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Illegal Working, Migrants and Labour Exploitation in the UK: Liminal Legality and The Immigration Act 2016

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Abstract

The UK's Immigration Act 2016 is an assemblage of carceral elements targeting illegal working by migrants and their employers, and regulatory elements designed to enforce labour market regulation. This combination of immigration, criminal and labour law raises questions about how the UK government has framed the issue of labour exploitation. This article adopts a socio-legal approach in order to appreciate how making 'illegal working' a crime figures in a specific governance project. Situating the Immigration Act 2016 within the context of neo-liberal globalisation, it develops a productive account of migrant illegality to which it adds a conception of liminal legality that emphasises both the agency of actors and the gap between legality and legitimacy. Using official documents, it shows how the Immigration Act 2016 is a response to a specific governance crisis, which is to maintain the 'British way' of regulating the labour market despite deteriorating outcomes for many workers.

Keywords

Labour, illegal, migrant

I would like to thank Karen Engle, Ruth Dukes, Bernard Ryan, Moritz Neugebauer and three anonymous reviewers for their helpful comments and Karen Engle at the Rapoport Centre for Human Rights in Austin, Texas and Bernard Ryan at the University of Leicester for the opportunity to present the paper. All errors are my own.

Illegal labour exploits workers, denies work to UK citizens and legal migrants and drives down wages.¹

Exploiting or coercing people into work is not acceptable. It is not right that unscrupulous employers can force people to work or live in very poor conditions, withhold wages or mislead them into coming to the UK for work.²

1. Introduction

Both the politicians who sponsored the Immigration Act 2016, such as the (then) Conservative Immigration Minister James Brokenshire quoted above, and the provisions of the statute explicitly link detecting and punishing illegal (migrant) workers to labour market enforcement. Part of an immigration policy designed to make the UK a hostile environment for illegal migrants, the Immigration Act 2016 made 'illegal working' a crime, empowered state officials to seize the wages of illegal

¹ Immigration Act 2016 Factsheet – Illegal Working

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537205/Immigration_Act_-_Part_1_-_Illegal_Working.pdf> accessed 21 September 2017.

² Immigration Act 2016 Factsheet –Labour market enforcement

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537203/Immigration_Act-Part_1_-_Labour_Market_Enforcement.pdf> accessed 21 September 2017.

workers, imposed criminal sanctions on employers who have reasonable cause to believe that an individual does not have the right to work in the UK, and empowered the government to close a workplace where an employer who is employing an illegal worker has employed illegal workers in the past.³ The Immigration Act 2016 also established the Director of Labour Market Enforcement, whose task it is to come up with a strategy for enforcing labour regulation, expanded the remit of the Gangmasters Licensing Authority, which was repackaged as the Gangmasters Labour Abuse Authority, to combat labour abuse throughout the UK labour market and enlarged the regulatory toolkit available to designated public officials to enforce labour standards.

This assemblage of carceral and regulatory elements targeting illegal migration and labour regulation raises a series of questions.⁴ How has ‘illegal working’ risen to prominence as a policy problem in the UK?⁵ How did illegal

³ In addition to the provisions that touch upon labour law, the Immigration Act 2016 contains a number of provisions designed to disrupt the daily activities of migrants who are not lawfully present in the UK, enhances the powers of immigration officers, and extends the scope of the ‘deport first, appeal later rule’. See Alex Balch, *Immigration and the State: Fear, Greed and Hospitality* (Palgrave Macmillan 2016) 164 for a discussion of the UK’s hostile environment for illegal migrants.

⁴ Aiwah Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* (Duke University Press 2006) 8.

