britain, that Britain is innocent and in fact selfless in bringing about freedom for Black and enslaved people. It effected a negation of England’s principal role in the global slave

⁵⁰² *ibid.*

⁵⁰³ See Mayblin (n 16) ch 5; Lake and Reynolds (n 355) ch 3.

⁵⁰⁴ Harris, ‘Too Pure an Air’ (n 275).

⁵⁰⁵ See Kenan Malik, ‘Let’s Put an End to the Delusion That Britain Abolished Slavery’ *The Guardian* (11 February 2018) <<https://www.theguardian.com/commentisfree/2018/feb/11/lets-end-delusion-britain-abolished-slavery>> accessed 8 January 2022.

trade and the enslavement of people, through the fact that England itself would not see or experience the offence to those enslaved, indentured, or generally unwanted in Britain.

Of course, this was not true. Ordinary people as well as the elite of society directly benefitted from every aspect of the empire, including the enslavement of people and compensation for their loss of property through abolition.⁵⁰⁶ The ports of Bristol, Liverpool and London were major sites of the enslavement trade, selling shackles and force-feeding head pieces. The trade brought considerable wealth to the port cities, both on an individual level and in the development of the cities. By ensuring the explicit practice of the slave trade remained largely at the ports, meant it could be seen as going “through” Britain rather than “in” Britain. However, much was done to ensure Britain was “kept pure” from the people who were powering the empire through coercion, enslavement and indentureship while benefiting from it. Romantic tropes in popular literature avoided the practice of slavery happening in England, such as story lines from Africa to the Caribbean and enslaved characters not making it to freedom in England.⁵⁰⁷ This ensured an innocence through the production of denial and ignorance within the heart of empire.

The co-constitution of restrictive immigration laws in the self-governing colonies and the United States significantly impacted Britain. The first legislation that restricted entry into Britain that is often cited is the Aliens Act 1905. Much of the literature focusing on the Act view it as an anti-Semitic response to Jewish immigration to Britain,⁵⁰⁸ however, there is less written on the immigration controls around the British empire that influenced it. Previous attempts to register and prevent settlement of lascars had been made, demonstrating the fractious nature of British subjecthood and the blurred lines between subject and alien, as detailed above. Calls for restrictions into Britain had been gaining momentum in response to the immigration laws and policies in the United States and dominions. Despite the fact these new nations were trying to increase their settler populations, there were restrictions to ensure the suitability of these settlers. These restrictions underpinned arguments for restrictions to Britain in three ways. First, it was said that people refused entry to the colonies and United States were settling in Britain. Second, Britain was a smaller nation that was already full, and third, that the impact of these two points were ‘eroding British esteem and prestige’, jeopardising Britain’s place in the world.⁵⁰⁹ However, the 1888 Select Committee on Emigrations and Immigration (Foreigners) did not recommend any legislation but cautioned it may become needed in the future.

⁵⁰⁶ ‘Legacies of British Slave-Ownership’ (n 298).

⁵⁰⁷ Gerzina (n 416) 188 & 200.

⁵⁰⁸ Helena Wray, ‘The Aliens Act 1905 and the Immigration Dilemma’ (2006) 33 *Journal of Law and Society* 302.

⁵⁰⁹ Bashford and Gilchrist (n 452). 416

Three Bills were introduced and defeated in 1894, 1897 and 1898. The 1900 election saw an increase of restrictionist MPs and pressure was increasing again. When a Royal Commission sat in 1902-03 it was also weighted in favour of restriction.⁵¹⁰ Every recommendation made by the Royal Commission, which were largely influenced by immigration laws from the colonies, Europe and the US, were tabled in the Alien Immigration Act of 1904 (name of the Bill). The Bill polarised Parliament and passed with a great deal of compromise on both sides.⁵¹¹ There are two distinctive characters of the Bill when placed in comparison with colonial, European and American legislation. One was the inclusion of right to religious and political asylum and distinction between alien and immigration. The right to asylum is believed to be the first mention of the principle of asylum to non-nationals in modern law and it is distinctly different to legislation it drew inspiration from.⁵¹² However, the legal formalisation fore fronted the role of law in the asylum process and formalised the burden of proof on the refugee for the first time.⁵¹³ Secondly, it was an aliens Act, rather than an immigration Act. The distinction was important in defining an alien as someone not a subject of the crown. Therefore, the Act does not apply to anyone who is a British subject, an attempt to unify the identity. Colonial privilege was decreasing for British nationals emigrating to dominions, as the law formally applied to them in the same way it did everyone else. ‘This is one of the rarely noted ironies of the Colonial Office’s insistence on race-neutral laws.’⁵¹⁴ However, British nationals were of the few who had the resources to move freely and were often supported by government subsidised emigration.

In order to address this the British Nationality and Status of Aliens Act 1914 intended for ‘the first time for a system of Imperial naturalisation on a uniform and definite basis throughout the whole Empire’,⁵¹⁵ declaring a natural born British subject as ‘[a]ny person born within His Majesty’s Dominions and allegiance’ from the male line.⁵¹⁶ While there were provisions in the Act for legislation in dominions that distinguished British subjects⁵¹⁷ and immigration control, it secured an understanding that the laws should not limit ‘the common status possessed by all British subjects’.⁵¹⁸ With the outbreak of World War One, the unity of British subjects needed to be distinct from that of the alien friend or enemy. The Aliens Restriction Act 1914, introduced two

⁵¹⁰ *ibid.* 418

⁵¹¹ *ibid.* 425

⁵¹² *ibid.* 425-6

⁵¹³ Simon Behrman, ‘Legal Subjectivity and the Refugee’ (2014) 26 *International Journal of Refugee Law* 1, 5.

⁵¹⁴ Bashford and Gilchrist (n 452). 426

⁵¹⁵ The Under-Secretary of State for the Colonies (Lord Emmott), *British Nationality and Status of Aliens Bill 1914* 503.

⁵¹⁶ *British Nationality and Status of Aliens Act 1914* (c 17) (s1(a)).

⁵¹⁷ *ibid.* (s26(1)).

⁵¹⁸ R Hansen, ‘The Politics of Citizenship in 1940s Britain: The British Nationality Act’ (1999) 10 *Twentieth Century British History* 67, 72.

days later, put the burden of proof on the suspected person to prove himself or herself a British subject rather than alien, and until then they would be deemed an alien.⁵¹⁹ The Acts gave the government wide reaching immigration controls and powers to the police and military to intern and deport enemy aliens.⁵²⁰ The Act was not repealed at the end of the war, but the Aliens Restriction (Amendment) Act 1919 extended the 1914 Act for a further year, and it was renewed annually until 1981. The 1920 Aliens Order – an amendment to the 1919 Act – extended powers to immigration officers to refuse aliens who could not support themselves on entry. For those wishing to work in Britain, a permit had to be issued by the Minister of Labour to prospective employers.⁵²¹ The Special Restriction (Coloured Seamen) Act 1925 placed the burden of proof of British citizenship on the Black settled population in port cities, which had previously been assumed.⁵²²

It was an era of limited travel to Britain, due to high unemployment and reports of racist attacks in Britain.⁵²³ Further, settled West African and lascar seamen bore the brunt of hostilities that lingered towards wartime enemies, anti-Semitism, and high unemployment among returning soldiers. Most communities of colour were settled around dockland and port towns due to the work. These were the sites of “race riots” in 1919, Glasgow in January; South Shields in January & February; London in April and Liverpool, Cardiff, Barry, Newport in June. While these were not the first outbreaks of violence between the white, Black and Asian populations, they were the biggest collective disturbances, with serious injuries, five deaths and hundreds taken into protective custody and cordoned areas in the communities. Despite the fact that the attacks were instigated by white men on communities of colour lay of little importance, and the logic followed that if the Black and Asian communities had not been present, the attacks would not have happened. Newspapers therefore instigated calls for segregation and repatriation.⁵²⁴ While formally these laws were regulating aliens, in practice settled British subjects from around the empire were impacted. Some of these modes of restriction are the same that would be brought in to limit and restrict Citizens of the UK and colonies and commonwealth citizens some fifty years later, which will be details in the next chapter.

⁵¹⁹ Aliens Restriction Act 1914 (c 12) (s1(4)); Arnold D McNair, ‘British Nationality and Alien Status in Time of War’ (1919) 35 *Law Quarterly Review* 213, 229.

⁵²⁰ Andrew Geddes, *The Politics of Immigration and Race* (Baseline Book Co 1996). 21

⁵²¹ *ibid* 21; The Open University, ‘1920 Aliens Order | Making Britain’ (*Making Britain. Discover how South Asians shaped the nation, 1870-1950*) <<http://www.open.ac.uk/researchprojects/makingbritain/content/1920-aliens-order>> accessed 14 November 2018.

⁵²² Geddes (n 520) 23.

⁵²³ *ibid*.

⁵²⁴ Spencer (n 451). 9

5. Conclusion: Holding on to Power Through the Right to Exclude

The purpose of this chapter has been to demonstrate how migration routes and practices developed during the British empire have shaped global racial segregation and exclusion. Taking a global and historical view, with particular focus on the eighteenth, nineteenth and early twentieth centuries this chapter has shown how immigration, nationality and citizenship were intrinsic in the development of colonialism and enabled a holding on to power and property through the right to exclude non-white British subjects and aliens. This was made possible through the fracturing of legal and material rights associated with subjecthood around the empire, most prominently through exceptional statuses of slave and indentured labourer. However, the attempts to control free movement from governed territories to self-govern territories exposed the lie of the empire's promise of equality. Legal privileges were conferred to those who were identifiable as white, institutionalising entitlements to patriarchal whiteness. 'As a form of property, patriarchal whiteness is a valuable possession warranting protection.'⁵²⁵ During this time of mass migration, the development of conquest, segregation and immigration laws embedded full legal entitlement to whiteness. 'Whiteness became a form of property.'⁵²⁶

The model of plantation and other extractive industries demanded cheap labour to build and sustain them, but the permanent settlement of people who were not white was not desired and legislative efforts were made to ensure the temporariness of people from governed territories in white societies. If they refused this imposed temporariness and exercised themselves beyond economic units of labour and into the civic and economic functioning of these societies, restrictions and taxations were imposed to encourage departure. This was also the case in Britain in the twentieth and twenty-first centuries and will be explored in the next chapter.

Racial and ethnic identities were established and normalised. They were vital to the control of people within territories and between them, allowing for rights to be fractured along racial lines through explicit, but also race neutral legislative language. 'Everyday categories are precisely those that have disappeared into infrastructure, into habit, into the taken for granted. These everyday categories are seamlessly interwoven with formal, technical categories and specifications.'⁵²⁷ The purpose of this chapter has been to demonstrate the colonial genealogies of the taken for granted techniques of regulation and technical or legal categorisations. Demonstrating how these categories developed within the context of migration and control serves two functions; firstly, to evidence the racialised logic within these legislations, and secondly, to evidence how these logics

⁵²⁵ Moreton-Robinson (n 205) 67.

⁵²⁶ *ibid* 66.

⁵²⁷ Bowker and Leigh Star (n 45) 319.

become naturalised and normalised. These both show how faith is put into legislated racialised and punitive logics which were, and continue to be engaged with, thoughtlessly and strategically ignorant of these logics.

The belief in the purity of the white race and fear of miscegenation was also a driving force behind categorisation and segregation. The inherited privileges that came from whiteness motivated territorial and global segregation. 'It was thus a colonial fantasy to imagine that British subject status implied a lack of distinction between white British and racialised subjects.'⁵²⁸ The exposure of this fantasy contributed to the demise of the empire. Self-governing dominions had issue with the colonial office overseeing the legal status of the population in their colonies, including how this status differed between the Indigenous, indentured and settled populations. This was also the case with the movement of people in and out of the colonies, particularly the white colonies and demands were made for equality of rights among Englishmen through exercising sovereign control over their territories.⁵²⁹ It was the governed territories that experienced the consequences of this. Throughout the twentieth century most governed and self-governed territories gained independence, with Britain holding on to the illusion of empire through strategic national legislation. This will be addressed in the next chapter.

⁵²⁸ El-Enany, *Bordering Britain* (n 23) 40.

⁵²⁹ Lake and Reynolds (n 355) 124.

Chapter Three

The Empire Coming Home

*Decolonisation, it was argued, need not necessarily lead to the loss of British influence and trade in Asia and Africa if handled well. The concept of a multiracial Commonwealth, however nebulous and ill-defined, was used ceaselessly to try to bind former British Territories together. The image, if not the reality, of unrestricted entry to the ‘mother country’ was often seen as a cornerstone of this ideal.*⁵³⁰

1. Introduction

Britain’s domestic history and the histories of Britain’s empire are usually told as separate accounts. This thesis contributes to the literature that argues these two histories are interconnected and co-constitutional.⁵³¹ Chapters One and Two have given an international framing to British colonial history. This chapter will turn the focus of analysis to the British mainland as a colonial space, to better understand Britain as “home”, both to the heart of empire and seemingly separate from empire. Continuing chronologically from Chapter Two, this chapter begins a legal analysis from where most accounts of Black British history begin – from the years following the Second World War and the arrival of 492 West Indians on Empire Windrush at Tilbury, Essex in July 1948. In the 1940s the Black British population was 20-30,000, and Empire Windrush was preceded by Ormonde and Almanzora the year before, carrying 108 and 200 people from the West Indies. Britain had been home to Black populations and people long before this,⁵³² however, the images from Tilbury dock has been marked as a turning point in British history. As Lowe describes, ‘to the British public they [the West Indian passengers] posed a threat to the old colonial order that structures itself on a strict hierarchy of racial geographies: disenfranchised blacks in the colonial outposts, with privileged whites at the imperial centre.’⁵³³ This chapter demonstrates how the development of immigration, asylum and citizenship legislation was underpinned by this understanding and enabled it to materialise. It shows how the racialised and exclusionary logics

⁵³⁰ Dennis Dean, ‘The Conservative Government and the 1961 Commonwealth Immigration Act: The inside Story’ (1993) 35 *Race & Class* 57, 59.

⁵³¹ Bhambra, ‘The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism’ (n 16); El-Enany, *Bordering Britain* (n 23); Ballantyne (n 159); Mayblin (n 16).

⁵³² David Olusoga, *Black and British: A Forgotten History* (Pan 2017).

⁵³³ Hannah Lowe, “‘Remember the Ship’: Narrating the Empire Windrush’ (2018) 54 *Journal of Postcolonial Writing* 542, 552.

developed throughout the empire during the late nineteenth and early twentieth were “brought home” and implemented in the heart of empire. The process of legislative development and implementation demonstrate how these punitive and racialised logics were embedded thoughtlessly and strategically.

There was never an understanding that colonial immigration controls were needed, nor would it have been tolerated by the political majority,⁵³⁴ given both the attachment to and need for the empire and then transition to the commonwealth. However, there was also never a belief that colony and commonwealth citizens, and particularly from the governed dominions, would exercise their rights to move to the UK. This right was considered more a symbolic tradition rather than a material right.⁵³⁵ By 1948 the dominions had gained substantial independence from Westminster. India and Pakistan had gained full independence and were members of the commonwealth. While Britain still held administrative power in most colonies, independence was becoming an increasing expectation. This was however, anticipated to take a long time and Britain anticipated it would hold on to its position as head of the empire during this process.

The same year Empire Windrush travelled to the UK, the British Nationality Act passed through Parliament. While criticised for effecting an open-door immigration policy to the colonies, the 1948 Act reaffirmed the right to free movement within the empire. As Anderson states, ‘this was NOT an immigration policy per se, but a nationality policy with immigration consequences.’⁵³⁶ The insistence on maintaining this open-door policy between Britain and the colonies and commonwealth was ‘designed to bind these countries, in outlook, attachment, and policy, closely to the United Kingdom’, particularly the old dominions to where many British people were emigrating to.⁵³⁷ It was anticipated people from the colonies could come to work and study but go home again. So, when Empire Windrush returned to Britain with 492 West Indians intending to work but also to settle, the government were caught by surprise due to their own narrow thinking. The Prime Minister, Clement Atlee, knew of the ship’s journey and its passengers and made attempts to prevent its departure to England, and when that failed tried to redirect it to East Africa.⁵³⁸ Far from being invited, most British subjects who travelled after the war funded and made their own way to Britain and had difficulty setting themselves up with jobs and housing when they got there.⁵³⁹

⁵³⁴ Hansen (n 518).

⁵³⁵ *ibid* 88.

⁵³⁶ Anderson (n 18) 39.

⁵³⁷ Hansen (n 518) 89.

⁵³⁸ David Olusoga, ‘The Myths of Windrush’ [2018] *BBC History Magazine* 24.

⁵³⁹ The National Archives, ‘Bound for Britain Experiences of Immigration to the UK’ (*The National Archives*, 09 2022) <<https://www.nationalarchives.gov.uk/education/resources/bound-for-britain/>> accessed 9 January 2022.

Resistance to restrictive legislation was bound by the desire to keep an open relationship with the white settler nations and the political unacceptability to distinguish between the white and racialised nations. Concern at such an ‘influx’, but belief it would not happen again demonstrates the naïveté of Parliament. It also shows the intended focus of the 1948 Act was towards white settler dominions and exposed the anxiety that such a small number of Black Caribbeans arriving in Britain could cause to unsettle the racial hierarchies.⁵⁴⁰ However, as Britain lost its imperial role the strength and therefore benefit of the “common status” of British subjecthood around the empire also weakened and so restrictions became seen as increasingly necessary by Parliament. This chapter will focus on how continued legislation responded to immigration by colonial subjects and commonwealth citizens to Britain, and how, as with the white self-governing dominions, this legislation was primarily tasked with restricting entry and settlement to non-white people.

This analysis is structured into two parts. Firstly, the legislations of 1948, 1962, 1968, 1971 and 1981 will be explored through an in-depth legal analysis and socio-political context. While there is a dense literature concerning these Acts,⁵⁴¹ I return to these ‘turning points’⁵⁴² in Britain’s history from empire to nation to argue that they are part of a method of international racial segregation. Developing from the analysis laid out in Chapter Two I argue these legislations are a continuation of the practices developed by the dominions in the late nineteenth and early twentieth centuries as an exercise in the right to exclude and ensure a racial segregation between the UK and its former colonies, or ‘a white Britain policy in the making’.⁵⁴³ Further, as Nadine El-Enany points out, Britain was a member of a regional block from 1973 and it was not until the ultimate departure of the United Kingdom from the European Union in 2020, as the outcome of the 2016 referendum to leave the European Union, that the UK became a nation in its current formation for England, Northern Ireland, Scotland, and Wales, as opposed to an empire or part of a regional bloc, for the first time.⁵⁴⁴ Therefore, the separation between pre and post nation and pre and post immigration law of 1981 is a false one.

The second half of this chapter will move from a chronological approach to a thematic approach to argue that the methods developed throughout these historic turning points continue

⁵⁴⁰ Hansen (n 518) 90.

⁵⁴¹ Ambalavaner Sivanandan, *A Different Hunger: Writings on Black Resistance* (Palgrave Macmillan 1982); John Solomos, *Race and Racism in Britain* (Third edition, Palgrave Macmillan 2003); Spencer (n 451); Anderson (n 18); Dummett and Nicol (n 371); Devyani Prabhat, ‘Unequal Citizenship and Subjecthood: A Rose by Any Other Name..?’ (2020) 71 Northern Ireland Legal Quarterly 175; El-Enany, *Bordering Britain* (n 23).

⁵⁴² Randall Hansen, ‘The Kenyan Asians, British Politics, and the Commonwealth Immigrations Act, 1968’ (1999) 42 *The Historical Journal* 809, 833.

⁵⁴³ El-Enany, *Bordering Britain* (n 23) 103.

⁵⁴⁴ El-Enany, *Bordering Britain* (n 23).

within the domestic space to create a legal and social segregation between citizens and non-citizens. Drawing on Sivanandan's assertion that migrants are the targets of xeno-racism,⁵⁴⁵ I will argue that migrants are segregated from mainstream society and support systems. I will do this through a legal analysis of asylum rights, housing and social support, criminalisation and exceptional circumstances from the 1993 Act onwards.

2. Segregation Through Nationality, Immigration and Asylum Law

This relationship between domestic Britain and empire has important functions and consequences when it comes to understanding the continuities and discontinuities of colonial practices in the UK, as was argued in Section 4.2 in Chapter Two. Similarly, the interaction between the two in developing punitive systems has been noted by JM Moore. Rather than new punitive regimes, Moore argues that current criminal punitive practices in contemporary British society were practices developed in the colonies and brought to the metropole.⁵⁴⁶ He argues that people who are subjugated to the 'new punitiveness' and exclusionary policies of the criminal system are descendants of those who were subjugated to colonial punitive and exclusionary policies during the time of empire. Moore evidences the network of empire; '[s]olutions were developed independently in different parts of the Empire and ideas were exchanged and transported from the metropolitan centre to colonial outposts and back again'.⁵⁴⁷ This was constantly evolving and being shaped by the exchange of localised experiences and practices between sites of power across the British Empire.⁵⁴⁸ On the other hand, punitive laws of mobility that explicitly prevented racialised British subjects' entry were developed and shared between the dominions almost irrespective of what the Colonial Office wished, as argued in Chapter Two. Prior to this, the Colonial Office was heavily involved in managing the transportation of enslaved and indentured people around the empire and limiting their employment and civic rights and mobilities in both their new and home lands.

The flows of policing behaviour, rights and mobility of racialised people around the empire prior to the Second World War, echo those gradually legislated in the UK afterwards. Further, the largely free mobility, or preferential mobility of white subjects continued throughout this period. As opposed to the white settler dominions who were overtly racially exclusionary in the first half of the twentieth century, UK legislation maintained the appearance of race neutrality, though the

⁵⁴⁵ Ambalavaner Sivanandan, 'Poverty Is the New Black. An Introduction' (2001) 43 *Race & Class* 1.

⁵⁴⁶ JM Moore, 'Is the Empire Coming Home? Liberalism, Exclusion and the Punitiveness of the British State' (2014).

⁵⁴⁷ *ibid.* 33

⁵⁴⁸ Ballantyne (n 159).

intentions were always clear. This was particularly the case with the over policing and criminalisation of racialised communities, as well as the reduction of civic rights and increase of financial burdens after colonial and commonwealth free movement ended, as will be discussed in Section 3. Evidence of colonial force was far enough away from the centre for it not to have to face the consequences at home. As Adam Elliot-Cooper explains, '[e]very imperial ambition has needed to conduct violence at arm's length, creating illusions of legitimacy or simply lightening the efforts of those at the top of it's hierarchies'.⁵⁴⁹ However, as migration from the colonies and commonwealth increased, so too did the surveillance and policing of 'the 'colony' areas'.⁵⁵⁰

In *Policing the Crisis*, Hall et al develop an understanding of the criminalising and surveillance of former colonial subjects within 1970s Britain and Northern Ireland.⁵⁵¹ The legislative expansion of the early 1970s served to manage the striking working class, Catholic resistance in Northern Ireland⁵⁵² and remove British Subjecthood entitlements from Black and Brown commonwealth citizens to prevent their entering the UK and to manage race relations in Britain.⁵⁵³ These expanded criminal and counter insurgency powers to surveil and control 'internal threats' that brought colonial struggles and 'political violence back home'.⁵⁵⁴ Within the context of international liberation movements, there was 'the belief that the anti-imperial struggle... could be strategically and tactically linked with domestic conflict'.⁵⁵⁵ Legislative expansion was used to "criminalise' every threat to a disciplined social order', and to "legalise'...every means of containment'. This lead Hall and others to term the the early 1970s the 'law and order society'.⁵⁵⁶

I argue that this society of law and order extends to the management of displaced people through immigration and asylum laws. Until the early 1980s the development of immigration laws increasingly exercised the right to exclude racialised and formally colonised people. A detailed legal analysis will be given in 3.1.1 – 3.1.6. Asylum and immigration laws not only exercised the right to exclude through an increasing criminalisation of entry into the territory, but the asylum community in Britain are increasingly contained, segregated and policed through dispersal policies, reporting and detention. Asylum applications increased worldwide during the 1980s, with a threefold increase in the UK between 1988-89.⁵⁵⁷ The majority of applications made in the UK in late 1980s

⁵⁴⁹ Adam Elliot-Cooper, 'Violence Old and New: From Slavery to Serco', *Blackness in Britain* (Routledge). 65

⁵⁵⁰ Stuart Hall and others, *Policing the Crisis: Mugging, the State, and Law and Order* (1978 edition, Macmillan 1978). 291

⁵⁵¹ *ibid.*

⁵⁵² For mobility between Northern Ireland and mainland Britain within the context of counterterrorism see Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (Illustrated edition, Pluto Press 1993).

⁵⁵³ The Industrial Relations Act 1971 (repealed 1974), Emergency Powers Act 1971, Immigration Act 1971

⁵⁵⁴ Hall and others (n 550). 291

⁵⁵⁵ *ibid.* 291

⁵⁵⁶ *ibid.* 288

⁵⁵⁷ Dallah Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 164.

were made by those from the former British colonies of Sri Lanka, Somalia and Uganda.⁵⁵⁸ In 1992 the Conservative government capped the number of “genuine refugees” that could be admitted to Britain from the former Yugoslavia, reasoning the country could not absorb them. Despite national and regional outrage, the government stood firm.⁵⁵⁹

Efforts to restrict entry of refugees as well as their rights while in the UK and powers of deportation have been formalised through legislation since 1993. The Conservative Party introduced the first asylum legislation, the Asylum and Immigration Act 1993. Further legislation was deemed necessary to reduce the backlog of cases, further deter applications and, most importantly, for ‘political value’.⁵⁶⁰ So followed the Asylum and Immigration Act 1996. New Labour came to power in 1997 and immediately reviewed the whole asylum process. Labour claimed to redirect itself away from the racist policies of consecutive Conservative governments – despite being the legislators of the explicitly racist 1968 Act – and assured it would remain tough on immigration but would ensure policies were indiscriminately applied. This recast disbelief of claimants and abuse of the system and meant the tough approach would be applied to all asylum seekers and migrants irrespective of race. New Labour brought in the Immigration and Asylum Act 1999, which consisted of 170 sections and 16 schedules and required secondary legislation for enforcement which had yet to be drawn up. Therefore, the details of what was passed were unknown and the details in the secondary legislation were not debated.⁵⁶¹ The 1999 Act moved the immigration and asylum process considerably closer to a criminal process and continued to outsource responsibility and liability to third parties. Not long after the Nationality, Immigration and Asylum Act 2002 brought all three areas of regulation together in 164 sections and 9 schedules. Again, it relied on future secondary legislation, which would be undebated, and was criticised for the late tabling of amendments and major clauses which meant they were not adequately scrutinised.⁵⁶² A detailed legal and thematic analysis will be given in 3.2.1 – 3.2.4.

For those who managed to enter Britain, legislation has ensured the segregation of asylum seekers and undocumented migrants from British society. Everyday choices about livelihoods could be removed and exercised at the will of the state, such as where to live and where to buy food. Separate systems of accommodation and welfare support have been created apart from the welfare system for citizens and those with indefinite leave to remain (ILR), marking out those who are seeking asylum and marking them as dependent on the state. An expansion of the detention system increased indefinite detention of people whose claims had not been successful. Legal rights,

⁵⁵⁸ El-Enany, *Bordering Britain* (n 23) 142.

⁵⁵⁹ Solomos (n 541) 67.

⁵⁶⁰ Stevens (n 557) 169.

⁵⁶¹ *ibid* 176.

⁵⁶² *ibid* 195–196.

such as the right to appeal, bail hearings and access to legal aid have been ever changing and there has been an increase in the criminalisation of asylum seekers through unauthorised employment. The increasing powers given to immigration officers meant someone suspected of being undocumented could have their person and property searched, with or without a warrant, and arrested, further blurring the boundary between criminal and immigration processes. Further, those who are in the UK must go over and above those who are citizens and with ILR. They pay financial penalties, such as the NHS surcharge, increasing immigration fees and they must have exceptional circumstances for family reunification as well as proof of funds to entirely support their adult family member. Sivanandan's argues that this is xeno-racism. He states:

If it is xeno-phobia it is – in the way it denigrates and reifies people before segregating and / or expelling them – a xenophobia that bears all the marks of the old racism, except this it is not colour coded. It is a racism that is not just directed at those with darker skins, from the former colonial countries, but at the newer categories of the displaced and dispossessed whites, who are beating at western Europe's doors, the Europe that displaced them in the first place. It is racism in substance but xeno in form – a racism that is meted out to impoverished strangers even if they are white. It is xeno-racism.⁵⁶³

New Labour promised the toughness of the immigration regime would no longer be solely directed to racialised people, but to anyone deemed out of place. This toughness is the colonial practices of punitive systems and policing of mobility, behaviour and rights. Just as access and strains on social services and housing were classed as issues that arose because of unrestricted commonwealth immigration since the arrival of SS Windrush, too many asylum seekers and “bogus” asylum seekers, or economic migrants from Europe are blamed for putting a strain on social services and housing fifty years later.⁵⁶⁴ Sivanandan disputes migration as a cause, stating ‘that the *forced* concentration of immigrants in the deprived and decaying areas of the big cities high-lighted (and reinforced) existing social deprivations: racism highlighted them as its cause.’⁵⁶⁵ The *forced* segregation of those in the asylum system and those distinctively migrant into concentrated areas are blamed for deprivation and decay which is not their cause: ‘racism highlighted them as its cause.’⁵⁶⁶ This is not to say that those who are from the racialised commonwealth and their descendants are not still subject to racism within the UK. But the

⁵⁶³ Sivanandan, ‘Poverty Is the New Black. An Introduction’ (n 545) 2.

⁵⁶⁴ Cameron (n 326).

⁵⁶⁵ Sivanandan, *A Different Hunger* (n 541) 105.

⁵⁶⁶ *ibid.*

segregation of asylum support demonstrates the dependency of asylum seekers on the state, working in a similar way: to make them visible but separate.⁵⁶⁷

The detachment of commonwealth citizens within the British national identity led ‘the construction of darker citizens as aliens over the 1960s was based on a visceral understanding of difference predicated on race rather than in relation to any legal basis’.⁵⁶⁸ It is also the visible separation of people seeking asylum and the support needed that is the new focus of difference and resentment. The strengthening of rights and entitlements to belonging in the UK creates opposition and resentment between those deemed eligible to belong, and those who do not. This echoes the resistance to the settlement of indentured labourers in settler colonies, the objection was racial; it was only the labour of commonwealth countries that were wanted, ‘not their presence’ and definitely not their settlement, dependents and descendants.⁵⁶⁹

Ware unpacks the ‘common sense’ approach taken by populist politicians that pay tribute to the perceived decline of racial privilege among the poorer social groups in predominantly white societies, and the resentment to it. By acknowledging constituents concerns around immigration and their own declining racial privilege the homogenisation of the working class as white is established, erasing working class people of colour and legitimising resentment towards migrants for receiving better treatment from the state as migrants or refugees.⁵⁷⁰ The resentment rises because the notion of British fairness and generosity is either offended or abused.⁵⁷¹ Ware asserts this needs to be challenged in two ways. Firstly, that fairness is distributed evenly and ‘in the absence of bias or favouritism’, and that the government is the right authority to judge the notion of fairness.⁵⁷² Secondly, that by acknowledging it creates an openness to talk about it.⁵⁷³ The first point cements migration and people of colour as the cause of genuine declining material conditions people face and block a more nuanced discussion around class and inequality. The second point establishes the suppression of the discussion of race within Britain, which Ware contests, highlighting the continued discussion of race and racist legislative restrictions, and therefore removal of rights, to those who can claim British citizenship.⁵⁷⁴

⁵⁶⁷ Rosemary Sales, ‘The Deserving and the Undeserving? Refugees, Asylum Seekers and Welfare in Britain’ (2002) 22 *Critical Social Policy* 456, 457.

⁵⁶⁸ Bhambra, ‘The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism’ (n 16) 403.

⁵⁶⁹ Sivanandan, *A Different Hunger* (n 541) 4.

⁵⁷⁰ Avtar Brah, ‘The Scent of Memory: Strangers, Our Own and Others’ (2012) 100 *Feminist Review* 6, 12.

⁵⁷¹ Ware (n 27) 1.4.

⁵⁷² *ibid.*

⁵⁷³ *ibid* 1.5.

⁵⁷⁴ *ibid* 3.6.

There is an assertion that commonwealth migration was ‘imposed upon the host society without their considered consent’.⁵⁷⁵ In Powell’s infamous 1968 ‘Rivers of Blood’ speech, he portrays the ‘native born’ as innocent victims of the immigration ‘on which they were never consulted, they found themselves made stranger in their own country’.⁵⁷⁶ Powell’s speech is widely considered a defining moment in British politics, inciting racial and xenophobic hatred. The speech was given just one month after the 1968 Commonwealth Immigration Act, which he publicly supported, and lay the groundwork for future immigration policies, particularly the Immigration Act 1971.⁵⁷⁷ In his speech, Powell only references Commonwealth immigration, erasing the large post-war European immigration. He considered the rate of immigration and settlement of Commonwealth citizens as a problem in and of itself, stating that the decedents of Commonwealth citizens will become the majority of the Black and Asian community in Britain by 1985. Therefore, there is a need for ‘the extreme urgency of action now’,⁵⁷⁸ for they will have ‘arrived here by exactly the same route as the rest of us’ – by birth⁵⁷⁹ - and therefore have the same rights as other – white – people born in Britain, making it harder to remove this ‘evil’ from the country once this has happened.⁵⁸⁰

Powell’s answer to this dilemma was to prevent further immigration and incentivise repatriation. Two stories of ordinary and decent constituents are given as examples of how English people are the victims of commonwealth immigration. The first is of a man who – with no hint of irony – would not be happy until his three grown children were settled abroad, as the country was ‘not worth living in’ and he feared ‘the black man will have the whip hand over the white man’ in two to three decades time.⁵⁸¹ The second is of an elderly woman who could not earn a living as she was unable to rent out her boarding house rooms. However, this is because she was unwilling to rent out her rooms to the local black community. These two examples of racist disgruntlement are alarming indictments of white innocence and with a growing number of white people considering themselves a ‘persecuted minority’ and fear speaking out for fear of reprisal.⁵⁸² These examples also speak to a feeling of a lack of agency and decision making – of having something done to someone, without their agreement. The ignorance of how and why Commonwealth citizens came – some in response to an invitation from the British government and all through a

⁵⁷⁵ Bhambra, ‘The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism’ (n 16) 403.

⁵⁷⁶ Powell (n 27).

⁵⁷⁷ ‘What Powell says today, the Tories say tomorrow and Labour legislates on the day after.’ Sivanandan, *A Different Hunger* (n 541) 24.

⁵⁷⁸ Powell (n 27).

⁵⁷⁹ Birth right citizenship was removed in British nationality Act 1981

⁵⁸⁰ Powell (n 27).

⁵⁸¹ *ibid.*

⁵⁸² *ibid.*

right of citizenship – allows the narrative of innocence to be told. During his time as Health Minister (1960-63), Powell himself travelled around the Commonwealth recruiting trained doctors and nurses to fill labour shortages in the NHS, recruiting 18,000 people from India and Pakistan.⁵⁸³ Throughout its history, NHS nursing and doctor recruitment shortages have been met through the recruitment of cheaper labour from the West Indies and South Asia. By 1971 31 percent of the NHS workforce were from outside the UK.⁵⁸⁴ Recruiting already trained staff that could work in Britain due to the similar training system, saved money and expediency. This was also used by Powell to differentiate between skilled migrants and unskilled migrants, supporting his argument for restrictions. Finally, he was against the calls for public sector pay increase, recruitment of migrant nurses particularly undercut this argument.⁵⁸⁵ This has echoes of the strategic use of labour to divide the work force to quell demands for improved working conditions, as detailed in the tactics of the white plantation owners between the white and Black slaves and workers. It also demonstrates the continuation of seeing people, particularly migrants, as economic units. This had multiple benefits for the UK and NHS rather than treating commonwealth and colony citizens as citizens. What the Commonwealth is, and the entwined history between England and the former empire is not mentioned. Instead, the people who have emigrated to Britain from the Commonwealth are depicted as gaining entry ‘by hook or by crook’ for the purposes of ‘admission to privileges and opportunities eagerly sought’.⁵⁸⁶

3. From Empire to Nation: Immigration Control 1948 – 2000s

Nationality, immigration and asylum law have mapped identities, categorising and constructing formerly colonised peoples as subjects, citizens, aliens, migrants and refugees. The policing of boundaries moved with these mutations, aggressively redefining access to Britishness and on what terms. This had the effect of reducing and removing rights from entitled people as well as erasing the history of what came before each legislation. Law structures the past, present and future. It is both a continuation of and rupture from the past, and a reorientation in the present towards a new and promising future.⁵⁸⁷ This is an absorbing and assimilating process, and one that reproduces

⁵⁸³ Stephanie Snow and Emma Jones, ‘Immigration and the National Health Service: Putting History to the Forefront’ <<http://www.historyandpolicy.org/index.php/policy-papers/papers/immigration-and-the-national-health-service-putting-history-to-the-forefront>> accessed 15 November 2018.

⁵⁸⁴ Colin Yeo, ‘The Interregnum: 11 Years without Free Movement from 1962 to 1973’ (*Free Movement*, 19 May 2017) <<https://www.freemovement.org.uk/interregnum-11-years-without-free-movement-1962-1973/>> accessed 3 February 2021.

⁵⁸⁵ Snow and Jones (n 583).

⁵⁸⁶ Powell (n 27).

⁵⁸⁷ Mawani, ‘Law as Temporality’ (n 160) 71.

itself in the position of authority.⁵⁸⁸ Used as a social tool to erase histories and connections of rights, new legislation means '[r]etrospection would no longer be necessary'.⁵⁸⁹ The development of restrictions of colony and commonwealth citizens, and treatment of those who did settle in the UK during the twentieth century 'speak to the reconfiguring of boundaries of who belongs in a postcolonial metropole'.⁵⁹⁰ As Britain's identity shifted from head of the empire to head of an increasingly hollow commonwealth, it eventually set its sights on European membership.⁵⁹¹ The UK first applied to the European Economic Community (EEC) in 1963 and again in 1967 and finally joined in 1973, which are dates easily mapped on to increasing controls on colony and commonwealth mobility, as the UK could not have citizens all over the world who could have legal entrance and settlement in Europe. These will be discussed in the sections below.

While race-relations were debated at length in Parliament, anti-discrimination, or race relations legislation were only enacted once restrictions on commonwealth and colony migration was established in the 1962 Act. The idea was immigration of Black and Brown people needed to be restricted, and only then could tensions between white communities and racialised communities be addressed. Each race relations legislation was preceded by legislated immigration restrictions. Sivanandan argues, 'Basically the Act was not an act but an attitude'.⁵⁹² He goes on to argue,

[i]t has taught the white power structure to accept the blacks and it has taught the blacks to accept the white power structure. It has successfully taken politics out of the black struggle and returned it to rhetoric and nationalism on the one hand and to the state on the other.⁵⁹³

Formal legal equality, including through anti-discrimination legislations, do not necessarily bring about more resources and better life chances for discriminated communities but can neutralise politic struggle, as noted above.⁵⁹⁴ There was evidence of explicit racial discrimination in housing and employment, as well as concerns around the rise of fascism within areas where there were larger communities of colour, such as Notting Hill.⁵⁹⁵ The 1965 legislation focused on public

⁵⁸⁸ *ibid.*

⁵⁸⁹ Keenan, 'Smoke, Curtains and Mirrors' (n 160) 92.

⁵⁹⁰ Saima Nasar, 'Commonwealth Communities: Immigration and Racial Thinking in Twentieth-Century Britain' in Saul Dubow and Richard Drayton (eds), *Commonwealth History in the Twenty-First Century* (Palgrave Macmillan 2020) 120.

⁵⁹¹ *ibid.*

⁵⁹² Sivanandan, *A Different Hunger* (n 541) 117.

⁵⁹³ *ibid.* 120.

⁵⁹⁴ See generally, but also for analysis into formal equality for LGBTIQ+ communities see Spade (n 48); Ryan Conrad and others, *Against Equality: Queer Revolution, Not Mere Inclusion* (AK Press 2014).

⁵⁹⁵ Dennis Dean, 'Conservative Governments and the Restriction of Commonwealth Immigration in the 1950s: The Problems of Constraint' (1992) 35 *The Historical Journal* 171, 192.

places, while the 1967 legislation focused on employment and housing. The Race relations (Amendment) Act 2000 extended anti-discrimination legislation into the public sector, most notably including the police but excluding immigration decisions as these were mostly made through nationality and ethnicity.⁵⁹⁶

Within this context, the following sections will give a detailed legal analysis from 1948 to present day. The first half will detail the transition from holding on to empire, to Britain's ultimate retreat from empire by focusing on legislation from 1948 – 1981. The second half will argue that the practices developed through the explicitly racially targeted immigration restrictions during this period are developed and expanded to encompass migrants more generally, and specifically asylum seekers and refugees. I argue, the legislation between 1948-1981 prevents racialised people entering and settling in Britain; the right to exclude and therefore segregate racialised populations outside the UK from the white population inside the UK territory, while legislation focused on asylum creates a segregation between the settled community and the refugee and undocumented communities.

3.1 British subjects to migrants

3.1.1 British Nationality Act 1948

The development of citizenship laws in the dominions were calling the common code of British subjecthood into question. All British subjects had 'identical rights, obligations, and status due to their allegiance to the Crown',⁵⁹⁷ however, citizenship laws of the Irish Free State and Canada undermined this. The Irish Nationality and Citizenship Act 1935 defined anyone not an Irish citizen as an alien, including British subjects. This was dismissed as rogue behaviour and shoehorned into the informal but critical common code of British nationality between the dominions.⁵⁹⁸ Ireland became a free state dominion in 1922, excluding six counties in the north which remains under control of Westminster. Britain still regarded Irish citizens as British subjects.⁵⁹⁹ Ireland became the national sovereign of Ireland in 1937 and a republic in 1949, at which time terminating commonwealth membership though did not become a foreign nation to Britain. This meant Irish citizens were treated as commonwealth citizens even though they were not.⁶⁰⁰ Further, anyone born in Ireland before 1949 could remain a British subject by writing to the British Home Secretary and declare they wishes to remain so without the bureaucratic and

⁵⁹⁶ El-Enany, *Bordering Britain* (n 23) 147.

⁵⁹⁷ Hansen (n 518) 72.

⁵⁹⁸ *ibid* 73.

⁵⁹⁹ Dummett and Nicol (n 371) 128.

⁶⁰⁰ *ibid* 129.

financial requirements usually associated with it. Burma (Myanmar) did not join the commonwealth at its independence in 1947, but its citizens were also offered to keep their subjecthood which had to be claimed within a two-year limit.⁶⁰¹ Ireland and Burma demonstrate the complexity as well as leniency and accommodation of British subjecthood and unofficial commonwealth relations when desired by the British state. They also demonstrate the inconsistencies.

When Canada introduced the Canadian Citizenship Act 1946 Westminster saw it as a direct challenge to its power as it altered the common code without prior consultation.⁶⁰² It also ignited similar Acts among the dominions. The Act made British subjecthood attainable through Canadian citizenship rather than a direct relationship between Crown and subject. This challenged the common code, or 'doctrine of indivisibility of subjecthood throughout the Empire and Commonwealth' which had been agreed upon in 1914,⁶⁰³ making British subjecthood secondary to Canadian citizenship.⁶⁰⁴ This had implications throughout the Commonwealth, 'destroy[ing] the existing bond of union and substitutes a purely statutory connection.'⁶⁰⁵ It also created a situation where people could be a British subject through Canadian citizenship, but not recognised in Britain, and vice versa, which would de facto impose a status against the wishes of the Canadian Parliament and thus a self-governing dominion.⁶⁰⁶ Canada's provocation through the Act could not be excused, as Ireland had been, however considerable accommodation was made.

Unable to ignore the exercise of independence behind these Acts anymore, a conference of legal experts from the dominions and India met in London in February 1947.⁶⁰⁷ From this meeting it was agreed dominions were able to grant primary status to its own citizenship, with a secondary commonwealth status which would grant British subjecthood at a future date.⁶⁰⁸ It established the granting of subject status through the citizenship of the United Kingdom and Colonies (CUKC), forming the groundwork of the British Nationality Act 1948. The 1948 Act created this shared citizenship, but rights and responsibilities associated with citizenship were granted primarily through subjecthood, and citizenship status was obtained by virtue of British subject.⁶⁰⁹ Dummett and Nicol argue that this created confusion over the two statuses, of British

⁶⁰¹ British Nationality Act 1948 (c 56) s 2.

⁶⁰² Hansen (n 518) 72.

⁶⁰³ British Nationality and Status of Aliens Act 1914.

⁶⁰⁴ Hansen (n 518) 73.

⁶⁰⁵ *ibid.* 73.

⁶⁰⁶ *ibid.* 74.

⁶⁰⁷ Dummett and Nicol (n 371) 134.

⁶⁰⁸ *ibid.*

⁶⁰⁹ *ibid.* 138.

subject and CUKC citizen, which were not rectified for decades.⁶¹⁰ A second status of citizens of the independent commonwealth countries (CICC) was created. These two statuses were an attempt to smooth over the departure of dominions and new republics without addressing the radical changes that were happening with the shrinking of the British empire and status of Britain. The intention of the Act was to ensure no one lost British status, and those not included in newly established citizenships would still have British subject status.⁶¹¹ However, '[t]he direct bond between sovereign and subject was abandoned at a stroke'.⁶¹² Rather than for the benefit of the increasingly independent dominions, the Act created a new imperial legal category to affirm the empire, for the benefit of Britain, through a 'legal sleight of hand'.⁶¹³ This imperial legal citizenship was the first conception of citizenship and was indivisible between Britain and the colonies – there was no British citizenship without citizenship of the colonies. The Act was a reactive attempt to hold together a crumbling empire, upholding the imperial foundations of British citizenship and the notion of Britain as the “mother country” at the centre of the empire.⁶¹⁴

There was considerable migration to Britain after World War II to address a labour shortage, as indicated above. While there was significant movement of British subjects from the colonies and commonwealth,⁶¹⁵ who sponsored their own way, these numbers paled in comparison to European aliens. There were restrictions on travel of aliens, but the state sponsored recruitment brought people from across Europe, and prisoners of war from the USA and Canada.⁶¹⁶ Those sponsored included 127,900 ex-service personal and their families from Poland who were able to permanently settle in Britain if they wished. A further 29,400 people were recruited from Poland through the European Volunteer Worker (EVW), to join 100,000 Eastern Europeans refugees for the scheme.⁶¹⁷ The Ministry of Labour directly recruited Europeans who were displaced and encamped after the war. A scheme was set up to administratively and financially manage this, from recruitment, travel and repatriation of European aliens outside of the Aliens Order 1920, which

⁶¹⁰ *ibid.*

⁶¹¹ *ibid.* 139. See 132-3 for details of this situation in India, Pakistan and Ceylon (Sri Lanka).

⁶¹² Hansen (n 518) 77.

⁶¹³ El-Enany, *Bordering Britain* (n 23) 80.

⁶¹⁴ Nadine El-Enany, 'Things Fall Apart: From Empire to Brexit Britain' (*IPR Blog*, 2 May 2017) <<http://blogs.bath.ac.uk/iprblog/2017/05/02/things-fall-apart-from-empire-to-brexit-britain/>> accessed 16 July 2018; Geddes (n 520) 11; Hansen (n 518).

⁶¹⁵ Between 1955-1962 (when the first restrictive legislation was introduced) 472,000 people emigration from the colonies and commonwealth to Britain. See Lord Andrew Green, 'A Summary History of Immigration to Britain' (*Migration Watch UK*) <<http://www.migrationwatchuk.com/briefing-paper/document/48>> accessed 9 January 2022.

⁶¹⁶ El-Enany, *Bordering Britain* (n 23) 84.

⁶¹⁷ Solomos (n 541) 50; Gurminder K Bhambra, 'Brexit, the Commonwealth, and Exclusionary Citizenship' (*OpenDemocracy*, 8 December 2016) <<https://www.opendemocracy.net/en/brexit-commonwealth-and-exclusionary-citizenship/>> accessed 28 January 2021.

was specifically concerned with individuals.⁶¹⁸ In the six years after World War II 70,000-100,000 people moved from Ireland to the UK.⁶¹⁹ They were also supported with housing, employment, education and welfare for three years.⁶²⁰ Restrictions could not be placed on migration from the colonies and commonwealth, and this was part of a very expensive effort to rapidly fill labour shortages to discourage this migration before the end of the 1940s. This calls into question the popular narrative, which explains racialised migration, that people were invited from the colonies and commonwealth to Britain.⁶²¹ Some had contracts with the National Health Service (NHS) or London Transport, but this was generally not encouraged by the governments of the day.⁶²²

3.1.2 Close Monitoring in the 1950s

The migration of colony and commonwealth citizens was closely monitored throughout the 1950's and while legislation was under discussion it was not felt either immediately necessary or viable when considering imperial relations and domestic opposition.⁶²³ There were, however, informal and administrative measures taken to restrict migration from the Asian commonwealth and West Indian colonies. These included appeals to the USA to relax quotas restrictions as well as requests to commonwealth and colonial leaders to comply with financial and bureaucratic restraints to restrict people leaving the Caribbean.⁶²⁴ India and Pakistan implemented restraints from 1955, India up until 1960, whereas other countries, such as Jamaica did not.⁶²⁵ Those who applied for a passport to travel to Britain in India and Pakistan had to prove financial security to support themselves once in Britain. Anyone who could not, was not granted a passport.⁶²⁶ This assisted in limiting the number of Indian and Pakistani people reaching Britain, especially those deemed "undesirable", namely those who would need state assistance. In the West Indies colonial development programmes of industry, education and welfare programmes were being implemented to quell nationalism and increase earnings from the colonies, but also to prevent the "push factors" of emigration. These programmes were being used to hold on to the colonies for extractive profiteering and were spurred on by the 'threat' of emigration *to Britain*.⁶²⁷ This will be discussed further in Chapter Four. The British post-war welfare system was seen as a "pull factor"

⁶¹⁸ Solomos (n 541) 50.

⁶¹⁹ *ibid* 45.

⁶²⁰ Bhambra, 'Brexit, the Commonwealth, and Exclusionary Citizenship' (n 617).

⁶²¹ Stuart Hall in Dean (n 595) 179.

⁶²² An exception to this is Powell's direct recruitment of NHS works in the early 1960s.

⁶²³ Spencer (n 451) chs 2 and 3.

⁶²⁴ Dean (n 530) 63.

⁶²⁵ Spencer (n 451) 25.

⁶²⁶ *ibid* 27.

⁶²⁷ Dean (n 595) 179.

for colony and commonwealth immigration, an argument which will echo to present day debates. As such, calls for housing and other social support for those newly arrived were refused.⁶²⁸ The threat of controls was also a push factor, with increased migration towards Britain to pre-empt the restrictions. The Colonial Office was armed with this as a strong argument to prevent restrictive legislation.

Overemphasis on a perceived link between welfare and “coloured” migration was also made in the 1950s by Lord Salisbury.⁶²⁹ This flawed connection reinforced the assumption of an unskilled newly arrived workforce and downplayed racism which barred people from employment and housing. It firmly placed colony and commonwealth subjects within the working class, while maintaining a distinct racialisation as the white working class remained a distinct and oppositional group. Debates on colonial and commonwealth immigration were a battle between two departments. The Colonial Office wished to maintain imperial relations with colonies and commonwealth, and the Home Office wished ease social tensions and reduce the number of arrivals by limiting access to housing and jobs. One such call came from the Home Secretary, Gwilym Lloyd George, who in 1955 presented incoming British subjects from the colonies and commonwealth as a law and order issue; ground work for what was to come in the 1970s.⁶³⁰ This was intended to gather a more sympathetic approach to his proposition of restricting colonial immigration.⁶³¹ He relied on evidence produced from within his department, such as police reports, to depict the relationships, or rather tensions, between the white and Black communities with the blame being laid on the latter as they ‘maintain[ed] life styles that were objectionable to white communities.’⁶³² It was, however, considered an issue limited to specific localities, rather than a national issue. Tensions were not nationally evident until the race riots in Nottingham and Notting Hill 1958.

Law and order were to be maintained, without focusing on those involved being from the commonwealth. The government did not want to stoke calls for restrictive legislation which could risk reactive legislation to the riots and risk receiving criticism from across the commonwealth.⁶³³ However, restrictions were supported by the Observer Newspaper which championed the white Australia policy, apartheid in South Africa and segregation between India and Pakistan.⁶³⁴

⁶²⁸ Dean (n 530) 68.

⁶²⁹ *ibid* 59.

⁶³⁰ See Hall and others (n 550).

⁶³¹ Dean (n 595) 181.

⁶³² *ibid*.

⁶³³ *ibid* 189.

⁶³⁴ *ibid* 192.

Support for the empire was waning. In the 1950s decolonisation was expected to be a long and controlled process with Britain in charge of this slow and managed hand over of power. Part of the preparation for this was the education and training of promising people from the colonies and commonwealth to ensure a British education, British ways and embed ties for future relationships.⁶³⁵ Even after independence, English legal training was provided both in London and in the new nations, ensuring a common law bond after empire as the commonwealth grew.⁶³⁶ Seen as a method of continued English influence and connections, this would build ‘an army of gentleman lawyers...carrying the lifeblood of British civilization within them.’⁶³⁷ However, the reception of students and trainees were mixed, and there was concern over what impression they would take back with them of Britain and what that would mean for future relations.

Immigration restrictions did not help this, and colonial administrations argued they were destabilising the process of decolonisation.⁶³⁸ It was a struggle between maintaining relations with colonies and commonwealth while not encouraging their migration to Britain but also maintaining free movement between the dominions. Though it no longer laid any claim to comment on the racially discriminatory immigration laws of the dominions, Britain could not be seen to be legislating racially discriminatory laws at home while being critical of racially discriminatory laws in South Africa and Southern Rhodesia (Zimbabwe). This was a clear acknowledgement that the policies were explicitly intended to enact a racial segregation to maintain Britain as a white space, while also maintaining the façade of equality among subjects. However, Britain’s role was receding by the 1960s and the belief of a multiracial commonwealth with unrestricted entry to Britain as the mother country and corner stone of this ideology was no longer viable.⁶³⁹ Further, attentions were moving to the European Economic Community (EEC), and restrictions on people from the colonies and commonwealth were needed before an application to the EEC and free movement within it would be possible.⁶⁴⁰

3.1.3 *Commonwealth Immigration Act 1962*

There was a rush to travel to Britain before restrictive legislation came into effect. People who were contemplating returning home, or who were in Britain for a short period settled to avoid the risk of not being able to return.⁶⁴¹ The 1962 Act amended the terms on which the status of CUKC

⁶³⁵ *ibid* 177.

⁶³⁶ Harrington and Manji (n 280).

⁶³⁷ Wes Pue quoted in *ibid* 393.

⁶³⁸ Dean (n 595); Dean (n 530).

⁶³⁹ Dean (n 530) 59.

⁶⁴⁰ *ibid* 73.

⁶⁴¹ Spencer (n 451) 132.

could be exercised to enter the UK under the 1948 Act. It legislated for immigration restrictions on British subjects who were not born in Britain or had a passport issued in the UK or Ireland.⁶⁴² The refusal, removal and detention of commonwealth citizens and British passport holders issued Outside of the UK and Ireland was legislated.⁶⁴³ Those suffering from some mental or physical health needs were deemed undesirable, those with a criminal conviction and anyone deemed ‘contrary to the interest of national security’ could explicitly be refused.⁶⁴⁴ The largest group of people moving to Britain were Irish, and though not exactly welcomed it was deemed impractical to enforce restrictions. Further, the government did not want to cause any conflict that would ignite ‘the vexed problem of Northern Ireland’.⁶⁴⁵ In exempting the Republic of Ireland the British Government minimised the risk to retain control over the closest occupied territory. Further, allowing a predominantly white common travel area while restricting the common travel area of racialised citizens, demonstrates the primary issue was not migration in and of itself, but racialised migration. In the period between the 1948 Act and the 1962 Act, there had been a transition in terminology, from British subjects or citizens of the UK and colonies (CUKC) to immigrants.⁶⁴⁶ The 1962 Act removed the distinction between aliens and subjects by amending ‘deportation of aliens’ to ‘deportation’, thus allowing non-aliens, or British subjects, to be deported.⁶⁴⁷ Hereditary citizenship through the paternal line, as well as parents with settled status in Britain at the time of birth exempt people from deportation, predominantly preventing deportation of white people.⁶⁴⁸ It fractured British subjecthood and created a tiered system of rights and entitlements which was built on, but obscured the colonial relations which generated it.

Those British subjects who were now restricted in their status were eligible, and required, to enter Britain through an employment voucher system.⁶⁴⁹ There were three tiers of labour vouchers which were expected to act as a system to enable migration from the white British settled dominions and limited migration from the colonies and commonwealth nations of predominantly Black and Brown subjects. Applications had to be made to the Ministry of Labour according to these three categories; people with a job to come to (category A) and skilled workers considered useful to the country (category B) and all others, with preference given to those who had fought

⁶⁴² Commonwealth Immigrants Act 1962 (c 21) s 1 (2).

⁶⁴³ *ibid* 3 (b) (c) (d).

⁶⁴⁴ *ibid* 2(4)(a) (b) (c).

⁶⁴⁵ Dean (n 530) 69.

⁶⁴⁶ El-Enany, *Bordering Britain* (n 23) 94.

⁶⁴⁷ Commonwealth Immigrants Act 1962 pt 3 s20 (1).

⁶⁴⁸ *ibid* II s6(2)(a).

⁶⁴⁹ *ibid* 2(3)(a).

in the armed forces (category C).⁶⁵⁰ This third category ceased by 1964.⁶⁵¹ Vouchers were liberally granted to start with. Immediate family and close relatives could join family members in Britain, and students were not affected by the 1962 Act. However, by 1965 the letter of the Act was applied by the new Labour Government, limiting dependents to immediate family members who had to provide an entry certificate or identity documentation at port of entry. A time limit of length of study was placed on student visas and a six-month limit on visitors.⁶⁵² The voucher quotas were reduced and exclusively granted to categories A and B applications.

These restrictions significantly restricted the migration and settlement from Black and Brown commonwealth countries.⁶⁵³ While the legislation was written in race neutral terms, it was believed to have the effect of preventing Black commonwealth nationals, as they were generally considered to be unskilled and those applying for categories A and B were assumed to be white settler commonwealth nationals.⁶⁵⁴ In effect, this racialised the term unskilled and deskilled racialised people. The voucher system would satisfy the control and reduction of Black and Brown immigration through a quota system, while not placing a total restriction on immigration. It would satisfy changing labour needs without explicitly restricting along colour lines, though the distinction of skilled and unskilled were explicitly racialised.⁶⁵⁵ This 'effected the transition of Commonwealth (and therefore British) citizens from the status of citizen to labourers on contract...from status to contract'.⁶⁵⁶ The Commonwealth Immigrants Act 1962 nationalised the line of racism which had been evoked since the 1950s, the coupling of racialised immigration with welfare claims, through state legal systems and 'made racism respectable and clinical by institutionalising it', differentiating the rights of "old" and "new" commonwealth citizens.⁶⁵⁷ Existing administrative measures meant this distinction had been in practice for a while, but this was the first time a legal distinction was made and it 'became the basis for a schedule of restrictions that placed limitations on the rate of growth by immigration of Asian and Black communities in Britain'.⁶⁵⁸

⁶⁵⁰ Solomos (n 541) 58.

⁶⁵¹ The 1965 White Paper removed (Category C) and placed limit of 8,500 on A & B Category vouchers. B Category vouchers were limited to doctors, dentists, nurses, teachers and graduates in science and technology. The voucher system did not apply to Irish citizens, but new powers were reserved for Home Secretary to control Irish Immigration, but this have not been exercised.

⁶⁵² Spencer (n 451) 135–136.

⁶⁵³ *ibid* 135.

⁶⁵⁴ Dean (n 530) 67–8.

⁶⁵⁵ Dean (n 595).

⁶⁵⁶ Sivanandan, *A Different Hunger* (n 541) 109.

⁶⁵⁷ Sivanandan (n 24) 109.

⁶⁵⁸ Spencer (n 451) 134.

3.1.4 *Commonwealth Immigration Act 1968*

A policy of 'Africanisation' was adopted by the independent governments of Tanzania, Uganda and Kenya with independence in 1961, 1962 and 1963. This was a policy of defining and promoting African culture, language and identity and returning ownership and wealth to Indigenous Africans.⁶⁵⁹ However, it was also a process of alienation of minority communities. Those born in Kenya, or with a father born in Kenya received automatic citizenship.⁶⁶⁰ Large parts of the Asian and white communities in Kenya were excluded and they were required to apply for citizenship within two years and renounce all other citizenships. This left those who did not hold Kenyan citizenship without secure legal status in their own countries. They had to apply for work permits, being limited in trading opportunities and losing civil service employment.⁶⁶¹

Most Asian and white Kenyans retained their citizenship of the UK and colonies (CUKC) and with it their British passports. As a result, migration of Asian Kenyans to the UK had gone from 2,000 a year to 1,000 a month in 1967 to 750 a day in February 1968.⁶⁶² Mobility was restricted through the Commonwealth Immigration Act 1962 if a person was born outside of Britain or had a passport issued outside of the UK and Republic of Ireland, as detailed above.⁶⁶³ However, after independence British passports in Kenya were issued under the authority of the British government through the high commissioner, formally the colonial governor before independence.⁶⁶⁴ Any CUKC passports issued by a colonial office – in this case passports issued before Kenyan independence – were subject to immigration controls when entering the United Kingdom, whereas a passport issued under the authority of London – as was the case with passports issued after Kenyan independence – were exempt.⁶⁶⁵ It was a case of 'distinguishing among their passports, but not their citizenship.'⁶⁶⁶ Without automatic citizenship and an increasingly precarious situation for this minority community of Asian Kenyans, growing numbers of people who emigrated from Kenya to Britain and were eligible to do so. As Randall Hansen argues, this was not 'an unpredictable side-effect of empire', but once again a 'naïve hope that Asians would not exercise their right to enter Britain, a lesson they should have learned during the first large-scale arrival of Commonwealth immigration in the 1950s.'⁶⁶⁷

⁶⁵⁹ Saima Nasar, 'We Refugees? Re-Defining Britain's East African Asians' in Jennifer Craig-Norton, Christhard Hoffmann and Tony Kushner (eds), *Migrant Britain. Histories and Historiographies: Essays in Honour of Colin Holmes* (Taylor & Francis Group 2018) n 1.

⁶⁶⁰ The Constitution of Kenya 1963 s 1.

⁶⁶¹ Hansen (n 542) 817.

⁶⁶² Hansen (n 542).

⁶⁶³ Commonwealth Immigrants Act 1962 s 2(a)(b).

⁶⁶⁴ Hansen (n 542) 829.

⁶⁶⁵ *ibid* 828.

⁶⁶⁶ *ibid*.

⁶⁶⁷ *ibid* 833.

After a compromised and urgent – but ultimately a failed – appeal to President Kenyatta of Kenya to prevent the increased numbers of Asian Kenyans leaving for Britain, approval for new legislation to do this went ahead. Reflecting the mood at the time, one month before Powell’s infamous speech, the Commonwealth Immigration Act 1968 was pushed through Parliament in three days, amending the 1962 Act and limited rights of entry to new commonwealth countries as a direct response to the arrival of Asian Kenyans. It limited the right of entry to people with at least one parent or grandparent born in the United Kingdom, therefore reducing routes for people from “new” commonwealth countries but keeping the route open for white settler states.⁶⁶⁸ The Nationality Act 1964 had already established this precedent, allowing a renounced citizenship to be regained if they had otherwise qualified as a CUKC by their own, their father or grandfather’s birth in Britain, meaning restrictions were not as enforced on most white people in Kenya and others settled in the region.⁶⁶⁹ Britain issued a voucher system to allow a limited number – 1,500 primary migration annually – to arrive from East Africa, and negotiated for some Asian Kenyans to be resettled in Canada.⁶⁷⁰ Many were ‘shuttlecocked’ between Britain and Kenya, and around Europe until they found somewhere they were allowed to settle.⁶⁷¹

The European Commission of Human Rights received complaints from 200 East Asians between 1970 and 1973 regarding the 1968 Act.⁶⁷² The Commission found that the immigration restrictions in the 1968 Act was racially discriminatory in practice and motives towards the Asian community of East Africa⁶⁷³ and amounted to ‘degrading treatment’ as per Article 3 of the European Convention of Human Rights. While the Commission was not ‘faced with the general question whether racial discrimination in immigration control constitutes as such degrading treatment’⁶⁷⁴ it does go beyond, detailing the explicitly racialised restrictions of the 1968 Act. It highlights the predominant ability for white settlers, and not East African Asians, to resume citizenship as per the 1964 Act and the extension of patrial status, along with the right of abode and employment this entails, to those who would ‘normally be white Commonwealth citizens’ and not to East African Asians through the 1971 Act.⁶⁷⁵ The government however ignored the ruling and left it unchallenged, meaning it did not go to the European Court of Human Rights.⁶⁷⁶

⁶⁶⁸ Commonwealth Immigrants Act 1968 (c 9) s 1.

⁶⁶⁹ British Nationality Act 1964 (c 22) ss 1, 2 and 3.

⁶⁷⁰ Spencer (n 451) 141–142.

⁶⁷¹ Hansen (n 542) n 68; *East African Asians v/ the United Kingdom* [1973] European Commission of Human Rights 4403/70-4419/70, 4422/70, 4423/70 4434/70 4443/70 4476/70-4478/70 4486/70 4501/70 4526/70-4530/70 (joined).

⁶⁷² El-Enany, *Bordering Britain* (n 23) 114.

⁶⁷³ *East African Asians v/ the United Kingdom* (n 671) para 201.

⁶⁷⁴ *ibid* 196.

⁶⁷⁵ *ibid* 202.

⁶⁷⁶ Hansen (n 542) n 75.

3.1.5 *Immigration Act 1971 and Becoming European*

The 1971 Act created two new categories, *patrial* and *non-patrial*, to distinguish between those living in the UK free from restrictions and those who were living in the UK but under immigration rules.⁶⁷⁷ *Patrials* were people born, adopted or naturalised in Britain or had a parent born in Britain and British and commonwealth citizens who had been in the UK for five years or more who had registered to become a citizen.⁶⁷⁸ *Non-patrials* could apply for work permits, but they were for a limited time period, and no longer offered permanent residency or the right of entrance for dependants.⁶⁷⁹ The term *alien* was replaced with the wording ‘not a *patrial*’, or *non-patrial*.⁶⁸⁰ There was no distinction between commonwealth citizens who were not ordinary residents of the UK and *aliens*, both were classed as *non-patrials*.⁶⁸¹ This clearly demarcates a severance between the UK and the commonwealth, as is also clear in the legislative name shift from commonwealth restriction to immigration. When there was a question over a person’s *patrial* status, the burden of proof lay with the individual.⁶⁸² A *non-patrial* with limited leave to remain could be required to register their residency with the police.⁶⁸³ Those who became *non-patrial* were financially assisted to leave the UK to a place of intended permanent residence, to encourage departure.⁶⁸⁴ Between the 1962 and 1971 Act, commonwealth citizens who entered Britain on the voucher system were eligible for settlement whereas the 1971 Act required an annually renewed work permit making settlement more precarious and temporary.⁶⁸⁵

The government’s stated aim was to have one permanent comprehensive immigration system where those already resident in the UK for five years or more would be treated no differently than those born here.⁶⁸⁶ It was also set as a reassurance – to white Britain – that there would be no further so-called large-scale primary immigration.⁶⁸⁷ It effectively curtailed primary immigration from the racialised commonwealth. The Immigration Act 1971 came into force on 1 January 1973, the same day the UK joined the EEC and with it allowed free movement of 200

⁶⁷⁷ Immigration Act 1971 1973 (c 77) s 2(6).

⁶⁷⁸ Spencer (n 451) 143.

⁶⁷⁹ *ibid* 144.

⁶⁸⁰ For example Immigration Act 1971 s 30(1).

⁶⁸¹ Spencer (n 451) 144.

⁶⁸² Immigration Act 1971 s 3(8). This was not the first-time burden of proof was placed on individual, see Chapter Two Section 3.2 Special Restriction (Coloured Alien Seaman) Order 1925 and Section 4 for analysis on Aliens Act 1905, Aliens Act 1914.

⁶⁸³ *ibid* 3(1)(c).

⁶⁸⁴ *ibid* IV 29(1).

⁶⁸⁵ Solomos (n 541) 63.

⁶⁸⁶ Immigration Act 1971 2(1).

⁶⁸⁷ El-Enany, *Bordering Britain* (n 23) 116.

million people within the bloc. Now a common travel area was with a predominantly white regional bloc, combined with the restrictions of the 1962 and 1968 Act, encouraged the racialisation of non-patrials, and those racialised people were non-patrials, or rather, not British. Ending free movement within the commonwealth was necessary to enter the EEC, and Britain exchanged free movement between racialised states, while keeping the door open for the white settler states, with free movement of white European states.⁶⁸⁸ Despite extensive restrictions and defeat of much of the empire, Britain entered the EEC still with an empire. These colonial possessions, predominantly small island nations, were accommodated upon its entrance into the EEC, as had been the case with the founding European empire members.⁶⁸⁹

As with the Asian community in Kenya, Asian Ugandans were increasingly insecure in their home country due to the policy of Africanisation. General Idi Amin announced a 90-day period for anyone with a British passport to leave Uganda in August 1972. This led to the expulsion of some 30,000 South Asians with British passports from their homes. However, their destination was uncertain after the treatment of Asian Kenyans in the same situation just four years earlier with the addition of the 1968 Act. While unrestricted entry into Britain was not permitted, the British government 'took responsibility' for the resettlement of the Asian Ugandan population.⁶⁹⁰ After negotiations 23,000 people settled in Canada, India, New Zealand, Malawi and Kenya, with just under 29,000 being resettled in Britain.⁶⁹¹

Despite their British passports and citizenship of the United Kingdom and colonies, those arriving in Britain were processed and resettled as refugees through the Ugandan Resettlement Board. Supported housing was only offered in 'green zones', away from 'red zones' of already settled Asian communities to disperse newly arrived and settling Asian communities in Britain.⁶⁹² Many refused the housing support and resettled among family and familiarity.⁶⁹³ The creation of refugee status for Asian Ugandans therefore politically and historically neutralised the source of injustice experienced by Asian Ugandans. Neither their ancestral or actual home (Uganda) or

⁶⁸⁸ 'EU Residual affinities with the peoples of other post-colonial territories had to be disavowed. Citizenship would mediate racism by embodying Irish Europeanness directly, rather than being a symbol of a deeper cultural belonging'. For a more contemporary example of conflation with non-EU nationals' status and the belief that all non-EU nations – read people who are not white – are not entitled to services of the state, do not have legal status and are taking advantage of the system see John A Harrington, 'Citizenship and the Biopolitics of Post-Nationalist Ireland' (2005) 32 *Journal of Law and Society* 424.

⁶⁸⁹ El-Enany, *Bordering Britain* (n 23) 183.

⁶⁹⁰ Spencer (n 451) 145.

⁶⁹¹ *ibid*; El-Enany, *Bordering Britain* (n 23) 123.

⁶⁹² Lord Wade, 'Uganda Asians: Resettlement Policy' (*Hansard*, 6 December 1972) col 267

<<https://api.parliament.uk/historic-hansard/lords/1972/dec/06/uganda-asians-resettlement-policy>> accessed 2 February 2022.

⁶⁹³ *ibid*.

imperial or administrative home (UK) would acknowledge their right of belonging and settlement as citizens.⁶⁹⁴ These actions demonstrate the ‘elasticity with which they have been classified’; from subject, to citizen to refugee.⁶⁹⁵ Britain was therefore positioned to be undertaking an exceptional and humanitarian act by receiving CUKCs as refugees.⁶⁹⁶ The evacuation of 7,000 white Ugandan’s was met with no delay however, and their repatriation to Britain was assumed and enacted despite the fact they were not expelled by Amin.⁶⁹⁷

3.1.6 *The British Nationality Act 1981*

In the run up to the 1979 general election Margaret Thatcher pledged to curtail the number of “new” commonwealth citizens arriving and causing the risk of Britain being ‘rather swamped’.⁶⁹⁸ The British Nationality Act 1981 came into force in 1983 and further restricted right of entry and abode. These changes brought the UK in line with Europe, though the UK refused to forgo internal check within the European Community.⁶⁹⁹ The 1981 Act abolished the CUKC status while establishing citizenship into three categories. Only British citizens held the right of abode, which was continued through the 1971 Act patrial status.⁷⁰⁰ The two other statuses, British Dependent Territories citizen⁷⁰¹ and British Overseas Citizen⁷⁰² were territorially unanchored, not just from Britain but also from any specific territory, making them legally and conceptually external to Britain and subject to immigration controls. El-Enany argues, ‘[t]hey corresponded to an empire, the memory and acknowledgment of which was fast fading, even by those closely connected with its administration.’⁷⁰³ Citizens of British Dependent Territories, such as Hong Kong and the Falkland Islands, could not enter Britain unrestricted, but could access British consular services abroad.⁷⁰⁴ British Overseas Citizen replaced CUKC status and passports. It was a catch all category which enabled any ‘remaining claims’ to enter and settle in the UK to be transitioned out.⁷⁰⁵ As such, this

⁶⁹⁴ Nasar (n 659) 141.

⁶⁹⁵ *ibid* 139.

⁶⁹⁶ El-Enany, *Bordering Britain* (n 23) ch 4.

⁶⁹⁷ *ibid* 124.

⁶⁹⁸ Margaret Thatcher, ‘TV Interview for Granada World in Action (“rather Swamped”)’ (*Margaret Thatcher Foundation*, 27 January 1978) <<https://www.margaretthatcher.org/document/103485>> accessed 22 November 2018.

⁶⁹⁹ Spencer 148-9.

⁷⁰⁰ El-Enany, *Bordering Britain* (n 23) 125.

⁷⁰¹ British Nationality Act 1981 1983 (c 61) pt II.

⁷⁰² *ibid* III.

⁷⁰³ El-Enany, *Bordering Britain* (n 23) 129.

⁷⁰⁴ British Dependent Territories was renamed British Overseas Territories in 2002. British Overseas Territories Act 2002 (c 8) ss 1 and 2.

⁷⁰⁵ Spencer (n 451) 148.

status conferred no rights and could not be inherited by children,⁷⁰⁶ emptying the rights of transfer and use usually entailed within citizenship status.

Commonwealth citizens needed to register as British citizens within five years or face losing residency.⁷⁰⁷ A good character requirement for naturalisation of non-citizens,⁷⁰⁸ as well as those with British Dependent Territories citizenship was introduced.⁷⁰⁹ Sufficient knowledge of English, Welsh or Scottish Gaelic was also required for naturalisation.⁷¹⁰ This had the effect of continuing immigration policing on resident communities and ‘extending the border from the point of entry and admittance into the nation-state to a more fluid point of inclusion/exclusion encroaching into everyday life of racially marginalised communities.’⁷¹¹ The right of *jus soli*, which had been reaffirmed in the 1948 Act and granted British citizenship to anyone born in the UK and colonies, was removed and citizenship and right to enter and settle was limited to *jus sanguinis* stemming from a parent’s settled status at time of birth.⁷¹²

Samantrai argues British nationality changed ‘from the patriarchal family enshrined in the 1948 Nationality Act to the racial family of the 1981 act’.⁷¹³ I support this statement, to an extent; legislations from 1948-1981 are steeped in privileging and protecting whiteness. However, the patriarchal state has not disappeared. This citizenship through parentage meant that someone born to a British parent overseas was entitled to British citizenship, but not someone born in Britain whose parent/s did not have settled status.⁷¹⁴ By removing birth right citizenship but maintaining inherited citizenship, the Act ensured Britishness as inherited through whiteness, while excluding racialised people and formally colonised people *in Britain* from Britishness. The introduction of the term parent in the 1981 Act meant that a mother could pass on her nationality automatically for the first time, as well as the father. However, anyone born overseas before the enforcement of the 1981 Act (1983), must register through the mother’s citizenship using a UKM form,⁷¹⁵ which still creates an additional step as compared to a father which has been legislated for since 1948.⁷¹⁶ Further, if citizenship is sought through the father, for anyone born after 2006 the father is still

⁷⁰⁶ *ibid.*

⁷⁰⁷ British Nationality Act 1981 s 7.

⁷⁰⁸ *ibid* sch1 s1(1)(b).

⁷⁰⁹ *ibid* sch1 s5(1)(b).

⁷¹⁰ *ibid* sch1 1(1)(b)(c).

⁷¹¹ Nisha Kapoor and Kasia Narkowicz, ‘Characterising Citizenship: Race, Criminalisation and the Extension of Internal Borders’ (2019) 53 *Sociology* 652, 654.

⁷¹² British Nationality Act 1981 s 1 (a) (b).

⁷¹³ Quoted in Terese Jonsson, *Innocent Subjects: Feminism and Whiteness* (Pluto Press 2020) 14.

⁷¹⁴ British Nationality Act 1981 s 2.

⁷¹⁵ ‘Register as a British Citizen (Form UKM)’ (*GOV.UK*)

<<https://www.gov.uk/government/publications/register-as-a-british-citizen-form-ukm>> accessed 9 January 2022.

⁷¹⁶ British Nationality Act 1981 s 4C; British Nationality Act 1948 s 5.

classed as the person married to the child's mother.⁷¹⁷ Therefore, it is still a notion of colonial and patriarchal innocent white womanhood that is secured.⁷¹⁸

3.2 Merging Immigration and Asylum

With the 1981 Act considered the final curtailment of Britain's colonial ties, the legislative focus turned to restricting asylum seekers and refugees as the, ultimately unwanted and unexpected, number of arrivals had increased. This section will demonstrate how the legal shift in focus continued its purpose of restriction and segregation at the border and internally, much of which is still in place. Before moving to the analysis of UK asylum law, it is important to consider that the international legal mechanism, the 1951 Refugee Convention, came as a response to World War II and significantly shaped who was considered a refugee. This included a geographical and purely retrospective limitation, meaning that only those affected by events in Europe before 1 January 1951 could be protected by the Convention.⁷¹⁹ After WWII and until the end of the Cold War the refugee was represented as an individual white male political exile.⁷²⁰ This bears out in mass relocations from European camps to Britain between the end of the war and the Convention, as detailed in Section 3.1.1. Colonial powers insisted on this narrow definition, side-lining calls for universal access to international legal mechanisms of protection and accountability in the rebuilding after the war across the development of human rights conventions.⁷²¹

Colonised populations, including those now independent, were excluded from international refugee protection and therefore international support for displacement in these territories despite some resettling European refugees.⁷²² This European action meant that the displacements and statelessness caused by the drawing of new territorial lines, such as the partition of India and dispossession of Palestinians were not entitled to international protection despite being in need of it. As noted by non-European states, this disallowed colonised peoples any mechanisms which would 'make them conscious of their rights', contributing to the racial exclusionary application of the rights of man that have echoed for centuries.⁷²³ The resistance to grant the same rights between "old" and "new", or white and racialised, to commonwealth citizens,

⁷¹⁷ British Nationality Act 1981 s 50(a)(9); Colin Yeo, 'How Can the Home Office Tear up the British Passport of a Six-Year-Old Boy Born in Leeds?' (*Free Movement*, 6 September 2018) <<https://www.freemovement.org.uk/how-can-the-home-office-tear-up-the-british-passport-of-a-six-year-old-boy-born-in-leeds/>> accessed 9 January 2022.

⁷¹⁸ See Jonsson (n 713).

⁷¹⁹ Convention and Protocol Relating to the Status of Refugees s 1(b).

⁷²⁰ BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 *Journal of Refugee Studies* 350, 351.

⁷²¹ Mayblin (n 16) ch 6.

⁷²² *ibid* 131–136.

⁷²³ *ibid* 6.

despite formal equality, was a direct response to racialised British subjects exercising the rights of both self-governance and freedom of movement. This is evident in the progression of British immigration law, as detailed in Section 3. Despite the removal of the limitation with the 1967 Protocol,⁷²⁴ Britain resisted accepting formally colonised people as refugees and delegitimised them as “bogus” refugees or economic migrants. In fact, Britain signed the protocol a year before it legislated restrictions of entry for Asian Kenyans into Britain, rendering them stateless. The Refugee Convention was never meant for those suffering the consequences of European colonialism.⁷²⁵

The refugee that emerged after the Cold War ‘no longer possessed ideological or geopolitical value’ and so their usefulness changed, as did the approach of states to them.⁷²⁶ Arrivals of refugees were framed as sudden and unexpected, rather than a logical consequence of people leaving their homes whose political systems and natural resources had been transformed by British colonialism.⁷²⁷ This was because Britain did not have an established asylum settlement programme, but responded with ad hoc and specific programmes.⁷²⁸ Therefore anyone who traveled to Britain outside of these limited sanctioned programmes and made an asylum claim was perceived as unexpected. There were exceptions allowing entry under ‘compassionate grounds’ which allowed ‘Britain to present itself as a generous host – rather than colonial state.’, as was the case with the Asian Ugandan community in 1972.⁷²⁹

This ahistorical account allows the government to criminalise movement and increase border technologies that would make it harder to reach the UK in an effort to exclude irregularised mobilities. For example, from the 1980s, visa requirements were increasingly placed on countries where asylum seekers were fleeing, or were predicted to flee from, making it harder to leave their country of origin and disembark in the UK.⁷³⁰ Further, the Sangatte Protocol 1991 and the Touquet Treaty 2003 enable an offshore exchange either side of the English Channel as French border guards are based at Dover and British border guards in France to check documentation before embarking towards the destination country. The increased criminalisation and eroding of trust around the right to seek asylum has enabled the eroding of asylum rights and states’ responsibilities both internally and internationally.

⁷²⁴ Convention and Protocol Relating to the Status of Refugees.

⁷²⁵ El-Enany, *Bordering Britain* (n 23) 141.

⁷²⁶ Chimni (n 720) 351.

⁷²⁷ El-Enany, *Bordering Britain* (n 23) ch 4.

⁷²⁸ Sales (n 567) 462.

⁷²⁹ El-Enany, *Bordering Britain* (n 23) 135.

⁷³⁰ *ibid* 142.

The remainder of this section will detail the legislative developments and the increasing segregation of those seeking asylum and with irregularised statuses with regards to accommodation, welfare support, criminalisation and additional financial and moral burdens, arguing it creates tiers of settlement status and therefore rights. It will focus on asylum law as this was a new area of domestic law which took the focus racialised migration after colony and commonwealth migration had been sufficiently limited. Many of the asylum laws are legislated with immigration and nationality. Therefore developments in these areas are also highlighted, extending the analysis from the Section 3.1. The right to asylum holds a special protected status. While the Convention limited protection to specific events in Europe, there is a universal right to seek and enjoy asylum.⁷³¹ The UK regularly proclaims it has had a ‘long and proud history of granting protection to those who need it’.⁷³² However, Britain’s used its role to water down the right to be one of seeking asylum, rather than being granted asylum.⁷³³ This ensured power remained with the state and demonstrates the intention of refusal even for this protected status. Following Sivanandan’s argument, I argue that segregation – both physically through remote and separate housing and immigration detention and deportation, and socially through separate social support and housing systems from citizens and settled residence ‘bears all the marks of the old racism’ and is xeno-racism.⁷³⁴

3.2.1 Legal recognition and rights

The Asylum and Immigration Appeals Act 1993 was the first piece of domestic legislation for asylum. The Act defined an asylum claim,⁷³⁵ legislated the commitment to the 1951 Convention⁷³⁶ and an appeals procedure⁷³⁷ and held a restriction on deportation until the claimant had been notified of the final decision.⁷³⁸ However, those with cases deemed without foundation were fast-tracked,⁷³⁹ which was expanded by the Asylum and Immigration Act 1996.⁷⁴⁰ Detention before

⁷³¹ Universal Declaration of Human Rights Article 14.

⁷³² Home Office in Alan Travis, ‘Refugees Applying to Live in UK Face Being Sent Home after Five Years’ *The Guardian* (9 March 2017) <<http://www.theguardian.com/world/2017/mar/09/refugees-applying-to-live-in-uk-face-being-sent-home-after-five-years>> accessed 13 February 2021; Priti Patel, ‘We Have a Proud History of Helping Those in Need but Other Countries Must Do More’ *Mail Online* (28 August 2021) <<https://www.dailymail.co.uk/news/article-9936489/PRITI-PATEL-proud-history-helping-need-countries-more.html>> accessed 30 August 2021; Cameron (n 326).

⁷³³ Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and history review* 309, 343–439.

⁷³⁴ Sivanandan, ‘Poverty Is the New Black. An Introduction’ (n 545) 2.

⁷³⁵ Asylum and Immigration Appeals Act 1993 (c 23) s 1.

⁷³⁶ *ibid* 2.

⁷³⁷ *ibid* 8.

⁷³⁸ *ibid* 6.

⁷³⁹ *ibid* 8.

⁷⁴⁰ Asylum and Immigration Act 1996 (c 49) s 1.

deportation was authorised.⁷⁴¹ The 1996 Act introduced the concepts of ‘safe country’ and ‘safe third country’, where there is ‘in general no risk of serious persecution’ which essentially removed grounds for any nationals from a country on the safe country list and their appeals were fast tracked.⁷⁴² Those deemed eligible for safe third country removal had their right of in country appeal removed.⁷⁴³ The Immigration and Asylum Act 1999 entitled those being detained to a statutory bail hearing, with a general right to be released on bail.⁷⁴⁴ A unified appeal procedure with a new appeal through the Human Rights Act 1998 was introduced.⁷⁴⁵

Once a person has secured refugee status, through a successful asylum claim, they legally hold the same social rights as someone with citizenship and indefinite leave to remain (ILR). However, there is little promotion of access to these rights, so knowledge and uptake of them are low.⁷⁴⁶ A person holds leave under refugee status for five years and is then entitled to apply for settlement. In 2016 a new safe return review policy meant that after five years the person’s need for refugee status would be reviewed in all cases, rather than in exceptional circumstance. This removes the security of refugee status for the individual and their families, continuing the temporary nature and insecurity of the asylum process beyond recognition of refugeehood. An error in the original decision-making process, criminal activity or sufficient changes in the home country can result in a return of the applicant.⁷⁴⁷ This impacts an already limited uptake of social rights entitled for refugees and can have a negative impact regarding their integration, education, employment and planning for their future.

3.2.2 Social Support and Housing

The 1993 Act limited local authorities duty to provide housing to people seeking asylum as well as excluding any assistance if the claimant has any accommodation available, ‘however temporary’, under homelessness legislation.⁷⁴⁸ The 1996 Act removed the eligibility of people under immigration controls for financial social support such as child benefit, income support, housing benefit, council tax benefit and jobseekers allowance.⁷⁴⁹ Those under immigration controls were also exempt from social welfare and homeless support and could be excluded from

⁷⁴¹ Asylum and Immigration Appeals Act 1993 s 7.

⁷⁴² Asylum and Immigration Act 1996 ss 1 and 2.

⁷⁴³ *ibid* 2 and 3.

⁷⁴⁴ Immigration and Asylum Act 1999 (c 33) ss 44–54.

⁷⁴⁵ *ibid* 69–74 and 65.

⁷⁴⁶ Sales (n 567) 466.

⁷⁴⁷ Travis (n 732).

⁷⁴⁸ Asylum and Immigration Appeals Act 1993 ss 4 and 5, specifically 4(1)(b).

⁷⁴⁹ Asylum and Immigration Act 1996 ss 10 and 11.

accommodation.⁷⁵⁰ Only if the person made a claim at the border or were from a country in a ‘state of upheaval’, meaning it was not possible to be returned there, would they be eligible for certain support.⁷⁵¹

Social security support was completely restructured through the 1999 Act. Asylum seekers were specifically excluded from welfare support by preventing the use of the National Assistance Act 1948, which had enabled access to welfare support for asylum seekers who were destitute through case law.⁷⁵² All ‘non-contributory’ benefits were removed and people without settled status or citizenship have no recourse to public funds (NRPF) at all.⁷⁵³ Financial support and / or accommodation could only be provided through National Asylum Support Services (NASS), but this was discretionary, even if the person seeking asylum was destitute. A dispersal policy was implemented when assigning accommodation, with no consideration given to people’s networks or needs, to move people away from the southeast of England. Financial support was provided through prepaid vouchers. Vouchers were only redeemable at certain shops, no change could be given, and certain items, such as alcohol and cigarettes, were exempt. Cashiers were therefore required to check eligibility of items purchased as well as ensure the person spending the voucher matches the identity on the voucher, leading to the over surveillance of the asylum-seeking community by the resident community.⁷⁵⁴ This created a segregated system of support between asylum seekers and people with any other status, marking people out as different.⁷⁵⁵ The coerced movement of asylum seekers within the UK is emblematic of continued coercion of racialised people. The asylum seeker label and system marked them out as a threat and eligible for social exclusion.⁷⁵⁶ To draw upon Sivanandans argument again,⁷⁵⁷ the forced containment of asylum seeking people within these separate systems of support curates a racialised poverty, marking asylum seekers out further. Liz Fekete explains, ‘the enemy is not so much ideology as poverty.’⁷⁵⁸ Asylum seekers receive 10% less funding than the poorest households of UK citizens.⁷⁵⁹ This poverty is usually contrasted between countries and is unexceptional outside of the borders of the UK. This will be discussed further in Chapter Four.

⁷⁵⁰ *ibid* 9.

⁷⁵¹ Stevens (n 557) 173.

⁷⁵² *ibid* 190.

⁷⁵³ For example, during the global pandemic in 2020-21 this meant people without this status but who were furloughed from work were not eligible for the financial support from the government or unemployment benefit.

⁷⁵⁴ Sales (n 567) 464.

⁷⁵⁵ For the impact on child dependents of asylum seekers see Mayblin (n 16) 152–165.

⁷⁵⁶ El-Enany, *Bordering Britain* (n 23) 165.

⁷⁵⁷ Sivanandan, *A Different Hunger* (n 541) 105.

⁷⁵⁸ Liz Fekete, ‘The Emergence of Xeno-Racism’ (2001) 43 *Race & Class* 23, 23.

⁷⁵⁹ Mayblin (n 16) ch 7 specifically 175.

The Nationality, Immigration and Asylum Act 2002 went further than a segregated support system and legislated for segregated accommodation centres which were initially proposed in remote areas. Though it did not pass it was kept under review.⁷⁶⁰ Those who were destitute or at risk of destitution could either receive support through NASS or the accommodation centres.⁷⁶¹ These centres were intended to meet all the needs of the residents, such as food, money, transport to and from the centre and to claim asylum, education and training, legal support, faith spaces and health services.⁷⁶² The Act proposed that children of asylum seekers be educated in the centres, separately to the state school system.⁷⁶³ While it did not pass, it marked these children out and schools could be discouraged from accepting children of asylum seekers as there is an expectation this would impact the schools overall performance as well as the possibility of holding additional expenses for additional support, such as language.⁷⁶⁴ The residents were expected to stay six months which could be extended to nine months. They held no security or rights of tenure,⁷⁶⁵ before being dispersed into other accommodation around the country.⁷⁶⁶ Support without accommodation which had been provided for in the 1999 Act was removed,⁷⁶⁷ so anyone requiring support was compelled to be accommodated in this segregated housing, which encompasses all social needs and removes chances to interact with mainstream society and be at risk of dispersal, or forego any support at all.

3.2.3 Criminalisation and Additional Burdens

Responsibility for checking the documentation of people prior to embarking on a journey to the UK was already outsourced to transportation, with a penalty of £1000 per undocumented person if they failed to do so,⁷⁶⁸ but the 1993 Act extended liability to those transiting through the UK.⁷⁶⁹ The same Act introduced finger printing of asylum seekers and their dependents, including children.⁷⁷⁰ People seeking asylum, and anyone assisting them, were criminalised if knowingly obtaining leave by deception, for example arriving into the UK on a visitor's visa and intending to

⁷⁶⁰ Nationality, Immigration and Asylum Act 2002 (c 41) s 16; Stevens (n 557) 195.

⁷⁶¹ Nationality, Immigration and Asylum Act 2002 s 17.

⁷⁶² *ibid* 29.

⁷⁶³ Stevens (n 557) 195.

⁷⁶⁴ Sales (n 567) 459.

⁷⁶⁵ Nationality, Immigration and Asylum Act 2002 s 32.

⁷⁶⁶ Stevens (n 557) 198.