⁵ The problem of ‘illegal’ working was not discovered since there is no empirical evidence of its extent. According to David Bolt, Independent Chief Inspector of

Borders and Immigration, 'there are no reliable estimates for the numbers of migrants working illegally in the UK' and the government has no way to estimate to estimate the number of immigration offenders' in An Inspection of How the Home Office Tackles Illegal Working October 2014 – March 2015 (London, ID 10121501 12/15) 2, 8. In response to a Freedom of Information request, the Office of National Statistics stated that it did not estimate the number of illegal migrants, but that a 2001 Home Office report estimated that there were 430,000 illegal migrants and that a London School of Economics report estimated that there were 533,000 irregular migrants in 2007. Office for National Statistics 15 May 2015 <<https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/illegalimmigrantsintheuk>> 21 September 2017. Despite the absence of evidence of the extent of illegal migrants, the problem of illegal migrants is widely circulated in much of the print media. Most recently, several newspapers claimed that the government was hiding the number of illegal migrants, reporting that 'David Wood, who was head of immigration enforcement at the Home Office until 2015, said that more than 1.2million illegal immigrants are currently living in Britain, predominantly after overstaying their visas'. Kate McCann, 'Hundreds of thousands of illegal immigrants drop off radar in the UK every year according to secret figures' (*The Telegraph*, 17 June 2017). <<http://www.telegraph.co.uk/news/2017/06/15/hundreds-thousands-illegal-immigrants-drop-radar-uk-every-year/>> 21 September 2017. For a discussion of some of this data see House of Commons, Home Affairs Committee, Immigration

working and labour market enforcement, which is the term used in the UK to refer to enforcing labour standards, come to be linked in the UK? In answering these questions, it is tempting to take the government's stated objectives – which are to strengthen the UK's borders in order to prevent illegal migrant workers from undercutting British workers wages and to protect vulnerable migrants from exploitation – at face value and then proceed to show how the criminalisation of illegal working is likely to back fire. This critique was lodged by opposition parties and migrant rights advocacy groups as the Immigration Bill 2015/2016 wound its way through Parliament; at every opportunity they repeatedly pointed out that the measures contained in the proposed legislation were unlikely to deter illegal migrants from entering Britain and that the likely effect of criminalising migrants who were working in violation of immigration rules was to make them more, and not less, vulnerable to exploitation.⁶ While this critique of the Immigration Act 2016 is incontrovertible, I argue that it is important to move beyond an empiricist or positivist account of this law and, instead, to adopt a constructivist socio-legal approach to it in order to appreciate the significance of making 'illegal working' a crime. Thus, I am interested in a third question: What is the significance of the connection between making illegal working a crime and strengthening the

policy; Basis for building consensus, second report of Session 2017-2019, HC 500, 15 January 2018.

⁶ Melanie Gower, Doug Pyper and Wendy Wilson, *Immigration Bill [Bill 74 of 2015-16]* (House of Commons Library, Briefing Paper Number 07304, 6 October 2015) 18; HC Hansard, 1 December 2015, col 121.

enforcement of labour standards for understanding the UK government's framing of labour exploitation and its approach to labour market regulation from 2010 to 2017?

Throughout the lengthy legislative process, background papers, explanatory notes and fact sheets, the tropes of the 'illegal migrant', 'lawful migrant', 'British worker', 'unscrupulous employer', 'criminal gang', 'poor victim', 'slave' and 'level playing field for employers' constantly recur.⁷ The Immigration Act 2016 constructs a legal assemblage of different elements that constitutes a broader legal narrative in which the 'illegal worker' and 'unscrupulous employer' figure as the *objects* of legal opprobrium. Yet, as I will attempt to illustrate, the *subject of*, or audience for, this

⁷ For the Parliamentary debates see <<https://services.parliament.uk/bills/2015-16/immigration.html>> accessed 21 September 2017. For related documents see Immigration Act 2015 to 2016: overarching documents <<https://www.gov.uk/government/publications/immigration-bill-2015-overarching-documents>> accessed 21 September 2017; for the consultation on labour market enforcement, Labour market exploitation: improving enforcement <<https://www.gov.uk/government/consultations/labour-market-exploitation-improving-enforcement>> accessed 21 September 2017. See an overview in BEIS and Home Office, Impact Assessment, EANDCB Validation: Tackling Exploitation in the Labour Market (18/08/2016); Home Office, *An employer's guide to the administration of the civil penalty scheme* 2014 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/338061/civil_penalty_scheme_-_28_July_2014.pdf> accessed 27 September 2017. T

narrative is the British worker who can now rest assured that the UK's labour market is fair.⁸ In this way, the Immigration Act 2016 is part of the UK government's political project to persuade citizen/voters that the current regime of 'light touch' labour market regulation is in their best interest, and that illegal migrants exploited by rogue employers and criminal gangs, and not the deregulated labour market, pose the greatest threat to their labour standards and working conditions.⁹