⁷⁶⁷ Immigration and Asylum Act 1999 s 96; Nationality, Immigration and Asylum Act 2002 s 43.

⁷⁶⁸ Immigration (Carriers' Liability) Act 1987 (c 24).

⁷⁶⁹ Asylum and Immigration Appeals Act 1993 s 12(2).

⁷⁷⁰ *ibid* 3.

claim asylum when visiting, or by illegal entry.⁷⁷¹ Employers became liable for penalties for employing anyone without the right to work or without ‘valid and subsisting’ leave.⁷⁷²

The 1996 Act granted an expansion of power of arrest and search warrants to Immigration officers.⁷⁷³ These were expanded in the 1999 Act, which gave extensive powers of arrest and search of both person and property, including without a warrant, and the use of reasonable force were extended to immigration officers.⁷⁷⁴ The means of deception to obtain leave were expanded and criminalised, as were the sanctions for carrier liability.⁷⁷⁵ Marriages thought to be suspicious were required to be reported by the registrar.⁷⁷⁶ Asylum seekers could and would be detained.⁷⁷⁷

Financial and moral burdens are placed on racialised minorities and those with migrant connections which cause harm and precarity and is a form of punishment and deterrence. Adult family reunification is only eligible to those with citizenship, settled status (ILR), refugee status or have limited leave as EEA nationals. This means those who are in the UK on a humanitarian status or exceptional leave to remain (ELR) cannot usually bring their partners to the UK so they can have a family life or fulfil caring responsibilities for adult family members with long term health conditions even if they meet the requirements.⁷⁷⁸ The cost of immigration applications have increased significantly in the last decade, with the government claiming it was the immigration services to be self-funded.⁷⁷⁹ Therefore, additional financial burdens are placed on people without citizenship, and on the route to obtain this status.

Those needing to apply for immigration leave must pay for the processing of their applications. In addition to these fees, an NHS surcharge must be paid with immigration payments for the full length of the status. For a two-year limited leave to remain visa, an adult will have to pay £1,033 plus NHS surcharge of £624 per year of the visa.⁷⁸⁰ The cost is slightly reduced for a child. Additionally, there are biometrics enrolment and appointment fees. A child who is not automatically born British can register as a British citizen if their parents become British or settled

⁷⁷¹ Asylum and Immigration Act 1996 ss 4 and 5.

⁷⁷² *ibid* 6 and 8.

⁷⁷³ *ibid* 7.

⁷⁷⁴ Immigration and Asylum Act 1999 ss 147–159.

⁷⁷⁵ *ibid* 28 and 32.

⁷⁷⁶ *ibid* 24.

⁷⁷⁷ *ibid* 147–159.

⁷⁷⁸ Thank you to Nina Sekular for highlighting this point. For details see GOV.UK, ‘Immigration Rules Appendix FM: Family Members - Immigration Rules - Guidance’ <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members>> accessed 20 February 2021.

⁷⁷⁹ Jon Burnett and Fidelis Chebe, ‘Towards a Political Economy of Charging Regimes: Fines, Fees and Force in UK Immigration Control’ (2020) 60 *The British Journal of Criminology* 579, 581.

⁷⁸⁰ GOV.UK, ‘Home Office Immigration and Nationality Fees’ (20 February 2020)

<<https://www.gov.uk/government/publications/visa-regulations-revised-table/2020>> accessed 20 February 2021; GOV.UK, ‘Pay for UK Healthcare as Part of Your Immigration Application’ (GOV.UK)

<<https://www.gov.uk/healthcare-immigration-application/how-much-pay>> accessed 20 February 2021.

in the UK⁷⁸¹ or from the age of 10.⁷⁸² Both avenues must be completed before the child reaches eighteen. The processing cost of naturalisation of a child is £372, while the fee was charged at £1,012. In 2021 the Court of Appeal found this fee unlawful, based on the best interests of the child, and the Home Secretary was required to revisit the fee.⁷⁸³ In 2002, sufficient knowledge about life in the UK was added to the language requirement of the 1981 Act, meaning a citizenship test.⁷⁸⁴ A citizenship ceremony, oath and pledge of allegiance to the Queen are compulsory, and cost more money, harking back to the relationship between sovereign and subject of the empire.⁷⁸⁵ These fees are simply impossible for many. They are designed to deter people from settling in Britain and are the cause of people becoming undocumented and therefore criminalised because they cannot afford to pay for renewed visas and stay documented. The fee for immigration takes account of ‘the benefits and entitlements of the product’, the product being an immigration or British nationality status.⁷⁸⁶ The ‘value of the product’⁷⁸⁷ is the security of status, rights and entitlements bound within it. It confers domestic and international privileges, particularly reciprocal visa privileges with other global north countries, which again confers a two tier system of inclusion and exclusion globally.

All immigration applications must be considered on grounds of the public good.⁷⁸⁸ If the ‘applicant’s presence in the UK is not conducive to the public good because of their conduct, character, associations or other reasons’, this can be grounds for refusal of an application, including an application made under the right to private life.⁷⁸⁹ Considerations include the person’s likelihood to be a burden on the taxpayer, ability to integrate and to speak English. It sits alongside other grounds for refusal, including a visitor visa if the applicant has received a 12-month sentence,⁷⁹⁰ on medical grounds⁷⁹¹ and failure of the applicant to prove they will be admitted into another country when transiting through the UK.⁷⁹² It is a requirement to deport people with unsettled status if they receive a sentence for 12 months or over, even if the defendant has been in the UK

⁷⁸¹ British Nationality Act 1981 s 1(3).

⁷⁸² *ibid* 1(4).

⁷⁸³ *Project for the Registration of Children as British Citizens & Anor, R (On the Application Of) v Secretary of State for the Home Department (Rev 1)* [2021] CA EWCA Civ 193.

⁷⁸⁴ Nationality, Immigration and Asylum Act 2002 s 1.

⁷⁸⁵ *ibid* Sch 1.

⁷⁸⁶ Home Office, ‘Impact Assessment for Immigration and Nationality (Fees) Regulations 2018’ (Home Office 2018) Impact Assessment (IA) HO0310 3.

⁷⁸⁷ *ibid*.

⁷⁸⁸ Nationality, Immigration and Asylum Act 2002 s 98.

⁷⁸⁹ GOV.UK, ‘Immigration Rules Part 9: Grounds for Refusal - Immigration Rules - Guidance’ para 9.3.1 <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal>> accessed 17 February 2021.

⁷⁹⁰ *ibid* 9.4.1.

⁷⁹¹ *ibid* 9.16.1.

⁷⁹² *ibid* 9.10.1.

since they were a child or have a settled or British partner and children.⁷⁹³ This may be reduced to a six-month sentence.⁷⁹⁴

Devyani Prabhat demonstrates how legal inequalities have been inbuilt into citizenship laws since they were introduced. While subjecthood was enforced around the empire, the focus was on allegiance rather than rights. Subjecthood rights were granted automatically to white settler communities, whereas rights gained by racialised subjects were largely pushed and fought for.⁷⁹⁵ As with subjecthood, the promises and legal guarantee of citizenship are less certain for racialised minorities and those with migrant connections. For example, the UK Government have taken the extreme position that it is possible to deprive someone of their citizenship on terrorism grounds, even if there is no actual charge, if they have connections to another nationality, thereby not contravening the international law on statelessness. This is even if the other citizenship is involuntary or automatic and even if the other country does not accept the person as a citizen.⁷⁹⁶ This is again reminiscent of earlier displacements and deprivations of rights, while not technically stateless, it had the effect of removing existing rights and nationality.⁷⁹⁷

The conditionality of legal protection and belonging is used as a disciplining tool. Refusal, deprivation and deportation makes previously entitled and settled people excludable on the conditionality on the conduct and behaviour.⁷⁹⁸ Good character, established in the 1981 Act, is a requirement for anyone applying for registration and naturalisation from the age of ten.⁷⁹⁹ It is also a requirement for asylum applications and ILR since the 2010s and is a basis for refusal and deprivation, deportation and refusal of entry. In 2016 this was the primary reason for denial of citizenship.⁸⁰⁰ There is no set legal definition for good or bad character, but Kapoor and Narkowicz argue citizenship refusal decisions fall largely in two categories that 'sustain and enhance structured racialized systems of exclusion, marginalization and precariousness as they operate through immigration control.'⁸⁰¹ Firstly, through administrative irregularities and criminal misdemeanors,

⁷⁹³ UK Borders Act 2007 (c 30) s 32(5); Nick Nason, 'Briefing: What Is the Law on Deporting Non-EU Foreign Criminals and Their Human Rights?' (*Free Movement*, 2 July 2020) <<http://www.freemovement.org.uk/what-is-the-law-on-the-deportation-of-non-eu-foreign-criminals-and-their-human-rights/>> accessed 17 August 2021.

⁷⁹⁴ CJ McKinney, 'Home Office Floats Automatic Deportation after Six-Month Sentence' (*Free Movement*, 4 January 2021) <<https://www.freemovement.org.uk/home-office-floats-automatic-deportation-after-six-month-sentence/>> accessed 17 August 2021.

⁷⁹⁵ Prabhat, 'Unequal Citizenship and Subjecthood: A Rose by Any Other Name..?' (n 541) 17.

⁷⁹⁶ Prabhat, 'Unequal Citizenship and Subjecthood: A Rose by Any Other Name..?' (n 541).

⁷⁹⁷ Decolonisation was not a systematic approach and the status of British subject, and latterly British Overseas Citizens, gave status but no rights to entre British or any real protections therefore people effectively were stateless, for details of effective statelessness in Ceylon (Sri Lanka), India and Pakistan see Dummett and Nicol (n 371) 132–133.

⁷⁹⁸ Prabhat, 'Unequal Citizenship and Subjecthood: A Rose by Any Other Name..?' (n 541) 29.

⁷⁹⁹ British Nationality Act 1981 s Sch 1 (1)(b).

⁸⁰⁰ Kapoor and Narkowicz (n 711) fig 1.

⁸⁰¹ *ibid* 662.

highlighting the higher burden on non-citizens and the increasing criminalisation of migrants and immigration. Secondly, through associations or affiliations with identified state or non-state actors in terrorist organisation, war criminals or crimes against humanity. This, they argue, is based on racialised assumptions which preferences the “west’ above the ‘rest” in terms of politicised violence and is impossible to redeem one’s character once it has been associated in this way.⁸⁰² Kapoor and Narkowicz further argue that a ‘fatal transgression’ remains a permanent mark on the person’s character which excludes them from the privilege of British citizenship. The over policing and surveillance of an individual’s character outside of a secure citizenship status creates an almost impossibly high threshold of pure characters throughout the applicant’s life – in the past, present and future. The circumstances of application, such as asylum, may require transgressions such as false documents or unsanctioned state entry to be possible and refugees should not be penalised for doing so.⁸⁰³ This purity associated with Britishness is reminiscent of Lord Mansfield’s assertion that ‘the air of England is too pure’.⁸⁰⁴ The additional burdens for non-nationals for entry and settlement to the UK are echoes of scrutiny and intervention on behaviour as a guise for race, as detailed in Chapters One and Two. Rather than explicit racial discrimination, legal and policy hurdles are built on centuries of over regulation and suspicious behaviour while are incompatible with the purity of Britishness and whiteness.

4. Conclusion

Through an analysis of legal developments over the last six to seven decades I have argued that nationality, immigration and asylum legislation has excluded the former racialised colonies and commonwealth, both tangibly and intangibly, and continued to implement the international racialised segregation through this exclusion in the domestic national space. This is an example of how the white self-governing dominions impacted domestic nationality, immigration and asylum legislation at the heart of empire. These laws are exclusionary in nature, demarcating who is included within the national space and who is not. The exclusionary nature of these laws increased and contributed to the UK shedding its colonial ties while implementing colonial methods of categorisation and exclusion. The erasure of Britain’s colonial past, through these legislative developments, is a refusal to acknowledge and an effort to exclude this past from its present and future. It is a form of aphasia, which denies and discourages critical engagement or even acknowledgement of the colonial histories which bind many people who travel to the UK with the

⁸⁰² *ibid* 663.

⁸⁰³ *ibid* 466; Convention and Protocol Relating to the Status of Refugees Article 31; *R v Uxbridge Magistrates’ Court & Another, ex parte Adimi* [1999] EWHC Admin 765.

⁸⁰⁴ Harris, ‘Too Pure an Air’ (n 275).

country. It is therefore a refusal to permit citizens from former colonies and the commonwealth from claiming a place in Britain's future.

Refugees entered Britain from the commonwealth long before the 1980s, but there was no restriction on travel. In the late 1960s and early 1970s around 103,500 Asians left East Africa for Britain.⁸⁰⁵ It was therefore unnecessary, or undesirable from a political perspective, to qualify whether people left their territory of origin (many were displaced in the process of nation making during decolonisation) and settled in the UK as refugees, citizens or as economic migrants. People from colonised territories did not qualify as refugees at the point of high mobility to Britain.⁸⁰⁶ This demonstrates the fluidity and construction of legal categories, and the political influence in the shifting nature. James Callaghan, the Labour minister in is charge of the 1968 legislation, stated:

Our best hope of developing in these Islands a multi-racial society free of strife lies in striking the right balance between the number of Commonwealth citizens we can allow in and our ability to ensure them, once here, a fair deal not only in tangible matters like jobs, housing and other social services but, more intangibly, against racial prejudice.⁸⁰⁷

The tangible and intangible properties of citizenship underwent a seismic shift over the period focused on in this chapter. A move from tangible (territorial possessions) to intangible “bonds of empire” were emphasised as Britain's territorial control was receding around the world. A shift to a sense of belonging from the empire to the commonwealth was stressed for Britain to retain power and control, which ceased when it no longer became advantageous to Britain.

Critical race scholars have been sure to draw attention to the unequal political and academic focus of the hysteria around post-war migration and shortage of housing, employment competition and social tensions.⁸⁰⁸ Further, Britain was a country of emigration throughout most of this period. While Britain was implementing immigration restrictions on the racialised colonies and commonwealth, the British government were also still running assisted passage schemes with the white settler commonwealth. The assisted passage “10 Pound Pom” scheme to Australia ran between 1947 - 1981⁸⁰⁹ and to NZ between 1947 – 1975.⁸¹⁰ The British government were still

⁸⁰⁵ Nasar (n 659) 138.

⁸⁰⁶ Sivanandan, 'Poverty Is the New Black. An Introduction' (n 545).

⁸⁰⁷ Callaghan in Hansen (n 542) 819.

⁸⁰⁸ Sivanandan, *A Different Hunger* (n 541); Bhabra, 'The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism' (n 16); El-Enany, *Bordering Britain* (n 23); Solomos (n 541).

⁸⁰⁹ 'Post World War II British Migration to Australia' (*Museums Victoria Collections*) <<https://collections.museumsvictoria.com.au/articles/13640>> accessed 4 February 2021.

⁸¹⁰ 'Assisted Immigration to New Zealand 1947-1975' (*New Zealand History*) <<https://nzhistory.govt.nz/culture/assisted-immigration-to-nz-from-the-uk>> accessed 4 February 2021.

participating in immigration policies of white expansion and settlement, as discussed in Chapter Two, which effected the continuation of white settlement across the globe as well as ensured the exclusive return of white settlement to Britain for two generations, as Britain was 98 percent white in 1971.⁸¹¹

The framing of migration and immigration laws through a national lens rather than an international lens serves a purpose. Patterns of global inequalities are embedded in an ignorance of the historical conditions which created these inequalities. As Gurminder Bhambra and Nadine El-Enany's scholarship shows the relationship between wealth and poverty are intimately linked and immigration laws are an ever-present legacy of colonial wealth extraction by excluding colonial subjects from accessing the wealth generated by colonialism.⁸¹² Wealth is redistributed through the aid budget, but as the next chapter will demonstrate, the aid budget is being used to continue the colonial project of containment and exclusion from Britain.

⁸¹¹ Details in El-Enany, *Bordering Britain* (n 23) 119.

⁸¹² Gurminder K Bhambra and John Holmwood, *Colonialism and Modern Social Theory* (Wiley 2021); El-Enany, *Bordering Britain* (n 23).

Chapter Four

Re-globalising the Border

*We are investing our aid money upstream and overseas to better manage the problem arriving at our shores.*⁸¹³

1. Introduction

The first half of the thesis has argued Britain's historic management of mobility across the globe has been fundamental in creating racial segregation on a global scale. England, extending its borders to become the United Kingdom, expanded its legal and territorial control. This encompassed twenty five percent of land across the globe, significant nautical control and governance of 500 million people, or one fifth of the global population, between the sixteenth and twentieth centuries.⁸¹⁴ This global control was not relinquished willingly, due in part to the white self-governed dominions demanding equality with Britain by being able to control incoming migration, as argued in the previous chapter. Further, fiercely fought independence movements in the governed territories ultimately won out and Britain was forced to retreat. However, its inclination for control did not end.

Building on these arguments, this chapter will demonstrate Britain's role in contemporary migration programmes to keep people in so-called migrant or refugee "producing" countries and away from itself as a "receiving" country. Domestic legislative developments to achieve this were detailed in the previous chapter. Building on these claims, this chapter argues how the racialised dynamics developed detailed in this first half of the thesis are thoughtlessly and strategically reproduced through aid funding migration control in order to maintain a globalised racial segregation. By relying on these dynamics, these programmes justify violence and exclusion to racialised bodies, while positioning the UK as benevolent and innocent of these violences.

As highlighted in the thesis Introduction, there are four stages of Britain's migration management project. With focus on the external border, the first stage is concerned with preventing people leaving their countries or regions of origin, with aid development projects

⁸¹³ Press Association, 'David Cameron "to Use £475m of UK Aid Budget to Ease Migration Crisis"' *The Guardian* (12 November 2015) <<https://www.theguardian.com/uk-news/2015/nov/12/david-cameron-to-use-475m-of-uk-aid-budget-to-ease-migration-crisis>> accessed 2 February 2017.

⁸¹⁴ Ashley Jackson, *The British Empire: A Very Short Introduction* (OUP Oxford 2013) 1.

designed to prevent “push factors” from “source countries” as well as manage the onward movement of people from their region of origin. The second stage is concerned with ensuring no irregularised people enter the frontier of Europe through the externalisation of border controls to third or transition countries. Prior to the UK’s exit of the EU, defence and aid resources were utilised at an EU level to prevent and reduce the number of people entering EU territory and then onwards to the UK. Since 2016 the UK funds programmes with the same aim. The third and fourth stages are an exercise of internal border regimes which affect people within the UK. The third stage, the hostile environment, is a collection of laws and policies which refuses access to everyday public services to people who are considered undocumented. These measures have externalised immigration controls to private, public and third sector actors within the UK borders. It restricts access to services to enable returns and to identify people for removal, voluntarily or forced. The fourth stage develops the means to deport people from the UK by facilitating the reception of deported migrants from the United Kingdom to their countries of origin. This is part of aid funding agreements to aid receiving countries and aid projects. This chapter demonstrates how aid is utilised to implement stages one, two and four.⁸¹⁵ The hostile environment will be the focus of Chapter Five.

In his work on the securitisation of border controls Vaughan-Williams argues that conventional understandings of what the border is and where it lies have been expanded in the twenty-first century.⁸¹⁶ Rather than at traditional locations such as the outer limits of the UK national territory, as well as air and seaports, the border has extended beyond the nation state to foreign territories through border technologies. This has been an attempt by the UK Government to ‘globalise’ its borders.⁸¹⁷ However, this argument starts with an understanding of Britain’s history of immigration and people regulation through a national lens, rather than one of empire. Vaughan-Williams states,

Indeed, the offshore projection of the UK’s border is interesting precisely because it complicates commonsensical geopolitical notions about the location of the borders as well

⁸¹⁵ Domestic immigration rules are the third stage, but aid can only be used for the first twelve months of an asylum seekers in country stay. National purposes are largely implemented through domestic budget and through immigration fees. See ‘Official Development Assistance (ODA)’ <https://webcache.googleusercontent.com/search?q=cache:IJTU2W_k45QJ:https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/What-is-ODA.pdf+&cd=11&hl=en&ct=clnk&gl=uk&client=firefox-b-d> accessed 8 December 2020; Burnett and Chebe (n 779).

⁸¹⁶ Nick Vaughan-Williams, ‘The UK Border Security Continuum: Virtual Biopolitics and the Simulation of the Sovereign Ban’ (2010) 28 *Environment and Planning D: Society and Space* 1071.

⁸¹⁷ *ibid.*

as conventional understandings of the distinctions between inside and outside, domestic and international, and so on...these practices do challenge the prevalent assumption in the modern geopolitical imagination that states' borders are coterminous with their territorial limits.⁸¹⁸

That ideas of nations, borders and immigration controls are coterminous is an assumption this thesis works to dispel. In this chapter I will build on my argument that understanding domestic immigration controls within a national framework gives a limited understanding. Put simply, Britain has a long history of controlling people's mobility across the globe. As this thesis argues, bordering techniques and management were developed during colonialism; through immigration laws and policies of containment, forced and indentured mobility, and selectively sponsored free movement.. Britain's border was a global border. I agree with Vaughan-Williams that technology and security has extended the British border beyond the nation state over recent decades. However, rather than a "globalising" as he argues, I argue this process has been a "*re*-globalising" of the British border which is mapped over colonial techniques of bordering, management and extractive profiteering of people. This chapter situates Britain's global border within a contemporary understanding by arguing that contemporary technological advancement in border controls, as well as bilateral and multilateral agreements to outsource and extra-territorialise immigration controls is an attempt by Britain to *re*-globalise its borders after the collapse of the empire and increasingly restrictive immigration laws during the twentieth century saw its formal retrenchment to the UK, as detailed in Chapter Three. This is facilitated through aid and development programmes, agreements and budgets.

The first section will demonstrate how aid programmes regulate mobility to prevent displaced populations migrating to Europe, with specific focus on the UK's role. Within aid programming, the journey of a migrant is seen in three stages; departure, transition and return. Aid programmes specifically target these stages to exclude displaced people from Britain through containment, limitation and deportation. Examples of each stage will be detailed. To gain a broader understanding of this contemporary situation the historical connections between aid and migration will be detailed. The second section begins with the colonial origins of development and details the transition to aid and development over the course of the breakdown of the empire. Shifts in aid spending to incorporate increased securitisation, national interests and migration over time are detailed. This leads into the final section, which will argue how these programmes are a *re*-globalising of Britain's borders through immigration controls and efforts to manage racialised

⁸¹⁸ *ibid* 1074.

populations. It contributes to the thesis argument by detailing how Britain is exercising a right to exclude while obscuring accountability for it. It is doing this by implementing exclusionary policies through aid programmes, and therefore maintaining its position of benevolence and fairness.

2. Migration Journeys from Departure to Return

The 2004 International Development Committee report, *Migration and Development: How to make migration work for poverty reduction* signalled an intention to forge closer working between migration and development. The committee argued for a partnership between migration and development along the same lines as the more established partnership of trade and development.⁸¹⁹ Since the introduction of the International Development Act 2002, the only requirement of international development funding, or Overseas Development Aid (ODA), is that it must tackle poverty alleviation.⁸²⁰ The only person bound by this requirement was the Secretary of State for International Development, until the merger with the Foreign and Commonwealth Office in 2020. Since then, the Secretary of State for Foreign, Commonwealth and Development Affairs of the United Kingdom is bound by the requirement of poverty alleviation.⁸²¹ The *Migration and Development* report places migration within the framework of poverty alleviation and discusses the journey from departure to return with focus on economic migration.⁸²² This approach conceptualises the migration journey is in three stages – leaving, travelling, returning – for aid intervention. It also reinforces the temporality and economic value of people as economic migrants, as discussed within the context of indentureship in Chapter Two.

While the Secretary of State oversees the aid budget and is bound by domestic legislative regulations, there is a broader regulatory framework set by international and intergovernmental bodies. The Organisation for Economic Co-operation and Development (OECD) determines what qualifies as ODA through its Development Assistance Committee (DAC).⁸²³ Broadly, the promotion of economic development and welfare of developing countries qualifies as ODA, while military aid, promotion of security interests of the donor and activities fulfilling primarily commercial objectives of the donor do not. There are a number of ODA migration programmes, including migration management under peace and security related activities.⁸²⁴ Migration regulation

⁸¹⁹ 'Migration and Development: How to Make Migration Work for Poverty Reduction' (International Development Committee 2004) HC 79–I Sixth Report para 168.

⁸²⁰ International Development Act 2002 2002 (c 1) s 1(1).

⁸²¹ *ibid* 1(3).

⁸²² 'Migration and Development: How to Make Migration Work for Poverty Reduction' (n 819) s 3.

⁸²³ 'Official Development Assistance (ODA)' (n 815).

⁸²⁴ Development Assistance Committee, 'ODA Casebook on Conflict, Peace and Security Activities' (Organisation for Economic Co-operation and Development 20-Oct-2017 2017) DCD/DAC(2017)22/FINAL.

is also set within the United Nations' sustainable development goal (SDG) of reducing inequality, specifically planned and well managed migration policies.⁸²⁵ Prior to the UK's departure from the EU, the UK contributed significant funds to the EU aid budget.

In 2008 the EU published a European Pact on Immigration and Asylum with a clearly stated aim to create a 'synergy between migration and development' through partnerships 'with countries of origin and transit'.⁸²⁶ In the Pact it affirms the centralisation of migration within the external relationship of EU member states in order to facilitate this synergy.⁸²⁷ In response to the so-called "migrant crisis" in 2015, both the EU and the UK redirected the existing aid budget to managing migration to Europe from Africa and the Middle East, essentially externalising the borders of Europe once again into Africa. In the UK the Department for International Development (DfID) (then responsible for the aid budget) announced three cross-government funds; the Conflict, Stability and Security Fund (CSSF),⁸²⁸ the Official Development Assistance Crisis Reserve and the Prosperity Fund.⁸²⁹ The EU announced the EU Emergency Trust Fund for Africa (EUTF).⁸³⁰ While the UK no longer contributes to these EU programmes, there are significant parallels between the EU and the UK approach. Further, the UK held bilateral agreements and aid programmes independent of the EU prior to its exit from the EU. Both will be discussed below.

It is important to highlight the UK Government holds four red lines on migration which severely shape and limit the possibilities of migration and development policy. The UK Government refuses to commit to; increasing settlement numbers, compulsory burden sharing or resettlement programmes, expanding options for legal migration to Europe or any merging or blurring between refugees and economic migrants.⁸³¹ Policies made around red lines such as these cannot fully respond to migration needs and trends, but holds at its core the right to exclude non-Europeans from Europe and the UK. Through a combination of contributing the SDG examples that follow with a focus on the trafficking and smuggling of migrants, I argue that the UK Government has ensured the programmes detailed below are working within the framework of

⁸²⁵ 'Reduce Inequality within and among Countries' (*United Nations Sustainable Development*) Goal 10.7 <<https://www.un.org/sustainabledevelopment/inequality/>> accessed 9 December 2020.

⁸²⁶ Council of the European Union, 'European Pact on Immigration and Asylum (13440/08)' 4.

⁸²⁷ *ibid* 13.

⁸²⁸ Until March 2015 CSSF was known as the Conflict Pool

⁸²⁹ DFID and HM Treasury (n 37).

⁸³⁰ Independent Commission for Aid Impact, 'The UK's Aid Response to Irregular Migration in the Central Mediterranean. A Rapid Review. March 2017' (Independent Commission for Aid Impact 2017) A rapid review para 3.6 <<http://icai.independent.gov.uk/wp-content/uploads/Migration-ICAI-review-EMBARGOED-00.01-10-March-2017.pdf>> accessed 6 June 2017.

⁸³¹ *ibid* 4.12.

humanitarianism and development, while complying with the Government's refusal to extend international protection *in* the UK.

While it is clear that countries and their officials have agency in how foreign aid projects and immigration enforcement is undertaken, the relationships and negotiations emerge from within a 'hierarchy of sovereignty' which encourages asymmetrical cooperation in favour of richer nations.⁸³² Political or military support, development aid, favourable trade agreements and technical training can incentivise states to cooperate with international immigration enforcement.⁸³³ The next sections will give examples of contemporary aid programmes, funded by the UK, which aim to curb or prevent any irregularised or additional regularised migration to the UK. It will follow the three stages of the migration journey; in country or region of origin to prevent departure, attempts to block onward journeys to Europe and facilitating the deportation of so-called irregular migrants. In line with humanitarian approaches, the official purpose of these programmes is to alleviate poverty, save lives and provide development programmes. However, it is important to note that every step of this journey is immensely dangerous, with an estimated 10,819 people dead or missing on their migration journey within Africa, 23,150 people dead or missing on the Mediterranean route and 766 people dead or missing in Europe between 2014 and 2021.⁸³⁴

2.1 Poverty Alleviation *or* Containment Through Aid

The desire to keep people in their country of origin, or failing that in their regions, is the first stage of the development chain. Attempts to deter "potential migrants" to Europe are made through offering alternatives to the irregularised routes of the Aegean or Mediterranean Seas such as skills training, focus on the regional labour market and temporary European skills visas at the end of the training.⁸³⁵ However, the latter option is not supported by the UK Government due to its red lines on supporting any initiatives which involve regularised migration to Europe.⁸³⁶ In this section I will show how *Jobs Compacts* and *Upstream Programmes* also intend to keep people already displaced from their countries of origin in the region and prevent them from onward movement. These two

⁸³² David Lake in Nicole Ostrand and Paul Statham, "Street-Level" Agents Operating beyond "Remote Control": How Overseas Liaison Officers and Foreign State Officials Shape UK Extraterritorial Migration Management' (2020) 47 *Journal of Ethnic and Migration Studies* 25.

⁸³³ *ibid.*

⁸³⁴ 'Deaths during Migration Recorded since 2014, by Region of Incident' (*Missing Migrants Project*, 22 December 2021) <<https://missingmigrants.iom.int/data>> accessed 29 December 2021.

⁸³⁵ Independent Commission for Aid Impact (n 830) Box 6.

⁸³⁶ *ibid.*

examples show the range of projects which are focused on preventing onward travel. The two will be discussed in turn.

The *Ethiopian Jobs Compact* is a job creation programme funded by UK Aid, the World Bank, the EU and the European Investment Bank. The UK has promised just under £80 million of the £450 million budget between 2017-2024. It is held as an example programme that goes beyond a humanitarian response into ‘durable solutions’ between the host country and international donors.⁸³⁷ As part of the agreement the Ethiopian Government has lifted the reservation on refugees’ access to employment and in exchange 100,000 jobs are to be created, with 30,000 job for refugees. These jobs will be created by developing industrial parks through international finance.⁸³⁸ Ethiopia hosts the largest refugee population in the Horn of Africa, with most people from South Sudan, Eritrea and Somalia.⁸³⁹ The lifting of employment restrictions has coincided with refugees being able to undertake civil registration of births, deaths, marriages and divorce, which enables people to secure a legal status, employment and residency permits.⁸⁴⁰ As of December 2020 2,600 refugees had been issued with work permits.⁸⁴¹

The UK has a seven-point strategy for their work with Ethiopia, supported by multi-year funding. In addition to the *Jobs Compacts*, this includes building a stronger evidence base, strengthening laws enforcement capacity (which is not ODA funded), refugee protection, facilitating legal migration to Gulf states, refugee returns to countries of origin, strengthening regional approaches to border management and refugee issues.⁸⁴² There is significant need for humanitarian aid to support the 800,000⁸⁴³ refugee population and host country. Increasing economic prosperity through employment opportunities of nationals and the refugee population is a significant developmental aim and is in line with the requirement of poverty alleviation for UK Aid. However, a major concern for donors is the onward travel from Ethiopia to Europe. The impact of onward travel restrictions on refugees’ movement and employment opportunities have been a significant cause of that concern.⁸⁴⁴

⁸³⁷ *ibid* II.

⁸³⁸ *ibid* 4.34.

⁸³⁹ UNHCR, ‘Country - Ethiopia’ (*Operational Data Portal. Refugee Situations*, 30 November 2021) <<https://data2.unhcr.org/en/country/eth>> accessed 29 December 2021.

⁸⁴⁰ United Nations High Commissioner for Refugees, ‘In a Historic First, Ethiopia Begins Civil Registration for Refugees’ (UNHCR, 27 October 2017) <<https://www.unhcr.org/news/briefing/2017/10/59f2f4757/historic-first-ethiopia-begins-civil-registration-refugees.html>> accessed 29 December 2021; UK Aid, ‘Jobs Compact Ethiopia. Project GB-GOV-1-300393’ <<https://devtracker.fcdo.gov.uk/projects/GB-GOV-1-300393/summary>> accessed 29 December 2021.

⁸⁴¹ UK Aid, ‘Jobs Compact Ethiopia. Project GB-GOV-1-300393’ (n 840) 5.

⁸⁴² Independent Commission for Aid Impact (n 830) Box 8.

⁸⁴³ UNHCR (n 839).

⁸⁴⁴ Ethiopia holds reservations to employment and mobility to the 1951 Refugee Convention. Independent Commission for Aid Impact (n 830) Box 7.

As mentioned above, border management is included in the UK's migration strategy with Ethiopia. Ethiopia has no restrictions on asylum seekers entering the country, so the border management and refugee issues within the strategy are to prevent onward journeys through immigration controls, or *Upstream Programmes*. These programmes are funded by the Conflict, Stability and Security Fund (CSSF) and work in targeted countries of origin and transit countries to 'ensur[e] safe, managed and regular migration'.⁸⁴⁵ One such *Upstream Programme* has been implemented in Eritrea, Nigeria and Niger between 2019-2022, as these countries hold the largest communities to journey on to Libya and attempt to cross the Mediterranean to Italy, also known as "third" or "transit" countries.⁸⁴⁶

The programme is led by the Foreign and Commonwealth Office (FCO)⁸⁴⁷ and partnered with the Home Office (HO), both of whom have explicitly stated that they are not bound by the International Development Act 2002.⁸⁴⁸ This will be discussed further in Section 3.3. Despite this, the programme summary indicates it contributes to the SDG of reducing inequality, specifically planned and well managed migration policies.⁸⁴⁹ The United Nations Office on Drugs and Crime (UNODC) implements the '[s]trengthening [of] the human and institutional capacity of the Eritrean government to fight against human smuggling and trafficking' and the International Organization for Migration (IOM) implements a '[c]ollaboration against Trafficking and Smuggling between Nigeria and Niger'.⁸⁵⁰ These programmes are implemented through international organisations and funded through the ODA. Combined with a focus on trafficking and smuggling of migrants, this ensures the programmes are working within the framework of humanitarianism and development, while complying with the Government's refusal to receive international protection *in* the UK.

2.2 Saving Lives *or* Outsourcing Migration Controls

In this section I will detail the UK's aid contribution to two agreements between the EU and "transition" countries, and subsequent programmes after the UK's departure from the EU, to contain people trying to journey on to EU territory within their borders. There are two routes

⁸⁴⁵ GOV.UK, 'CSSF Programme Summary. Reintegration and Support for Returnees Programme' (n 40) 1.

⁸⁴⁶ Independent Commission for Aid Impact (n 830) fig 2.

⁸⁴⁷ As of 29 December 2021, the programme website has not been updated to reflect the merger between Department for International Development and Foreign and Commonwealth Office in 2020. The budget for this project has been fully paid by this date also. See UK Aid, 'DevTracker Project GB-GOV-52-CSSF-01-000018 Transactions' (*Development Tracker*) <<https://devtracker.fcdo.gov.uk/projects/GB-GOV-52-CSSF-01-000018/transactions>> accessed 29 December 2021.

⁸⁴⁸ Ambreena Manji and Peter Mandler, 'Parliamentary Scrutiny of Aid Spending: The Case of the Global Challenges Research Fund' (2019) 72 *Parliamentary Affairs* 331, 340.

⁸⁴⁹ 'Reduce Inequality within and among Countries' (n 825) Goal 10.7.

⁸⁵⁰ GOV.UK, 'CSSF Programme Summary. Reintegration and Support for Returnees Programme' (n 40) 1.

most travelled by displaced people trying to reach the EU. One is to travel overland to Turkey and then by sea to Lesbos, a Greek island. The other is to travel overland to Libya and then by sea to Lampedusa, an Italian island. In response to the significantly increased use of these routes in 2015, the EU made two agreements with Turkey and Libya, the *EU-Turkey Statement* of March 2016 and the *Malta Declaration* of February 2017.⁸⁵¹ I will discuss the UK's contribution to each in turn.

Both the UK and the EU⁸⁵² funding for the *EU-Turkey Statement* provides humanitarian supports to refugees in Turkey. Prior to its departure from the EU, the UK contributed to the agreement from DfID's Syrian Crisis Response budget.⁸⁵³ This supports the *EU-Turkey Joint Action Plan*, through implementing development and humanitarian commitments.⁸⁵⁴ The key aspects of the project address humanitarian needs, education, health care, protection to vulnerable groups, social cohesion between newly arrived people and the local Turkish population, and livelihoods. After its withdrawal from the EU, the UK continued to support the agreement's aims through the *Migration: Eastern Route (Turkey) Programme* which ran between 2017-2022. The programme primarily supports refugee integration through Syrian school girls' education programmes and is funded through the CSSF and implemented through the FCO.⁸⁵⁵

There is significant need for resources to address these socio-economic concerns; however, these humanitarian projects are implemented as part of the UK migration strategy and thus allow the ODA to be used for the benefit of national interests, something supported by DfID and now the FCDO which will be further discussed in Section 3. There are two clear points within both UK projects' business cases that support this aim; to prevent irregularised migration to the Europe and reduce the "push" factors that discourage people remaining in Turkey and try to continue on to the EU.⁸⁵⁶ UK aid is providing humanitarian assistance and funding girls education programme as part of an explicit strategy designed for the purpose of 'stopping them [migrants] leaving' Turkey and traveling on to Europe, even after its withdrawal from the EU.⁸⁵⁷

⁸⁵¹ European Council (n 17); European Council, The President (n 17).

⁸⁵² The largest ever humanitarian programme signed by the EU – the Emergency Social Safety Net (ESSN) – commenced in October 2016 and provided an unconditional debit card cash transfers to one million refugees. Two aid agencies, World Food Programme (WFP) and Marcy Corp were allocated for distribution. See Diego Cupolo, 'Money Makes the EU-Turkey Deal Go Round' (*DW.COM*, 18 March 2017) <<http://www.dw.com/en/money-makes-the-eu-turkey-deal-go-round/a-37990073>> accessed 3 July 2017.

⁸⁵³ DFID, 'The UK's Contribution to the Facility for Refugees in Turkey' (DFID 2016) Business Case Summary Sheet Project Code: 300287.

⁸⁵⁴ *ibid* 2.

⁸⁵⁵ UK Aid, 'Migration: Eastern Route (Turkey) Programme (CSSF-01-000006) (DAC 15190)'.

⁸⁵⁶ DFID (n 853); UK Aid, 'Migration: Eastern Route (Turkey) Programme (CSSF-01-000006) (DAC 15190)' (n 855).

⁸⁵⁷ UK Aid, 'Migration: Eastern Route (Turkey) Programme (CSSF-01-000006) (DAC 15190)' (n 855) 3.

The UK part funded programmes in Libya through the *Malta Declaration*. The focus of these programmes has been humanitarian support, including non-food items, water, medical and psychosocial support and sanitary facilities to people in detention centres⁸⁵⁸ as well as training of Libya coast guards to carry out search and interdiction operations.⁸⁵⁹ Search and rescue support to NGOs was not approved.⁸⁶⁰ The programmes have been funded through *The Safety, Support and Solutions Programme for Refugees and Migrants in Europe* and the *Mediterranean Region Programme* in 2016/7 from DfID.⁸⁶¹ Additional programmes include a £2 million DfID Humanitarian Programme for human rights training of detention centre guards and health related services, a €100,000 CSSF contribution to an EU programme building Naval Coastguard capacity and a £1.7 million CSSF project that funds improving the conditions of detention centres and voluntary returns, run by IOM.⁸⁶²

The speed with which the UK and EU have implemented agreements and programmes demonstrate a rapid response to the “migration crisis”. However, details of the agreements and funded programmes make clear this is understood as a crisis for Europe, rather than for people making those journeys. The *Malta Declaration* reaffirms the EU’s approach to irregular migration; ‘A key element of a sustainable migration policy is to ensure effective control of our external border and stem illegal flows into the EU.’⁸⁶³ While it is the Libyan coast guards and authorities in Libyan territory that carry out border controls, it is under the guidance and funding of EU member states.⁸⁶⁴ In practice it is an extension or outsourcing of the border control beyond British and European territory. The stated purpose of this is to prevent loss of life on this treacherous route, however, the main objective in training Libyan coast guards is to increase interception of people along the Mediterranean from Libya to Italy. The former Defence Secretary, Sir Michael Fallon, reaffirmed the UK’s position in providing training to Libyan coast guards as part of this agreement;

⁸⁵⁸ The last data for number of people in detention in Libya is from 2018, which set the number at a total of 8,672 ‘Libya Immigration Detention Profile’ (*Global Detention Project*) <<https://www.globaldetentionproject.org/countries/africa/libya>> accessed 26 January 2022.

⁸⁵⁹ Independent Commission for Aid Impact (n 830) iii.

⁸⁶⁰ *ibid* 22.

⁸⁶¹ *ibid*.

⁸⁶² This also includes a UNHCR contribution to appeal to migrants and refugees in the region, a protected fund for women and girls and £1.5 support to IOM data gathering, *ibid*.

⁸⁶³ The agreement also reiterates the importance of a strong partnerships with North Africa and sub-Saharan Africa in addressing the root causes and flow of irregular migration. This statement opens the possibility of further agreements between the EU and African nations to exchange aid for stemming irregular migration to Europe. European Council, The President (n 17).

⁸⁶⁴ As the humanitarian organisation Refugee International put it; ‘To be clear, the E.U. is empowering the Libyan coast guard to do something none of its member states could do without violating international law – returning people to Libyan territory and thereby exposing them to horrific abuse.’ Izza Leghtas, ‘E.U. Must Not Fuel “Hellish” Experience for Libya’s Migrants’ (*Refugees Deeply*) <<https://www.newsdeeply.com/refugees/community/2017/06/16/e-u-must-not-fuel-hellish-experience-for-libyas-migrants>> accessed 9 July 2017.

“Fighting the smuggling of people and arms will save lives and make Britain safer and more secure.”⁸⁶⁵ This statement emphasises the official aim of aid programmes, while emphasising Britain’s safety and security from the people making the journeys, preventing from entering Europe.

All people in Libya who have migrated irregularly and been intercepted by the authorities are detained rather than given an option of safe and legal passage to a place of refuge.⁸⁶⁶ Therefore this aid programme, which has not been fully risk assessed, is contributing to denying vulnerable people the right to asylum and subjecting them to indiscriminate and indefinite detention. The UK Government stated that this was an EU project, and an EU risk assessment would be adequate.⁸⁶⁷ This is an example of diverting risk to the EU, and therefore accountability to the impacts of aid spending and projects. Concerns have been raised elsewhere about the difficulty in accounting for ODA spending to multilateral institutions.⁸⁶⁸ This is because there is less control to ensure the ODA meets its legal targets when money is pooled and distributed according to the multilateral institutions mandate. Here, I argue, the layers of funding responsibility and risk assessment are being used to divert accountability for the issues raised by the projects.

There has been insufficient analysis of the economic and political conditions of detention centres in Libya by implementing partners and responsible departments.⁸⁶⁹ A key concern of the Independent Commission for Aid Impact (ICAI) is that insufficient monitoring and management to assess the risk of unintended harm through UK aid funded migration programmes has been carried out. Specifically, this is raised with regards to the funding of Libyan coast guards and detention centres.⁸⁷⁰ The ICAI highlights how even ‘neutral humanitarian assistance’ could lead to

⁸⁶⁵ Lizzie Dearden, ‘British Government Continues Support for Libyan Coastguard despite Refugee “killings” and Attacks on Rescue Ships’ *The Independent* (5 January 2017) <<http://www.independent.co.uk/news/uk/home-news/refugee-crisis-libya-coastguard-uk-british-government-support-killing-shooting-rescue-ship-attacks-a7512071.html>> accessed 6 July 2017.

⁸⁶⁶ An estimated 700,000 to one million in 2017 Independent Commission for Aid Impact (n 830) 21.

⁸⁶⁷ *ibid* 22.

⁸⁶⁸ Ambreena Manji, ‘The International Development (Official Development Assistance Target) Act 2015: Legislative Spending Targets, Poverty Alleviation and Aid Scrutiny’ (2016) 79 *Modern Law Review* 655, 674.

⁸⁶⁹ This is despite credible reports detailing the involvement of some officials, both at state and local level, in people smuggling, trafficking and extortion within detentions centres. Independent Commission for Aid Impact (n 830) 23.

⁸⁷⁰ There are reports of Libyan coast guards opening fire on search and rescue aid boats and boats carry refugees in Libyan and international waters. There are also eyewitness accounts of shooting, murder and torture of migrants by Libyan coast guards. The purpose of this is to threaten and force the boats back to Libya, preventing aid boats assisting boats in distress. Reports of torture, rape and murder in detention centres are not uncommon, as well as dirty conditions and rare and inedible food. Lizzie Dearden, ‘Libyan Coastguard “opens Fire” during Refugee Rescue as Deaths in Mediterranean Sea Pass Record 1,500’ *The Independent* (24 May 2017) <<http://www.independent.co.uk/news/world/europe/refugee-crisis-deaths-mediterranean-libya-coastguard-opens-fire-drowned-gunshots-ngos-rescue-boat-a7754176.html>> accessed 6 July 2017; Lizzie Dearden, ‘Aid Workers Recount Libyan Coastguard Attacks on Refugee Rescue Boats as British Government Continues Support’ *The Independent* (5 January 2017) <<http://www.independent.co.uk/news/world/africa/libyan-coastguard-attack-shooting-refugee-rescue-boat-msf-medecins-sans-frontieres-armed-bullet-a7512066.html>> accessed 6 July 2017;

more people being detained and the necessary assessment and analysis required to uphold the principle of “do no harm” that underpins UK aid programmes have not been fulfilled.⁸⁷¹ DfID however rejected this claim, stating ongoing measures were in place to assess intentional and unintentional impacts.⁸⁷² When the only other option from detention is “assisted voluntary return”, however, the ICAI casts doubt that this can be ‘truly voluntary’.⁸⁷³ The plethora of programmes in Turkey and Libya, I argue, work as a smoke screen to create a ‘plethora of *ignorances*’ of the abuses that are taking place through the funding and programming of aid and the true purpose of these programmes – to exclude people travelling irregularly from the UK.⁸⁷⁴

2.3 Promises of Aid *or* Deported by Aid

This section investigate the aid funded programmes which enable the deportation of people from the UK to their countries of origin. An example of this is the *Reintegration and Support for Returnees Programme* which was led by the HO between 2017-2019, partnered with the FCO, neither of whom were bound by the 2002 Act. The purpose of the programme was to ensure the ‘successful and sustainable reintegration’ of returned people through ‘post-arrival support and longer term phased reintegration through activities including vocational or educational training, job placement, business start-up, and signposting to local organisations and services.’⁸⁷⁵ The IOM facilitated this programme in Afghanistan, Nigeria and Pakistan.⁸⁷⁶ As with *Upstreaming Programmes*, this programme contributes to reducing inequality, specifically planned and well managed migration policies,⁸⁷⁷ is implemented through international organisations and is funded by ODA through the CSSF.

People who have been deported to Jamaica are supported through two services in Kingston, the deportee homeless shelter ‘Open Arms’ and the National Organisation for Deported Migrants (NODM). These services are funded predominantly by the UK aid budget through the

Dearden, ‘British Government Continues Support for Libyan Coastguard despite Refugee “killings” and Attacks on Rescue Ships’ (n 865); Karen McVeigh, ‘Refugee Women and Children “Beaten, Raped and Starved in Libyan Hellholes”’ *The Guardian* (28 February 2017) <<https://www.theguardian.com/world/2017/feb/28/refugee-women-and-children-beaten-raped-and-starved-in-libyan-hellholes>> accessed 7 March 2017.

⁸⁷¹ Independent Commission for Aid Impact (n 830) 23.

⁸⁷² HM Government, ‘HM Government Response’ <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/609536/HMG-response-ICAI-migration-mediterranean.pdf> accessed 6 September 2017.

⁸⁷³ Independent Commission for Aid Impact (n 830) 23.

⁸⁷⁴ Sedgwick (n 77) 25.

⁸⁷⁵ GOV.UK, ‘CSSF Programme Summary. Reintegration and Support for Returnees Programme’ (n 40) 1.

⁸⁷⁶ GOV.UK, ‘CSSF Programme Summary. Reintegration and Support for Returnees Programme’ (n 40).

⁸⁷⁷ ‘Reduce Inequality within and among Countries’ (n 825) Goal 10.7.

Reintegration and Rehabilitation Programme (RRP).⁸⁷⁸ The homeless shelters are contracted to reserve beds for people who are destitute after being deported from the UK to Jamaica. NODM collect deportees from the airport, helps them access national documents and clear their belongs through customs.⁸⁷⁹ The existence of ‘support services’ helping recently returned nationals reintegrate is used as a justification in allowing the deportations to happen.⁸⁸⁰ However, rather than a support service, the purpose of RRP is to ‘better monitor, manage and police risky populations’.⁸⁸¹ In addition to the homeless hostels, RRP funded a passport archive to access records and identify Jamaican nations more easily for deportation and contributed to the Jamaican Passport, Immigration and Citizenship Agency to improve efficiency and record keeping of identity documents and immigration procedures.⁸⁸² These aid funded immigration technology systems are part of the broader apparatus to monitor, categorise and exclude beyond the territorial border of Britain. Aid programmes also fund the criminal justice sector, such as *Promoting prison reform in Jamaica* which ran 2015-2018.⁸⁸³ It strengthened incarceration practices to imprison Jamaicans, as well as people who are Jamaican nationals in Britain and receive a prison sentence of twelve month or over, as detailed in Section 3.2 of Chapter Three. They are called foreign national offenders and are automatically deported with this sentence. Aid programmes such as this one fund prison programmes to deport people from Britain with these sentences so they can be deported first and carry out their sentence in the country of origin. These examples of projects supporting deportation, immigration and correctional facilities are all from the same RRP/CSSF fund, increasingly connecting criminality and immigration,⁸⁸⁴ as explored in Chapters Three and Five.

In 2000 the Lomé IV Convention was signed between the EU, including the UK, and 79 African, Caribbean and Pacific nations (ACP). This was an agreement of £8.5 million in aid and trade between the two parties. Within it both parties agreed to ‘accept the return of and readmission of any of its nationals who are illegally present on the territory’ of the corresponding party.⁸⁸⁵ This compulsory repatriation was added to the agreement in the final hours and ties aid

⁸⁷⁸ de Noronha (n 40) 202; UK aid, ‘Rehab & Reintegration of Offenders Design Mission’ (*Development Tracker*, Autumn 2010) <<https://devtracker.fcdo.gov.uk/projects/GB-1-113995>> accessed 14 December 2020.

⁸⁷⁹ de Noronha (n 40) 27.

⁸⁸⁰ *ibid* 2.

⁸⁸¹ *ibid* 216.

⁸⁸² *ibid*.

⁸⁸³ This programme is said to be completed, but no costs have been spent. UK aid, ‘Promoting Prison Reform in Jamaica’ (*Development Tracker*) <<https://devtracker.fcdo.gov.uk/projects/GB-GOV-3-PMD-JAM-111127>> accessed 14 December 2020.

⁸⁸⁴ de Noronha (n 40) 216–217.

⁸⁸⁵ ACP-EC Partnership Agreement, ‘Lomé Convention’ (2000) 2000/483/EC 22000A1215(01) Article 13 5(c)i <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22000A1215\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22000A1215(01))> accessed 13 December 2020.

and trade to the deportation of ACP nationals from the EU.⁸⁸⁶ This would include accepting chartered flights from EU countries that are arranged to deport people *en masse* to a region. In preparation for the UK's exit from the EU, the House of Lords European Union Committee acknowledged the importance of the EU Readmissions Agreements in facilitating the return of people to countries of origin through a wide 'range of levers' and emphasised the need to 'maintain' and 'enhance' the UK's capability to continue this policy.⁸⁸⁷

3. Aid and Migration

The previous section detailed the contemporary strategy of containment, segregation and expulsion of people from the UK through migration controls which are funded by aid money. This section will contextualise these practices within the history of development funding and underline the connection between the control over mobility of people with 'entangled histories' with the UK.⁸⁸⁸ Here I will argue that as regulating migration has become increasingly framed as a national interest, so too has the use of aid money to facilitate it. Starting with the history of colonial development the following sections will detail the transition from empire to development, identifying a strong continuation of hierarchy and tutelage between Britain and independent nations receiving aid funding. It will then go on to detail the contemporary legislative framework for aid spending and how the management of migration came to be a central recipient of this funding.

3.1 From Empire to Development

The origins of UK aid lie with the 1929 Colonial Development Act. Prior to the 1929 Act it was the responsibility of colonial administrations to finance social developments within their territories, from their own resources rather than the British Government.⁸⁸⁹ There were, however, limited grants or loans to do so. The 1929 Act was the first step by the British Government to take legal responsibility for the financial assistance of development in the territories of the British empire.⁸⁹⁰ The 1929 Act established a limited fund to support trade and agriculture in colonial

⁸⁸⁶ Fekete (n 758) 28; Statewatch, 'Lomé Convention Used to Impose Repatriation on the World's Poorest Countries' (2000) 10.

⁸⁸⁷ House of Lords European Union Committee, 'Brexit: Refugee Protection And' (House of Lords 2019) 48th Report of Session 2017–19 100.

⁸⁸⁸ Encarnación Gutiérrez Rodríguez, 'The Coloniality of Migration and the "Refugee Crisis": On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism-Migration and Racial Capitalism' (2018) 34 *Refuge: Canada's Journal on Refugees / Refuge: revue canadienne sur les réfugiés* 19.

⁸⁸⁹ Owen Barder, 'Reforming Development Assistance: Lessons from the U.K. Experience' in Lael Brainard (ed), *Security by Other Means: Foreign Assistance, Global Poverty, and American Leadership* (Brookings Institution Press 2007) 278.

⁸⁹⁰ *ibid* 278–279.

territories, with the purpose of reducing unemployment and developing ‘commerce with or industry in the United Kingdom’.⁸⁹¹ All funding applications were considered and allocated by the Colonial Development Advisory Committee. The committee did not consider social welfare, repeat payments or projects without benefit for the UK within the remit of the Act.⁸⁹² The budget was underspent every year except one and allocated funds were not always claimed.⁸⁹³ The Colonial Development and Welfare Act 1940 expanded the remit of aid expenditure considerably to encompass ‘schemes for any purpose likely to promote the development of resources of any colony of the welfare of its people.’⁸⁹⁴ Social welfare was included to quell social unrest across colonial territories, particularly due to welfare issues in Caribbean, West and East Africa.⁸⁹⁵ The 1945 Act increased the annual budget from £1 million to £5 million and funded The Colonial Social Science Research Council £500,000 annually.⁸⁹⁶ The Colonial Development and Welfare Act 1945 extended the mandate until 1956 with £120 million for ten years and increased the research funding to £1 million annually.⁸⁹⁷

Through the ‘promotion of a higher standard of living’ development projects became a ‘renewed basis of legitimacy’ for the British empire after World War II.⁸⁹⁸ Independence movements were gaining success, as with India and Pakistan in 1947, and while independence in Africa did not begin until the mid-1950s, the collective resistance against the British and French empires and organising for a collective Pan-African governance was threatening colonial hold.⁸⁹⁹ Projects to support colonies develop into self-governing nations through political inclusion and economic development therefore became the focus.⁹⁰⁰ Rather than explicitly racial justifications, Frederick Cooper argues colonial rule was justified through managing behaviours which did not conform to modern or civilised ways of living. This backwardness justified political and physical repression, continuing hierarchies of civilisation and rights along racial lines.⁹⁰¹ Therefore, the ‘developmental logic’ of colonial civilising projects continued through to post-independence through aid and development.⁹⁰² Through new post-war international institutions, development

⁸⁹¹ Colonial Development Act 1929 (c 5) s 1(1).

⁸⁹² Barder (n 889) 278–279.

⁸⁹³ ER Wicker, ‘Colonial Development and Welfare, 1929-1957: The Evolution of a Policy’ (1958) 7 *Social and Economic Studies* 170, 176.

⁸⁹⁴ Colonial Development and Welfare Act 1940 s 1

⁸⁹⁵ Barder (n 889) 279; Frederick Cooper, *Africa in the World: Capitalism, Empire, Nation-State* (Harvard University Press 2014) 60.

⁸⁹⁶ Wicker (n 893) 181.

⁸⁹⁷ *ibid* 183.

⁸⁹⁸ Cooper, *Africa in the World: Capitalism, Empire, Nation-State* (n 895) 61.

⁸⁹⁹ *ibid* 60–65.

⁹⁰⁰ Wicker (n 893) 184; Cooper, *Africa in the World: Capitalism, Empire, Nation-State* (n 895) 61.

⁹⁰¹ Cooper, *Africa in the World: Capitalism, Empire, Nation-State* (n 895) 62.

⁹⁰² El-Enany, *Bordering Britain* (n 23) 93.

became omnipresent with Third World countries being in need of development to Western standards of progress through Western assistance.⁹⁰³ Development policy was closely aligned with academic research and Uma Kothari argues this transition, from colonial control to development, embedded Western superiorities and difference within development.⁹⁰⁴ In a practical sense, some British colonial administrators transferred into the emerging field of development studies, bringing with them their expertise, knowledge and skills acquired within the colonial setting.⁹⁰⁵ The historical continuities between colonialism and development are largely neglected within the sector, thus becoming 'part of a project that creates and maintains a dichotomy between a colonialism that is 'bad', exploitative, extractive and oppressive and a development that is 'good', moralistic, philanthropic and humanitarian.'⁹⁰⁶ As with the colonial narrative, Arturo Escobar argues the narrative or discourse of development is in the hands of those who carry out development projects and agendas. Therefore, the knowledge produced about, and power over those who are made subjects in need of development are also in these hands.⁹⁰⁷

In Britain, concerns over cultural difference and inequalities between communities were addressed through legislation to restrict immigration and manage race relations from the mid-twentieth century, as detailed in Chapter Three. The Ministry of Overseas Development was proposed in the 1964 Labour Party manifesto to address concerns over inequalities between nations.⁹⁰⁸ In order to enable the prosperous and racially cohesive way of life in Britain the Ministry would centralise the sporadic approach to aid and ensure people remained, or were contained, within their own nations rather than travel to Britain.⁹⁰⁹ Mark Duffield argues, 'immigration control...provoked the modern aid industry. In response to genuine fears over the integrity of free society's way of life, immigration control, national cohesion and international development were brought together within the same security design.'⁹¹⁰ While immigration was not the only driver, it did play a key role. The shift from an explicit racism to one of socio-cultural differences that had taken place in the colonial territories, as mentioned above, was also taking place in the metropole.

⁹⁰³ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 2012) ch 1.

⁹⁰⁴ Uma Kothari, 'From Colonial Administration to Development Studies: A Post-Colonial Critique of the History of Development Studies' in Uma Kothari (ed), *A Radical History of Development Studies: Individuals, Institutions and Ideologies* (1st edition, Zed Books 2005).

⁹⁰⁵ *ibid.*

⁹⁰⁶ Uma Kothari (ed), *A Radical History of Development Studies: Individuals, Institutions and Ideologies* (1st edition, Zed Books 2005) 51.

⁹⁰⁷ Escobar (n 903) 9.

⁹⁰⁸ The Labour Party manifesto, 'The New Britain' (1964).

⁹⁰⁹ Mark Duffield, 'Racism, Migration and Development: The Foundations of Planetary Order' (2006) 6 *Progress in Development Studies* 68, 73.

⁹¹⁰ *ibid.*

In this vein, social cohesion was only possible through the exclusion of people who were thought to jeopardise the national cultural harmony. This included those racialised as culturally distinct as well as those who were impoverished.⁹¹¹ Immigration laws could restrict those from the colonies entering Britain, but international development needed to compensate for the inequalities between nations to prevent people feeling they needed to leave. These development programmes were to encourage an individualised self-reliance within countries or regions, thereby trying to contain people within their territories and prevent ‘unrestricted global circulation’.⁹¹²

The interrelationship between development and conflict and security developed in the 1980s and 1990s. The United Nations Development Programme stated this marked a ‘transition from the narrow concept of national security to the all-encompassing concept of human security’.⁹¹³ However, far from giving equal weight to nations and their populations, critics have claimed that this approach has broadened the concept of fear and threat, cementing them with the global south; ‘underdevelopment has become dangerous’.⁹¹⁴ Further, this approach opens the possibility of intervention from the global north into the global south through a justification of development and human security demonstrating lasting characteristics of coloniality and allowing for a ‘racialisation of development’.⁹¹⁵

3.2 In the Name of National Interests

Since the establishment of aid funding, it has run in conjunction with UK trade and commerce.⁹¹⁶ This came to a head with the first legal challenge to development assistance in the high-profile High Court ruling on the Pergau Dam project in 1997.⁹¹⁷ The project was the largest financed by UK aid. It funded a hydroelectric dam in Malaysia in exchange for a major arms deal between the UK and Malaysian governments. The ruling stated the use of aid money for commercial endeavours was not legally supported in this case and the project went against the Overseas Development and Cooperation Act 1980.⁹¹⁸ However, this was because the project had no economic or humanitarian benefit for the Malaysian people and therefore was not of ‘sound

⁹¹¹ Duffield (n 909); Fekete (n 758).

⁹¹² Duffield (n 909) 72.

⁹¹³ UNDP, ‘Human Development Report 1994’ (UNDP 1994) 24
<http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf> accessed 7 September 2017.

⁹¹⁴ Duffield in Nick Vaughan-Williams and Columba Peoples, *Critical Security Studies: An Introduction by Columba Peoples* (Routledge 1611) 128.

⁹¹⁵ Duffield in *ibid.*

⁹¹⁶ Barber (n 889) 286.

⁹¹⁷ Patrick McAuslan, ‘The International Development Act, 2002: Benign Imperialism or a Missed Opportunity?’ (2003) 66 *The Modern Law Review* 563.

⁹¹⁸ Barber (n 889) 296.

development purposes' rather than because aid money was used in exchange for an arms trade deal.⁹¹⁹ The ruling does not therefore sever the multi-tasking of aid. The primary development objective can still be fulfilled while 'also us[ing] the assistance for some other purpose' – say political or trade purposes.⁹²⁰

As part of an effort to abate the connection between business and aid, particularly after to the Pergau Dam scandal, the Labour Government established the Department for International Development (DfID) in 1997. Ethics, research and evidence was promised, alongside a manifesto commitment to the 0.7% UN aid target, tying in with the international direction and principles that culminated in the Millennium Development Goals.⁹²¹ The 2000 White Paper brought a new agenda of development, including the causes of migration.⁹²² Partnerships with other government departments (OGDs), donors, development agencies and organisations in the private and voluntary sectors in the UK and developing countries were established as the way forward. The International Development Act 2002 enshrined the purpose of aid as poverty reduction.⁹²³ What constituted poverty reduction and therefore the spending of international aid was solely at the discretion of the Secretary of State for International Development.⁹²⁴ These significant changes during the New Labour Government are still in effect and have laid the groundwork for how aid can be utilised.

These changes were intended to ensure government accountability of public spending for UK aid. However, Patrick McAuslan has argued that far from ensuring accountability it gives the responsible Secretary subjective and 'unfettered Ministerial discretion' as to what is likely to constitute poverty reductions and is therefore eligible for aid.⁹²⁵ He argues the 2002 Act legislates the Government out of judicial review and accountability of how aid is spent; '[i]t's *Pergau Dam* relief not poverty relief which is at the root of section 1.'⁹²⁶ Far from a change in approach, McAuslan argues the flexible scope of interpretation left to the Secretary of State does little to ensure against further misuse of aid money. It only need be argued to alleviate poverty and

⁹¹⁹ Manji and Mandler (n 849) 339.

⁹²⁰ *ibid.*

⁹²¹ Barder (n 889) 290.

⁹²² DFID, 'Eliminating World Poverty: Making Globalisation Work for the Poor. White Paper on International Development'

<<http://webarchive.nationalarchives.gov.uk/+http://www.dfid.gov.uk/Documents/publications/whitepaper2000.pdf>> accessed 15 August 2017.

⁹²³ International Development Act 2002 s 1 (1).

⁹²⁴ *ibid* 1 (3).

⁹²⁵ McAuslan (n 917) 582.

⁹²⁶ *ibid* 584. Emphasis in original.

contribute to sustainable development. This point is significant as this low threshold does not safeguard against secondary misuse of aid money.⁹²⁷

In 2002 a leaked memo from Downing Street revealed a proposal that aid should be made conditional on accepting the return of people with unsuccessful asylum applications from the UK.⁹²⁸ Downing Street supported bilateral agreements between the UK and EU with Somalia, Sri Lanka and Turkey for this purpose.⁹²⁹ However, the then International Development Secretary Claire Short rejected the proposal, arguing it would be illegal to do so under the 2002 Act, as the ODA must be used for development and not to “try to blackmail governments into facilitating the early return of failed asylum seekers.”⁹³⁰ Patrick McAuslan challenges this. As spending of the ODA was now completely subjective to the whim of the Secretary of State rather than legislated objective criteria, he argues, ‘she [the Secretary of State] would be on weak ground in arguing that assistance to aid recipient governments to bolster good governance in the specific area of immigration controls could not, *as a matter of law*, as opposed to a matter of her personal opinion, be *likely* to contribute to a reduction in poverty.’⁹³¹ A consequence of the 2002 Act, therefore, is a legally broad approach for the potential uses of aid and a distancing of accountability for how a significant aid budget is spent. While accountability falls to one person, the Secretary of State, how they are held accountable and what they are accountable for is less definitive. Further, the conditionality of aid spending is also left open to the Secretary of State.⁹³² Therefore aid agreements could arguably be tailored to the ‘political bargaining process’ of each agreement void of explicit commitments within the legislation to human rights or development by either parties.⁹³³ Unofficial secondary purposes of aid facilitate an extension of border control beyond British territory for Britain’s political goals, such as to prevent people arriving to the UK as detailed in the examples in Section 2, while maintaining an ignorance of it within the official purpose. If it is obscured by the primary aim of poverty alleviation or not within the official purpose, then accountability of these unofficial and secondary purposes is weak.

Further, prior to the UK’s withdrawal from the EU a significant portion of the UK aid budget was allocated to the EU which is not administered by the UK and therefore leaves no national legal mechanism to direct or administer EU aid.⁹³⁴ When money is transferred from the

⁹²⁷ Manji and Mandler (n 848).

⁹²⁸ “‘Turn Away Refugees’ Says Tory Leader’ *BBC News* (24 May 2002) <http://news.bbc.co.uk/1/hi/uk_politics/2005605.stm> accessed 3 December 2020.

⁹²⁹ Barder (n 889) 301.

⁹³⁰ Claire Short in *ibid*.

⁹³¹ McAuslan (n 917) 594. Emphasis in original.

⁹³² International Development Act 2002 s 7.

⁹³³ McAuslan (n 917) 592.

⁹³⁴ *ibid* 601. In 2002 30 percent of the UK aid budget was directed to the EU.

Treasury to the EU, then the requirement of poverty alleviation is bypassed as it only falls within the responsibility of DfID and the Secretary of State, as the examples in Section 2.2 shows.⁹³⁵ The limited criteria for aid spending, as well as complete discretion to the Secretary of State leaves little room for accountability, for example through judicial review, over the appropriate use of aid spending.⁹³⁶ While the conditionality of aid in exchange for returned nationals was not deemed appropriate by the Development Secretary in 2002, it was already agreed upon at an EU level in the Lomé IV Convention in 2000, as shown in Section 2.3. A change of opinion or Secretary of State is all that was needed, as has happened. What this does, I argue, is allow the government to carry out a “bad’, exploitative, extractive and oppressive’ agenda of containment and segregation behind a screen of “good’, moralistic, philanthropic and humanitarian’ development projects.⁹³⁷ Using aid funding as leverage within unequal power dynamics not only exercises control over underdeveloped people and nations, as described by Escobar, but also attempts to obscure these dynamics by redefining this control as development rather than colonial power. Colonial power is therefore continuing to extend its reach beyond the borders of the UK by controlling the borders of underdeveloped countries and excluding and expelling people from its own territory. Labelling these actions as development obscures these power dynamics and therefore avoids accountability for them, producing ignorance around the ongoing coloniality of aid and a re-globalising of the UK’s borders.

3.3 The Expansion of Migration Regulation

In 2015 the Conservative Government marked an affirmative direction and called for strategic aid spending, coupling international development with defence, security and national interests in the DfID and Treasury Spending Review.⁹³⁸ National security and mass migration gained prominence with the urgent increase of people making the journey to Europe in search of refuge that year, known as the “refugee crisis” or “migrant crisis”. Mass migration was placed alongside disease, terrorism and climate change as a direct threat to British interests.⁹³⁹ DfID had historically been allocated the vast majority of the international aid budget, but increasingly portions have been

⁹³⁵ *ibid* 594.

⁹³⁶ Manji (n 868).

⁹³⁷ Kothari (n 906) 51.

⁹³⁸ Both in terms of approach and budgetary commitment; 0.2 percent of GNI on defence spending and 0.7 percent of GNI on international aid spending. DFID and HM Treasury (n 37) 3; HM Government, ‘National Security Strategy and Strategic Defence and Security Review 2015. A Secure and Prosperous United Kingdom’ (HM Government 2015) Cm 9161

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/478933/52309_Cm_9161_NS_S_SD_Review_web_only.pdf> accessed 23 August 2017.

⁹³⁹ DFID and HM Treasury (n 37) 3.

distributed to OGDs as part of a new integrated aid strategy.⁹⁴⁰ In 2019 OGDs spent 22.4 percent of the ODA, therefore decreasing the budget for DfID.⁹⁴¹ Between 2015-2020 the ODA budget was legally ring-fenced at 0.7 percent of GNI,⁹⁴² allowing DfID, as well as fourteen budget-starved OGD,⁹⁴³ to pursue their departmental agendas in line with the stipulations of international aid, including the Foreign and Commonwealth Office (FCO), Home Office (HO) and Ministry of Defence (MOD). This means increasing portions of the ODA are not legally obliged to fulfil the requirement of poverty alleviation. Added to this, the FCO and Department for Business, Energy & Industrial Strategy (BEIS) – the first and second biggest recipients of ODA outside DfID⁹⁴⁴ – stated they will ‘be guided by the aims’ of the 2002 Act even though they are not legally bound to, while MoD stated it will follow the general legislation on government department spending rather than the ODA, as there is not requirement to do so.⁹⁴⁵

Given the direction of the government’s migration strategy, leaving the management of ODA spending to the goodwill of OGD rather than legally binding obligations – albeit a subjective one – raises significant concerns. It is feasible that OGD priorities will gain greater influence over collaborative working providing the low threshold of poverty alleviation is met. I would argue that this is evident when examining aid funding of the government’s migration strategy. The primary objective of this strategy is to reduce the number of people entering the UK through irregularised means. The government has acknowledged that the primary aim of the ODA cannot be to reduce irregular migration to Europe and the UK but must be to protect vulnerable people and address the root cause of migration.⁹⁴⁶ Yet, DfID part funded the government’s migration strategy which focuses on the prevention of irregularised migration to Europe and the UK. There is a clear tension between the objectives of the migration strategy and DfID’s obligations. The ICAI argues the two aims can work together as DfID programmes can reduce numbers of people who irregularly migrate as a secondary objective. How primary and secondary objectives are determined is often, as argued above, a ‘matter of interpretation’.⁹⁴⁷

The recent increased focus on irregular migration within ODA expenditure calls for greater attention and analysis. Only a small portion of the migration strategy and budget flow through

⁹⁴⁰ Manji (n 868) 664.

⁹⁴¹ ‘Statistics on International Development: Final UK Aid Spend 2019’ (Foreign, Commonwealth and Development Office 2020) 5.

⁹⁴² International Development (Official Development Assistance Target) Act 2015 (c12).

⁹⁴³ National Audit Office, ‘Managing the Official Development Assistance Target – a Report on Progress’ (National Audit Office 2017) HC 243 Session 2017–2019 <<https://www.nao.org.uk/wp-content/uploads/2017/07/Managing-the-Official-development-Assistance-target-a-report-on-progress.pdf>> accessed 22 August 2017.

⁹⁴⁴ ‘Statistics on International Development: Final UK Aid Spend 2019’ (n 941) 14.

⁹⁴⁵ Manji and Mandler (n 848) 340.

⁹⁴⁶ HM Government, ‘HM Government Response’ (n 872).

⁹⁴⁷ Independent Commission for Aid Impact (n 830) 13.

DfID. Therefore, how the ODA is being used across government departments, intergovernmental funds and multilateral institutions needs to be looked at further. The level of priority given to reducing irregular migration can be seen with the increase of resources since 2015. UK migration policy is led by the Home Office, which manages a diverse range of ODA-funded projects, including international and immigration policy and strategy. Initially in response to the situation in the eastern Mediterranean DfID hosted a migration team which developed a Migration Department in 2015. This department leads on the government's humanitarian projects and international focused work. DfID led Global Agenda, a cross governmental working group which contributes to the UK's influencing of the international migration approach. The FCO has a Mediterranean Migration Unit and a migration focus was added to the remit of core embassy and policy staff. The Cabinet Office has a senior advisor on migration, and the National Security Adviser and the Home Office chair a cross-governmental Migration Steering Group covering a range of thematic and geographical areas.⁹⁴⁸ In June 2020 DfID joined the FCO to become the Foreign, Commonwealth and Development Office (FCDO) and in November of the same year the ODA was reduced to 0.5% to ease the domestic financial uncertainty due to the coronavirus pandemic. The Secretary of State for the FCDO was now accountable for the ODA spent through the FCDO and made a commitment to bring spending back inhouse.⁹⁴⁹ However, this is a merger of the two biggest spenders of the overseas aid budget and it is not yet clear how this will affect any clear departure from previous priorities and spending patterns. Research is needed to determine whether it is this more or less likely the merger will reduce the use of ODA for migration control. However, this is beyond the scope of this chapter.

The Conservative Government set its aid agenda in *UK Aid: Tackling Global Challenges in the National Interest*,⁹⁵⁰ announcing illegal migration will be tackled through the Conflict, Stability and Security Fund (CSSF).⁹⁵¹ CSSF is overseen by the Crown Prosecution Service, National Crime Agency, Stabilisation Unit, FCO, MoD, Home Office and DfID. It is the only government fund to be funded through both the ODA and Defence budget. This fund responds to the understanding that tackling risk of international instability and conflict has a direct impact on the security of the UK. Illegal migration is listed as a threat among terrorism, corruption and trafficking, and is new to CSSF's strategic framework.⁹⁵² The strategic direction of the CSSF is set

⁹⁴⁸ Information about these groups is extremely limited, this information is according to the *ibid* 4.25-4.30.

⁹⁴⁹ Dominic Raab, Official Development Assistance: Foreign Secretary's statement, 2020; Dominic Raab, 'Dominic Raab: Targeted Foreign Aid Remains a UK Priority' (25 November 2020) <<https://www.ft.com/content/726590b0-a05c-409f-85b1-5db2b3662176>> accessed 4 December 2020.

⁹⁵⁰ DFID and HM Treasury (n 37).

⁹⁵¹ Until March 2015 CSSF was known as the Conflict Pool

⁹⁵² DFID and HM Treasury (n 37) para 3.7.

by the National Security Council, which is chaired by the Prime Minister, firmly establishing the government's approach to irregular migration as a matter of national security rather than humanitarian or developmental approach.⁹⁵³

The ICAI Rapid Review questions the relabelling of programmes under the migration strategy, stating they are being based on untested assumptions which are not fully researched and do not 'demonstrate a contextualized understanding of migration'.⁹⁵⁴ Departments are under a great deal of pressure to be seen to be addressing irregularised migration when they do not have the relevant previous expertise and experience.⁹⁵⁵ The National Audit Office (NAO) raised concerns about the development, effectiveness and monitoring of programmes,⁹⁵⁶ as discussed above. While the NAO is one of the three governing bodies of the ODA, it scrutinises questions around the value for money, not poverty alleviation.⁹⁵⁷ Therefore, scrutiny over the disjuncture between the aim of the aid budget and how the budget is being spent is weak.⁹⁵⁸ Ambreena Manji and Peter Mandler argue the 'fragmented ODA landscape' possess challenges for parliamentary scrutiny and accountability.⁹⁵⁹ The multi-use of ODA, they argue, is another example of the reduction of accountability and weak governance of UK aid.⁹⁶⁰ The purpose and outcome of this weak governance will be discussed in the next section.

4. The Virtue and Coercion of Developmental Aid

In the previous sections I have identified examples of how aid has been explicitly and implicitly used for national interests, specifically the regulation of migration to prevent people reaching the UK and to facilitate deportation. While it is vital to identify these purposes and how aid is being utilised, it is also important to understand them within the legal expectation of developmental aid and the language of benevolence, which has been retained throughout. As explained, poverty reduction must be the primary purpose of aid,⁹⁶¹ and the 2015 migration strategy reaffirms the

⁹⁵³ The ICAI argues that the re-labelling of existing development programmes to include a focus on irregularised migration hinders their effectiveness.

⁹⁵⁴ Independent Commission for Aid Impact (n 830) iii.

⁹⁵⁵ The government does not hold a shared working understanding of what constitutes the "migration crisis" or hold a coordinated list of migration related programmes, which is holding back an otherwise well reviewed intergovernmental coordinated approach. *ibid* i and 9.

⁹⁵⁶ DfID, as the most experienced department with ODA, advises OGD on the use of the ODA. Action on migration therefore does not hold appropriate oversight as to how the puzzle of projects and groups work and with what effect. The range of resource yet lack of joined up thinking between the groups, particularly from an aid perspective, demonstrates the UK Government's need to appear to be doing something without a comprehensive plan. National Audit Office (n 943) 6.

⁹⁵⁷ Manji and Mandler (n 848) 334.

⁹⁵⁸ *ibid* 340.

⁹⁵⁹ *ibid* 332.

⁹⁶⁰ *ibid* 4.

⁹⁶¹ International Development Act 2002 s 1.

commitment ‘to meet our promises to the world’s poor’.⁹⁶² The UK is proud of its history on aid and claims it ‘leads the world on international development’.⁹⁶³ With a larger protected aid budget, the UK was able to respond rapidly to natural and health disasters and fulfil its ‘moral commitment to helping the millions of people around the world who live in poverty.’⁹⁶⁴ The UK has a long history of fulfilling its moral commitment through tutelage and the betterment of others, from the abolition movement, apprenticeship schemes and installing new systems of governance, discussed in Chapter One, to the religious and educational missionary programmes.⁹⁶⁵ Rather than a promise of equality it has reinforced the colonial hierarchy, with the support of the law.

The framing of such laws in humanitarian terms and aims ‘sought to justify the violence... unleashed in humanitarian terms.’⁹⁶⁶ It is, Desmond Manderson argues, ‘a process that was both coercive and virtuous’.⁹⁶⁷ The violence in the present is necessary to fulfil a promise of a utopian future which never comes. Colonial legality, Manderson argues, sets to ‘postpone the present, to hold back its legal commitments to justice and fairness to some indeterminate future time’.⁹⁶⁸ The aid projects detailed in Section 2 give examples of this process of coercion and virtuosity. Former Prime Minister David Cameron explicitly stated the practical implications of the new agenda of the aid budget when in 2016 he pledged £275 million over two years to Turkey for humanitarian needs of people fleeing Syria (see Section 2.2); ‘It is us looking at how we focus our spending on humanitarian assistance, but also dealing with an issue that has repercussions for us in Britain. So we are investing our aid money upstream and overseas to better manage the problem arriving at our shores.’⁹⁶⁹ Here Cameron demonstrates that the way the UK intends to address this crisis is by preventing people’s ability to make the journey and by forcing them to stay in the region, for example by tackling the sale of dinghies, as well as insisting African nations must accept returning migrants.⁹⁷⁰ These approaches do not address the causes of irregular migration, as promised in the aid strategy,⁹⁷¹ nor the consequences for the people on the move.

⁹⁶² DFID and HM Treasury (n 37) 3.

⁹⁶³ *ibid* 1.1.

⁹⁶⁴ *ibid* 1.2.

⁹⁶⁵ Vron Ware, *Beyond the Pale: White Women, Racism, and History* (Verso 1992); Jonsson (n 713).

⁹⁶⁶ Manderson (n 272) 91.

⁹⁶⁷ *ibid* 92.

⁹⁶⁸ *ibid* 83.

⁹⁶⁹ Association (n 813).

⁹⁷⁰ *ibid*.

⁹⁷¹ DFID and HM Treasury (n 37).

4.1 Representation and Technology

The representation of migrants and asylum seekers is an important factor in this jarring approach to developmental aid excluding displaced people from the UK and outsourcing immigration enforcement at all stages of the migration journey. Alison Mountz argues sites of exclusion takes place at the periphery. Refugee camps, detention centres, prisons, ports and islands are highly securitised sites in remote locations which enable exclusion and secrecy. As well as this physical exclusion, there is an exclusion of migrants and asylum seekers in public discourse.⁹⁷² These work in tandem; ‘This geographic distance makes space for discursive projects that not only engage but create publics with narratives that capitalise on well-rehearsed historical tropes, such as fear of invasion by radicalised others’.⁹⁷³ Migrants and asylum seekers are ‘simultaneously “invisibilized” and “hypervisibilised”’.⁹⁷⁴ This is evident in Cameron’s speech above. The stories and histories of people seeking refuge and economic improvement and non-regularised people who make Britain their home are obscured, silencing human insecurities that lead to and result from irregularised migration while the need for national security is promoted.⁹⁷⁵

This spatial separation is further reinforced by an ‘organisation of view’⁹⁷⁶ which, Timothy Mitchel argues, places the observer ‘from a position that is invisible and set apart’ from the world they observe.⁹⁷⁷ Speaking about the world exhibitions, Mitchel argues while Europeans believed the gaze had ‘no effect’, it ‘corresponded at the same time to a position of power.’⁹⁷⁸ To engage with the world like this, Mitchel argues, works in two ways. Firstly, the viewed becomes the object or spectacle, a representation of the real from the point of view of the European observer. Secondly, the European position or point of view is rendered invisible, thereby embedding an objectiveness to it.⁹⁷⁹ The effect of this is ‘to grasp the world as though it were a picture or exhibition’.⁹⁸⁰ Media images and narratives curate a reality of what is happening in peripheral zones of exclusion, creating a spectacle representation of the real. The creation of the spectacle and the objective through the colonial gaze, as argued by Mitchel and Escobar,⁹⁸¹ creates the belief ‘as though the world were divided... into two: into a realm of mere representations and a realm of

⁹⁷² Alison Mountz, ‘IN/VISIBILITY and the SECURITIZATION of MIGRATION Shaping Publics through Border Enforcement on Islands’ (2015) 11 *Cultural Politics* 184, 187.

⁹⁷³ *ibid.*

⁹⁷⁴ *ibid* 186.

⁹⁷⁵ *ibid* 187.

⁹⁷⁶ Timothy Mitchell, *Colonising Egypt: With a New Preface* (University of California Press 1991) 25

<<http://ebookcentral.proquest.com/lib/cardiff/detail.action?docID=224456>> accessed 2 January 2022.

⁹⁷⁷ *ibid* 37.

⁹⁷⁸ *ibid* 35.

⁹⁷⁹ *ibid* 1.

⁹⁸⁰ *ibid* 35.

⁹⁸¹ Escobar (n 903) 7.

the ‘real’; into exhibitions and an external reality; into order of mere models, descriptions or copies, and an order of the original’.⁹⁸² Escobar further explains,

This regime of order and truth is a quintessential aspect of modernity and has been deepened by economics and development. It is reflected in an objectivist and empiricist stand that dictates that the Third World and its peoples exist “out there,” to be known through theories and intervened upon from the outside.⁹⁸³

Supporting this thesis argument, Escobar explains how the ordering and organising of people creates a segregation between those who need ordering and organising, and those who do the ordering and organising. This is central to the process of “development” and “progress”. They appear natural while being constantly maintained. “The colonial ruler... is a voyeur. He desires to see everything and to fix it in its place, but never to be seen himself.”⁹⁸⁴ These separating and voyeuristic tendencies to create order and truth has taken many forms through the colonial period and continues through the regulation of migration and development programmes.

Technologies of law, internal and external frontiers, borders and passports manage mobilities of people to create an order and truth about the past, present and future and a detachment between the real and the representational. The previous chapters of this thesis have shown how technologies of law, borders and passports have managed mobilities of people along explicit and implicit racial lines. This monitoring and management of mobility has expanded through digital technologies, such as embedded biometric electronic microprocessor chips in ID documents and passports, biometric databases including fingerprinting and facial recognition, asylum and visa decision-making processes, ground sensors and aerial video surveillance drones to name some.⁹⁸⁵ These border technologies, securities and surveillances predetermine people on the move as high level security threats and determine people through and as categorisable data.⁹⁸⁶ These military, quasi-military and autonomous technologies establish the targets of monitoring as a high level security threat. Targets are anyone deemed out of place that require restrictions and surveillance within territories as well as across territories, regions and the globe.⁹⁸⁷

⁹⁸² Mitchell (n 976) 40.

⁹⁸³ Escobar (n 903) 8.

⁹⁸⁴ Manderson (n 272) 103.

⁹⁸⁵ Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance’ (United Nations 2020) A-75-590-AUV 4.

⁹⁸⁶ *ibid* 3.

⁹⁸⁷ Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (n 985).

Collaborations between private organisations and public bodies on a national, regional and international level have expanded the monitoring of mobilities and facilitated the collection of an expansive database of people within the development sector. Taylor and Broeders describe this as ‘information capitalism’ which has allowed private companies to ‘map, sort and categorise’ people into data creating new visibilities of ‘population-level data-bases and maps’.⁹⁸⁸ This aims to ‘monitor and target people for intervention’ and work in parallel with – or in lieu of – state data mapping. As a result, not only can individuals and small groups being abstracted into data, but this datafication can be scaled up to cities and nations which are separate and inaccessible at the national level.⁹⁸⁹ This collection infrastructure ‘give[s] rise to distributed forms of governance and powers to intervene.’⁹⁹⁰ It also raises serious questions as to who owns and has access to the data of vulnerable populations. States can be locked out of data due to cost, which disproportionately excludes poorer nations and makes richer nations and private companies rich in data capital. Further, differing agendas between the collection of data and the use of data can create function creep, meaning the data can be used in a manner originally unintended, with a loss of control and unaccountability over its use.⁹⁹¹ That much of this data collection is funded through aid money raises further questions as to the role of aid agencies in creating and entrenching inequalities, as well as posing risks to vulnerable groups who are displaced.

Mirca Madianou describes the role played by data and digital innovation practices in the relationship between aid agencies and displaced people as ‘technocolonialism’.⁹⁹² This term focuses on the practices of technology innovation, rather than the actual object of hardware or software. The replication of coloniality works through treating displaced people as legitimate sites of experimentation. Risk is thereby justified in pursuit of innovation. Value is extracted from these sites, sites of vulnerable people, through data collection which will profit private companies and develop strategies of social control, order and discrimination, under the guise of emergency measures and protection for those targeted.⁹⁹³ Extraction of the bodies of displaced and vulnerable people from the global south into both economic and power values is reminiscent of and builds

⁹⁸⁸ Linnet Taylor and Dennis Broeders, ‘In the Name of Development: Power, Profit and the Datafication of the Global South’ (2015) 64 *Geoforum* 229, 236.

⁹⁸⁹ *ibid* 234.

⁹⁹⁰ *ibid* 231–232.

⁹⁹¹ Mirca Madianou, ‘Technocolonialism: Digital Innovation and Data Practices in the Humanitarian Response to Refugee Crises’ (2019) 5 *Social Media + Society* 2056305119863146, 6; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (n 985).

⁹⁹² Madianou (n 991) 10.

⁹⁹³ *ibid* 2.

on the extractive profiteering in which ‘vulnerable bodies are spun into gold’ throughout the colonial period.⁹⁹⁴

Patricia Tuitt argues we need a broader conceptualisation of the violence of rightlessness. The refugee, whose legal and political construction is inextricably bound to territory – that being the loss of one’s rights when moving from one’s national territory to another – masks and in fact helps to “other” those who are displaced but do not fit the definition of refugee. The ‘non-territorial alienation’ of the internally displaced or supra-territorially ‘out of place’ populations is therefore downplayed and obscured.⁹⁹⁵ I argue that the regulation of people’s mobility through these aid programmes and technologies is a ‘non-territorial alienation’ through an extension or re-globalising of the border. This violence is enacted through multi-partnered aid programmes, public-private partnerships and technological abstractions. The management of people along their migration journeys is best understood as a violence which is beyond any one nation state or actor but is supra territorialised violence.

Yet, the nation still defines itself both through and beyond its territory. It is in this beyond – the extended reach of the nation – where the contestations of the nation take place upon the marked people who reside there. Tuitt argues,

[t]hey [those marked as out of place] are critical to the process of defining the nation, for revealing, in their image, not the outside of the state but the limits of its tolerance... In their treatment and in their being we see the sovereign state clothed in all its violent properties.⁹⁹⁶

It is the treatment of people marked by their displacement, I argue, that perform a function for the state. Beyond the territorial reach of the state, they are still met with its control. The displaced status, or the potential to be displaced, from the nation which marks them out for intervention. To quote Tuitt again, it is in ‘the treatment of person as thing we see the nation’s true limits, its authentic boundaries.’⁹⁹⁷ This process, Tuitt argues, creates a person property hybrid. It is the boundary between person and property which allows us to understand who a subject is, a human who holds rights and obligations within the law, that who transcends an object, or property. It is through this relationship with the law which gives status, rather than to be an object of law. Through their alienation, displaced people are outside the law, treated as a person property hybrid

⁹⁹⁴ Magnet 2011 153 in Madianou (n 991).

⁹⁹⁵ Patricia Tuitt, ‘Refugees, Nations, Laws and the Territorialization of Violence’ in Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (Ashgate Publishing Limited 2004) 38.

⁹⁹⁶ *ibid* 47.

⁹⁹⁷ *ibid* 43.

and susceptible to non-territorialised violence.⁹⁹⁸ Through aid programmes, the limits of the state's tolerance has retracted and its reach has become legitimately globalised. How then, is this mobilised to create new forms of intensive exploitation beyond the state, and how are othered and racialised people generated into sources of value in this context?

The *Jobs Compacts* is an example of the innovation and investment in technological solutions to long term social and political problems – or ‘solutionism’ – through public and private partnerships.⁹⁹⁹ Access to essential services and sustenance within refugee camps can be exchanged for biometric data. This is not a free choice as people who access these services are in extreme need. This is known as surveillance humanitarianism and surveillance asylum.¹⁰⁰⁰ People can be locked out of services if there is an error with data as simple as a misspelling. Privacy and data can be breached causing severe harm and human rights abuses.¹⁰⁰¹ Therefore, I argue, when a person consents to their biometric data being recorded in UNHCR camps in exchange for essential services and sustenance, the process of datafication creates the non-autonomous condition that exist in a person property hybrid. This is an intensely extractive process and creates people as sources of value. It is utilised to manage and contain mobilities and further increases efficiency to contain, restrict and extract from those considered high level security risk which is replicated along the stages of the migration journey.

The funding of these projects through international aid adds to the criticisms that aid is primarily effective in furthering a neo-liberal and neo-colonial agenda.¹⁰⁰² Profit, power, information and categorisation are developed from the bodies of displaced and vulnerable people from the global south through extractive practices to create value. This is reminiscent of and builds on colonial extractive profiteering.¹⁰⁰³ However, ‘[t]his industry...produces what it is meant to eliminate, curtail, or transform – more migrant illegality.’¹⁰⁰⁴ This method justifies a distancing, and therefore expansion – both territorial and through narrative creation – away from the national publics.

⁹⁹⁸ *ibid* 47.

⁹⁹⁹ Madianou (n 991); Taylor and Broeders (n 988).

¹⁰⁰⁰ Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (n 985) 12.

¹⁰⁰¹ *ibid* 32–37.

¹⁰⁰² McAuslan (n 917).

¹⁰⁰³ Magnet 2011 153 in Madianou (n 991).

¹⁰⁰⁴ Ruben Andersson, *Illegality, Inc: Clandestine Migration and the Business of Bordering Europe* (University of California Press 2014) 8.