This article proceeds in two stages. First, it sketches the political and economic context in which to situate the Immigration Act 2016 and provides a conceptual framework for analyzing how the figure of the illegal migrant becomes imbued with meaning. Here I develop the idea of 'liminal legality' to show how the new crime of illegal working grants state officials the flexibility to specify the harm caused by migrants who work without the requisite immigration authorization,

⁸ Douglas Hay, 'Time, Inequality and Law's Violence' in Austin Sarat (ed), *Law's Violence* (Ann Arbor: University of Michigan Press 1992).

⁹ According to the Department of Business, Innovation and Skills, 'A key driver of the strong performance of the UK labour market is our light-touch system of employment regulation. The labour market, like other markets, needs a framework of rules but the UK framework is less onerous than most'. Flexible, effective, fair; promoting economic growth through a strong and efficient labour market (October 2011) 3

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32148/11-1308-flexible-effective-fair-labour-market.pdf.accessed> 28 January 2018.

calculations which are meaningful only in the context of strategies and priorities linked to particular governance projects. Second, it shows how the Immigration Act 2016 is a response to a specific governance crisis concerning the deteriorating outcomes for workers labouring in the bottom half of the UK's neoliberal labour market.¹⁰ As we will see, in its explanation of, and justification for, the Immigration Act 2016, the Conservative government portrayed labour exploitation both as a harm suffered by legitimate businesses that are undercut by rogue employers who employ illegal migrants and as a harm endured by vulnerable migrants who are abused by criminal gangs. This assessment was part of a governance project to preserve 'light touch' approach to labour market regulation, which the UK government celebrates as resulting in 'one of the most flexible labour markets in the world'.¹¹ The indeterminacy in where state officials will draw the borders of

¹⁰ Matthew Taylor, *Good work: The Taylor review of modern working practices* (Department for Business, Energy & Industrial Strategy 2017) 28
<<https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices> > accessed 21 September 2017; Enda Hannon, 'Economic Policy and Employment under the Coalition Government' in Steve Williams and Peter Scott (eds) *Employment Relations under Coalition Government: The UK Experience, 2010-2015* (Routledge 2016); Stephen Clarke,(eds) *Work in Brexit Britain: Reshaping the Nation's Labour Market* (Resolution Foundation 2017).

¹¹ Department for Business, Innovation & Skills and Department, Employment Status Review (December 2015) 5.

<<https://www.gov.uk/government/publications/employment-status-review-2015>>

illegality in practice also provides them with the flexibility to deploy and coordinate different axes of labour regulation and labour disciplining. In this way, formal law is imbued with legitimacy through the practice of enforcement and prosecution, and its attendant circulation and publication through press releases and media portrayals.

Throughout the paper I use the term 'illegal' migrant, which I appreciate is a controversial choice as many researchers prefer to use less politically laden terms such as 'irregular', 'unauthorised' or 'undocumented' to refer to migrants who do not have either the authorisation to be in or to work in the ways that they are the host country. I have chosen to use the terms 'illegal' migrant and 'illegal working' not only because they directly implicate the law, but also because of their broad

accessed 21 September 2017; Taylor (n 10) 17, 93. This light (and limited) touch approach was also embraced by the Labour government after the Hampton Review of regulation. Phillip Hampton, *Reducing Administrative Burdens: Effective inspection and enforcement* (HM Treasury/HMSO 2005). See Sandra Fredman, 'The Ideology of New Labour Law' in Catherine Barnard, Simon Deakin and Gillian Morris (eds), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple* (Hart 2004).

Although some commentators note the government's mixed and sometimes incompatible messages about migrant workers, I argue that these messages are compatible if we bracket the government's avowed purpose and instead try to construct its governance project. Catherine Barnard, Amy Ludlow and Sarah Fraser Butlin, 'Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers' (2017) *Industrial Law Journal* 1 doi:10.1093/indlaw/dwx020.

political and popular currency.¹² Moreover, as I explain in the next section, by foregrounding ‘illegality’ and its liminality in the context of the new crime of ‘illegal working’, my goal is underscore the difference, as well as the relationship, between law and its legitimacy. My overall aim is to show how the ‘illegal worker’ is overdetermined in the current fraught political context in the UK in which Brexit and immigration are critical vectors of populist politics.