5. Conclusion

This chapter has argued that the aid budget has been used to continue the colonial agenda of regulating mobility through practices of segregation, containment and the return of people from the UK. Through strategic use of the aid budget, the UK has re-globalised its borders under the guise of humanitarianism rather than colonial power. The colonial project of racial segregation is implemented through aid programmes to facilitate the containment and expulsion of displaced people from the UK. In line with global northern trends, the UK manages a networked approach and three-point strategy to control mobility and exercise national and regional exclusive possession through a humanitarian and development framework. The use of developmental aid obscures the colonial agenda, and therefore repudiates acknowledgement and accountability of it. The framing and implementation of these practices of exclusion within humanitarianism produces an ignorance to sanctioned humanitarian violence. The colonial gaze, this chapter has argued, initiates and perpetuates a separation between those who are represented and those who look. While it holds an active power relation, looking is understood as objective and passive by those who look. This ignorance perpetuates a separation between the observer and the observed, while maintaining the innocence and agency of perspective of the looker. Those who are represented are organised and sorted to be understood, and these methods of ordering are presented as neutral through the law. Aid programmes may be racially neutral, but the focus of aid policies is, by design, nations and nationals in the global south. They are an extension of the technologies of exclusion and maintenance of the global colour line, as introduced in Chapter Two.

The increasing criminalisation of migration, as discussed in Chapter Three and Five, causes and justifies the legal terrain that catches irregularised people in its net. Smuggling and trafficking are exploitative, dangerous and often deadly. They are, however, some of the only means by which people can attempt to make journeys; people are pushed into these choices through the removal of safe and legal routes for migration. Aid projects that then focus on tackling smuggling and trafficking are highlighting the human rights abuses of displaced people, such as *Upstream Programmes*, *The Safety, Support and Solutions Programme for Refugees and Migrants in Europe* and the *Mediterranean Region Programme*. These programmes are not addressing national, regional and international laws and policies that are causing the environments in which these abuses happen. These aid programmes are strategically produced for the UK to appear transparent in its effort to respond humanitarily to the increasing number of people migrating irregularly, while also being exploitative in its agenda to exclude. These are examples of how the UK creates the conditions

of abuse while presenting itself as a leading contributor to the ‘humanitarian challenges’ of migration and maintaining its position as world leader on international development.¹⁰⁰⁵

The following chapter will focus on contemporary UK domestic immigrations control known as the hostile environment. The chapter will focus on how ignorance enables the enforcement of the hostile environment, both through a banal following of policy, as well as a strategic use of ignorance to avoid accountability.

¹⁰⁰⁵ DFID and HM Treasury (n 37) para 1.18 and 1.1.

Chapter Five

Avoiding Responsibility

*I am concerned that the Home Office has become too concerned with policy and strategy and sometimes loses sight of the individual. This is about individuals, and we have heard the individual stories, some of which have been terrible to bear.*¹⁰⁰⁶

1. Introduction

The foregoing chapters have documented the coloniality of migration. This has been demonstrated through processes of racial differencing and the differing rights attributed through a hierarchical racialised understanding. They have also shown how global racial segregation commenced with the migratory routes of empire and is enforced through contemporary immigration laws and migration regulations. Through this, I have argued that ignorance to these practices has been produced through the law. This chapter builds on this understanding and provides a moral critique of the hostile environment, as legislated for in the 2014 and 2016 Acts. It also demonstrates how the hostile environment policies are implemented through ignorance.

The term “hostile environment” refers to the legislative and policy measures to ensure that people considered without a legal right to be in the country feel unwelcome. It is both hostility of feeling and refusal of services needed to live. Introduced in 2012, the then Home Secretary (2010-2016), Theresa May was the architect of the new immigration reforms, and infamously stated; “The aim is to create here in Britain a really hostile environment for illegal migration.”¹⁰⁰⁷ The purpose and effect of this statement, and subsequent legal and policy developments, has disseminated an internal and an external message. Firstly, to create a daily life that is so unliveable for people in the UK who are considered undocumented as to encourage “voluntary returns” and identify people for removal, either “voluntarily” or forced. It is in effect, a coercive self-deportation tactic.

¹⁰⁰⁶ Amber Rudd, Windrush Children (Immigration Status) 2018 col 28.

¹⁰⁰⁷ James Kirkup and Robert Winnett, ‘Theresa May Interview: ‘We’re Going to Give Illegal Migrants a Really Hostile Reception’ - Telegraph’, 25 May 2012, accessed 10 January 2018
<https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>.

Secondly, it is a deterrent message to people considered “would-be migrants”, to prevent people attempting to come to the UK. This is part of an approach premised on the belief that ‘[m]igrants think our streets are paved with gold’, to cite the title of a newspaper article written by Theresa May and her French counterpart at the height of fears of people coming to the UK from Calais in 2015.¹⁰⁰⁸

The hostile environment goes beyond what are seen as traditional border and immigration measures and is administered by front line and desk-based employees through predominantly public but also private services. Under the hostile environment, deprivation of services that are essential to living, such as health care, housing, employment, a bank account and education, are administered by healthcare staff, landlords, human resources, bank tellers and teachers rather than exclusively by border guards. Personal data about the people denied services are shared with the Home Office. This data is then used to flag and review the person’s immigration status and could lead to raids, detention and deportation. This is a worst-case scenario. However, short of this, deprivation of services, housing and employment has led to severe harm, both financially and psychologically, even if the person is eventually found to have the legal right to live in the country.¹⁰⁰⁹ Without the collaboration of employees within these essential public and private services, the hostile environment cannot be implemented.

The hostile environment has been called ‘overboard’ and the foreseeably racially exclusionary and discriminatory outcome of the strategy in contravention of international human rights law.¹⁰¹⁰ Key reports have recommended the repealing of the hostile environment, particularly the deputising of immigration enforcement to public and private actors.¹⁰¹¹ This, however, has not happened. Therefore, I argue it is a worthwhile exercise to understand how responsibility for the hostile environment, and its discriminatory and harmful nature, is avoided. This understanding would contribute to challenging the hostile environment, namely the outsourcing of immigration controls, the increasing criminalisation of people and data sharing, as detailed in Section 3. This

¹⁰⁰⁸ Theresa May and Bernard Cazeneuve, ‘Migrants Think Our Streets Are Paved with Gold’, 1 August 2015, accessed 2 August 2015, <http://www.telegraph.co.uk/news/uknews/immigration/11778396/Migrants-think-our-streets-are-paved-with-gold.html>.

¹⁰⁰⁹ Patients Not Passports and others, ‘Patients Not Passports: Migrants’ Access to Healthcare During the Coronavirus Crisis’ (2020).

¹⁰¹⁰ E Tendayi Achiume, ‘End of Mission Statement of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance at the Conclusion of Her Mission to the United Kingdom of Great Britain and Northern Ireland’ para 37 <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23073&LangID=E>> accessed 20 January 2022.

¹⁰¹¹ *ibid* 38; Wendy Williams, ‘Windrush Lessons Learned Review’ (House of Commons 2020) Independent Review HC93 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5_577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf> accessed 20 March 2020.

chapter will initially focus on the deputising of responsibility as a starting point to understand how the hostile environment is carried out by public and private actors. It will further detail how responsibility is avoided through thoughtlessness and a lack of critical engagement, as well as through strategic uses of avoidance during the Windrush scandal and its aftermath.

I will begin this chapter with an outline of how public and private sector workers enforce the hostile environment, as well as the increasing criminalisation of migrants and data sharing through a legal analysis of the Immigration Acts 2014 and 2016. Developing the analysis introduced in Chapter One, I will then explore the unremarkable and everyday nature of thoughtlessness and evil conceptualised by Arendt.¹⁰¹² I will give a detailed consideration of this in relation to the hostile environment, starting with the role of the individual in immigration controls and then turn to the institutional context through an examination of the *Windrush Lessons Learned Review*. While this enquiry is productive in helping to understand how the hostile environment is implemented, I think there are limits. The hostile environment is a package of measures with the specific and explicit intention to reduce net migration in the UK through hostile means. Drawing on the work of Linsey McGooney, I therefore turn to how ignorance is employed strategically, again giving examples at both an individual and an institutional level to evade accountability for any negative outcome of the policy.¹⁰¹³ I will discuss the role of ignorance employed by the Home Secretary at the peak of the scandal, and how it was utilised to maintain their innocence. From individual strategy of ignorance, I turn to a structural strategy of ignorance and non-compliance by the Home Office in its tendering of inquiries, but inaction on the recommendations.

This is not an exhaustive demonstration of how ignorance and thoughtlessness are employed, but examples to illustrate how ignorance is utilised to both implement the hostile environment and remove any accountability for the consequences for it. I identify concerns around the discourse of the Windrush scandal throughout this chapter, to bring about a broader discussion of the hostile environment and how this scandal was typically seen as a grave mistake or anomaly for a group of citizens caught up in the hostile environment rather than the intended consequence of these policies. The next section will give a broader account of the political and legal contexts

¹⁰¹² Adolf Eichmann is the subject of Hannah Arendt's profound yet controversial book *Eichmann in Jerusalem. A Report on the Banality of Evil*. He was the accused on trial for his role in the "Final Solution to the Jewish question" in the Third Reich. The first to stand trial in Israel, as he did not hold a rank high enough to have been tried in the Nuremberg Trials. It was this position, as a bureaucrat that followed rules rather than one who made them, that holds an interesting consideration of accountability and judgement. The concept of the banality of evil was a lesson learnt based on the specific facts of this trial. My intention is not to draw parallels between the Third Reich and the Home Office, but to see how these lessons may be helpful when thinking about the hostile environment and immigration system in the UK. I will explore this question in conjunction with the understanding that rather than a site of exceptionalism, the pervasiveness of the border and who enforces it can be termed as the 'banalisation of the border', as Vaughan-Williams does. See Arendt, *Eichmann in Jerusalem* (n 69) 228; Vaughan-Williams (n 816) 1071.

¹⁰¹³ {Citation}

that enacted the hostile environment. It will give a legal analysis of the Immigration Act 2014 and 2016, and how these Acts further constructed “the illegal”, both figuratively and legally.

2. The Construction of the Illegal

This section will focus on the construction of bogus and illegal subjects drawing on examples from the present Conservative government (2015-), the coalition government (2010-2015), New Labour era (1997-2010) and as far back as the 1980’s. It will demonstrate that the hostile environment policies have longer roots than 2012 policy announcement. Through a slow policy build-up, the border and policies that enact it becomes increasingly both present and routine. Drawing on Sheona York’s work, it will focus on how, through the hostile environment, the ‘very definition of “illegal” shifts from being an *objective definition of a person’s status under the law* to a *contingent relation* between the person and whichever private or public entity she faces in order to obtain a right of entitlement.’¹⁰¹⁴ The creation on the status of illegal brings about a propertied relationship between those who are entitled to rights and those who are not. While this is constructed through the law, it is implemented subjectively by people with status. Those who are entitled to rights have the power to exclude those deemed illegal from the rights baring status. In sum, the hostile environment ‘*create[s] and perpetuate[s] illegality*’, rather than reducing or removing it as it claims.¹⁰¹⁵

When the Windrush scandal broke in April 2018, Alan Johnson, the last Labour Home Secretary before Theresa May, was interviewed. He said, “a hostile environment for people who are here illegal is actually not a terrible thing”, but goes on to say, ‘to actually include in that hostile environment people who came over here and were given British nationality... is horrendous’.¹⁰¹⁶ Nodding next to him was Priti Patel, the soon to be Home Secretary from 2019. The phrasing of people who *came over here* and were *given* British nationality is telling. The Windrush generation held Citizenship of the United Kingdom and Colonies before they left their countries of birth to travel to Britain. It was not bestowed or given as a gift, it was the result of colonisation and the formalisation of CUKC through British subject status across the British empire in the 1948 Act. Articulating people as coming over here emphasises their *over there-ness*, as *not from here*. It removes the connected histories of colonial citizenship and geography that are still relevant today, all but

¹⁰¹⁴ Sheona York, ‘The “Hostile Environment”: How Home Office Immigration Policies and Practices Create and Perpetuate Illegality’ [2018] *Journal of Immigration, Asylum and Nationality Law* 1.

¹⁰¹⁵ *ibid.* Emphasis in original.

¹⁰¹⁶ “‘Have You Used the Phrase ‘Hostile Environment?’” Asks @afneil “I Can’t Remember Every Word I Uttered as Home Secretary” Says Alan Johnson on the Phrase #bbctw @IainDale Made the Claim an Hour Previously on #bbcqt’ (*Twitter*, 20 April 2018) <<https://twitter.com/bbcthisweek/status/987111276739362816>> accessed 11 May 2020.

silenced in the national narrative of who gets to be British. As demonstrated in Chapter Three, this tactic of separation and exclusion has a long history.

While Theresa May is credited with being the first MP to use the term “hostile environment” explicitly as a core policy, she did not create it but rather escalated and expanded it. The picture would be incomplete without detailing the existing measures that limited migrants and asylum seekers access to work and social security. Prior to the Coalition Government’s launch of the policy in 2012, there was an encroaching legislative framework that deterred people from employment and barred people from public financial support, which was also in place for people claiming asylum. The term “hostile environment” was actually introduced by the New Labour Government in 2007. Liam Byrne, the then Immigration Minister introduced fines to employers for hiring employees without the necessary rights to work. Byrne said,

What we are proposing here will, I think, flush illegal migrants out. We are trying to create a much more hostile environment in this country if you are here illegally. We have to make Britain much less of an attractive place if you are going to come here and break the rules.¹⁰¹⁷

Both in sentiment and practical steps this is the hostile environment. Labour brought in measures to ensure employers completed immigration checks on employees and tougher sanctions if they failed to do so. These sanctions could be reduced or avoided if the employers cooperated with immigration enforcement to arrange raids of those they had employed.¹⁰¹⁸ Concerns of racial discrimination and narrow views of Britishness were raised by an equality impact assessment, but a new employment hotline and introduction of foreign national identity cards was expected to address this.¹⁰¹⁹ Coordinated working was expected between immigration, taxation and benefits systems.¹⁰²⁰

In February 2010 the UKBA document ‘Protecting our Borders. Protecting the Public’ set a four-point strategy to creating a hostile environment to tackle immigration crime: deter, disrupt, detect and deal. ‘We are committed to doing more to reduce the harm caused by immigration and cross border crime and make the UK a hostile environment for those that seek to break our laws or abuse our hospitality.’¹⁰²¹ This creates a direct causal relationship between immigration and the

¹⁰¹⁷ Andrew Taylor, ‘Business to “Flush out” Illegal Workers’ (*Financial Times*, 15 May 2007)

<<https://www.ft.com/content/0425cc28-0324-11dc-a023-000b5df10621>> accessed 9 May 2020.

¹⁰¹⁸ Alan Travis and home affairs editor, ‘Officials Launch Drive to Seek out Illegal Migrants at Work’ *The Guardian* (16 May 2007) <<https://www.theguardian.com/uk/2007/may/16/immigration.immigrationandpublicservices>> accessed 9 May 2020.

¹⁰¹⁹ *ibid.*

¹⁰²⁰ Taylor (n 1017).

¹⁰²¹ Home Office, ‘Protecting Our Border, Protecting the Public’ 10 <<https://docplayer.net/325921-Protecting-our-border-protecting-the-public.html>> accessed 9 May 2020.

need to protect the public from it. The framing of ‘immigration and cross border crime’ makes ambiguous whether it is all immigration that the public need protecting from, or if immigration is the crime as well as cross border crime. Either through this ambiguity or the criminalisation of unsanctioned immigration, or both, the fear of immigration increases and creates a need to protect the public from the harm that is said to be caused by it. In the run up to the 2005 election, both Labour and the Conservatives were affirming it was not racist to be concerned about immigration, or to impose limits on immigration.¹⁰²² Both manifestos also frame immigration through a criminality lens which impact communities. As was demonstrated in Chapters Two and Three, British borders have, at least officially, been relatively fluid until much more recently. Examples were given in Chapter Four to demonstrate the extension of the border beyond British territory, in order to ensure security for Britain. Since 2006 there has been a commitment to cross-government enforcement and the Nationality, Immigration and Asylum Act 2002 legislated the obligation for local authorities, employers, police and banks to share data with the Home Office for immigration purpose.¹⁰²³

It is important to note that while immigration laws apply UK wide, they are enforced through sectors which are devolved, such as health, education and housing. Therefore, many sites of the hostile environment function within England, but not in the devolved nations. The hostile environment is formally legislated in the Immigration Acts of 2014 and 2016. These Acts will be analysed in the following sections to understand three elements to the policy. First, how it increases the criminalisation of migrants, second how it facilitates a collaboration between the Home Office, other government departments and third sector organisations which blurs the distinction between immigration enforcement and other private and public actors, and third how it facilitates the mass sharing and collection of data.¹⁰²⁴ These three elements will now be detailed in turn.

2.1 The Criminalisation of Migrants

The hostile environment places the burden of proof on the individual, treating anyone as illegal who cannot provide the documentation necessary for public and private services to verify their immigration status. Therefore, whatever the person’s legal status is, the different requirements and

¹⁰²² “Concern over asylum and immigration is not about racism. It is about fairness. People want to know that the rules and systems we have in place are fair.” Tony Blair in Maya Goodfellow, *Hostile Environment: How Immigrants Became Scapegoats* (Verso Books 2019) 113–14; ‘It’s not racist to impose limits on immigration’, in The Conservative Manifesto, ‘Are You Thinking What We’re Thinking? It’s Time For Action.’ (2005) 18 <<http://www.manifesto.com/wp-content/uploads/2015/09/Conservatives-manifesto-uk-2005.pdf>> accessed 2 August 2020.

¹⁰²³ Wendy Williams (n 1011) 65 & 63.

¹⁰²⁴ Corporate Watch (n 128).

levels of evidence determine whether they are entitled to the service.¹⁰²⁵ If this cannot be met, people are treated as though they are illegal and pushed out of mainstream services, such as housing and employment, and into precarious situations to access services needed or go without, such as healthcare, which could risk their lives. For example, anyone who is not ‘ordinarily resident’ is eligible for the NHS surcharge.¹⁰²⁶ But ‘ordinarily residence’ cannot be equated with an immigration status.¹⁰²⁷ Primary health care services, for example GP appointments and Accident and Emergency (A&E), are exempt, however, the hostile environment deters people with insecure status from accessing these services.¹⁰²⁸

Existing rights of migrants have been restricted or removed through the hostile environment, creating more situations where people are left unprotected by the law. This has been implemented through new offenses, including that of working while undocumented, which carries up to a six month sentence and earnings confiscated as proceeds of crime;¹⁰²⁹ driving while undocumented, which could carry a custodial sentence and have their vehicle impounded.¹⁰³⁰ Immigration officers and police have new powers to stop and search a person and their vehicle based on suspicion of immigration status.¹⁰³¹ Further, criminal liability has been placed on landlords and employers, who could receive a maximum of five years imprisonment and a fine for renting to or employing undocumented people if they could not demonstrate they had undertaken sufficient checks.¹⁰³² The list of authorised documentation required for employers to evidence employees legal status were reduced in 2014. Penalties apply to the employer if the employee continues to work without these new checks, even if the employee holds the right to work. As York points out, people with legal status are being treated as though they are breaking the law.¹⁰³³ Further, the employee is removed from the process. The checks and outcome are communicated between the employer and Home Office rather than the employee. York describes this process, of circumventing the individual involved, as *legal distancing* and also happens with immigration checks

¹⁰²⁵ York (n 1014) 11.

¹⁰²⁶ This has been since the NHS (Amendment) Act 1949, which was enacted in the 1980’s. It was inconsistently enforced by NHS Trusts in England until stricter enforcement required it. See ‘Recovering the Cost of NHS Treatments given to Overseas Visitors’ (GOV.UK) <<https://www.gov.uk/government/news/recovering-the-cost-of-nhs-treatments-given-to-overseas-visitors>> accessed 20 January 2018.

¹⁰²⁷ York (n 1014) 9.

¹⁰²⁸ Zoe Gardner, ‘Migrants Deterred from Healthcare during the COVID-19 Pandemic’ (Joint Council for the Welfare of Immigrants 2021) <<https://www.jcwi.org.uk/migrants-deterred-from-healthcare-in-the-covid19-pandemic>> accessed 20 January 2022.

¹⁰²⁹ ‘Immigration Act 2016’, sec. 34.

¹⁰³⁰ Immigration Act 2016, sec. 44.

¹⁰³¹ *ibid* 43.

¹⁰³² *ibid* 39 and 35.

¹⁰³³ York (n 1014) 13–16.

for bank accounts, driving licences and the right to rent scheme.¹⁰³⁴ Landlords received new powers to evict tenants without papers without a court order, and the Home Office can order landlords to evict tenants.¹⁰³⁵ People who are rough sleeping and from a country in the European Economic Area (EEA) have been subject to detention and deportation.¹⁰³⁶

As well as the limitation of access to services, an important aspect of the hostile environment is how people are stopped, searched and detained following street stops and raids. Immigration officers often misuse their increasing powers.¹⁰³⁷ People who are stopped on the street are often done so because they are illegally racially profiled. In 2015 the Independent Chief Inspector of Borders and Immigration (ICIBI) found immigration enforcement officers only had warrants to enter the premises for 43% of the raids.¹⁰³⁸ Street stops and raids are one of the most violent and public acts of the hostile environment. For some it will be their first encounter with immigration enforcement, for others it is one of the last acts of the hostile environment in the UK. Having been made possible because of collaboration between the Home Office and private and public sectors sharing data, increasing surveillance and refusing people services, employment and housing pushes people into informal and vulnerable employment and housing. After raids, people can be detained indefinitely in immigration prisons.¹⁰³⁹ Many people have ongoing cases and the majority of people are released back into the community because the Home Office doesn't have grounds to remove or detain them.¹⁰⁴⁰

2.2 The Collaboration of Citizens

Public, private and third sector actors collaborate with the Home Office, through this collaboration individual employees play a role in collaboration which expands the reach of the Home Office. Local authorities, the Greater London Authority (GLA) and homeless charities who

¹⁰³⁴ *ibid* 13.

¹⁰³⁵ Immigration Act 2016 ss 40 and 41.

¹⁰³⁶ 'The Immigration (European Economic Area) Regulations 2016' legislates an EEA national may be removed (regulation 23(3)) if they misuse of the right to reside (regulation 26). While it does not explicitly state the misuse of the right to reside includes rough sleeping it has been exercised to these means. It is interpreted as not exercising ones treaty rights, and therefore considered to be a misuse of rights. These new rules meant Immigration and Compliance Enforcement (ICE) officers were removing and detaining people they believed to be in this situation. In December 2017 NELMA and Public Interest Law Unit took the Home Office to court, and the policy was deemed unlawful. Some EEA nationals have received compensation for illegal detention and deportation. See Immigration (European Economic Area) Regulation 2016.

¹⁰³⁷ Liberty, 'A Guide to the Hostile Environment. The Border Controls Diving Our Communities - and How We Can Bring Them Down' (Liberty, April 2018), 46–49,

¹⁰³⁸ Independent Chief Inspector of Borders and Immigration, 'An Inspection of How the Home Office Tackles Illegal Working October 2014 – March 2015', December 2015, 24.

¹⁰³⁹ The UK is the only country in Europe without a time limit for detention. See 'Immigration Detention' (*Right to Remain*, 19 April 2018) <<https://righttoremain.org.uk/toolkit/detention/>> accessed 20 January 2022.

¹⁰⁴⁰ 'Immigration Detention in the UK' <<https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/>> accessed 20 January 2022.

the GLA commission, work in collaboration with Immigration and Compliance Enforcement (ICE) officers. This is done through joint street patrols, sharing data and identifying people who refused to leave ‘voluntarily’. St Mungo’s and Thames Reach are two charities that work with the GLA. Securing the removal of rough sleepers secures 10% of St Mungo’s contracted fee.¹⁰⁴¹ Corporate Watch noted collaborators in this sector have been ‘strong advocates of the tougher regime’ as a solution to reduce homelessness in local authorities.¹⁰⁴²

Employers and landlords are encouraged to cooperate with the Home Office through waiving fines, criminal sanctions or being closed down if they comply with or arrange ICE raids on employees or tenants. To avoid this, employers and landlords carry out immigration checks on their employees before allowing them to work or rent a property. The High Court has found the scheme causes private landlords to racial discriminate ‘where otherwise they would not’.¹⁰⁴³ There is a strong financial motivation to change the culture of the NHS from free from the point of access, to assessing eligibility before access to healthcare.¹⁰⁴⁴ The Overseas Visitor and Migrant Cost Recovery Programme was set up in 2014 with a target to raise £500million through charging “overseas visitors”.¹⁰⁴⁵ In order to achieve this front-line service staff must ask patients for proof of immigration status before they receive treatment. If they cannot provide the evidence needed they must make payment at 150% the cost before they receive treatment. If treatment is urgent, the person will receive a bill afterwards and if the payment is outstanding by £500 for more than two months it is likely to negatively impact any future immigration applications.¹⁰⁴⁶

If higher education institutions (HEIs) do not fulfil Home Office requirements, they could lose the licence needed to recruit international students.¹⁰⁴⁷ As such, HEIs monitor visa and attendance of international staff and students to secure international sponsorship licence and ensure no reputational or financial damage.¹⁰⁴⁸ With vague requirements in place from the Home Office, many HEIs go beyond the Home Office demands to ensure compliance.¹⁰⁴⁹ Collaboration

¹⁰⁴¹ Corporate Watch (n 128) 14.

¹⁰⁴² *ibid.*

¹⁰⁴³ *Joint Council for the Welfare of Immigrants, R (On the Application Of) v Secretary of State for the Home Department* [2019] [2019] High Court [2019] EWHC 452 (Admin) [105]. ‘It is my view that the Scheme introduced by the Government does not merely provide the occasion or opportunity for private landlords to discriminate but causes them to do so where otherwise they would not. The State has imposed a scheme of sanctions and penalties for landlords who contravene their obligations and, as demonstrated, landlords have reacted in a logical and wholly predictable way.’

¹⁰⁴⁴ For example the Overseas Visitor and Migrant Cost Recovery Programme was set up in 2014 with a target to raise £500million through charging “overseas visitors”. Corporate Watch (n 128) 6.

¹⁰⁴⁵ *ibid* 4.

¹⁰⁴⁶ Liberty, ‘A Guide to the Hostile Environment. The border controls diving our communities - and how we can bring them down’.

¹⁰⁴⁷ Corporate Watch (n 128) s 4.

¹⁰⁴⁸ *ibid.*

¹⁰⁴⁹ *ibid.*

with private organisations such as the DVLA have been in effect since 2005, with a Home Office officer ‘embedded’ in the DVLA to be on hand to answer any inhouse immigration queries of customers.¹⁰⁵⁰ The collaboration was formalised through the 2014 Act.

2.3 The Collection and Sharing of Data

The collection and sharing of data is a lesser known strategy that underpins the ability of the Home Office to be able to implement the hostile environment. Home Office data is notoriously inaccurate, with the quality of data used to implement the hostile environment policies highlighted as a major concern of the Independent Chief Inspector of Border and immigration.¹⁰⁵¹ Large scale data sharing with private organisation such as the DVLA and banks have been in effect since 2011 and were extended through Memorandums of Understandings (MoU) to fulfil the restrictions set out in the 2014 Act.¹⁰⁵² CHAIN is a London wide database of information regarding people rough sleeping. It is run by St Mungo’s and funded by the GLA and information is shared with ICE teams. MoUs have been in place to share data between other government departments, such as the Department of Health and Department for Education. NHS Digital is a database that holds personal information of patients that is routinely collected. There has been an agreement to share data on a mass scale from NHS Digital to the Home Office on request. In 2016 NHS Digital shared 8127 patient information requests with the Home Office, from these requests 5854 people were traced by the Home Office.¹⁰⁵³ In May 2018 data sharing on a mass scale was halted, due to campaign efforts inside and outside the NHS as well as a focus on the practice during the Windrush scandal the same month.¹⁰⁵⁴ However, data is still being collected by NHS Digital through front line staff and the Home Office can request it for people they believe have committed a serious crime and who they aim to deport.¹⁰⁵⁵ Data has also been collected on pupils’ nationality and country of birth up to the age of 16 as part of the school census since 2015. Despite claims that it was for internal use, a MoU between the Department for Education and the Home Office revealed 1500 pupils’ records from England were shared per month between the two departments since

¹⁰⁵⁰ Independent Chief Inspector of Borders and Immigration, ‘An Inspection of the “Hostile Environment” Measures Relating to Driving Licences and Bank Accounts January to July 2016’ (2016).

¹⁰⁵¹ *ibid*; Corporate Watch (n 128); Liberty (n 127).

¹⁰⁵² s46-47 and s40-43 of the Immigration Act 2014 relate to driving licences and bank accounts. Independent Chief Inspector of Borders and Immigration (n 1050) para 5.9-5.19 and 6.11-6.21.

¹⁰⁵³ Corporate Watch (n 128) s 2.

¹⁰⁵⁴ Denis Campbell and Denis Campbell Health policy editor, ‘NHS Will No Longer Have to Share Immigrants’ Data with Home Office’ *The Guardian* (9 May 2018)

<<https://www.theguardian.com/society/2018/may/09/government-to-stop-forcing-nhs-to-share-patients-data-with-home-office>> accessed 20 January 2022.

¹⁰⁵⁵ *ibid*.

June 2015, including country of birth, nationality and home address.¹⁰⁵⁶ In November 2016, the collection of this data for children aged 2 – 5 was discontinued and in April 2018 DfE announced it would stop collecting nationality and country of birth data.

Legal and civil challenges have demonstrated that people are taking notice of the attempts to increase surveillance and border controls throughout services and have worked collectively to challenge these policies.¹⁰⁵⁷ However, the Data Protection Act 2018 was passed containing an immigration clause for ‘the maintenance of effective immigration control’ or ‘the investigation or detection of activities that would interfere with effective immigration control’.¹⁰⁵⁸ Organisations have raised concerns that the exemption could in fact remove the rights of millions, in terms of access to their information, to be able to correct or erase it or know what data is being processed, why and by whom.¹⁰⁵⁹

The hostile environment creates an everydayness to border controls that see some incorporated into regular workloads, creating a ‘banalisation of the border’.¹⁰⁶⁰ This externalisation of legal responsibility blurs the lines of accountability while also removing processes and procedures to prevent rights abuses and injustices. The ubiquity of immigration controls within the public, private and third sectors and increased surveillance in everyday life can be understood as a ‘border on every street’, a mobile border or people taking the space (and violences) of the border with them, which disproportionately impact people and communities of colour.¹⁰⁶¹ The normalisation of the daily performances that uphold the internal border encourages the belief that rights are entwined with responsibilities, and entitlements to state services with belonging in the

¹⁰⁵⁶ Home Office, ‘Memorandum of Understanding Between The Home Office And Department for Education In Respect of the Exchange Of Information Assets’ s 15.2.3

<<https://www.whatdotheyknow.com/request/377285/response/941438/attach/5/20161016%20DfE%20HO%20MoU%20redacted.pdf>> accessed 29 August 2020.

¹⁰⁵⁷ For example see Against Borders for Schools (ABC) and Liberty campaign against collection and sharing of school children; Docs not Cops and Doctors of the World campaigning against immigration status determining access to health care and data collection and sharing within the NHS; NELMA and Public Interest Law successful legal against the Home Office for deportation of EEA nationals who are sleeping rough.

¹⁰⁵⁸ Liberty, ‘Campaigners Condemn Government’s “Shameless Attempt” to Strip Millions of Their Privacy Rights in New Data Protection Bill’, Liberty Human Rights, 24 October 2017, <https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/campaigners-condemn-governments-shameless-attempt-strip>.

¹⁰⁵⁹ *ibid.*

¹⁰⁶⁰ Nick Vaughan-Williams, ‘The UK Border Security Continuum: Virtual Biopolitics and the Simulation of the Sovereign Ban’, *Environment and Planning D: Society and Space* 28, no. 6 (2010): 1077.

¹⁰⁶¹ Rachel Robinson, 3 April 2014, ‘A border in every street’, Liberty, <https://www.liberty-human-rights.org.uk/news/blog/border-every-street>; Webber, Frances, ‘You Have No Rights! The Creation of the Bad Immigrant’ (Hospitality, the Hostile Environment, and the Law, Cumberland Lodge, Windsor, 2018); Sarah Keenan, ‘A Prison around Your Ankle and a Border in Every Street: Theorising Law, Space and the Subject’, in *Routledge Handbook of Law and Theory*, ed. Andreas Philippopoulos-Mihalopoulos, 1 edition (Abingdon, Oxon; New York, NY: Routledge, 2018).

UK.¹⁰⁶² The hostile environment communicated different messages to address and constitute different audiences within the UK, especially England. The understanding of the ideal and compliant law-abiding citizen is becoming narrower, and people assumed to ‘not to be playing by the rules’ are “illegal” threats within the domestic space who are increasingly racially targeted and discriminated.¹⁰⁶³ The border is omnipresent, being enforced by or enforced on people depending on their immigration status.

3. Thoughtlessness and Ignorance

This section considers theories of thoughtlessness and ignorance and will be applied to examples of the hostile environment. This, I argue, will cast a new light on how the hostile environment is enabled. The aim of this exercise is to refocus where and how we look for injustice and understand where and how the power is that enables it. It is part of a wider effort to focus on structural and systemic reproductions of racism and injustice rather than individual “bad apples” who are depicted as anomalies within an otherwise functioning system. It shifts a focus from individuals and towards an understanding of how the individual works, both within and because of the system, in this case the immigration system. This is not to remove individual responsibility but to aid understanding of how and why environments create a routinisation and banalisation of evil actions and functions, as Arendt articulates it, and therefore the thoughtless nature of racism and injustice. However, by understanding how the individual (re)produces injustice as part of this environment it allows an understanding of locations of power, and therefore locations of resistance.

It has been persuasively argued that the hostile environment has exceeded prior injustice borne from immigration laws within the UK, and has garnered a state of emergency which has ‘fundamentally altered’ the terms of which we, including legal practitioners, should respond to these laws.¹⁰⁶⁴ Patricia Tuitt argues there are at least four aspects of the hostile environment which ‘put in question whether the obligation to obey the law applies in respect to them.’¹⁰⁶⁵ These characteristics are; the impossible burden of proof on Windrush Generation applicants, the stripping of basic human entitlements of the applicants who fail to prove their legal residency; the

¹⁰⁶² Jon Burnett, ‘Entitlement and Belonging: Social Restructuring and Multicultural Britain’ (Institute of Race Relations 2016) <<http://www.irr.org.uk/wp-content/uploads/2016/03/Entitlement-and-belonging.pdf>> accessed 30 March 2016.

¹⁰⁶³ G4S, ‘Protecting National Interests. Strengthening the UK Border, Safely and Securely’, Government (G4S, 2009), 2. For example, see JCWI, “‘No Passport Equals No Home’: An Independent Evaluation of the “Right to Rent” Scheme’ (Joint Council for the Welfare of Immigrants, 3 September 2015).

¹⁰⁶⁴ Patricia Tuitt, ‘Socio-Legal Studies in a Time of Emergency’ (2021) 5:30 <<https://virt-us.app/e/slsa-2021/sessions/194/>> accessed 9 April 2021.

¹⁰⁶⁵ Patricia Tuitt, ‘Unjust Laws and Legal Education’ (*Patricia Tuitt*, 12 December 2019) <<https://www.patriciatuitt.com/single-post/2019/12/12/unjust-laws-and-legal-education>> accessed 6 April 2021.

disproportionate sanctions on public and private individuals who are legally obliged to carry out the hostile environment; and the consequence of racial discrimination because of compliance with the law.¹⁰⁶⁶ This last point is vital in identifying the hostile environment as a state of emergency and in raising the critical question as to the obligation of obedience. I shall therefore focus on thoughtlessness and ignorance, as well the strategic use of ignorance to highlight how injustice operates in seemingly innocuous ways.

3.1 Thoughtlessness and Evil

The first section below details how the outsourcing of border controls as part of the hostile environment creates a distance between the Home Office and person who may not have all the necessary papers to live in the country. I argue this generates a thoughtlessness and ignorance through the chain of data collection, with focus on the individual. The environment that fostered this blind compliance of the individual, can also be a thoughtless one. The second section will focus on the institutional environment of thoughtlessness that produced the Windrush scandal as an example of structural thoughtlessness and ignorance.

3.1.1 Individual thoughtlessness and ignorance

The separation between Eichmann and the consequences of his bureaucratic work is, what Nick Gill calls, a moral distance which creates moral indifference.¹⁰⁶⁷ This separation allows a detachment between perpetrator and those who suffer from their actions, thus protecting the perpetrator from a reckoning of conscience. When confronted with the impact of their actions this could force someone into critical awareness and thoughtfulness of their role. Distance between the decision maker and subject of the decision has already been made steadily greater within immigration and asylum decision making.¹⁰⁶⁸ Yet outsourcing immigration controls through collaboration with public and private essential services exacerbates this distance much further. For example, data collection and the datafication through these institutions adds a degree of separation from the Home Office, and therefore immigration enforcement. If your child's education institution is requesting information such as country of birth and nationality as part of the student census for the Department of Education (DfE), it is very different to the Home Office asking for this information (see Figure One). Indeed, the government stated the data request was to improve

¹⁰⁶⁶ *ibid.*

¹⁰⁶⁷ Nick Gill, *Nothing Personal?: Geographies of Governing and Activism in the British Asylum System* (John Wiley & Sons 2016).

¹⁰⁶⁸ *ibid.*

the lack of sufficient evidence on effective education for foreign nationals.¹⁰⁶⁹ Education institutions who receive funding from DfE were required to request this data. This was a result of a Memorandum of Understanding (MoU) between the Home Office and DfE.¹⁰⁷⁰ The diagram below shows the direct approach taken to find out an individual's immigration status, and then the new approach through the hostile environment. The additional steps, I argue, exacerbate the potential thoughtlessness that can be generated through bureaucratic and administrative structures.

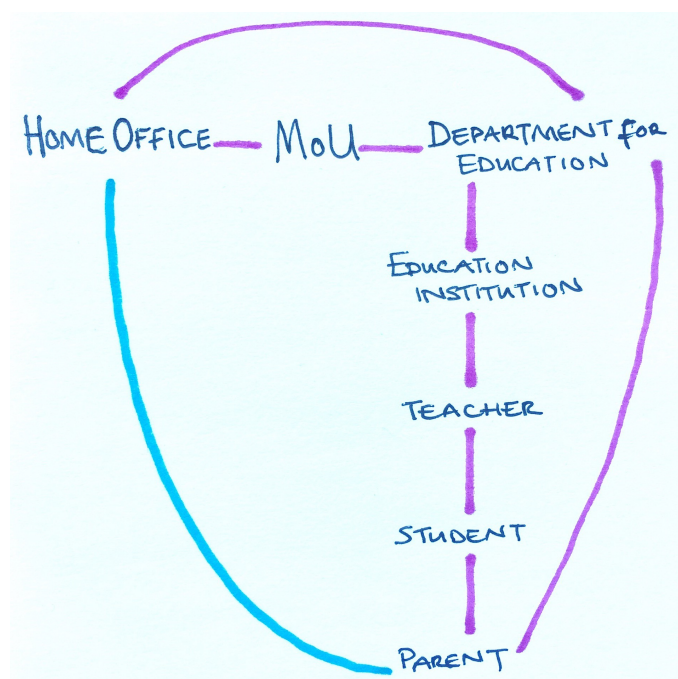


Figure One: Diagram of different steps to find out a person's immigration status.

The stated purpose of sharing this information was for the promotion and welfare of children in England, as well as preventing and detecting crime, 'including abuse of the immigration system' and pursuing national security measures.¹⁰⁷¹ The strategic aims of the data sharing were a combination of statutory duties for both departments, albeit unevenly; 'protect[ing] the interest and safety of any child' sat alongside immigration control aims to 're-establish contact with children and families the HO has lost contact with and trace immigration offenders'; the reduction

¹⁰⁶⁹ Freddie Whittaker and Billy Camden, 'Pupils Who Were Not White British Told to Send in Birthplace Data' *Schools Week* (23 September 2016) <<https://schoolsweek.co.uk/pupils-who-were-not-white-british-told-to-send-in-birthplace-data/>> accessed 29 September 2020.

¹⁰⁷⁰ Home Office, 'Memorandum of Understanding Between The Home Office And Department for Education In Respect of the Exchange Of Information Assets' (n 1056).

¹⁰⁷¹ Home Office, 'Memorandum of Understanding Between The Home Office And Department for Education In Respect of the Exchange Of Information Assets' s 5.1 <<https://www.whatdotheyknow.com/request/377285/response/941438/attach/5/20161016%20DfE%20HO%20MoU%20redacted.pdf>> accessed 29 August 2020.

of ‘harm resulting from abuse of immigration control’; ‘combat illegal migrant working and those that benefit from it’; ‘create a hostile environment for those who seek to benefit from the abuse of immigration control’; and ‘reduce the illegal migration population.’¹⁰⁷² This strategy is clearly stated as part of the hostile environment.

Returning to Arendt’s analysis of Eichmann, she demonstrated it was not only this inability to think outside one’s own circumstances, or beyond the immediate practicalities of the task at hand, that allowed Eichmann to remove himself from guilt of the bloodiness and violence of the Final Solution, but his abdicating his own agency and placing it in higher ranking officials. ‘*Who was he to judge?* Who was he “to have [his] own thoughts in this matter”?’¹⁰⁷³ In abandoning his own agency, Eichmann demonstrates it is not only the monsters we imagine that can commit evil, but more often it is enacted by thoughtless and compliant participants. The normalcy and commonality of the person that caused such harm is what is terrifying. Indeed, bureaucracies dehumanise people into administrative functionaries, creating compliant *nobodies*.¹⁰⁷⁴ The trial, and Arendt’s reporting of it, put one cog of a bureaucratic system, Eichmann, on trial as an individual and as a human being.¹⁰⁷⁵ Eichmann resisted this, holding on to his role as a functionary, not as a human being. He argued that anyone else in that role would have done the same. It was the system and culture within which he operated that created the totalitarian laws and rules and encouraged commitment to them. He was simply a law-abiding citizen.¹⁰⁷⁶ His conscience was clear because he was wedded to the laws and rules and had followed them.¹⁰⁷⁷ The lack of critical engagement, or even having and perusing thoughts of doubt towards them, never mind at a deeper level towards the ideology, is the banality of how evil can operate.

When education institutions were requested to add questions onto the census to collect data on students, they did. They were required to do so through the MoU, but not legally so.¹⁰⁷⁸ Despite this, a narrow reading of the request from DfE was followed by most education institutions. Letters were sent from institutions to parents and guardians requiring nationality information. Figure Two is an example of one such letter. This education institution took the opportunity to request further information than was required by DfE and the Home Office, specifically languages spoken and understood at home by the child as well as any languages they were exposed to in their early development. While this letter does not use mandatory language, it

¹⁰⁷² *ibid* 15.1.2..

¹⁰⁷³ Arendt, *Eichmann in Jerusalem* (n 69) 114. Emphasis in original

¹⁰⁷⁴ *ibid* 289.

¹⁰⁷⁵ *ibid*.

¹⁰⁷⁶ *ibid* 8.

¹⁰⁷⁷ *ibid* 25.

¹⁰⁷⁸ Home Office, ‘Memorandum of Understanding Between The Home Office And Department for Education In Respect of the Exchange Of Information Assets’ (n 1056) s 1.7.

does imply compliance. Figure Three is an example of a letter that repeatedly uses mandatory language, stating the information 'must' be provided. Both examples give only a few days to complete and return the form, which limits the opportunity for critical discussion of the request. The second letter reassures that '[i]nformation will not be used for any other purposes', which should exclude use for immigration purposes, but may be passed to DfE, again adding steps of separation between the school, DfE and the Home Office. This data is added to existing information held on the National Pupil Database and will be shared with the Home Office when requested.¹⁰⁷⁹

¹⁰⁷⁹ Home Office (n 19) for details of request see generally s 15.



Tuesday, 27 September 2016

Dear Parent/ Carer

The Department for Education (DfE) carry out a school census three times a year. This is when they collect data from all schools across the country.

Whilst the information they collect is generally the same each year, from October 2016 the DfE will be collecting additional pupil data due to new Government regulations. The school now needs to hold a record of every pupil's nationality, country of birth and any additional languages spoken by children at home or in the community.

Therefore, could you please complete the attached form for your child and return it to school by Monday 3rd October 2016 to enable us to update our records in preparation for the October census.

Your assistance in this matter would be greatly appreciated.

Yours faithfully,



Headteacher

To be returned to school by Monday 3rd October

Pupil Information Request

Full Name of Child: _____ Class: _____

Child's Nationality:		Child's 2 nd Nationality: (if dual registered)	
Child's Country of Birth:			
Native Languages spoken by parents/guardians of child:	1.	2.	
Languages spoken/understood at home by child:	1.	2.	
Any other languages your child has been exposed to during their early development:	1.	2.	

Signed (Parent/Carer): _____ Date: _____

Please see overleaf for Guidance from the DfE



Figure Two: Example of a census data request¹⁰⁸⁰

¹⁰⁸⁰ Against Borders in Schools Facebook page. Accessed 25 August 2020. <https://www.facebook.com/schoolsabc/photos/a.1809940242584764/185624011288110>

18 July 2016

Our Ref: [REDACTED]

TO: ALL PARENTS AND CARERS

Dear Parents and Carers

The Department for Education (DfE) has stated that each school must provide information on every student's nationality and country of birth.

As this is a mandatory requirement, we would be grateful if you would please complete the attached form, for each child attending [REDACTED] and return to the School Office by Friday, 22 July 2016.

We would like to reassure you that the information provided will be held confidentially at all times and it will be passed on to any other school to which your child transfers to avoid repeating the exercise.

The information provided will be used to compile statistics on the school careers and experiences of children from different backgrounds, to help ensure that all children have the opportunity to fulfil their potential. These statistics will not be published in a way that allows individual children to be identified publicly and the information will not be used for any other purpose. From time to time this information will be passed to the Local Authority and the DfE to contribute to local and national statistics.

It is imperative that this form is completed and returned to the school. Please complete the attachment and send back to school or send an email with all the stated information to [REDACTED]

Should you need any help completing the form, please do not hesitate to contact the School Office.

Thank you in advance for your support

Figure Three: Example of a census request cover letter¹⁰⁸¹

The purpose of this section has been to detail the environment in which an individual is encouraged to and can act thoughtlessly. The consequences of this thoughtlessness on an individual level can and has resulted in discrimination and potentially result in the pupil and their family being traceable by the Home Office. Though Government guidance stating the schools cannot request documentation, such as passport or birth certificate, for either country of birth or nationality, some schools did so.¹⁰⁸² Some schools treated children differently based on their ethnicity. One school sent two different emails; children recorded as “white British” were assumed

¹⁰⁸¹ Against Borders in Schools Facebook page. Accessed 25 August 2020.
<https://www.facebook.com/schoolsabc/photos/a.1809940242584764/1854598694785585>

¹⁰⁸² Department for Education, ‘School Census 2016 to 2017. Guide, Version 1.6’ 66 & 67
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/609375/School_census_2016_to_2017_guide_v1_6.pdf> accessed 29 August 2020; Whittaker and Camden (n 1069).

to be born in the UK and speak English at home and parents or guardians were only requested to get in touch if this was not the case, while the parents or guardians of children who were not recorded as “white British” were emailed to request this information as a matter of urgency.¹⁰⁸³ One school also requested to know if the pupil was an asylum seeker or refugee.¹⁰⁸⁴ This demonstrates a discriminatory practice for data collection requests, before this information has even been obtained or confirmed. It both assumes and affirmed an understanding of Britishness as white, born in the UK and English speaking, and the multitude of people outside of this narrow scope have their Britishness questioned. Further, guidance states that if a parent or guardian explicitly refuses the information or does not provide the information, the school can write ‘refused’, ‘not yet obtained’ or ‘not know’.¹⁰⁸⁵ This information was generally not given by education institutions, and as is demonstrated in the letters above, the information was strongly encouraged or demanded.

The MoU was implemented inconsistently both across institutions and in compliance with the guidance. At a front-line institutional level, it is an individual implementation. I am not arguing that this was purposefully done, despite clear examples of some schools going beyond and directly against the guidance, but through a thoughtlessness and ignorance as to the consequences of discriminatory requests as well as what may happen as a result of the data collection. Education institutions were under an obligation to request the information, but they did not inform parents and guardians they were not obliged to provide it. As with Arendt’s critique of thoughtlessness, there was an assumption that compliance to the rules of the system is both a required and good thing – they were just doing their jobs. Further, it focuses on a narrow understanding of the immediate task, without considering the intended and unintended impacts of the task as the purpose of the requirements and therefore one’s role as a quasi-immigration officer.

The new data requests in the DfE census creates and further demarcates pupils through categories of country of birth and therefore distancing them from a narrow understanding of Britishness and nationality. Children are targeted and differentiated from this understanding as a “norm” in the classroom based on race and nationality, including those who are misclassified or unclassified.¹⁰⁸⁶ This can create insecurity both in the classroom and at home which will impact learning, but also every other aspect of life. If the procedures implemented through the MoU allows the Home Office to locate people they think may be undocumented, this will have a

¹⁰⁸³ Whittaker and Camden (n 1069).

¹⁰⁸⁴ *ibid.*

¹⁰⁸⁵ Department for Education (n 1082) 66 & 67.

¹⁰⁸⁶ Spade (n 48) 368.

profoundly negative effect on the child's education and wellbeing, despite this being a key purpose in the sharing of information.¹⁰⁸⁷ Those who can thoughtlessly fill out a form, will unlikely be negatively impacted by it.

As with the use of technology to monitor irregularised migration detailed in Chapter Four, the abstraction of people into data has a harmful effect. As Dean Spade argues,

Looking through this lens we can understand that the fundamental conditions of oppression and domination occur at the population level, structured through the administration of various norms, although law often refuses to recognize or address systemic oppression, focusing instead on narrow narratives of intentionality and individual harm and retribution.¹⁰⁸⁸

The hostile environment is necessarily implemented at an individual institutional level through the collaboration and compliance of institutions and front-line workers throughout public and private institutions. In this way tasks are further removed from the purpose of them, obscuring this purpose to reduce critical scrutiny. All that is needed are overworked, underpaid front line workers to thoughtlessly carry out what is asked of them to become immigration guards without knowing they have done so.

The stated primary purpose of the data collection was to improve an understanding of attainment of student born overseas and the impact of migration on the education sector. It was assured in the House of Commons and the House of Lords that pupil data would not be shared with other government departments, despite the MoU having been finalised eight months earlier.¹⁰⁸⁹ Initially, Theresa May had proposed making children's school place dependent on their immigration status, including withdrawing a child's school place. Met with resistance from DfE at the time, this data sharing agreement is seen as a compromise. This initial plan was only discovered after the implementation of the MoU and data collection requests through leaked cabinet papers in late 2016.¹⁰⁹⁰ Had this information been known by the public or government beforehand it would have been a much more transparent request from DfE via education institutions and met with greater resistance.

¹⁰⁸⁷ Home Office, 'Memorandum of Understanding Between The Home Office And Department for Education In Respect of the Exchange Of Information Assets' (n 1056) s 5.

¹⁰⁸⁸ Spade (n 48) 370.

¹⁰⁸⁹ Nick Gibb, 'Pupils: Personal Records: Written Question - 42942' (*UK Parliament*, 15 July 2016) <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-07-15/42942/>> accessed 29 August 2020; Viscount Younger of Leckie, 'School Census: Pupils' Nationality' (*Hansard*) <<https://hansard.parliament.uk/lords/2016-10-12/debates/BE938C0A-75F0-453B-8EB3-D4DC2C4556AF/SchoolCensusPupils%E2%80%99Nationality>> accessed 29 August 2020.

¹⁰⁹⁰ Laura Kuenssberg, 'Theresa May Had Plan to "deprioritise" Illegal Migrant Pupils' *BBC News* (1 December 2016) <<https://www.bbc.co.uk/news/uk-politics-38165395>> accessed 29 August 2020.

This section has argued that harm can be caused by thoughtlessness that operates on an individual level, this next section will argue that the institutional environment can also foster thoughtlessness through the example of the Windrush scandal.

3.1.2 Structural thoughtlessness and ignorance

Increasing evidence emerged in 2018 that a group of former British subjects with entitlement to live and work in the UK were being severely impacted by the hostile environment. They had travelled to the UK as children on their own or family members passports as citizens of the UK and Colonies (CUKC), mostly from the Caribbean. It has been dubbed the “Windrush scandal”. It dominated parliamentary debates, select committee hearings and the media in April and May of that year and has held significant focus since then. Despite this, progress in the regularisation of people’s status and only five percent of those eligible had received compensation by November 2021, with twenty-three people dying before they receive the compensation they were entitled to.¹⁰⁹¹

In the Windrush Lessons Learned Review, published in 2020, Wendy Williams evidences ‘institutional ignorance and thoughtlessness’ as a key contributing factor towards the Windrush scandal, specifically ‘thoughtlessness towards race and the history of the Windrush generation’.¹⁰⁹² Her report states that the particular history of the Windrush generation, and the historical relationship between the UK and Caribbean was *institutionally forgotten*. This included an institutional forgetting of legislation and policy. For example, the racialised immigration controls implemented in the Commonwealth Immigrants Act 1968, as detailed in Chapter Three, continued to have effect. The 1968 Act differentiated immigration rights on CUKC nationals based on the status of their parent or grandparent as citizenship could be passed down, favouring those from “old” rather than “new” commonwealth countries. The British Nationality Act 1981 essentially removed CUKC status, though those who had the right to abode could register for citizenship within seven years. The 1981 Act both introduced British citizenship and removed birth right citizenship. At least one parent had to hold citizenship to pass down, and if those who had settled in the country under the CUKC system but not gained citizenship would not then be able to pass that onto their child if born after the implementation of the 1981 Act. As Williams states, ‘While people who had settled in the UK before 1 January 1973, and their family members, were entitled to live

¹⁰⁹¹ House of Commons and Home Affairs Committee, ‘The Windrush Compensation Scheme’ (House of Commons 2021) Fifth Report of Session 2021–22 <<https://committees.parliament.uk/committee/83/home-affairs-committee/news/159118/compensation-scheme-failures-have-compounded-injustices-faced-by-windrush-generation-committee-finds/>> accessed 20 January 2022.

¹⁰⁹² Wendy Williams (n 1011).

permanently in the UK, this was because of their immigration status rather than a right of citizenship.¹⁰⁹³ Despite the legislative changes, administrative requirements for commonwealth citizens who arrived before 1973 to register were inconsistent. There was a registry for commonwealth citizens until 1987, though registration was not compulsory. Not only that, but there was also a conscious effort by the government to quell applications in case the Home Office could not cope with the workload. In a Home Office leaflet, it explicitly stated that no entitlements would be lost and there would be no changes to immigration status, or risk of deportation, without registration.¹⁰⁹⁴ However, without an ability to prove their continued presence in the UK since before 1973, this is exactly what happened.

While the review did not find racial discrimination as a contributing factor to the Windrush scandal, it does detail the racist motivations to reduce immigration from the colonies and “new” commonwealth countries from the 1960s onward. It argues, as I do in Chapter Three, that decades of racially motivated legal restrictions were based on the notion that there was an immigration problem in the UK, which was only a problem when discussing non-white immigration, set the social and political climate for the hostile environment.¹⁰⁹⁵ Williams argues, this is the responsibility for the whole of parliament, rather than solely the Home Office, as legislation is debated and passed by parliament. However, this history was *institutionally forgotten* by the Home Office and has allowed the racially motivated and focused impacts of past legislations to ‘continue unchecked’, both culturally and materially.¹⁰⁹⁶

The warnings posed regarding at-risk groups were not given enough consideration, such as the continuing rights of the Windrush generations from the 1971 Immigration Act, though not necessarily documentation to prove it, when the hostile environment measures were introduced.¹⁰⁹⁷ The Home Office should have known the risk factors before any changes were legislated, but warnings raised by external stakeholders were not considered thoroughly enough, and so they did not. Williams called this a ‘profound institutional failure’.¹⁰⁹⁸ When issues or concerns with individual cases were raised between 2006¹⁰⁹⁹ and 2018, little was done and the pattern emerging, of issues for a distinct group of people from the Caribbean who arrived before 1973, was not noticed. Even when the media started reporting on the matter from the end of 2017 and it became

¹⁰⁹³ *ibid* 82.

¹⁰⁹⁴ *ibid* 59.

¹⁰⁹⁵ *ibid* 2.

¹⁰⁹⁶ *ibid* 71.

¹⁰⁹⁷ *ibid* 44.

¹⁰⁹⁸ *ibid* 10.

¹⁰⁹⁹ ‘As early as January 2006, areas of the Home Office were aware of “a steady trickle of applications” from people who were in the UK on or before January 1973 on the basis of long residence, or as returning residents, or for No Time Limit.’ *ibid* 36.

a prominent scandal in 2018, the government was slow to acknowledge and respond to the situation. It failed to act decisively, dismissing the scale of the injustice, asserting investigations into it would be too costly to justify.¹¹⁰⁰ It then acted with surprise when damning facts came to light, still refusing to take full responsibility. Even when interviewed for the Review, some civil servants and former ministers still would not accept the scale of injustice, demonstrating 'ignorance and a lack of understanding of the root causes' of the Windrush scandal and were 'unimpressively unreflective'.¹¹⁰¹

In addition to missing the impact of past legislative, political and cultural factors Williams points out that adequate risk assessments of the new 2014 and 2016 Immigration Acts were not carried out. Government and departments risk and benefits assessments for the Immigration Bill 2013 were carried out, but the impact and risk for the public were not.¹¹⁰² As there had been no legal requirement to secure documentation, members of the Windrush generation were considered undocumented with legal status. In the lead up to the 2014 and 2016 Acts, people within this circumstance were highlighted as a risk, but the Home Office considered them a small and dwindling cohort and did not seem to accept any responsibility in safeguarding them against the impacts of the hostile environment measures.¹¹⁰³ It was up to the individual to prove their status, not the state.¹¹⁰⁴

Williams noted that officials did not think equalities considerations were required, such as a definable racial group, colour, national or ethnic origin, nor that the Equality Act 2010 was applicable within the day to day of the job.¹¹⁰⁵ There is no exemption of the Home Office from the Equality Act, however Equality Impact assessments that were introduced by Labour in 2010 were removed by David Cameron in 2012. This safety measure to ensure no unintended discriminatory consequences arose in decision making was seen as too bureaucratic and Cameron stated that policy makers would be able to use their own judgement.¹¹⁰⁶ However, with no institutional or procedural recognition to remember these requirements, consideration given to ensure individuals are not discriminated against is not remembered. Similarly, thoughtlessness and ignorance of the historic understanding of, albeit complex, immigration laws within the institution that writes and implements them has meant that safeguards were not put in place to ensure a definitive legal status to those entitled. The status of those within the Windrush generation who

¹¹⁰⁰ *ibid* 40 and 41.

¹¹⁰¹ *ibid* 13.

¹¹⁰² *ibid* 80.

¹¹⁰³ Wendy Williams (n 1011).

¹¹⁰⁴ *ibid* 61.

¹¹⁰⁵ *ibid* 84.

¹¹⁰⁶ *ibid* 69.

did not hold all their documentation became a '*contingent relation*' between them and the state, and increasingly through public and private services who could subjectively decide if they were entitled to exercise their rights, or be excluded from them.¹¹⁰⁷ Either Cameron, May and others in charge were ignorant of the consequences of the hostile environment, or they did not consider them. Despite apologies, a task force and continued pressure on the government to rectify this now undisputed wrong, there has been criticism that outreach and engagement for the compensation scheme has been carried out without 'any adequate thought process'.¹¹⁰⁸ Further, the Home Affairs Select Committee have raised concerns that not enough has been learnt from the Windrush scandal and William's Lessons Learned report.¹¹⁰⁹ Concerns have also been raised that the lessons have not been learnt to prevent a potential repeated undocumented but "legal" cohort after the UK formally leaves the European Union.¹¹¹⁰

Actions such as destroying landing cards of those who arrived from the Caribbean during the late forties to sixties, removed material proof as well as institutional memory.¹¹¹¹ The requirement of individual material proof, such as the four pieces of documentation needed for every year in the UK, became a compensation for the loss of institutional memory. Over the course of the twentieth and twenty-first century these requirements became more and more unachievable. The requirements to establish oneself as a "legal" citizen became the burden on people set outside that category. Despite having legal status, when questioned their Britishness could not be proved and so became undone. The shifting legal landscape has meant people are increasingly at risk of becoming unclassified or misclassified. Immigration and citizenship law is so complex that it is both by and a production of ignorance and thoughtlessness that people are caught in its web. This happened because the Home Office did not know, or chose not to know, its own legal history. Successive legislation structured a new present and future understanding of who was entitled to arrive, work and live in Britain while obscuring the past through this production of ignorance and denial. This process enabled a legislative erasure of the past and functioned under the idea that '[r]etrospection would no longer be necessary'.¹¹¹² However, the Windrush scandal was a significant instance of public accountability. In addition to institutional and legislative ignorance through thoughtlessness and forgetting, not knowing can be strategically useful. The next sections will build

¹¹⁰⁷ York (n 1014) 1.

¹¹⁰⁸ House of Commons and Home Affairs Committee (n 1091) para 63.

¹¹⁰⁹ House of Commons and Home Affairs Committee (n 1091).

¹¹¹⁰ Home Affairs Committee, 'EU Settlement Scheme' (House of Commons 2019) s 3 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1945/194506.htm>> accessed 20 January 2022.

¹¹¹¹ Amelia Gentleman, 'Home Office Destroyed Windrush Landing Cards, Says Ex-Staffer' *The Guardian* (17 April 2018) <<https://www.theguardian.com/uk-news/2018/apr/17/home-office-destroyed-windrush-landing-cards-says-ex-staffer>> accessed 15 April 2021.

¹¹¹² Keenan, 'Smoke, Curtains and Mirrors' (n 160) 92.

on the argument developed in the sections above, to argue that rather than a lack of thought, ignorance can also be deployed to obscure accountability and blame.

3.2 Strategic Ignorance

This section departs from the understanding of injustice brought about through thoughtlessness. The picture would be incomplete without also understanding how ignorance works ‘as a productive force in itself’.¹¹¹³ Linsey McGoeys argues that with the increasing demands of transparency and the legislative and technological means by which to try to achieve it, there is greater need for governments and other bodies to strategically shield information without appearing to be doing so. One method is strategic ignorance or strategic unknowns,¹¹¹⁴ in which conflicting aims contradict and thus hinder the purported aims of, say an inquiry.¹¹¹⁵ The seeming clash in the term highlights the logic implicit in intended contradiction.¹¹¹⁶ Rather than a mistake, this is inherent in the rationality of the strategy in order to obscure or protect interests that cannot be publicly known.¹¹¹⁷ With competing interests at play, the intended purpose of the inquiry cannot be fulfilled, but the inquiry can have the appearance of trying to fulfil it. As a result, small cosmetic changes are made but significant structural changes are avoided. McGoeys terms this the anti-strategy. This can be unplanned or unconscious, such as avoiding the fulfilment of the inquiry aims if there is a conflict of interest with funders; or planned and conscious, again by fulfilling the inquiry aims there will be a conflict of interest with funders which must be avoided. It could also be a mix of both. It is the second anti-strategy which this section will focus on. The planned or conscious anti-strategy differs from Arendt’s argument; rather than thoughtlessness, it is an appearance of thoughtlessness in order to avoid accountability of that which needs to be considered. This approach supports the overall aim of this chapter to shift focus from individual action and towards sites of structural injustice.

I will explore defensive ignorance in the following two subsections. Defensive ignorance is where an omission of information or knowledge masks a refusal to share knowledge in order to protect against accountability.¹¹¹⁸ McGoeys explains, ‘The purposeful suppression of data is often criminal, mere oversight or human fallibility less so.’¹¹¹⁹ The presentation of ignorance protects liability in intentionally withholding information or obscuring other or conflicting interests. In

¹¹¹³ McGoeys, ‘Strategic Unknowns: Towards a Sociology of Ignorance’ (n 173) 3.

¹¹¹⁴ McGoeys, ‘On the Will to Ignorance in Bureaucracy’ (n 173); McGoeys, ‘Strategic Unknowns: Towards a Sociology of Ignorance’ (n 173).

¹¹¹⁵ McGoeys, ‘On the Will to Ignorance in Bureaucracy’ (n 173) 219.

¹¹¹⁶ *ibid* 217.

¹¹¹⁷ *ibid* 228.

¹¹¹⁸ McGoeys, ‘On the Will to Ignorance in Bureaucracy’ (n 173).

¹¹¹⁹ *ibid* 231.

doing so, defensive ignorance projects incompetence which is more difficult to pin down or lay blame. This distracts from the anti-strategy of not achieving the stated goals, intentionally or unintentionally, and therefore looking elsewhere for the reasons for a failure of action. Defensive ignorance also encourages individual scapegoats by focusing on individual incompetency in order to obscure the structural incompetence or intentional wrongdoing. But thoughtlessness or incompetence is far from neutral, as has been demonstrated in the previous sections. First, I will apply the argument of defensive ignorance at an individual level through the example of the actions of the then Home Secretary Amber Rudd, during the peak of the Windrush scandal. Second, I will apply this argument at a structural level at the Home Office through inquiry reviews as a general anti-strategy.

3.2.1 Individual 'defensive' ignorance

During the height of the Windrush scandal in April 2018, defensive ignorance was employed by the then Home Secretary, Amber Rudd, to pardon herself of any wrongdoing. First, she denied there were targets for forced removal, and then denied she had any knowledge of any targets for forced removal when it emerged that there were targets. When questioned by the Home Affairs Select Committee on 16th April 2018, Rudd stated there were no targets for deportations or removals. She later clarified there were no national targets but that there may be regionally. Either way, she had 'not approved, seen or cleared any targets for removals.'¹¹²⁰ However, a leaked memo dated January 2017 details Rudd's intention to increase enforced removals by 10 percent, an 'ambitious but deliverable' target.¹¹²¹ This letter also anticipates the knock-on effects 'uplift' will have to the detention estate. After the leak, Rudd stated this was an ambition, not a target. However, eight days later another memo from June 2017 was leaked. This memo 'set a target of

¹¹²⁰ Nick Hopkins and Heather Stewart, 'Amber Rudd Was Sent Targets for Migrant Removal, Leak Reveals' (28 April 2018) <<https://www.theguardian.com/politics/2018/apr/27/amber-rudd-was-told-about-migrant-removal-targets-leak-reveals>> accessed 1 August 2020.

¹¹²¹ Nick Hopkins, 'Amber Rudd Letter to PM Reveals "ambitious but Deliverable" Removals Target' *The Guardian* (29 April 2018) <<https://www.theguardian.com/politics/2018/apr/29/amber-rudd-letter-to-pm-reveals-ambitious-but-deliverable-removals-target>> accessed 1 August 2020. 'However, the Compliant Environment will not work by itself. Illegal and would-be illegal migrants and the public more widely, need to know that our immigration system has 'teeth', and that if people do not comply on their own we will enforce their return, including through arresting and detaining them. That is why I will be refocusing IE's work to concentrate on enforced removals. In particular I will be reallocating £10m (including from low-level crime and intelligence) with the aim of increasing the number of enforced removals by more than 10% or over the next few years: something I believe is ambitious but deliverable. Clearly, the resumption of Detained Fast Track would be of significant help in this regard.'

In terms of the detention estate I want to ensure that we have sufficient beds to both deliver the 10% uplift in enforced removals over the few years but also to keep the highest risk Foreign National Offenders (FNOs) in detention, even where several hurdles to removal remain. I believe this is import[ant] for both public protection and public confidence in our system more generally.'

achieving 12,800 enforced returns in 2017-18' which puts us on 'path towards the 10% increased performance on enforced returns, which we promised the home secretary earlier this year.'¹¹²² This memo was sent to senior civil servants and special advisors, including both Amber Rudd and Brandon Lewis, the then Immigration Minister, though Rudd denies she had knowledge of it. Rudd resigned on 29th April 2018 for inadvertently misleading the Home Affairs Select Committee. The ministerial code calls for any 'inadvertent error' to be corrected at 'the earliest opportunity', which if she did not know about the targets is what she did.¹¹²³ The leaked memos, however, challenged this.

By maintaining that she inadvertently misled the Home Affairs Select Committee, as she had no knowledge of targets and never set or authorised any, Rudd positioned herself as innocent through her ignorance and her resignation would then be a noble act rather than an admission of guilt. By projecting incompetence rather than admitting knowledge that could be harmful, Rudd employs a defensive ignorance. However, the question is, why is the proof of targets something that needed to be kept from the public? The annual target contributes to the general target of reducing migration from the hundreds of thousands to the tens of thousands which is not only public knowledge but a 2010 Conservative Party campaign promise and the explicit purpose and aim for the hostile environment.¹¹²⁴ A Home Office source who the leaked second memo further challenged the notion that Rudd did not know, "At the Home Office we work in a target culture... The civil service is completely target-based. That's all we do. It is shamefaced nonsense for Amber Rudd to say otherwise."¹¹²⁵ A former borders and immigration chief also said the claim she did not know about targets was disingenuous.¹¹²⁶ When Rudd addressed the House of Commons regarding the Windrush generation, she was eager to distance herself from the policy as well as how policy was being driven within her department. This can be seen in the quote at beginning of the chapter, "I am concerned that the Home Office has become too concerned with policy and strategy and sometimes loses sight of the individual. This is about individuals, and we have heard the individual stories, some of which have been terrible to hear."¹¹²⁷ This statement removes Rudd from the

¹¹²² Hopkins and Stewart (n 1120).

¹¹²³ Cabinet Office, 'Ministerial Code' s 1.3(c)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf> accessed 1 August 2020.

¹¹²⁴ Cameron (n 326).

¹¹²⁵ Nick Hopkins and Rajeev Syal, 'Amber Rudd Faces New Pressure over Immigration Targets' *The Guardian* (29 April 2018) <<https://www.theguardian.com/politics/2018/apr/29/amber-rudd-faces-new-pressure-over-immigration-targets>> accessed 3 August 2020.

¹¹²⁶ Jamie Grierson, 'Ministers Must Have Known of Removals Targets, Says Former Immigration Chief' *The Guardian* (27 April 2018) <<https://www.theguardian.com/politics/2018/apr/27/ministers-must-have-known-of-removals-targets-says-former-immigration-chief>> accessed 3 August 2020.

¹¹²⁷ Amber Rudd Windrush Children (Immigration Status) (n 1006) col 28.

ministry that is responsible for this scandal, of which she is Secretary of State. It is because it became such a scandal, by breaching the norms of the acceptability of violence through immigration regimes, that an acknowledgement to the individuals impacted has been made.

This breach forced the Home Office to talk in terms of people and not numbers. The persistence of targets or no targets drew the language and culture of the Home Office out into public view. The Home Office is meant to exercise discretion, taking each case on its merits. This is the ‘firm but fair’ approach of the British rule of law and the stated aim of the hostile environment policies.¹¹²⁸ Targets undermine this. The use of targets abstract people into data, as argued in Chapter Four. This abstraction dehumanises those behind the data and allows them to be monitored, organised and categorised. The complexity and connected histories between the people reduced to a number within the immigration and Britain is strategically denied. It was this Rudd was trying to distance herself from. Without this knowledge Rudd was attempting to not be held responsible and thus accountable for this scandal. Rudd was attempting to shield herself from the consequences of her actions, a defence Arendt argued Eichmann employed, but strategically. However, she was not a nobody or a cog, she was a Secretary of State who drove forward the ideology and culture on the department she headed.

Rudd was not the architect of the hostile environment. Theresa May, the then Prime Minister had been the Home Secretary before Rudd and the architect of the hostile environment. There were in fact calls for May to resign rather than Rudd, who was largely seen as implementing May’s policy.¹¹²⁹ The leaked letter from Rudd to May challenges this view, with Rudd pushing up the number of enforced removals under May a further 10 percent.¹¹³⁰ Further, the focus and subsequent resignation over targets created a diversion from the policies of the hostile environment and onto a temporarily accountable scapegoat.

The resignation and new appointment of Home Secretary obscures the wrongdoings that are embedded in policies at an institutional and structural level. When appointed as Home Secretary, Sajid Javid was able to distance himself from his predecessors, despite voting for the

¹¹²⁸ Theresa May, ‘Amber Rudd’s Resignation Letter and Theresa May’s Response’ *BBC News* (29 April 2018) <<https://www.bbc.com/news/uk-politics-43944710>> accessed 21 January 2022.

¹¹²⁹ Heather Stewart, Amelia Gentleman and Nick Hopkins, ‘Amber Rudd Resigns Hours after Guardian Publishes Deportation Targets Letter’ *The Guardian* (30 April 2018) <<https://www.theguardian.com/politics/2018/apr/29/amber-rudd-resigns-as-home-secretary-after-windrush-scandal>> accessed 21 January 2022.

¹¹³⁰ Hopkins (n 1121).

Immigration Acts 2014 and 2016,¹¹³¹ and rebrand the policies as the compliant environment.¹¹³² It is worth noting that no one resigned for the hostile environment policies or the Windrush scandal itself. Rudd's resignation was not a result of the Home Office targets, but that she did not know about the targets and for inadvertently misleading parliament with this ignorance. The accountability for Rudd misleading parliament was short lived, with Rudd reinstated to a ministerial role just seven months after her resignation.

3.2.2 Structural 'defensive' ignorance

This section will consider the anti-strategy, the strategy of obscuring the reason for not achieving its stated goals, of the Home Office to the hostile environment on a structural level. This section will argue that defensive ignorance is employed by the Home Office as a form of 'institutional alibi'.¹¹³³ During the Windrush Lessons Learnt debate in the House of Commons on 21 July 2020, the Home Secretary committed to implementing all thirty recommendations in the Windrush Lessons Learned Review and stated a three-point response. Firstly, mandatory training of the history of immigration and race in Britain for new and existing staff as well as implementing this cultural and historic understanding into all new policies with monitoring mechanisms; secondly, a more diverse and inclusive workforce within the Home Office; and thirdly, an 'openness to scrutiny' and rigor in policy and decision making.¹¹³⁴ In this apparent willingness to learn from and implement all the recommendations made in the report, Priti Patel stated "this is not a box-ticking exercise".¹¹³⁵ The Home Secretary's approach was well received by the House in the debate. This change in tone comes with a change of leadership of the Conservative Party and Home Office and therefore a distancing from those in charge in the lead up to the scandal, David Cameron, Theresa May and Amber Rudd, who are considered largely responsible for it. Priti Patel is the third Home Secretary appointment in as many years since May, the architect of the hostile environment.

¹¹³¹ 'Sajid Javid MP, Bromsgrove' (*TheyWorkForYou*)

<https://www.theyworkforyou.com/mp/24854/sajid_javid/bromsgrove/divisions?policy=6734> accessed 21 January 2022.

¹¹³² The term 'compliant environment' was first introduced by Brandon Lewis, then Immigration Minister. When Sajid Javid took over as Home Secretary following Rudd's resignation Javid took to rebrand the policies to the compliant environment. This led to a speech by David Lammy, articulating the links between compliance and colonialism that the Windrush generation knew very well, demonstrating the compliant environment was no better than the hostile environment. Brandon Lewis, 'We Will Return Foreign Criminals to Their Home Country at the Earliest Opportunity.' (*Conservative Home*, 28 December 2017)

<<https://www.conservativehome.com/platform/2017/12/brandon-lewis-we-will-do-everything-in-our-power-to-return-foreign-criminals-to-their-home-country-at-the-earliest-opportunity.html>> accessed 3 August 2018.

¹¹³³ McGoey, 'On the Will to Ignorance in Bureaucracy' (n 173) 231.

¹¹³⁴ 'Windrush Lessons Learned Review' (*Hansard*, 21 July 2020) <<https://hansard.parliament.uk/Commons/2020-07-21/debates/CF88BF2D-55E5-4672-8103-E28A1136C3F1/WindrushLessonsLearnedReview>> accessed 31 August 2020.

¹¹³⁵ *ibid* 2021.

During the Windrush Lessons Learnt debate the Home Secretary was questioned about her commitment to the implementation of the review recommendations, specifically about the observation raised by Wendy Williams about the Home Office’s history with reviews; “in the past, the remedial actions taken by the Home Office were superficial to the extent that there was action at all, and that they did not have a lasting effect.”¹¹³⁶ To illustrate the point, it was noted that “many of the issues that were identified kept coming up successively, time and again, but in different contexts.”¹¹³⁷ Patel responded, this is a “report like no other”.¹¹³⁸ However, issues about outstanding recommendations and the transparency of implementation were raised by David Lammy, the author of the Lammy Review which investigated the impacts of the criminal justice system on Black, Asian and ethnic minority people in the UK, three weeks earlier. In this debate Lammy challenged the governments conflating between a commitment to, and implementation of, a recommendation and accused the government of not knowing how many recommendations they had implemented.¹¹³⁹ This obscuring of information as to the status of the review recommendations, I argue, is part of the anti-strategy.

There have been multiple reviews into racial injustice in the UK,¹¹⁴⁰ with recommendations outstanding from most of them.¹¹⁴¹ The process is cyclical and seemingly illogical, though not when considered as part of the anti-strategy. In commissioning reviews into racial injustice in the UK, successive governments have given the impression of tackling injustice in ‘good faith’.¹¹⁴² However, that is the purpose of the inquiries, to demonstrate this openness and willingness to change rather than the implementations of the recommendations which are recommended to

¹¹³⁶ *ibid* 2026.

¹¹³⁷ *ibid* 2026.

¹¹³⁸ *ibid* 2033.

¹¹³⁹ ‘Lammy Review’ (*Hansard*, 30 June 2020) <<https://hansard.parliament.uk/Commons/2020-06-30/debates/9846E64F-6A5D-44E5-A98F-4CB6D65D90AF/LammyReview>> accessed 31 August 2020.

¹¹⁴⁰ Most notably McPherson Report 2000, the Lammy Review 2017, Racial Disparity Audit 2017, Anngiolo Report 2017, McGregor-Smith Review 2017, the Windrush Report 2020, the Sewel Report 2021 and further calls for an enquiry into the disproportionate impact of COVID-19 on people of colour and ethnic minority people. The release of ‘COVID-19: understanding the impact on communities of colour was delayed for fear of its impact during Black Lives Matter uprisings. Haroon Siddique and Jamie Grierson, ‘Historical Racism May Be behind England’s Higher BAME Covid-19 Rate’ *The Guardian* (16 June 2020) <<https://www.theguardian.com/world/2020/jun/16/historical-racism-may-be-behind-englands-higher-bame-covid-19-rate>> accessed 31 August 2020; Inzamam Rashid, ‘Coronavirus: Review into Impact of COVID-19 on BAME Community Delayed Again’ *Sky News* (2 June 2020) <<https://news.sky.com/story/coronavirus-bame-review-delayed-again-due-to-proximity-to-us-race-riots-over-george-floyds-death-11998897>> accessed 31 August 2020.

¹¹⁴¹ Diane Abbot, ‘Twenty Years after the Macpherson Report into Stephen Lawrence’s Death, There Is Still so Much to Do’ *i news* (30 June 2020) <<https://news.co.uk/opinion/macpherson-report-stephen-lawrence-death-diane-abbott-20-years-459243>> accessed 31 August 2020; ‘Lammy Review’ (n 1139); Anoosh Chakelian, ‘The 375 Government Recommendations Boris Johnson Could Use Instead of Launching yet Another Commission on Inequality’ *New Statesman* (15 June 2020) <<https://www.newstatesman.com/politics/2020/06/375-government-recommendations-boris-johnson-could-use-instead-launching-yet-another>> accessed 21 January 2022.

¹¹⁴² ‘Lammy Review’ (n 1139) col 173.

effect change. The appearance of action routed in inaction. When concerns are raised about continuing inequality, ‘the answer is simply to call for more inquiries’.¹¹⁴³ The Home Office’s has reported an update to its Lessons Learned review response, demonstrating action to the review recommendations, an openness to change and how they are putting ‘the ‘face behind the case’’.¹¹⁴⁴ However, with regards to the compensation scheme, the Home Affairs Committee argue the fact the compensation scheme remains within the department that ‘caused the scandal’ and identified people as undocumented, has undermined confidence in the scheme and prevented people coming forward. Further, ‘bureaucratic insensitivities’ which resulted in the scandal, such as unreasonable level of evidence required for compensation, processing delays, poor communication and low staffing levels, are all present within the compensation system.¹¹⁴⁵ The replication of bureaucratic insensitivities are evidence of an anti-strategy. While having the appearance of being open and taking action, the regulatory process to implement the compensation scheme works against the stated aims of the scheme, or order to protect the Home Office’s interests.¹¹⁴⁶ The incompetence of the scheme shields this defensive ignorance.¹¹⁴⁷

Patel’s response to Windrush Lessons Learned Review was seemingly at odds with past approaches by the Home Office. By focusing on the Windrush scandal, the hostile environment as a policy is unlikely to be overhauled. Patel was hesitant to fully commit to a full review and evaluation of it, as recommended, initially.¹¹⁴⁸ The focus on the Windrush generation frames them as deserving of our sympathy. They are citizens who contributed to society and who have been wronged. Their innocence is a ‘necessary precondition’ of their ‘authentic victimhood’, and thus are eligible for state redress.¹¹⁴⁹ Equally we can see that when the person is considered “illegal”, the Home Office’s response remains a starkly different story, as Patel affirmed, “Have no doubt that where we find problems, I will seek to fix them, but equally, be under no illusion that if people are here wrongly or illegally, then naturally we will act.”¹¹⁵⁰ This can further be seen by the Home Secretary’s response to people crossing the channel between France and England by small dingy boat in order to seek asylum in the UK. Patel created a new role, Clandestine Channel Threat

¹¹⁴³ McGoey, ‘On the Will to Ignorance in Bureaucracy’ (n 173) 218.

¹¹⁴⁴ Home Office, ‘Windrush Lessons Learned Review Response: Comprehensive Improvement Plan’ 3 <<https://www.gov.uk/government/publications/windrush-lessons-learned-review-response-comprehensive-improvement-plan>> accessed 22 January 2022.

¹¹⁴⁵ House of Commons and Home Affairs Committee (n 1091) 4.

¹¹⁴⁶ McGoey, ‘On the Will to Ignorance in Bureaucracy’ (n 173) 219.

¹¹⁴⁷ *ibid* 231.

¹¹⁴⁸ ‘Lammy Review’ (n 1139) col 176; Wendy Williams (n 1011) 141 Recommendation 7.

¹¹⁴⁹ Jackie Wang, ‘Against Innocence. Race, Gender, and the Politics of Safety’ (2012) 1 *LIES Journal* 145.

¹¹⁵⁰ ‘Windrush Lessons Learned Review’ (n 1134) col 2023.

Commander, to make these ‘illegal attempts... unviable’.¹¹⁵¹ This challenges the new ‘compassionate and humane way and reach out to individuals in the right way’ promised just two weeks before.¹¹⁵²

The Windrush scandal, and hostile environment more broadly, has demonstrated that legal and illegal are not stable categories. The narrow interpretation of the Windrush victim, and their innocence put those outside this understanding in opposition to it. This binary is utilised to justify the category of illegal, along with the punitive conditions and sometimes deadly consequences that come with it. This distancing and dehumanisation remove nuance and the complexity of life, leaving a narrow space for simplistic understanding. Critique is sidelined and people are criminalised for doing what they need to do to survive, such as work, send their children to school and access health care.¹¹⁵³ The second leak during the peak of the Windrush scandal from June 2017 detailed there were 12,503 forced returns in 2016-17 and set the target for 12,800 for the following year. The target for assisted returns had been increased from 1,250 to 1,581, noting that ‘[t]ypically these will be our most vulnerable returnees’.¹¹⁵⁴ The same memo stated,

We move closer to the creation of a truly compliant environment with every passing year and have begun to pick up some, as yet anecdotal, evidence suggesting new powers and interventions are influencing behaviours both in terms of encouraging upstream compliance and encouraging voluntary departures.¹¹⁵⁵

The information usually strategically shielded by the Home Office is revealed in these leaks. The targets, callous language of ‘illegal and would-be illegal migrants’ displayed during that time demonstrated the thoughtlessness as impact of existing and increasing targets would have to the individuals behind the numbers. The governments shift from hostility to compliance draws attention to the routinisation of injustice through seemingly innocuous, unintended or incompetent practices. It demonstrates how structural and systemic reproductions create or encourage individual behaviours within the environment. These can be to encourage a lack of critical engagement or thought, as with Arendt’s critique, or utilised as an anti-strategy, to shield information that is at odds with the public facing objectives, as with McGoe’s critique. This makes more sense when placed within a historic understanding of immigration within Britain, as this

¹¹⁵¹ Home Office and Priti Patel, ‘Home Secretary Appoints Small Boat Commander’ (*GOV.UK*, 9 August 2020) <<https://www.gov.uk/government/news/home-secretary-appoints-small-boat-commander>> accessed 1 September 2020.

¹¹⁵² ‘Windrush Lessons Learned Review’ (n 1134) 2025.

¹¹⁵³ Spade (n 48); Wang (n 1149).

¹¹⁵⁴ Hopkins and Stewart (n 1120).

¹¹⁵⁵ *ibid.*

thesis does, particularly in controlling to movement of those from the former colonies and excluding them from Britain.

The reason I focus here on the Windrush scandal is because this brought the policies and actions of Home Secretaries into sharp focus, while being the tip of the iceberg of the hostile environment. The Windrush generation were a group with the clearest entitlement to live in Britain, yet they were still denied it. It took years to bring the issue to light, still the Home Office either denied or refused to engage with the scale of the injustice they caused, hoping it would blow over. If the media, campaigners and a small number of politicians had not brought the increasing number of stories to light, the scandal may never have been known to the extent that it is today. As a result, those the Windrush generation who have, may not have had their immigration status regularised and access to rights restored. However, this scandal focused not on the brutality of hostile environment policies themselves, but the fact that these policies, intended for “illegal migrants” caught former British subjects and people with long held legal status in its net. The language within the Windrush Lessons Learned Review, as well as the debate that erupted at the time strongly holds the ideals of good and deserving migrants, who have contributed to society, are British and rightfully belong in Britain.¹¹⁵⁶ That is not to say this is not true, but the debates presented this as an exception, and rather than challenge the duality of legal and illegal, deserving and undeserving, the debate justified and relied on it. As such, challenges to the hostile environment as a policy were limited and have not been sustained beyond the Windrush scandal. This period suspended political and public attitudes towards immigration rules, however, only in how they effected the Windrush generation. There was still overwhelming public support for the hostile environment at the peak of the scandal.¹¹⁵⁷ This shows a deeper level of ignorance to practices of regulation and that proceed the hostile environment and the scandal that the Windrush generation were caught up in it. The continued acceptance of regulation and exclusion of people deemed illegal from British services and society demonstrates a limited acknowledgment to the injustices of the hostile environment and resistance to any accountability of harm and wrongdoing, or a change of behaviour.

¹¹⁵⁶ See debate generally, but specifically regarding contributing to British society, ‘Well, let me say this: my parents, brothers, sisters and cousins have largely worked in the national health service, in factories and in London transport, and I always remember one of my uncles saying to me with tremendous pride that he had never missed a day of work. This is a generation with unparalleled commitment to this country, unparalleled pride in being British and unparalleled commitment to hard work and to contributing to society, and it is shameful that this Government have treated that generation in this way.’ ‘Windrush’ (*Hansard*, 23 April 2018) col 264
<<https://hansard.parliament.uk//commons/2018-04-23/debates/AFC7E55B-9796-4FDA-8BB6-9EBDC7CCDAE2/Windrush>> accessed 22 January 2022.

¹¹⁵⁷ Anthony Wells, ‘Where the Public Stands on Immigration’ (*YouGov*, 27 April 2018)
<<https://yougov.co.uk/topics/politics/articles-reports/2018/04/27/where-public-stands-immigration>> accessed 1 September 2020.

4. Conclusion

James Baldwin despaired at the ignorance and apathy of white people towards their Black brothers and sisters. ‘I base this on the conduct, not on what they say.’¹¹⁵⁸ Both ignorance and apathy are a cornerstone to the continuation of injustice towards people who are outside the national understanding of belonging in Britain. An apathy to think and know in a different way, to be thoughtful and critical of our own circumstance as well as beyond it can wreak havoc, as Arendt has taught us. In this chapter I have explored the concepts of ignorance and apathy, or thoughtlessness within the context of the hostile environment. I have also argued how ignorance is strategically used to evoke innocence and shield information to allow an institution to continue to function as “business as usual” while appearing to be accountable to wrongs done and acting to change. ‘The creative use of ignorance has been key to the regulator’s survival.’¹¹⁵⁹ I have employed the lens of ignorance to allow an understanding at both a structural and individual level, giving four examples to demonstrate how banal and everyday practices can cause and perpetuate great injustice both intentionally and unintentionally. These four examples are just that. The hostile environment is vast and examples of how it is failing, or appears to be failing, are almost daily.

My aim is to demonstrate that the Windrush scandal was not an anomaly of the immigration system, but its purpose. It visibilised the cruelty of it. However, the fact that this group of people got caught up in the hostile environment is largely seen as the scandal, not the hostile environment itself. The narrow interpretation of victim of the Home Office puts all others who are outside this understanding in opposition to them. As such, their life chances are threatened. That includes people at the sharper and less visible end of the policies, such as detention and deportation, as well as the hyper visible, such as the people crossing the channel. There is broad public support for hostile approaches to this too.¹¹⁶⁰

Critical engagement, and a refusal of apathy and ignorance, is a radical act among pervasive and institutionalised thoughtlessness and apathy. The example explored in Section 3.1.1 aimed to initiate the argument that each person has power within their role. While constrained within a system of laws and rule, each person must interpret these laws and rules and alert themselves to the consequences of them. Within the example of the census of education institutions, there was an opportunity for schools, parents and guardians to collectively resist the collaboration that was

¹¹⁵⁸ James Baldwin, *I Am Not Your Negro* (Raoul Peck ed, Vintage 2017).

¹¹⁵⁹ McGoey, ‘On the Will to Ignorance in Bureaucracy’ (n 173) 232.

¹¹⁶⁰ ‘Daily Question: How Much Sympathy Do You Have, If Any at All, for the Migrants Who Have Been Crossing the Channel from France to England?’ (*YouGov*, 11 August 2020) <<https://yougov.co.uk/topics/travel/survey-results/daily/2020/08/11/f4dc7/1>> accessed 1 September 2020.

being sought from them. This was taken by some. The criminalisation of people without the necessary documentation as well as the data sharing between departments and institutions can, should and is being challenged on a legal and political level. The aim of this is to provide grounding for collective grassroots interventions. There is a powerful presence of oppositional voices within each sector. Chapter Six will explore louder voices of resistance, but this chapter focuses on the processes that discourage critical thought and engagement as to the broader purpose of the role.

Chapter Six

Critical and Creative Interventions

*Good art starts a conversation.*¹¹⁶¹

1. Introduction

The previous chapter examined the apathy and ignorance towards, and thoughtlessness about, the violence of the hostile environment. This chapter develops the theory of resistance in Chapter One and explores the potential of critical and creative approaches in piercing these layers of apathy and ignorance. The law and legal actors have a significant role in this area, with legal challenges being vital to confronting legal violence. The work of legal challenges can push for change and accountability in the law.¹¹⁶² It can create material difference on an individual or a systematic scale. Litigation can centre Home Office policies, the hostile environment in action and demonstrate solidarity with those who are its targets.¹¹⁶³ However, the law is slow and ‘structurally limited’¹¹⁶⁴ as it must work within the legal parameters of state sovereignty, ‘within which the legitimacy of borders and immigration control is assumed.’¹¹⁶⁵ This process therefore reproduces, rather than challenges, colonial power.¹¹⁶⁶ The hostile environment, as I argued throughout this thesis, is a continuation of this colonial control. Resistance to the hostile environment also needs to be embedded in this understanding.

In the absence of adequate opportunities for legal redress and access to justice, acts of creativity can become important sites to challenge injustice as well as legal norms and processes.

¹¹⁶¹ ‘BBC Arts - The 2021 Turner Prize’, *BBC Arts* (1 December 2021)

<<https://www.bbc.co.uk/iplayer/episode/p0b76dqf/bbc-arts-the-2021-turner-prize>> accessed 28 January 2022.

¹¹⁶² Examples include the 2019 High Court judgment on the Right to Rent Scheme and the case of “The Stansted 15”, see *Joint Council for the Welfare of Immigrants, R (On the Application Of) v Secretary of State for the Home Department [2019]* (n 1043); *Thacker & Ors, R v EWCA Crim [2021]* Court of Appeal 97; Mel Evans, Emma Hughes and Ruth Potts, ‘The Making of Critical Knowledge Claims: Research, “Allyship” and Politics of Representation’ (*Discover Society*, 20 September 2021) <<https://discoversociety.org/2021/09/20/the-making-of-critical-knowledge-claims-research-allyship-and-politics-of-representation/>> accessed 26 November 2021.

¹¹⁶³ Evans, Hughes and Potts (n 1162).

¹¹⁶⁴ El-Enany, *Bordering Britain* (n 23) 148.

¹¹⁶⁵ *ibid.*

¹¹⁶⁶ Fitzpatrick, ‘Racism and the Innocence of Law’ (n 12); El-Enany, *Bordering Britain* (n 23) ch 4. see specifically sub-section Courts and Colonial Power

They can create dissonance, communicate and educate the who, what, where, when and how of the hostile environment – questions that have been at the heart of this thesis – to a broader audience. Creative endeavours can challenge old understandings and provoke new ways of thinking. They can empower people with this new understanding and knowledge, equipping them to make more informed choices about their role in enforcing the hostile environment. As bell hooks argues, '[t]he function of art is to do more than tell it like it is – it's to imagine what is possible.'¹¹⁶⁷ This is true within traditional art settings, such as galleries. As Desmond Manderson argues 'by introducing the viewer as a key component of the effect of the image', the temporal and spatial relationship between the viewer and the work transforms from one of distance to one of closeness.¹¹⁶⁸ As such, the spectator is brought into a participatory role of cause and effect with the subject matter of the work. The bridging of the distance, or 'now-time', generates an 'immediate, urgent and unavoidable – indeed revolutionary – demand for action.'¹¹⁶⁹ Manderson's argument encourages the breakdown between the spectator and artwork distinction. Therefore, art has the power to call into question the relationship between the viewed work, and the viewer.

As well as art works, I argue that this analysis can be extended to direct action and grassroots resistances. This can expand perceptions of what, or who, constitutes a legal actor. This can also include those who are unwittingly legal actors, as well as those who consciously refuse to act.¹¹⁷⁰ Actions such as the *Hunger for Freedom (H/F)* strikers in Britain and *san-papiers* in France can challenge prevailing norms of who lives and belongs in a country, as well as who participates and contributes to society.¹¹⁷¹ These movements confront and demand a rethinking of the accepted and settled ways of being and knowing in the everyday which structure and shape our world. This can include understandings around the border and the legal regimes which enable or disable belonging and entitlement to particular nation states through legal categorisations, as outlined in Chapter One. They can achieve this by *doing* and demonstrating that there are alternatives.¹¹⁷² By challenging current structures and demanding different ways of being, living and belonging, those

¹¹⁶⁷ bell hooks, *Outlaw Culture: Resisting Representations* (Routledge 1994) 281.

¹¹⁶⁸ Manderson (n 272) 106.

¹¹⁶⁹ *ibid.*

¹¹⁷⁰ For example, performance piece 'Please Love Austria / Ausländer raus (Foreigners out)' where the public to vote out two of twelve participants from a container ship each day, all of whom were migrants. Those voted out by public online voting, would be deported to their country of origin. Among other aspects, this piece challenged the public's role in deportations - who the public were and how they participated, even reluctantly, even by refusing to engage they were part of a legal process and performance. Christoph Schlingensiefel, 'Please Love Austria / Ausländer raus (Foreigners out)' <https://www.schlingensiefel.com/projekt_eng.php?id=t033>; For critiques see Connal Parsley, 'Public Art, Public Law' (2005) 19 *Continuum* 239; Claire Bishop, *Artificial Hells: Participatory Art and the Politics of Spectatorship* (Verso Books 2012).

¹¹⁷¹ Detained Voices, 'Yarl's Wood Detainees Began a Hunger Strike' (n 110); Simon Behrman, 'Accidents, Agency and Asylum: Constructing the Refugee Subject' (2014) 25 *Law and Critique* 249.

¹¹⁷² Davina Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Duke University Press 2013).

participating in creative and critical practices and projects are realising an imagined alternative, they are sharing ‘glimpses of the utopian’.¹¹⁷³ As such, this chapter presents a change of focus. It moves away from formal state and institutional law making and the way in which law has sustained processes of mobility, segregation and categorisation. It does so in two ways. First, it considers how participatory art practices can unpick, expose and pierce the dominant narrative within the context of the hostile environment. Second, it proposes how participatory art practices can challenge the ignorance of and acceptance and apathy towards the hostile environment. It can convey how it inflicts harm on people who are miss-documented and undocumented, through their exclusion from everyday society.

To explore the power of critical engagement with statutory law, its implementation and who constitutes legal actors in the context of art practice, this chapter draws upon *The Hostile Environment Walking Tour* (hereinafter *THEWT*). I argue that this art project is a demonstration of the power of art in creating a sense of accountability, solidarity and action in confronting the hostile environment. This was a project depicting the network of hostile environment policies, which I produced and ran as part of the *Who Are We? Project (WAW?P)*, a weeklong exhibition at the Tate Exchange, in the Tate Modern in May 2018. This chapter situates the project at the intersection of art, activist and academia, and explores the potential of projects such as *THEWT* in challenging the violence of the hostile environment and attitudes towards it. The importance of critical and creative interventions in developing solidarity and expanding legal consciousness are argued in the next section, through the example of *THEWT* as a participatory art project.

The sections following offer a critique of the methods taken up in *THEWT*. I argue these approaches offer subversive potential to the hostile environment and specifically challenge the ignorance, thoughtlessness and apathy produced through the law, as argued in the preceding chapters. Rather than a bordering off, this project takes knowledge which is strategically forgotten in order to enable the segregation of people who are excluded from legal status and protection in the UK. It was an effort to open, rather than foreclose, the terms of the debate of who is entitled to be part of and participate in society. It therefore brings into question the permissibility and apathy towards laws violence on those held outside the law. I will first demonstrate how techniques employed by the project drew on traditional methods of the art world to enable a more open reception to the message and aim of resisting immigration laws. Second, I argue that participation works to challenge the hostile environment in two ways. By challenging the dichotomy of art and spectator, participatory art practices explicitly bring the viewer into a relationship with the work and therefore implicate them within the hostile environment. Further, who participated was

¹¹⁷³ *ibid* 3.

important to break down the divisions between citizens and migrants, generating a shared space of solidarity and accountability. The collective approach serves to enable people to speak from their own experience and mitigate the reproduction of imaginative reconstructions of unknown perspectives highlighted in Chapter One. Third, these divisions were further undermined and solidarity strengthened through a shared practice of walking, talking and storytelling. Fourth, the posters leaving the gallery sustained the challenge to the hostile environment cultivated through *THEWT*. These subversive approaches are understood as a repudiation of epistemologies of white ignorance.¹¹⁷⁴

2. Solidarity through Critical Interventions

Critical engagements with the violence of immigration laws can create ‘disruptive opening[s]’.¹¹⁷⁵ These can be brought about by and encourage critical engagement with one’s own position and a willingness and ability to think beyond it, as argued in Section 3 of the previous chapter. This chapter responds to calls made by critical race scholars such as Mari Matsuda and Richard Delgado to ‘look to the bottom’¹¹⁷⁶ and listen to counternarratives of mainstream legal consciousness as valid sources of knowledge.¹¹⁷⁷ Within this context legal consciousness¹¹⁷⁸ is understood as the internalisation of legal norms which limit the imaginable possibilities of legal approaches or remedies.¹¹⁷⁹ This limitation of thinking can be understood as part of the production of ignorance, which sanctions a narrow legal imagination while producing exclusionary and punitive solutions. Through revolutionary readings of the law from “the bottom” a narrow, limited and ultimately prejudicial reading of the law is challenged.¹¹⁸⁰ These perspectives offer a minority or dual consciousness which can provide alternative viewpoints to understand law. It impacts on and

¹¹⁷⁴ Mills (n 81) 18; Mills (n 79).

¹¹⁷⁵ Hartouni (n 169) 80.

¹¹⁷⁶ Matsuda (n 98) 323.

¹¹⁷⁷ See also Delgado (n 99).

¹¹⁷⁸ I am aware of the substantial and valuable socio-legal literature on legal consciousness, but for the purposes of my argument here I draw work from critical legal and feminist scholarship of legal consciousness and consciousness raising. For socio-legal literature see Patricia Ewick and Susan S Silbey, ‘Conformity, Contestation, and Resistance: An Account of Legal Consciousness, 26 NEW ENG. L. REV.’ (1992) 26 New England Law Review 731; Susan S Silbey, ‘Everyday Life and the Constitution of Legality’, *The Blackwell Companion to the Sociology of Culture* (John Wiley & Sons, Ltd 2005); Patricia Ewick and Susan Silbey, ‘Sociology of Legal Consciousness and Hegemony’ in Přibán, Jiří (ed), *Research Handbook on the Sociology of Law* (Edward Elgar Publishing 2020); Leisy J Abrego, ‘Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants’ (2011) 45 Law & Society Review; Laura E Gómez, ‘Connecting Critical Race Theory with Second Generation Legal Consciousness Work in Obasogie’s *Blinded by Sight*’ (2016) 41 Law & Social Inquiry 1069.

¹¹⁷⁹ Matsuda (n 98) n 24.

¹¹⁸⁰ Matsuda (n 98).

interplays with people's lives who are not in the mainstream or who contribute to mainstream public legal consciousness.¹¹⁸¹

The power and insight 'outsiders' can have precisely because they are outsiders is vital in disrupting the comfort of 'insider' understandings of their own world and role within that world.¹¹⁸² Experiential knowledge is arguably '*more valid*' because those who experience oppression understand their own oppression, but also 'see the oppressors – and therefore the world in general – *more clearly*.'¹¹⁸³ It is vital to 'studying ourselves and "studying up"' rather than "studying down" to gain a broader understanding of the 'sources of social power'.¹¹⁸⁴ Our strength is in our difference and interdependence, as Audre Lorde asserts, and it is only in this understanding we can harness the strength, power and courage to generate new and uncharted ways of being.¹¹⁸⁵ Merely tolerating difference is the 'grossest reformism' and a total denial of the creative power in difference that is essential for a new and alternative future.¹¹⁸⁶ Lorde argues that while there are oppressions from above, by 'studying ourselves' we can understand that there are multiple and intersectional sources of social power, including within marginalised groups.¹¹⁸⁷ Self-reflection and understanding are necessary to address this. If we are to adopt Lorde's position and study ourselves, we must engage in a process of self-reflection to understand our relationship with those who oppress, and our position within oppressive relations more widely

Drawing on Lorde's work, this thesis argues that white people need to listen, see and reflect upon their own blind spots because of their own insider status if there is any hope of thinking and building a future beyond the violence of the present and past. These practices are essential if we are to work for a future well beyond tolerance and towards security in our solidarity and interdependence.¹¹⁸⁸ This is not a simple process, it can bring discomfort and resistance to acknowledging one's own complicity in a system that benefits you and subjugates another.¹¹⁸⁹ The interplay between complicity, benefit and subjugation needs to be understood in real material ways before solidarity is possible. Otherwise, what is thought to be allyship or solidarity can become a vehicle to absolve ourselves of complicity, accountability and guilt. Robin DiAngelo argues those in the racial majority live in an insulated and racially protected world which brings about a sense

¹¹⁸¹ *ibid* 341.

¹¹⁸² Haraway (n 186).

¹¹⁸³ Millen (n 99) para 7.2.

¹¹⁸⁴ Harding (n 99) 8–9.

¹¹⁸⁵ Lorde (n 99). 'The Master's Tools Will Never Dismantle the Master's House' 111

¹¹⁸⁶ *ibid* 111.

¹¹⁸⁷ See also Crenshaw (n 47).

¹¹⁸⁸ Lorde (n 99) 111.

¹¹⁸⁹ Sara Ahmed, 'A Phenomenology of Whiteness' (2007) 8 *Feminist Theory* 149; Robin DiAngelo, 'White Fragility' (2011) 3 *International Journal of Critical Pedagogy*.

of racial comfort within this world.¹¹⁹⁰ This racial comfort reduces tolerance to being challenged. Even the slightest challenge can trigger stress, outrage and defensive responses, deflecting or refusing to engage with grievances raised.¹¹⁹¹ This emotional fragility of whiteness therefore deflects accountability, prevents growth and redirects material and emotional attention to hurt white feelings rather than the pursuit of challenging racism and towards building a freer future.¹¹⁹²

Emotional deflection insulates white innocence and enables the continuation of a pretence of white ignorance. As Lorde describes,

Guilt is not a response to anger; it is a response to one's own actions or lack of action. If it leads to change then it can be useful, since it is then no longer guilt but the *beginning of knowledge*. Yet, all too often, guilt is just another name for impotence, for defensiveness destructive of communication; *it becomes a device to protect ignorance and the continuation of things the way they are, the ultimate protection for changelessness.*¹¹⁹³

These methods of silencing described by Lorde protect the complicity of white people within a white supremacist society while protecting racial privilege and 'enabl[ing] a discourse of white innocence'.¹¹⁹⁴ This is part of the production of ignorance around racism, where and how it manifests to protect whiteness and the privileges and innocence that are entwined with it. On the other hand, speaking up, or the 'transformation of silence into language and action', as Lorde describes it, is an individual and collective responsibility.¹¹⁹⁵

While constrained within a system of laws and rule, I argue each person can interpret these laws and rules, alerting themselves to the consequences of them and what role, if any, they have in implementing or maintaining systems of oppression and how they may resist. This develops the analysis that each person has power in their role in the previous chapter. Critical disruptions have a vital role to play in this process. *THEWT*, as I will argue, identified spaces and practices of complicity and therefore potential for accountability and solidarity with people impacted by the hostile environment. Within *THEWT* we aimed to generate a broader understanding of the hostile environment through lived experience and critical analysis of the law and policy which it is comprised of. This approach sought to move beyond guilt and centring white feelings and towards

¹¹⁹⁰ DiAngelo (n 1189).

¹¹⁹¹ *ibid.*

¹¹⁹² *ibid.*

¹¹⁹³ Lorde (n 99). 'The Uses of Anger: Women Responding to Racism' 130 My emphasis.

¹¹⁹⁴ Jonsson (n 713) 16.

¹¹⁹⁵ *ibid.* 'The Transformation of Silence into Language and Action' 40–44

an active and critical engagement; towards ‘the beginning of new knowledge’ through methods of co-production and solidarity.¹¹⁹⁶

Placing the law in creative spaces challenges traditional legal consciousness and opens it to the powerful possibilities of the creative imagination.¹¹⁹⁷ Critical and creative methods and spaces encourage the power of the imagination to grow. This sentiment is shared in the work of Máiréad Enright who explains that art can become ‘a means of challenging prevailing legal common sense and imagining law otherwise.’¹¹⁹⁸ Creative practices have the potential to do this, ‘in stretching the legal imagination by playing with consciousness, and in sustaining the everyday grind of making a better world.’¹¹⁹⁹ Matsuda argues for counternarratives and storytelling to challenge the imaginative limitations of legal consciousness and forge new cognitive paths.¹²⁰⁰ Ruth Fletcher develops a creative interplay with Matsuda’s argument, evocatively expanding it, stretching and creating legal consciousness into something different and new.¹²⁰¹ Fletcher situates legal consciousness to be the ‘taken-for-granted and not-immediately-noticeable: the background assumptions about legality which structure and inform everyday thoughts and actions’.¹²⁰² The limitation of thinking enables structures to appear invisible, or taken-for-granted, unless you come up against them.¹²⁰³ It is within these everyday thoughts and actions where critical interruptions can disturb the settled, accepted and unnoticed ways of thinking, seeing and speaking about immigration in Britain.

The next section will analyse *THEWT* as a critical and creative intervention and detail the methods employed to create a space of solidarity, shared knowledge and subversion to the hostile environment.

3. *The Hostile Environment Walking Tour* as Critical Intervention

This section introduces *The Hostile Environment Walking Tour (THEWT)* as a critical intervention and participatory art project. Participatory or collaborative art practices shift the traditional dynamics of artwork and audience, inviting the viewer to become collaborators or co-producers of the work. The prevalence of these practices in art worlds is increasing, but still very much a peripheral practice. Claire Bishop links the rise and fall of participatory art practice over the

¹¹⁹⁶ *ibid* 130.

¹¹⁹⁷ Finchett-Maddock (n 102).

¹¹⁹⁸ Máiréad Enright, ‘Four Pieces on Repeal: Notes on Art, Aesthetics and the Struggle Against Ireland’s Abortion Law’ (2020) 124 *Feminist Review* 104, 105.

¹¹⁹⁹ Fletcher (n 105) 127.

¹²⁰⁰ Matsuda (n 98).

¹²⁰¹ Fletcher (n 105).

¹²⁰² *ibid* 127; Simon Halliday and Bronwen Morgan, ‘I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination’ (2013) 66 *Critical Legal Problems* 1, 2.

¹²⁰³ Keenan, ‘Subversive Property’ (n 126).

twentieth century to the rise and fall of political transitions. When there are political upheavals, there is a ‘return to the social... and to rethink art collectively’.¹²⁰⁴ It is important to consider art’s role in accompanying political turns, but also its limitations. Doing so can support the engagement of art in politically tumultuous times. Debates over the artistic or ethical value of collaborative art have brought these questions to the fore.¹²⁰⁵ Fundamentally, I am interested in the engagement with and impact of the different stages of *THEWT* – the physical exhibition, walking group and workshop – and how these became opportunities for critical reflection of the hostile environment. Therefore, the turn in participatory art to “context providers” which facilitate dialogue rather than “content providers” is important.¹²⁰⁶ Grant Kester demonstrates the potential of ‘dialogical art’ as a ‘creative facilitation of dialogue and exchange’.¹²⁰⁷ Through this method, Kester argues, ‘conversation becomes an integral part of the work itself. It is reframed as an active, generative process that can help us speak and imagine beyond the limits of fixed identities, official discourse, and the perceived inevitability of partisan political conflict.’¹²⁰⁸ Through *THEWT* we aimed to critically engage with the hostile environment policies and pierce ignorance to them and their affect. We did this by bringing together ‘diverse communities’ to raise questions, exchange knowledge and develop a collective understanding of the hostile environment.¹²⁰⁹ The hope was to identify the collaborative aspects of the hostile environment and understand them as spaces of accountability. This could reframe them as opportunities of resistance and solidarity through weakening moments of implementation that are essential to its success.

Participation or collaboration, however, does not make art political or radical in and of itself. It may in fact reinforce neoliberal ideals of individual responsibility and risk, thus obscuring rather than critiquing the structural conditions which have led to these situations.¹²¹⁰ This, Bishop criticises, as ‘artistic gestures of resistance’.¹²¹¹ Significant expectation is placed on the artist and

¹²⁰⁴ Bishop (n 1170) 3. Emphasis in original

¹²⁰⁵ There appears a tension; whether the focus should be on process and ethical considerations or on objects of art and aesthetic considerations. Is collaborative art an opportunity to sacrifice authorship and the authority of the artist or does this authorship and authority remains essential to arts critical function? The former is criticised for subordinating artistic value and critique while the latter is criticised for reinforcing rigid institutional value judgements of the art world. However, what constitutes art and the aesthetic considerations that contribute to this debate are outside the scope of my argument. See Kim Charnley, ‘Dissensus and the Politics of Collaborative Practice’ (2011) 1 *Art & the Public Sphere* 37; Claire Bishop, ‘The Social Turn: Collaboration and Discontents’ (*Art Forum*, 2006) <<https://www.artforum.com/print/200602/the-social-turn-collaboration-and-its-discontents-10274>> accessed 16 July 2021; David M Bell, ‘The Politics of Participatory Art’ (2015) 15 *Political Studies Review* 73.

¹²⁰⁶ Grant H Kester, *Conversation Pieces: Community and Communication in Modern Art* (University of California Press 2004) 1.

¹²⁰⁷ *ibid* 8.

¹²⁰⁸ *ibid*.

¹²⁰⁹ *ibid* 1.

¹²¹⁰ For critique of New Labour’s cultural policy, the social inclusion agenda and roll of social participation in the arts see Bishop (n 1170) 14.

¹²¹¹ Bishop (n 1205). Emphasis in original.

their work to solve social ills and inequalities, as well as create an aesthetic experience.¹²¹² My aim is therefore not to instrumentalise the language and methods of participatory art to produce good socially included citizens. Rather than ‘a form of soft social engineering’, *THEWT* is a direct challenge to the structural and legal frameworks which require compliance to the state.¹²¹³

The project was comprised of three aspects; the physical exhibition made up of plinths, with information about the hostile environment policies on top of the plinths, and hazard tape; the group walking tour, which took place two times during the week; and poster making workshops which ran on three days. *THEWT* was run by The Hostile Environment Collective, a fluid group of activists, artists and academics with longstanding grassroots collective activism and artistic practice who were already active in resisting the hostile environment. I brought the group together for this project. It included people from the Detained Voices Facilitation Collective,¹²¹⁴ SOAS Detainee Support,¹²¹⁵ the Art/Law Network,¹²¹⁶ Protest Stencil,¹²¹⁷ and ‘Y’, a *Hunger for Freedom* protestor.¹²¹⁸ Most of us had longstanding working relationships. Bringing these groups together was a way of highlighting the existing and continual resistances taking place to challenge and disrupt the ideological and material functioning of the hostile environment. These relationships were vital for the success of the project as we came from an activist and abolitionist perspective with a shared understanding of the hostile environment, its policies and impacts. We also came from a shared understanding of the potential for art in communicating and creating social change. These standpoints of The Hostile Environment Collective are important situating our collective knowledge and how our engagement with the hostile environment has shaped our understanding of it. This was fundamental to the development of the project and were at forefront when engaging with people throughout the project.¹²¹⁹ The background between myself, as the producer of the project, and Y as a key member of the collective and group walking tour who had first-hand

¹²¹² Former community artist, Helen Sharp, is critical of the practice, raising the issue that community artists are expected to be everything and everyone, but without the funding or training. Helen Sharp, ‘An Artist’s Field Guide to Getting Lost’ (Art, Law, and the Border(s) in Ireland, Art/Law Network, 1 September 2021) <<https://artlawnetwork.org/art-and-the-border/>>.

¹²¹³ Bishop (n 1170) 5 and 14.

¹²¹⁴ Detained Voices is a website which platforms stories, experiences and demands by people held in UK Immigration Detention Centres, this group developed out of and still work with SDS. Detained Voices, ‘Detained Voices’ (n 105).

¹²¹⁵ SDS is a visitor’s group to people in detention with view to break down the isolation of detention and support people in taking control of their own cases and resistance to their imprisonment and deportation. SOAS Detainee Support (n 144).

¹²¹⁶ ‘Art/Law Network – Artists. Lawyers. Agitators. Collaborating for Change.’ (n 146).

¹²¹⁷ ‘Protest Stencil’ (n 145).

¹²¹⁸ Detained Voices, ‘Yarl’s Wood Detainees Began a Hunger Strike’ (n 110).

¹²¹⁹ Haraway (n 186).

experiences of the hostile environment was vital in developing a relationship of trust and shared goals.¹²²⁰

The exhibition was located at the Tate Exchange, of the Tate Modern. Stepping through the doors into the exhibition space you quickly became enthralled by the energy and activity of the *Who Are We? Project (WAW?P)*. You also find yourself immersed in the web of the hostile environment, immediately confronted with a placard detailing a synopsis of the hostile environment and the meeting point to join the tour (see Figure One). *THEWT* exhibition snaked around the whole floor space, from the entrance to the exit, and was identified by ten plain cardboard plinths embedded within the space. The network was mapped out across the exhibition floor with hazard tape to show the larger and connected impacts of the policies. Each plinth represented different sectors of society and explains what the hostile environment means within that sector and what impact it is having (see Figure Two). The *WAW?P* brought together participatory art projects who were working in solidarity and support with people who migrate. The curation of the plinths and hazard tape among these other projects depicted the divisive nature of the hostile environment (see Figure Three). This curation emphasised the proximity and limitations of the law and its hostilities between solidarity and support efforts. Overall, the participatory art projects worked independently, without interaction or interruption from each other. This is emblematic of how a lack of time or resources often prevent overworked projects engaging with each other. However, everyone did come across it. This was by choice, perhaps stopping and reading the plinth text, following its path, or joining the group walking tour or poster workshop. Alternatively, this was without intention or even choice. The curation meant people had to walk through the installation to reach other projects as well as enter and exit of the Tate Exchange. For the walking tour groups or poster making workshops we rallied people in the Tate Exchange to join as they began. As the group walking tour moved through the exhibition, we requested another group pause their performances to accommodate our own. The exhibition interacted with the space and people in the wide *WAW?P*, as much as they interacted with it. These observations, I argue, illustrate that everyone engaged with *THEWT* during their time at the *WAW?P*, as they do within society, even if they do not know it. It is often only when someone comes up against the hostile environment, is blocked by it, that they feel the force of its violence. Those who are not blocked by it, may or may not know it is there but importantly can continue with their lives without thought or concern for themselves. Surrounded but seemingly unaffected by its hostility.

¹²²⁰ For considerations of trust as microethics see Guillemin and Gillam (n 149) 266; Kofoed and Staunæs (n 150) 34.

As I have argued, critical interventions and participatory art practices can challenge traditional legal consciousness and understandings. They can also challenge beliefs of contribution and spectatorship ‘in ways that refuse to be dissuaded and empowered by the notion that forging institutions and institutional imaginaries are the exclusive terrain of the elites.’¹²²¹ The transformative potential of participatory practices in creating new forms of knowledge is well documented, particularly within non-hierarchical education practices and grassroots activist spaces.¹²²² *THEWT* emerged as a convergence project between art, activism and academia and drew from scholarship and practice from each of these areas. Learning through non-hierarchical, dialogic methods of listening and speaking has a rich history of transforming personal hardships into collective struggles against systematic injustice.¹²²³ These methodologies challenge established power structures and modes of thinking, to critically consider beyond them. They can challenge and destabilise the internalisation of legal norms which lead to the acceptance of immigration categories such as citizen, taxpayer, migrant, asylum seeker, refugee and economic migrant, that pervade mainstream legal consciousness. This destabilisation of internalised and normalised conceptualisations of immigration categories is necessary for questioning who is seen to be entitled to live in the UK, and the hostile environment encroaching nature into every aspect of life.

Subversive methods can be helpful in challenging such deep-rooted norms. The following sections will identify subversive approaches taken by *THEWT*. I argue these approaches offer potential to challenge the hostile environment, and specifically to challenge the ignorance, thoughtlessness and apathy produced through the law, as argued in the proceeding chapters. I first argue the traditional techniques of the art world employed in the project facilitated a more open reception to the message and aim of resisting immigration laws, creating subversion in the art space. Second, I outline two ways in which audience participation challenges the hostile environment. By collapsing the dichotomy of art and spectator, participatory art practices explicitly challenge the separation of the art and spectator, involving the participant with the work and therefore with the hostile environment. Further, the way in which the exhibition was designed meant that participants destabilised the divisions between citizens and migrants, generating a shared space of solidarity and accountability. Third, these divisions were further broken through a

¹²²¹ Cooper, ‘Can Projects of Reimagining Complement Critical Research?’ (n 97).

¹²²² Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (n 1172); Finchett-Maddock (n 102); Perry-Kessarar (n 107); Amanda Perry-Kessarar and Joanna Perry, ‘Enhancing Participatory Strategies With Designerly Ways for Sociological Impact: Lessons From Research Aimed at Making Hate Crime Visible’ (2020) 29 *Social & Legal Studies* 835.

¹²²³ Paulo Freire, *Pedagogy of the Oppressed: 30th Anniversary Edition* (Bloomsbury Publishing 2000); Jack Mezirow, ‘Transformative Learning: Theory to Practice’ (1997) 1997 *New directions for adult and continuing education* 5; MacKinnon (n 142); Matsuda (n 98); Delgado (n 99).

shared space of walking, talking and storytelling. Fourth, the posters traveling beyond the gallery sustained the challenge to the hostile environment cultivated through *THEWT*.

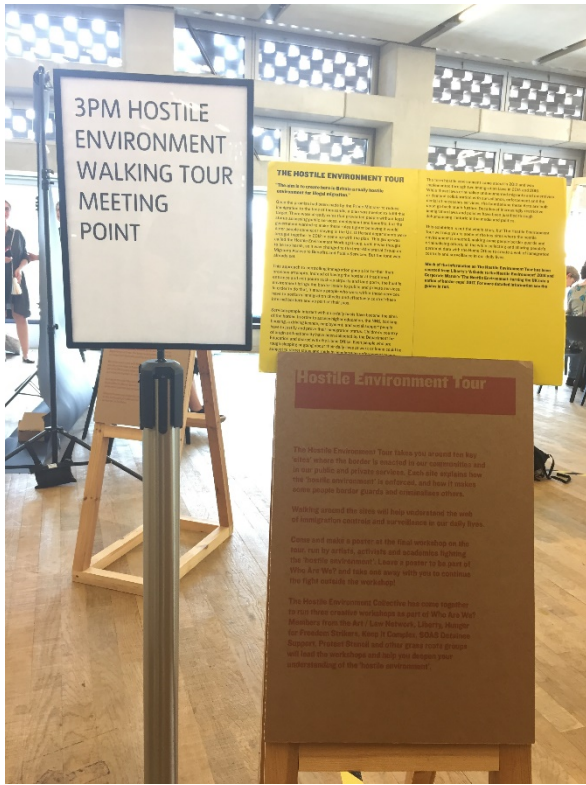


Figure One: Authors own

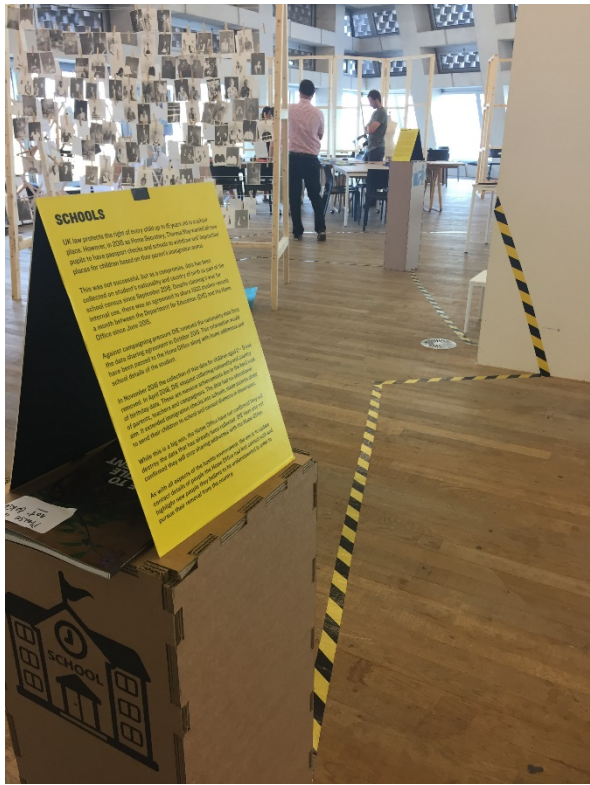


Figure Two: Authors own



Figure Three: credit Fares

3.1 Subversion within the Art Space

The majority of participatory art projects take place outside major art institutions.¹²²⁴ Therefore that we had an opportunity to undertake a participatory art project on the hostile environment within an art gallery poses some interesting questions. In the willingness of the art world to give space and resource to collaborative art, it gives space and resources to challenge the individual and singular artist primarily celebrated within the art world through explicitly employing methods of co-creation and co-production, which are not often celebrated within this space.¹²²⁵ However, it does so while maintaining its authority to articulate the boundaries of what constitutes art, who is inside and who is outside the art world.¹²²⁶ This is not a new approach by the art world which, like law asserts itself from the position of authority from which to continually reassert and rearticulate

¹²²⁴ For examples see Kester (n 1206).

¹²²⁵ A notable exception is the shortlist of exclusively artist collectives for the Turner Prize in 2021. The Turner Prize shortlist 'captures and reflects the mood of the moment in contemporary British art', with a recent reflection of local community and collective organising after lockdowns from the pandemic. The timing of this shortlist supports Bishop's argument that there is a return to the social at times of upheaval. Tate, 'Turner Prize Shortlist Announced – Press Release' (*Tate*) <<https://www.tate.org.uk/press/press-releases/turner-prize-shortlist-announced-0>> accessed 27 November 2021.

¹²²⁶ Charnley (n 1205) 51–52.

itself.¹²²⁷ But, as art critic and academic Griselda Pollock explains, ‘[t]he issue becomes one of how to make that paradox the condition of radical practice’.¹²²⁸ The tension within these two positions, of both challenging and drawing authority from powerful institutions, may offer a space within which to explore ‘the political in collaborative art’.¹²²⁹

Art galleries can offer a powerful environment for ‘extrarational’ transformation, which takes account of the emotion and imagination involved in this process.¹²³⁰ Aesthetic experiences engage interactions through different intelligence, such as visual, spatial, emotional, verbal-linguistic and so on, which offer the opportunity to conceptualise in different ways and with different understandings.¹²³¹ Holding, contemplating and reflecting on ambiguities in the message and its meaning show they can exist together and new relationships and knowledges can come into being, as with art/law.¹²³² Alexis Kokkos argues this provides an opportunity for the participant to ‘organize their cognitive competences in a manner that is different from the dominant pattern and to conceptualize the empirical reality through an alternative perspective.’¹²³³ This encourages the possibility of being open to alternative views and amenable to critical reflection.¹²³⁴ As such, distinctions between art and law, audience and participant and citizenship and immigration classifications can become unstable. There is disruptive and creative potential within this instability which can be harnessed when challenging rigid yet unstable concepts, such as those tackled within *THEWT*.

The social reality of the hostile environment is embedded within the lived every day and needs to be challenged in the lived every day. I am therefore interested in cognitive liberation within social reality, rather than cognitive liberation free from social reality engaging.¹²³⁵ Paolo Freire purposely employed art works that were related to the participants’ lives, such as sketches of potters at work, to focus the socio-political intentions of his education model.¹²³⁶ A challenge we faced was finding a way to be creative with the subject matter as the intentions and realities of the hostile environment were so explicit and so grave. We therefore decided to turn our attention

¹²²⁷ This is argued in Chapter One. For critique on power and modern art see Boris Grois, *Art Power* (MIT Press 2008).

¹²²⁸ Griselda Pollock, *Generations and Geographies in the Visual Arts: Feminist Readings*. (Routledge 1996) 5.

¹²²⁹ Charnley (n 1205).

¹²³⁰ Lauren Spring, Melissa Smith and Maureen DaSilva, ‘The Transformative-Learning Potential of Feminist-Inspired Guided Art Gallery Visits for People Diagnosed with Mental Illness and Addiction’ (2018) 37 *International Journal of Lifelong Education* 55; Alexis Kokkos, ‘Transformative Learning Through Aesthetic Experience: Towards a Comprehensive Method’ (2010) 8 *Journal of Transformative Education* 155.

¹²³¹ Kokkos (n 1230) 157.

¹²³² Finchett-Maddock (n 102).

¹²³³ Kokkos (n 1230) 159.

¹²³⁴ *ibid* 160.

¹²³⁵ For engagement with masterpieces of the artworld to induce cognitive liberation free from social reality to access ‘the *truth* they contain’, see Alexis Kokkos *ibid* 161. Emphasis in original

¹²³⁶ *ibid* Figure 1.

to who was involved, our materials and our message while keeping true to our foundations as activists. Rather than creating something entirely new, a key aim of the tour was to demonstrate the existing work and resistances to the hostile environment. This had two purposes, firstly to evidence that resistance to the hostile environment is already happening, it is possible and it has many forms. Secondly, to assure people they are not on their own. Learning, or unlearning, perceived truths is an emotional process, and it can be reassuring that there is a community of people who are similarly engaged. If people were interested in resisting the hostile environment in an existing community, we could give them information and link them to grassroots activist groups.

In the project design we utilised traditional symbols and methods of a gallery. These were the physical exhibition, which comprised of objects of focus on top of plinths, and conducting walking tour to explain them. Near the top of each plinth there was a symbol representing the site, place or service where the hostile environment is enacted and a double sided A4 text explaining how the hostile environment was being woven into the fabric of society and the everyday. This information was drawn from two reports and my own research.¹²³⁷ Employing the tradition of a gallery space, the hostile environment policies became the object of observation and critique as they were exhibited on tops of the plinths (see Figure Four). While *THEWT* was materially modest, it held multiple meanings and forms, attempting to produce something that ‘may be simple in means, but... rich in ends’.¹²³⁸ These traditional modes of the gallery offered legitimation to the work, clear symbols that it belonged in an art space, yet covertly allowed the political motivations of the work. The group walking tour was also a traditional method of engagement and knowledge sharing within a gallery. The collective act of speaking, listening and sharing employed by the whole group breaks down role of educator and student, and makes the organisers a ‘guide on the side’.¹²³⁹ The people who encountered the exhibition or joined the group walking tour may have thought they were taking part in a traditional activity within a gallery, viewing objects or taking part in a free walking tour, before realising they were embarking on a call to action. We used these known methods to bring a starting point of familiarity and comfort to those who joined. To put another way, we hoped to catch people off guard in what is a divisive topic – immigration – to enable a more open and evolving conversation through the ‘ritualistic context of an art event’.¹²⁴⁰ Playing with traditional gallery modes and through methods of participatory art practice in a major art

¹²³⁷ Liberty (n 127); Corporate Watch (n 128).

¹²³⁸ Gavin Grindon and Catherine Flood, 'Introduction' in *Disobedient Objects*, ed. Gavin Grindon and Catherine Flood (London: V&A Publishing, 2014), 12.

¹²³⁹ Spring, Smith and DaSilva (n 1230) 58.

¹²⁴⁰ Kester (n 1206) 2.

institution, I argue, had a subversive effect by enabling an interaction and dialogue that may not otherwise have taken place, for example as part of a campaign or protest.¹²⁴¹

Working within an institution like the Tate offered us insight into subversive methods within the institutional refrain. This can be a productive space, for example through the structure-yet-free approach employed by Amanda Perry-Kessaris.¹²⁴² The structure of the law and freedom of design bring a structured freedom at the intersection between the two approaches. They are able to create within legal restraints.¹²⁴³ Our creation and curation within the institutional and practical constraints of the Tate Exchange demanded a solution which at once brought together a 'practical, critical and imaginative' response to communicating the hostile environment.¹²⁴⁴ It is this kind of thinking, which can assist in creating or designing ways to subvert the hostile environment within the law, as given in the example of non-compliance with the data collection exercise of the school census in Section 3.1 of Chapter Five. The next section will analyse the subversive approach art, particularly participatory art, can bring to the spectatorship. It also highlights the importance of the people who participated in the project.

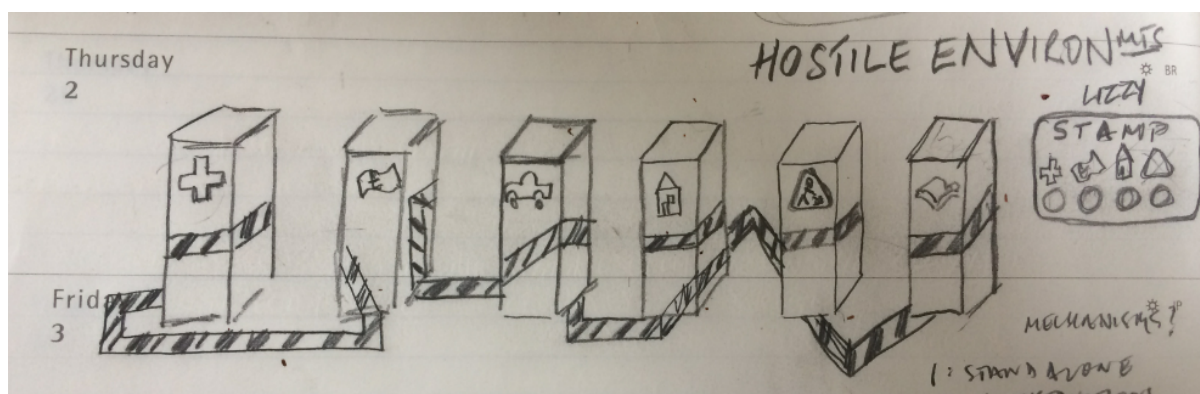


Figure Four: Installation sketch by Justin O'Shaughnessy

3.2 Participation as Challenge to the Spectacle

If participatory or collaborative art practices are designed to initiate a space of dialogue and collaboration rather than spectating, then there is a great deal to consider when thinking about how these practices can challenge the divisive and compliant mode of the hostile environment.

¹²⁴¹ Spring, Smith and DaSilva (n 1230) 64.

¹²⁴² Perry-Kessaris (n 107).

¹²⁴³ *ibid* 191.

¹²⁴⁴ *ibid* 186.

Challenges to who gets to make art, or more broadly who gets to participate in the production of, and have access to knowledge, are questions of, and challenges to, power.¹²⁴⁵ A radical shift in power must come with a radical shift in who has access to that power and be supported with resources to enable this change at all levels.¹²⁴⁶ Rather than being included in existing structures, power needs to be handed over to support and explore new ways of thinking, theory and practice. Part of the intention behind the invitation from the *WAW?P* to me to produce this exhibition was to share access to this elite space with people who have experienced the hostile environment, detention and practices of grassroots activism. As a space of interaction and collaboration, participatory art practices enable artists and audiences work together to develop, create, and talk through art.¹²⁴⁷ This approach blurs the separation between these two roles, as was the aim of *THEWT*. First, I will consider the role of art in establishing a duality between the viewed and the viewer, and in challenging it. Secondly, I will consider who participated in the project and the impact of this.

Art, exhibitions and images can create an ‘organisation of view’ which divides the world in two, as discussed in section 4.1 in Chapter Four.¹²⁴⁸ Firstly, the viewed becomes a spectacle for the viewer. Secondly, the viewer’s gaze is rendered invisible, and therefore objective.¹²⁴⁹ This creates two realms, the represented and the real.¹²⁵⁰ On the relationship between the represented and the real, Guy Debord argues, ‘[t]he spectacle is not a collection of images, it is a social relation between people that is mediated by images.’¹²⁵¹ The spectacle of the border and detention regime is created to mediate the social relations between “the migrants” and “the publics” through hypervisibilised images of threat and containment.¹²⁵² These mediated images create a false consciousness of both the threat – “the migrants” – and of a cohesive and harmonious community – “the publics”.¹²⁵³ In turn, critical awareness is immobilised, inducing ignorance and preventing the collective consciousness necessary for solidarity and revolution.¹²⁵⁴ This mediation is strategic, and ignorance of it further serves to avoid accountability of the violence perpetuated through it.¹²⁵⁵ Debord’s

¹²⁴⁵ For an in depth discussion on who gets to make work about migrants see Art/Law Network (n 129).

¹²⁴⁶ Chrissie Tiller, ‘Power Up’ 12–20 <<https://www.creativepeopleplaces.org.uk/our-learning/power>> accessed 16 July 2018.

¹²⁴⁷ For examples see Suzanne Lacy, ‘Three Weeks in May (1977)’ <<https://www.suzannelacy.com/exhibitions>> accessed 18 September 2021; Suzanne Lacy and others, ‘Ablutions (1972)’ <<https://www.suzannelacy.com/ablutions>> accessed 18 September 2021.

¹²⁴⁸ Mitchell (n 976) 25.

¹²⁴⁹ *ibid* 1.

¹²⁵⁰ *ibid* 40.

¹²⁵¹ Guy Debord, *The Society of the Spectacle* (Donald Nicholson-Smith tr, Zone Books 2020) para 4.

¹²⁵² Mountz (n 972).

¹²⁵³ *ibid*.

¹²⁵⁴ Debord (n 1251) para 25.

¹²⁵⁵ McGoey, ‘On the Will to Ignorance in Bureaucracy’ (n 173).

critique of passive consumption and conformity to dominant mode of thinking is helpful when thinking about the hyper-realised false consciousness of immigration in the UK and the compliance of both the mass media and “the public” in maintaining this spectacle. Rather than grand displays, such as border and detention regimes, Debord’s understanding of the spectacle supports my argument that the way the hostile environment has been integrated into everyday public and private services – in a banal way – has undermined the harm of the policies as well as the collective and critical consciousness needed to challenge it.¹²⁵⁶ As argued in Chapter Five, it is the banality of the administrative enforcement of the hostile environment that has allowed it to become integrated in everyday activities, hidden in plain sight.¹²⁵⁷ These structures normalise ignorance and encourage compliance. Therein lies its danger.

THEWT sought to highlight this danger. Through cultivating a relationship between art and spectator, by breaking down the barrier between the two, *THEWT* set to bring together “the publics”, “the migrant” and the laws and policies which cultivate the two. Desmond Manderson explains, ‘art’s potential lies...[in] the relationship it establishes with, and the point of view of, a spectator.’¹²⁵⁸ The viewer, as Manderson argues, can transform the meaning of the image, and the art can encapsulate the viewer within the work by incorporating their perspective. The changing of perspective brings the spectator into, or in relation to, the frame. This shift generates active participation in the cause and effect of the work, bridging the spatial and temporal distance between the two to the ‘here and now’ of the work.¹²⁵⁹ This is a shift from the perceived passive spectator to the active participant of all those who hold a gaze and perspective. Participatory art practices explicitly challenge the duality of ‘voyeuristic separation’,¹²⁶⁰ blurring who creates and contributes to the artistic process and outcome.¹²⁶¹ The hostile environment was rendered a spectacle under the viewer’s gaze. However, the participatory core of the *THEWT* broke down the division between these two positions and demanded a relationship between the hostile environment, the public and the migrant, casting this relationship under review.

I will now consider the impact of who participated in *THEWT* and the effect this method of participation had on the project. As discussed above, the organisers of *THEWT* had a shared focus to dismantle the hostile environment and abolish the detention regime. However, most did

¹²⁵⁶ Arendt, *Eichmann in Jerusalem* (n 69).

¹²⁵⁷ While there was widespread outrage at the impact of the Hostile Environment at the time of the Windrush Scandal, the foresight of this was not understood or considered a reason to vote against the Bill, with only sixteen MPs voted against the final reading of the Immigration Bill in 2016, see Florence Snead, ‘Windrush: How Jeremy Corbyn, Theresa May and Other MPs Voted on the Immigration Act 2014’ (*inews.co.uk*, 19 April 2018) <<https://inews.co.uk/news/politics/windrush-immigration-act-corbyn-may-145894>> accessed 3 December 2021.

¹²⁵⁸ Manderson (n 272) 107.

¹²⁵⁹ *ibid* 4.

¹²⁶⁰ Laura Mulvey, ‘Visual Pleasure in Narrative Cinema’ (1975) 16 Screen 6.

¹²⁶¹ For a critique on the passivity of the gaze from a Black female perspective see hooks (n 106).

not have first-hand experience of subjugation by the immigration system. Further, the people who joined the group walking tours were unknown to us and each other before hand. To bring the group together, we therefore needed to identify the point of common struggle during the group walking tours. Responding to the exhibition theme, the production of people and place, *THEWT* demonstrated how people are legally produced as collaborators and places are legally produced as sites of collaboration through the hostile environment. Simultaneously these laws produce the criminalisation and illegalisation of people and produce places of criminality and illegality. Through this approach we identified the hostile environment as a point of potential common struggle for people both with and without secure immigration status, as the whole of society is involved in producing and maintaining the hostile environment. This purpose was to give clear, concrete examples within the groups own lives, workplaces and places of education say, to stand in solidarity with undocumented or missdocumented people and against government policies. It also challenged the limited understanding of who an undocumented person is and who potentially needs their solidarity. This established a commonality between the group, especially ensuring we were in a position of solidarity with the organising member who had experiences of the hostile environment and detention. I do not mean to suggest the violent consequences are equal. The coercion and legal complicity demanded to participate in the violence against another, as well as the violence felt by people with insecure or incorrect immigration statuses are two approaches of the hostile environment. They both need to be resisted; it is an interdependent struggle.

This approach is fundamental for sharing the responsibility and challenging the ignorance and apathy towards the hostile environment rather than complying with – and therefore perpetuating – it. Lilla Watson, a Gangulu woman, artist, academic and activist, articulates the issue often encountered in coalition and solidarity work; ‘If you have come here to help me, you are wasting your time. But if you have come because your liberation is bound up with mine, then let us work together.’¹²⁶² This strikes at the core of hierarchical colonial dynamics in charity and aid projects, as well as the politics of view, as highlighted in Chapter Four and above. It exposes the dynamics of power within liberal discussions of immigration, as well as the conditional tolerance and hospitality, as highlighted in Chapter Five. By rejecting the notion of help, as Watson does here, she points to the hierarchical and conditional relationships which keep people in an indebted and subjugated state, by people who benefit from their subjugation while claiming they have

¹²⁶² Lilla Watson is credited with this quote, however, she attributes it to the Aboriginal Rights group in Queensland in the 1970’s Michael F Leonen, ‘Etiquette for Activists’ (*YES! Magazine*, 2004) <<https://www.yesmagazine.org/issue/hope-conspiracy/2004/05/21/etiquette-for-activists>> accessed 28 January 2022.

helped. An invitation to work together is an invitation to tackle the common struggle of the Home Office's systematic violence of racist immigration policies, as equals. This is an active process, rather than a passive or one-off encounter.¹²⁶³ While these state regimes demand collaboration and compliance with private and public services through the hostile environment, the group walking tour and broader *THEWT* project demonstrates a collaboration with people experiencing the violence of these regimes as an act of solidarity and of defiance.

A space of sharing knowledge, narratives and experiences was created. At two plinths there were further art works. A two-screen film was created by Detained Voices told stories and experiences of people in detention who understand the violence of the internal border regime. *SLEEP, a game where you try and get a night's rest*,¹²⁶⁴ engaged people in a frustrating game of snakes and ladders to access support as a person who is homeless. They were stationed by the street stops and rough sleeping plinths respectively, to make the connection between the hostile environment, street stops, public safety protection orders and detention. On the first walking tour was a *WAW?P* a poet in residence, Laila Sumpton, joined a group walking tour. She wrote a poem inspired by the discussion which she performed to the group at the end.

¹²⁶³ It strikes against passive hospitality and tolerance. For discussion on 'Refugees Welcome' as an example of this see Kemp (n 122); Gutiérrez Rodríguez (n 888).

¹²⁶⁴ See Daniel Hignell-Tully, 'Performative Agoras: The Use and Misuse of Public Space' in Lucy Finchett-Maddock and Eleftheria Lekakis (eds), *Art, Law, Power: Perspectives on Legality and Resistance in Contemporary Aesthetics* (COUNTERPRESS 2020).

*Hostile Environment Procedures:*¹²⁶⁵

*Open your pencil case-
we are scanning your crayons for prints
and before you complete Algebra2
we need your passport or failing that
a blood sample.*

*Before you buy plimsols we need to know
the soil your feet first stood upon.*

Do you have the right skin to drive?

*Before we mend your arm we need to know
what first broke your English,
we suspect it may have been your birth.
We may do a special home visit
to check the rest of your lot are not a danger
to the health of our nation.*

*Before you rent a roof under our British rain
we need to check you understand
Chaucer, custard and cheese rolling in Cheddar Gorge.*

*If you ever feel you're being followed
by men in macs and hats with nonchalant pipes
and Casablanca smiles or sense you're trailed
by searchlights- you're right.*

It's for our own protection.

*Send us your high school diploma
in a jiffy bag thick with cash-
if it's not well insulated
it won't get through-
for grades catch pneumonia
whilst travelling. So take
24 carrot shots-
so that you really shine.*

¹²⁶⁵ Laila Sumpton, 'Hostile Environment Procedures' (*Who Are We?*, 26 June 2018)
<<https://whoareweproject.com/edinthebox-2-2-2>> accessed 1 June 2019.

The poem reflected the discussion back to the group; the pervasiveness and impact of immigration laws and policies, from the surveillance of children's crayons and conditionality of receiving an education or medical treatment based on what soil they first stepped on, to skin colour and accent eliciting suspicion which can lead to immigration checks of people while driving and through home raids. The poem articulates the ad hoc and subjective understanding of Britishness which must be adhered to in order to belong. It is framed as this Britishness that is in need of safeguarding, rather than the needs of those who migrate. The poem frames these policies for 'our own protection' and 'the health of our nation', rather than concern for access to necessary services for people who are in the nation. The "firm but fair" immigration is mocked, with the evocative imagery of 'a jiffy bag thick with cash' to insulate immigration applications success with money rather than qualifications. The poet created a 'revelatory distillation of experience' from shared listening of first-hand testimony and legal and policy analysis to another shared language of poetry.¹²⁶⁶

These examples, the Detained Voices Film, *SLEEP*, and Hostile Environment Procedures, demonstrate the generative potential art can have in perceiving the law and provoke a legal consciousness beyond the narrow and prescriptive understanding through legal regimes. The playful engagement of *SLEEP* and Hostile Environment Procedures rearticulates legal and moral issues in a way that goes beyond them, places them in context and strips its authority which encourages a questioning of how the law is addressing perceived injustice but simultaneously creating injustice. Play 'suggests subjects' willing engagement in creative, open-ended practice', as Davina Cooper explains, 'what is also important is the aspirational surplus play identifies.'¹²⁶⁷ This could open the possibilities for something beyond that which is identified through critical analysis.¹²⁶⁸ The interconnections between critical analysis and play through creative means is a generative space to consider possibilities beyond the current regimes of power and oppression. The next section will demonstrate how the walking group created a shared space of solidarity and accountability through walking and talking.

3.3 Sharing Space through Walking and Talking

The group walking tour offered a shared space of walking and talking. Sharing this intimate experience 'allows us to occupy the space for an extended period of time while engaging with the spatial and cultural practices that constitute it.'¹²⁶⁹ These acts of movement, sound and engagement

¹²⁶⁶ 'Poetry is Not a Luxury', Lorde (n 99) 37.

¹²⁶⁷ Cooper, 'Can Projects of Reimagining Complement Critical Research?' (n 97).

¹²⁶⁸ *ibid.*

¹²⁶⁹ Kate Moles, 'A Walk in Thirdspace: Place, Methods and Walking' (2008) 13 *Sociological Research Online* 13(4)2 1, 4.1.

demonstrated new ways of thinking and being together. The act of walking can initiate a new way of engaging with the given environment, a method of generating a shared and interlinked knowledge.¹²⁷⁰ Walking and talking was employed as an educational practice and demonstration of solidarity between people with secure and insecure immigration status.

At two points during the weekend an impromptu group was formed by people who were visiting the exhibition to be guided around *THEWT*. The then Advocacy Director at Liberty, Corey Stoughton, led the first walking tour. While Corey led the group, Y contributed her own experience and understanding. Y and I developed this and lead the second walking tour (see Figures Five – Seven). During the second walking tour we employed these modes, with Y speaking of her own experiences of the hostile environment, and I explained the legal and policy changes situate the impacts of the hostile environment within a broader structural framework. This shows how personal struggles are structurally produced and maintained.¹²⁷¹ Importantly the group walking tour provided Y with an opportunity to tell her story in-person. Delgado explains the importance of storytelling for outgroups, or those marginalised in society, and the importance of other people listening.¹²⁷² He explains, ‘[t]he storyteller gains psychically, the listener morally and epistemologically.’¹²⁷³ The central participation of someone who was undocumented and detained because of the hostile environment had a powerful impact on the dynamic of the groups. Learning with, from and through the experience of someone who is considered an “outsider”, someone without a secure immigration status, challenges the comfort of “insider” understanding and belief of their own world, as well as role within that world.¹²⁷⁴ This is a dual process; the act of speaking and the act of listening.¹²⁷⁵

Storytelling can be a cathartic process for the teller and create solidarity with the listeners, emboldening others who have similar experiences and provides an alternative account of their experience to the dominant group who do not see the oppression and harm themselves.¹²⁷⁶ Stories and storytelling can build a framework of comfort and belief of how things have always been,¹²⁷⁷

¹²⁷⁰ Moles (n 1269).

¹²⁷¹ This draws on methods of consciousness-raising, which takes place in two modes; speaking from personal experience, which is then situated within a political and structural system of oppression. These modes work together to understand personal experience and struggle within a larger temporal and spatial network. See Rhiannon Firth and Andrew Robinson, ‘For a Revival of Feminist Consciousness-Raising: Horizontal Transformation of Epistemologies and Transgression of Neoliberal TimeSpace’ (2016) 28 *Gender and Education* 343, 350; Keenan, ‘Subversive Property’ (n 126).

¹²⁷² Delgado (n 99).

¹²⁷³ *ibid* 2437.

¹²⁷⁴ Haraway (n 186) 575.

¹²⁷⁵ Vincent Jungkunz and Julie White, ‘Ignorance, Innocence, and Democratic Responsibility: Seeing Race, Hearing Racism’ (2013) 75 *The Journal of Politics* 436.

¹²⁷⁶ Delgado (n 99) 2437–2438.

¹²⁷⁷ Rose (n 49).

but they also have the power to challenge that comfort.¹²⁷⁸ Delgado argues, ‘[t]heir [dominant groups] complacency - born of comforting stories - is a major stumbling block to racial progress. Counterstories can attack that complacency.’¹²⁷⁹ During the *Hunger for Freedom* protests, Y and her fellow strikers reached a large audience with their demands, circumstances in detention and their stories.¹²⁸⁰ Despite their own physical containment, they carried out a range of protests while being detained. In these actions, the strikers became protagonists in their own stories, rejecting how the state and the law determines them.¹²⁸¹ However, their detention meant they were physically contained from the impact they were making in society, only with contact through phones, email and visit to Yarl’s Wood. Y claimed space for herself and her story within the elite space of the Tate Modern and continues to through her platform in this elite space of academia, through my research.

In these elite spaces, Y challenged the traditional and narrow legal consciousness as well as the legal consciousness of those who listened. We heard the experiences and stories of someone considered deportable, who has been illegalised by the hostile environment, with agency, a story and a voice. She asserted her own legal consciousness, altered and developed through her experiences and untailed for media or legal interviews. She challenged what is understood as legal knowledge, and how this knowledge is produced.¹²⁸² As such, she ‘insisted that [this]

¹²⁷⁸ Lorde (n 99); DiAngelo (n 1189).

¹²⁷⁹ Delgado (n 99) 2438.

¹²⁸⁰ This included numerous media engagements, a Home Affairs Select Committee hearing and three Members of Parliament going to Yarl’s Wood to meet with them. Some engagement includes, but is not limited to Detained Voices, ‘We, the Yarl’s Wood Strikers, Would like to Meet with Yvette Cooper, Chair of the Home Affairs Select Committee’ (*Detained Voices*, 14 March 2018) <<https://detainedvoices.com/2018/03/14/we-the-yarls-wood-strikers-would-like-to-meet-with-yvette-cooper-chair-of-the-home-affairs-select-committee/>> accessed 5 June 2021; Detained Voices, ‘She Managed to See Us. Diane Abbott the Shadow Home Secretary Was Here This Morning.’ (*Detained Voices*, 23 February 2018) <<https://detainedvoices.com/2018/02/23/she-managed-to-see-us-diane-abbott-the-shadow-home-secretary-was-here-this-morning/>> accessed 4 June 2021; Parliamentlive.tv, ‘Urgent Question: Yarl’s Wood Detention Centre’ (03 2018) <<https://parliamentlive.tv/event/index/dfe0a138-115c-49a9-83ad-6436fed74d47>> accessed 7 June 2021; Detained Voices, ‘We Are Very Grateful to the North East Bedford MP Alistair Burt for Granting Us a Visit on the 9/03/18’ (*Detained Voices*, 11 March 2018) <<https://detainedvoices.com/2018/03/11/we-are-very-grateful-to-the-north-east-bedford-mp-alistair-burt-for-granting-us-a-visit-on-the-9-03-18/>> accessed 5 June 2021; Amelia Womack, ‘Theresa May Must Listen to the Demands of Yarl’s Wood Hunger Strikers’ *inews.co.uk* (1 March 2018) <<https://inews.co.uk/opinion/comment/yarls-wood-amelia-womack-hunger-strike-130863>> accessed 11 June 2021; Stuart MacDonald MP, ‘“Everyone Is Crying” - It Is Time for a Limit on Immigration Detention’ *openDemocracy* <<https://www.opendemocracy.net/en/opendemocracyuk/everyone-is-crying-it-is-time-for-limit-on-immigration-detention/>> accessed 11 June 2021; ‘A Message from the Women of Yarl’s Wood on International Women’s Day’ *New Statesman* (8 March 2018) <<https://www.newstatesman.com/politics/feminism/2018/03/message-women-yarl-s-wood-international-women-s-day>> accessed 5 June 2018; BBC Radio 4, ‘Protest at Yarl’s Wood, Long-Term Impact of Postnatal Depression, Female Comedians’, *Woman’s Hour* (27 February 2018) <<https://www.bbc.co.uk/sounds/play/b09smgy3>> accessed 3 June 2021.

¹²⁸¹ The term protagonist is articulated in Tuitt, *Race, Law, Resistance* (n 92) 5.

¹²⁸² This is a key argument of Critical Race Theory. See Robin D Barnes, ‘Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship’ (1990) 103 *Harvard Law Review* 1864; Matsuda (n

wom[a]n’s words were heard not as mere noise, but as self-authorising legal statements rooted in conceptions of transformation and accountability.¹²⁸³ Through the collective act of listening, necessary for the potential impact of storytelling to be realised, Y’s stories became our stories. ‘For these narratives, the narratives of racism narrated by racial others are not “their” stories rather than “mine,” but “ours,” and in this sense there is a collective responsibility to attend to, to listen, to hear, to respond, and to remedy racism.’¹²⁸⁴ As with Manderson’s argument on perspective, listening brings listeners into propinquity with the speaker, drawing them into what is being spoken and generating a collective understanding and accountability to address what is being said.

By embedding our starting point of understanding through lived experience and situating this within a structural analysis we made real the impact of the hostile environment felt. We brought an understanding of it within a longer time and a broader network of legislation and policy. This positioned the hostile environment within a framework of exclusionary practices rather than as an anomaly or mistake, as the Windrush Scandal was being framed around the time of the project. The aim of the group walking tour was to share and co-produce knowledge among those present. This would share the ownership and responsibility of that knowledge. The intended outcome was to bring about a critical engagement with those who were present and how they interacted with the hostile environment, both on a personal and a societal level.



Figure Five: Authors Own

Figure Six: Credit Fares

98); Matsuda (n 99); Delgado (n 99); Derrick A Bell, ‘Who’s Afraid of Critical Race Theory’ (1995) 1995 University of Illinois Law Review 893.

¹²⁸³ Enright (n 1198) 110.

¹²⁸⁴ Jungkunz and White (n 1275) 447.



Figure Seven: Credit Fares

3.4 Beyond the Gallery

The organising collective held poster-making workshops after the walking tours. We provided the space and materials but did not direct the workshop. This was an opportunity to communicate and experiment with shared knowledge we had generated during the group walking tour into something visible and tangible.¹²⁸⁵ It was also an opportunity to process information, which may have been a difficult or emotionally challenging.¹²⁸⁶ It allowed for space to discuss beyond *THEWT* and consider future engagements. Some posters responded to the hostile environment as curated in *THEWT*, some were anti-detention posters to take to the next *Shut Down Yarl's Wood* demonstration. Others were personal migration stories or about migration generally. Other posters made their way to the advertising spaces of bus stops (see Figure Eights – Ten). Having a material and portable output arising from the event to take meant the posters were a vehicle to continue the conversations outside of the gallery. In the bus spaces the hostile environment was promoted in plain view, as the government has been doing since 2012, but in a disruptive way. The aim was to shift the narrative and perspectives of everyday understandings of the hostile environment produced by the government.

¹²⁸⁵ Perry-Kessaris (n 107) 190.

¹²⁸⁶ DiAngelo (n 1189).

“Subvertising”, as this action could be described as, is a reaction to ongoing control of ‘communicative potential’ of the public space, and is an effort to highlight, mock, challenge and reclaim the communicative landscape of public space.¹²⁸⁷ Public space, as with public discourse, is ‘a space supposedly accessible to all’.¹²⁸⁸ However, critical interventions such as *THEWT* and subvertising highlight the ‘regime of order’ that gatekeep these public realms and keeps unauthorised people out of certain spaces as well as ‘to rule out semiotic, sensual and material disorder’.¹²⁸⁹ These critiques urge for a space of common use and participation rather than a space of common consumption and spectatorship.

Subvertising is part of ‘do-it-yourself urbanism’, which is a broad term for micro-urban practices which reshape the urban space either through their aims or due to the fact of these practices being there.¹²⁹⁰ They appropriate the city, laying claim and authority to this space through their participation instead of going through sanctioned and bureaucratic routes.¹²⁹¹ Rather than asking permission, we put our collective propositions about the hostile environment into the public arena, appropriating the bus stop as a space of communication against the hostile environment.¹²⁹² While not all DIY urbanism is a realisation of a new politics of the urban space, Kurt Iveson argues, ‘for this potential to be realized, new democratic forms of authority in the city must be asserted through the formation and action of new political subjects.’¹²⁹³ Rather than asking for permission, this requires a self-authority and self-authorisation to access, to participate and to appropriate spaces through DIY means. A ‘presupposition of equality’ is asserted within these acts through a claiming of rights to the space as well as opening the public space to public dialogue.¹²⁹⁴

There is potential in this percolation of legal control and order. As Connel Parsely explains, ‘[u]ltimately, this challenges law’s claim to power over the public at large—in so far as law requires, by definition, an exclusivity not only in the sense of political sovereignty but also in its claim to discursive dominance in constructing meanings of and for its ‘public’.’¹²⁹⁵ While law is pervasive, it can be negotiated, challenged and subverted so that its authority is destabilised. Putting these destabilising subvertisms and art projects in public space encourages new relationship between

¹²⁸⁷ Thomas Dekeyser, ‘Dismantling the Advertising City: Subvertising and the Urban Commons to Come’ (2021) 39 *Environment and Planning: Society and Space* 309.

¹²⁸⁸ *ibid* 313.

¹²⁸⁹ *ibid* 314.

¹²⁹⁰ Kurt Iveson, ‘Cities within the City: Do-It-Yourself Urbanism and the Right to the City’ (2013) 37.3 *International Journal of Urban and Regional Research* 941.

¹²⁹¹ *ibid* 945.

¹²⁹² *ibid*.

¹²⁹³ *ibid* 954.

¹²⁹⁴ *ibid*.

¹²⁹⁵ Parsley (n 1170) 240.

those subject to the law and the broader society who these policies are presumably protecting. This helps ‘lead us to think about how movements produce new forms of knowledge and strategy that help us to see from below.’¹²⁹⁶ The bus stop posters disrupted the everyday nature of the border, embodying the notion of a ‘disobedient object’ as something which contributes to ‘upending the terms of public debate.’¹²⁹⁷ In the words of a subvertiser, ‘when a subvertiser installs her own poster, it stands out as that which is most commonly not there: a yearning not to buy, a call for solidarity, a reminder of exploitation, a poetic assault on borders.’¹²⁹⁸ The government has been advertising and promoting the hostile environment through speeches, interviews, news articles, posters in NHS buildings, and of course, through laws and policies. Posters were placed to advertise resistance to these. A bus stop and the advertising spaces are part of the everyday function and design of the street. To take over the messaging in the bus stop frame utilises an everyday space to communicate challenge in plain view. Utilising and subverting the existing structures of the everyday puts forward a potential time and place of resistance. It is a challenge to the hostile environment. It is also a challenge to spectatorship, to the separations and segregations of everyday life, and the brutalities of border violence that have become normalised in the fabric of the everyday.

4. Conclusion

The aim of *THEWT* was to make a space of engagement, to offer a fuller understanding of the hostile environment and encourage people to challenge it within their own lives. We did this by critically engaging with the laws and policies and identifying spaces of implementation which could be challenged or subverted. These were counter narratives to the state and media led discourse against people who have been illegalised through the hostile environment. The participatory method of the practice meant everyone was encouraged to engage in the practice of walking, talking and meaning making. Importantly, it brought “the publics” into conversation with “the migrants” as a collective community to develop a collective, critical and multiple consciousness of the real-life impacts of the laws and policies of the hostile environment, who they impacted and how.¹²⁹⁹ This understanding brought “the publics” *into* the spectacles of harm, rather than as witnesses to them. To critically engage with the oppressive impacts of the hostile environment regime from Y’s first-hand perspective, as well as specific instances of how people are enforcing this regime and therefore harm within their jobs, bridges a dissonance between the operation of

¹²⁹⁶ Grindon and Flood (n 1238) 18.

¹²⁹⁷ *ibid* 9.

¹²⁹⁸ Dekeyser (n 1287) 316.

¹²⁹⁹ Matsuda (n 99).

law and its effect. This collective act of sharing, speaking and listening encouraged the imagination to open, engage and think critically about perceived understandings of the hostile environment and be receptive to the possibility for alternative and multitudinous realities. It brings the law into real life context and enables a space for the tensions which emerge when law and life interact to be considered. With this knowledge, methods of refusal and resistance can dismantle the hostile environment rather than build it.

Social change is an ever-evolving process, of which *THEWT* made a small contribution to. Political transformation does not happen through one experience but develops over continued critical engagement.¹³⁰⁰ We provided information of the organisation highlighted in *Liberty's Guide*¹³⁰¹ to attendees before they left. People from The Hostile Environment Collective were there to continue discussions and about the work of grassroots groups. However, we did not collect information from participants, ask for formal feedback or follow up with them after. While *THEWT* aimed to inspire systematic resistance within peoples' everyday lives, the project was a one-off encounter rather than a cohesive group which maintained engagement. We therefore do not know the impact of the project, except through conversations with people during the week. The impact of the posters in public and individuals taking them home is also unknown. This made the project a 'fragile and precarious' encounter, rather than one of sustained engagement and change.¹³⁰² Just before announcing the winner of the all collective Turner Prize 2021 shortlist, Pauline Black stated, "good art starts a conversation."¹³⁰³ At its most simple, this is what *THEWT* aimed to do and, I would argue, did. By drawing out details which are not explicit within mainstream accounts of the hostile environment, brings about critical observation, bringing a connection to the 'here and now' of the content of the project. This process 'transforms our temporal and aesthetic relationship to the image, unleashing its critical potential by changing our point of view.'¹³⁰⁴

The materials we used – the cardboard of the plinths, A4 paper with printed text, common symbols of the sites - were easily recognisable to and accessible in the everyday. Paints, letter stencils and hand cut stencils of the symbols representing the ten site, marker pens and biros were provided for in the workshop. The symbols of the different sites of the hostile environment were simple, recognisable and accessible. These choices were purposeful, to make the connection and

¹³⁰⁰ Freire (n 1223).

¹³⁰¹ Liberty (n 127).

¹³⁰² Enright (n 1198) 113 and 117.

¹³⁰³ (n 1161).

¹³⁰⁴ Manderson (n 272) 108.

demonstrate that we have what we need at our fingertips.¹³⁰⁵ In seemingly everyday materials resistance to the state and solidarity with its targets can be made visible and tangible.¹³⁰⁶ To take this further, the hostile environment has appropriated everyday public and private institutions, those who work within them and the public,¹³⁰⁷ as spaces of immigration enforcement. This everydayness is the heart of the policy. *THEWT* turned this back on itself, to equip they spaces of appropriation as sites of resistance. This re-appropriation has been argued as a feminist improvised skill by Fletcher which ‘displaces an old public script’.¹³⁰⁸

This playful and interactive approach develops a shared opportunity to ‘capture the collective imagination’.¹³⁰⁹ Art and ‘aesthetic experience can challenge conventional perspectives...and systems of knowledge’,¹³¹⁰ both through traditional artistic methods¹³¹¹ as well as participatory practices. It also pushes us to ‘a utopian rethinking of art’s relationship to the social and of its political potential’¹³¹² Instead of assuming the passive or active engagement of the audience through the content of an artwork,¹³¹³ the meaning of participatory art falls on the process and method of interaction and co-production.¹³¹⁴ The outcome of the artwork depends on the participation of those who engage with it. This chapter has detailed how simple methods of subversion, co-production, walking, talking, listening and making can push stories of comfort, and make space for a collectively developed understanding. These approaches are a step to challenging the apathy and ignorance towards, and thoughtlessness about the violence of the hostile environment.

¹³⁰⁵ Matsuda (n 98); Akane Kanai, ‘DIY Culture’, *Keywords in Remix Studies* (Routledge 2017).

¹³⁰⁶ Perry-Kessaris (n 107).

¹³⁰⁷ For an example of how the public have been encouraged to participate in the hostile environment see Hannah Jones, Yasmin Gunaratnam and Gargi Bhattacharyya, *Go Home?: The Politics of Immigration Controversies* (Manchester University Press 2017).

¹³⁰⁸ Fletcher (n 105) 135.

¹³⁰⁹ Alan S. Brown and Jennifer L. Novak-Leonard, ‘Getting In On the Act. How Arts Groups Are Creating Opportunities for Active Participation.’ (The James Irving Foundation, October 2011), 3.

¹³¹⁰ Kester (n 1206) 3.

¹³¹¹ See generally Manderson (n 272).

¹³¹² Bishop (n 1170) 3.

¹³¹³ Mulvey, ‘Visual Pleasure in Narrative Cinema’; Robert Hariman and John Louis Lucaites, ‘Photography: The Abundant Art’, *Photography and Culture* 9, no. 1 (2 January 2016): 39–58.

¹³¹⁴ Bishop (n 1170); Brown and Novak-Leonard (n 1309).

Conclusion

*Colonialism and immigration are part of the same continuum.*¹³¹⁵

It has been a decade since Theresa May first stated, “[t]he aim is to create here in Britain a really hostile environment for illegal migration.”¹³¹⁶ Since then, extensive legislation, policy and rules have created a matrix of hostility and compliance within society. This was breached by a national scandal, the Windrush scandal, when a generation of people with secure legal entitlement, were caught up in this matrix due to lack of documentation. With the UK leaving the EU, grave concerns were raised that EU citizens would be left without proof of status and become undocumented. There were fears they would become ‘another Windrush’.¹³¹⁷ These examples have entered public and political discourse as breaches of the relationship between nation and subject. Rights and privileges are meant to be protected and respected in the law and its implementation. However, within these debates the impact of the law’s violence on those who are deemed outside of its protection, those without legal status, has been either absent or understood as acceptable within a firm but fair legal system.¹³¹⁸

This thesis has understood this absence and acceptance through a historical analysis. Understanding how legal status and therefore protection of people was established, through an critical analysis of property, a key concern of this thesis has been when and how people have been made non-autonomous through the law. The relationship to nation as a materialisation of legal status has been considered through an analysis of colonial expansion and self-governance, forced and free mobility and the coercion and control of aid projects. These have all been understood as regulatory technologies of exclusion. Embedded within the inclusionary foundations of legal status and protection through the nation has been an exclusionary core. Lockean property theory understands the relationship of ownership through the cultivation and improvement of land. Through this use, land is attributed value and is thus commodifiable and accumulative. The

¹³¹⁵ Ambalavaner Sivanandan, ‘Catching History on the Wing’ (*Institute of Race Relations*, September 2008) <<https://irr.org.uk/article/catching-history-on-the-wing/>> accessed 17 January 2022.

¹³¹⁶ Kirkup and Winnett (n 2).

¹³¹⁷ Gaby Hinsliff, ‘EU Nationals Are Fearful. And after Windrush, They Should Be’ *The Guardian* (17 January 2020) <<https://www.theguardian.com/commentisfree/2020/jan/17/eu-nationals-fearful-brexite-windrush>> accessed 2 February 2022.

¹³¹⁸ ‘Windrush Lessons Learned Review’ (n 1134) col 2023; May (n 1128).

protection of property is the foundation of law and the need to protect property led to the development of a legal system. Those who own property therefore gain protection as well as legal status. Anyone who does not fulfil this productive and extractive process of generating and accumulating value are seen not only as wasteful, but as waste and in need of improvement.¹³¹⁹ They are therefore outside the property and legal system and can be excessively controlled for the benefit of the whole community. From this, we can see how notions of belonging, inclusion and contribution emerge from this understanding. We can also see how notions of the inverse have emerged to.

Brenna Bhandar observes, ‘improvement as a legal concept’, in Locke’s work, ‘one that is constitutive of the racial regimes of ownership emerging in North America, is cast almost entirely in civilisation terms.’¹³²⁰ While considered outside of the law, this status holds a usefulness to the state. Firstly, it is a unifying factor to those who are included, marking freedom and autonomy against that which it is not. Secondly, it highlights the inclusive and virtuous character of the state through civilising projects which justify expansion and control. In this way individuals and populations become subjects *of* not subjects *in* the legal and governance systems.¹³²¹ The violence of progress is individualised and obscures the systematic design of exclusion and subjugation.¹³²² The contemporary examples of aid programmes demonstrated how UK law was legitimately *reglobalised* in humanitarian terms. It also demonstrated how aid programmes were used to implement programmes of self-reliance and improvement while containing and expelling from the UK. In this way, those who were outside of the system of nations and rights through their deterritorialization,¹³²³ are seen as non-autonomous beings. In addressing this, this thesis applied and extended the theorisation of property and race, first articulated by Cheryl Harris,¹³²⁴ through mobility and immigration of the British empire. This has sought to address a gap in this scholarship when considering controls of mobility through immigration laws, as well as applying this conceptual analysis within the context of the British empire “at home”. This also contributes to the literature which emphasises the protective nature for accumulated wealth, as well as the exclusionary nature of immigration laws and policies.¹³²⁵

Segregation is generally accepted to be an egregious practice but thought to be one that is in the past. However, in this thesis I have argued that immigration laws effect a system of

¹³¹⁹ Bhandar (n 188) 35.

¹³²⁰ *ibid* 48.

¹³²¹ Winter (n 193).

¹³²² *ibid*.

¹³²³ Tuitt, ‘Refugees, Nations, Laws and the Territorialization of Violence’ (n 995).

¹³²⁴ Harris, ‘Whiteness as Property’ (n 196).

¹³²⁵ Bhambra and Holmwood (n 812); El-Enany, *Bordering Britain* (n 23).

segregation. Architectures of segregation continue to span the globe with technologies of exclusion within and between nations. Within Europe, contemporary aid funded migration policies implement policies of containment, segregation and deportation throughout the migration journey to Europe and the UK. At the external boundaries of the EU barbed wire fences and barriers have been built to exclude people fleeing oppression and war. These are to prevent people traveling from outside the EU, inside it or even between EU countries, as it was between France and the UK prior to 2021.¹³²⁶ Since 2015 the surveillance of the channel between UK and France has drastically increased, but this has been to ensure the exclusion of those crossing rather than their safe crossings.¹³²⁷ Domestically, a hierarchy or tiered system of immigration status and the rights attached to it has been escalating, initially through the asylum system and access to separate social services and now increasingly through the risk of citizenship deprivation.¹³²⁸ Hierarchies of rights and belonging, or ‘regimes of differentiation’ has colonial foundations.¹³²⁹ As Mahmood Mamdani argues, ‘[c]itizenship would be a privilege of the civilized; the uncivilized would be subject to an all-round tutelage.’¹³³⁰ Rather than equal rights, the empire cultivated ‘[e]qual rights for all civilized men.’¹³³¹ This “tutelage” spans increased surveillance and policing across the plantation economies of the empire as well as communities of colour and migrant communities within the UK.¹³³² The flows of policing behaviour, rights and mobility of racialised people around the empire prior to the Second World War, echo those gradually legislated in the UK afterwards. The framing of segregation as difference or tutelage as development is a strategy to generate ignorance of the causes and effects of segregation and therefore remove accountability of segregationist policies.

In the early twentieth century W. E. B. Du Bois observed, ‘[t]he problem of the twentieth century is the problem of the color-line, – the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea.’¹³³³ Du Bois attributed this to an awakening of a collective consciousness of whiteness, and the claim that this whiteness was synonymous with greatness. Initially developed within the context of a racially segregated USA, Du Bois’ concept

¹³²⁶ Home Office, Teresa May and Border Force, ‘Managing Migratory Flows in Calais: Joint Ministerial Declaration on UK/French Co-Operation’ (*Gov.UK*, 20 August 2015) <<https://www.gov.uk/government/publications/joint-ukfrench-ministerial-declaration-on-calais>> accessed 23 August 2015.

¹³²⁷ Joshua Nevett and Kathy Long, ‘Channel Tragedy: Scramble to Identify Dead off Calais’ *BBC News* (25 November 2021) <<https://www.bbc.com/news/world-europe-59416022>> accessed 3 January 2022.

¹³²⁸ Devyani Prabhat, ‘Stripping British Citizenship: The Government’s New Bill Explained’ (*The Conversation*) <<http://theconversation.com/stripping-british-citizenship-the-governments-new-bill-explained-173547>> accessed 3 January 2022; Prabhat, ‘Unequal Citizenship and Subjecthood: A Rose by Any Other Name...?’ (n 541).

¹³²⁹ Mamdani (n 393) 7.

¹³³⁰ *ibid* 17.

¹³³¹ Cecil Rhodes in *ibid* 7.

¹³³² Hall and others (n 550).

¹³³³ WEB Du Bois, *The Souls of Black Folk* (The Project Gutenberg) <<https://www.gutenberg.org/files/408/408-h/408-h.htm>> accessed 8 August 2021.

was grounded within a global understanding.¹³³⁴ In response to the revolutions against colonialism, Du Bois argues, whiteness became the ‘new religion... on the shores of our time’, creating a transnational racial alliance between European colonisers against those they racialised and colonised.¹³³⁵ Building on this, Marilyn Lake and Henry Reynolds chart the expansion and strengthening of whiteness through strategies and technologies of segregation, deportation and exclusion of people of colour.¹³³⁶ These strategies and technologies were ossified through immigration legislation which were shared and adapted throughout the white world, creating the global colour line, or ‘racial segregation on an international scale’.¹³³⁷ Building on DuBois and Lake and Reynolds argument, this thesis details the legal developments between the white dominions during the late nineteenth and early twentieth centuries and identifies how these strategies had an impact on the heart of empire. This, it has been argued, led to the development of domestic immigration laws throughout the second half of the twentieth century and implemented a status-based segregation within state services and support within the United Kingdom. This thesis has developed this analysis through contemporary examples, namely the hostile environment and aid funded migration management projects.

The increasing criminalisation of people through the hostile environment and previous immigration legislation shuts down nuance and debate around racial, migrant and global injustice. It complies with liberal or moderate politics of recognition and acceptability while enabling a narrative of hospitality and tolerance to those who play by the rules and those in need. However, tolerance and hospitality are not inherently good qualities. Further, the framing of Britain as a hospitable and tolerant nation simple is not borne out by the history of the country. An ignorance to this denies the violence people have experienced through immigration laws and migration policy, but is also present through the daily assertions of foreignness and unbelonging within society. It also allows the continuation of these laws as a viable “solution” to the “immigration problem”. Immigration laws are considered to be “firm but fair” and necessary for the nations interest. David Cameron, the Prime Minister under whom the hostile environment policy was explicitly legislated, gave assurance that immigration concerns are “not just legitimate; they are right.”¹³³⁸ Cameron affirmation dispels the “impression that concerns about immigration were

¹³³⁴ Du Bois (n 89).

¹³³⁵ *ibid* 18.

¹³³⁶ Lake and Reynolds (n 355).

¹³³⁷ *ibid* 5.

¹³³⁸ Cameron (n 326).

somehow racist”.¹³³⁹ This also forgoes previous legislative restrictions and assures these racist priorities remain on legislative agenda.¹³⁴⁰

Even humanitarian laws, which are understood as altruistic, implement violence and exclusion. Estella Carpi notes that ‘[h]umanitarian aid, ultimately, turns out to be a politics of space’.¹³⁴¹ A politics of distancing, containing and excluding. Alison Mountz explains how ‘[a]mid security “crises”, states use geography creatively to undermine access to legal representation, human rights and avenues to asylum’.¹³⁴² Through a careful orchestration of internal borders within public and private services as well as a *re*-globalising of the border beyond the UK, what is seen and unseen by the UK public who “witness”... from near or afar’ is largely in the hands of those managing the border.¹³⁴³ The control of the narrative is also.¹³⁴⁴ This is vital to obscuring the policies and laws of harm and exclusion. It enables a focus of criminalisation and security which creates and maintains fearful publics. This both creates the need for and justifies an expansion of existing approaches.¹³⁴⁵ The use of humanitarian language in policies of exclusion, as demonstrated in Chapter Four, obscures and normalises the brutal and fatal consequences from the UKs approach to border controls.¹³⁴⁶ In this way, ‘such violence is necessary in order to institute the rule of law’.¹³⁴⁷ Legal and humanitarian responsibilities are pushed further away from the UK through this approach and is part of a wider project to externalise responsibility and accountability to third, transition and returning countries.

These abuses and violence have the marks of colonialism and empire and is working within a continuum of subjugation. The rhetoric of exceptionality sets ‘the articulation of existential threats that are framed in the language of war and that legitimate the introduction of exceptional policies’.¹³⁴⁸ Exceptional policies which do not cease but increase through the ‘everyday, ordinary practice[s]’ of emergency, political and institutional enactments, create continuities which enable them in becoming the norm.¹³⁴⁹ This in turn shapes the global and domestic framing of migration

¹³³⁹ David Cameron, ‘In Full: Cameron Migration Speech’ *BBC News* (14 April 2011) <<https://www.bbc.com/news/uk-politics-13083781>> accessed 17 July 2018.

¹³⁴⁰ Ware (n 27).

¹³⁴¹ Estella Carpi, ‘Spaces of Transregional Aid and Visual Politics in Lebanon’ (*Southern Responses to Displacement*, 7 December 2020) <<https://southernresponses.org/2020/12/07/spaces-of-transregional-aid-and-visual-politics-in-lebanon/>> accessed 14 December 2020.

¹³⁴² Mountz (n 972) 184.

¹³⁴³ *ibid* 185.

¹³⁴⁴ Mountz (n 972).

¹³⁴⁵ *ibid* 186.

¹³⁴⁶ Keenan, ‘Smoke, Curtains and Mirrors’ (n 160).

¹³⁴⁷ Manderson (n 272) 92.

¹³⁴⁸ Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (1 edition, Routledge 2006) 5.

¹³⁴⁹ *ibid*.

within the domains of security, evoking fear and belief of threat from migration generally, or that which is labelled the “migration crisis”, rather than from a specific event.¹³⁵⁰

How people enter a country to seek asylum should not be criminalised.¹³⁵¹ However, countries in the global north co-ordinate approaches and share polices through inter-governmental and inter-agency groups.¹³⁵² This maintains the global segregation between what are seen as refugee and migrant “producing” countries and refugee “receiving” countries. This “us” and “them” distinction creates a collective community cohesion on among countries of the global north, which need to protect themselves against the mass migration from the global south. Mark Duffield explains that this dichotomy ‘suggest[s] a good deal about how we like to understand our own violence. They establish... traits of barbarity, excess and irrationality and *metropolitan* characteristics of civility, restraint and rationality.’¹³⁵³ Violence then becomes legally sanctioned, as well as being presented as humanitarian or fair. Colonial structures of economic and racial exploitation travel with people as they move and interact with legal regimes,¹³⁵⁴ however they are legally categorised. As such people who are ‘seeking protection in Britain are also seeking refuge *from* Britain.’¹³⁵⁵

This thesis has argued that the hostile environment is produced through ignorance; through legal concealments and justifications of dispossession, expropriation and violence. In turn, I argue, ignorance implements the hostile environment. Through a strategic ignorance and collective aphasia that Britain, and Europe, understand mass displacement of people as a crisis for us.¹³⁵⁶ Through this colonial aphasia, the production of ignorance and derailing of accountability, Britain obfuscates the violence and abuse that is being subjugated on people trying to seek refuge in the UK as well as those simply trying to live in the UK. Ignorance can be both strategically employed and produced through a thoughtlessness or an apathy to the violence of others. Martin Luther King Jr articulated his disappointment with white moderates in the civil rights struggle in the United States of America; ‘Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people off ill will. Lukewarm acceptance is much more

¹³⁵⁰ *ibid* 6.

¹³⁵¹ Convention and Protocol Relating to the Status of Refugees Article 31.

¹³⁵² Such as the International Centre for Migration Policy and Development (ICMPD) and the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies (IGC) which have synchronised a global network of restrictive immigration controls.

¹³⁵³ Mark Duffield, ‘Reprising Durable Disorder: Network War and The Securitisation of Aid’ in Björn Hettne and Bertil Odén (eds), *Global Governance in the 21st Century: Alternative Perspectives on World Order* (Almqvist & Wiksell 2002) 79.

¹³⁵⁴ Keenan, ‘A Prison around Your Ankle and a Border in Every Street: Theorising Law, Space and the Subject’ (n 1061).

¹³⁵⁵ El-Enany, *Bordering Britain* (n 23) 223–224.

¹³⁵⁶ Mills (n 79).

bewildering than outright rejection.¹³⁵⁷ Passive or thoughtless acceptance and implementation of laws with inbuilt hostility and violence still perpetuate hostility and violence, even if that is not the intention of the person. Through the banal routine of administration, exclusion is implemented. A 'plethora of *ignorances*'¹³⁵⁸ produce the acceptance of global and national inequalities as well as immigration status. Simply following the law does not deny legal violence. Through this analysis I have contributed an under researched area of scholarship, the production of ignorance in obstructing accountability through the law as well as how harm and violence are reproduced through every day and ordinary acts, by ordinary people. This encourages a shift of where and how we look to understand harm, and therefore also the challenging of it. The challenging of these instances of harm have been explored through critical and creative methods. This is an area of scholarship this thesis also contributes to.

Resistance and challenge to apathy and thoughtlessness is sought in methods of critical and creative intervention and participation. Rather than passive acceptance, I have argued, these methods can challenge and expand forms of legal consciousness through a pluralising of understandings and knowledge production. *The Hostile Environment Walking Tour (2018)* is an example of this. Through the lived experiences of the internal border regimes the hostile environment was analysed, questioned and challenged. These stories and experiences of people who have been in detention again brought experiences of violence in isolated spaces of detention into a prominent space of engagement. This participatory art practice put the hostile environment under examination, but also required self-reflection by those who were participating in it. Therefore, questions of complicity and accountability were not only raised but dealt with in the substance and methods of the project. This was an example of '[a]ction research as opposed to policy research – thinking in order to do, not thinking in order to think – thinking and doing being part of the same continuum.'¹³⁵⁹ By challenging our own ignorance and thoughtlessness to contributing to the implementation and perpetuation of violence norms and laws, these spaces or moments of complicity can become spaces or moment of resistance through a refusal to cooperate in a system of harm.¹³⁶⁰ Bringing groups who were already working to challenge the hostile environment together *The Hostile Environment Walking Tour* was a way to highlight the existing and continual resistances taking place to challenge and disrupt the ideological and material

¹³⁵⁷ Martin Luther King Jr, 'Letter from a Birmingham Jail' (16 April 1963)

<https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html> accessed 1 September 2020.

¹³⁵⁸ Sedgwick (n 77) 25.

¹³⁵⁹ Sivanandan, 'Catching History on the Wing' (n 1315).

¹³⁶⁰ Katie Hepworth, 'Doing Business at the Border: Abuse, Complicity and Legality' (*openDemocracy*, 6 May 2016)

<<https://www.opendemocracy.net/en/5050/doing-business-at-border-complicity-legality-and-refusal-to-participate/>> accessed 19 January 2018.

functioning of the hostile environment. These were methods both of co-producing knowledge and of co-producing resistance. Through the example of *The Hostile Environment Walking Tour*, this thesis contributed to scholarship working at the intersection of art and law for its generative potential in thinking and doing critically, creatively and collectively.

The Hostile Environment Walking Tour was central to the conceptual development and approach of my research questions. This thesis and *The Hostile Environment Walking Tour* were a co-production and critical engagement, reflection and communication. In responding to my research questions, this thesis has given a detailed analysis of Britain's hostile environment, placing it in both a historical and global understanding. It has simultaneously demonstrated how the UK immigration laws create and sustain processes of mobility, segregation and categorisation and how ignorance of these processes is produced, and accountability obscured. It has further offered insights into a potential approach of resistance to the hostile environment, through acts of critical engagement and participation. It has argued that creative resistances have an important function in making visible the violence of immigration laws and thereby challenging ignorance and accountability to it. In drawing these two approaches together, this thesis highlights how silences and ways of unknowing are produced while advocating for methods of vocalising and ways of learning to know and see. Through this analysis I have demonstrated that 'colonialism and immigration are part of the same continuum'.¹³⁶¹ It is up to all of us to collectively highlight and disrupt this continuum.

¹³⁶¹ Sivanandan, 'Catching History on the Wing' (n 1315).

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