2. Neoliberal Labour Markets and Illegal Migrant Workers

A Neoliberalism and Immigration

The process of globalisation is closely associated with international and transnational economic agreements, such as free trade agreements, which loosen the ability of nation states to impede cross-border capital flows.¹³ At a national level, neo-liberal labour market and social policies promote labour market deregulation, the commodification of labour and flexibilisation in order to open up spaces for accumulation where mobile capital is unencumbered by labour market ‘rigidities’ such as enforceable labour standards and forms of social protection such as

¹² Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge UP 2008) 4.

¹³ Stephen Gill, ‘Globalization, Market Civilization, and Disciplinary Neoliberalism’ (1995) 24 *Millennium: Journal of International Studies* 399.

unemployment insurance.¹⁴ Moreover, the flip side of capital's movement offshore to seek cheaper, harder-working, and more disciplined labour in contemporary globalisation is the use of migrant labour in the labour intensive sectors in the global North.¹⁵ Managed migration programs, typically of the circular or temporary variety for workers considered by richer states to be low skilled, are put in place to incorporate this surplus labour. As authorised immigration routes have narrowed, and especially since the mid-1990s, states have simultaneously criminalized and increased the penalties for people who attempt to or cross borders without official sanction. Immigration law transgressions have been transformed from regulatory offences to crimes and criminal law has seeped into immigration law.¹⁶ In this way, the 'on-going interplay of increasingly deregulated labour markets, characterized by employers' demands for low-cost "flexible" labour and highly restrictive immigration and asylum policies that variously structure, compromise and/or

¹⁴ David Harvey, *A Brief History of Neo-liberalism* (OUP, 2005); Jamie Peck, 'Explaining (with) Neoliberalism' (2013) 1 *Territory, Politics, Governance* 132-157.

Peck makes a useful distinction between neoliberalism as an ideology and as a set of incomplete, and temporary and spatially specific set of practices and policies.

¹⁵ Hannah Lewis, Peter Dwyer, Stuart Hodgkinson, and Louise Waite, 'Hyper-Precarious Lives: Migrants, Work and Forced Labour in the Global North' (2015) 39 *Progress in Human Geography* 580.

¹⁶ Julia Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 *Am. Uni. L. Rev.* 367; Dauvergne (n 12); Ana Aliverti, 'Enlisting the Public in the Policing of Immigration' (2015) 55 *British Journal of Criminology* 215.

remove basic rights to residence, work and welfare for all but the most prosperous migrants' create a supply of migrants with precarious legal status to work in precarious jobs'.¹⁷

The paradox is that the very qualities that make immigrants attractive to employers – 'their submissive malleability as rightless outsiders who perform the undignified tasks that natives shun' – are those 'that makes them undesirable as members of a society'.¹⁸ Illegal migrants exemplify this contradiction. Placing people in the category of migrant worker allows for their differential inclusion as lawfully subordinated people in the host nation and host labour market.¹⁹ While it is unacceptable (and most often illegal) to discriminate against people on the basis of their race or gender, it is considered to be lawful, if not just, to differentiate against workers on the basis of their migrant status; that is, on whether they are 'citizens' or 'foreigners'.²⁰ The migrant epitomises the alien or foreigner who, at the same time

¹⁷ Lewis et al (n 15) 594; Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labor Law and Policy Journal* 101.

¹⁸ Kristen Surak, 'Guestworkers: A Taxonomy' (2013) 84 *New Left Review* 84, 86.

¹⁹ Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor* (Duke 2013).

²⁰ Nandita Sharma, 'The "Difference" that Borders Make: "Temporary Foreign Workers" and the Social Organization of Unfreedom in Canada' in Patti Tamara Lenard and Christine and Strael (eds) *Legislated Inequality: Temporary Labour*

as fulfilling the demands of capital for an extreme form of flexible labour, is regarded as a threat to citizen workers' jobs and labour standards. Since migrants can be expelled when no longer needed, the nation state can simultaneously respond to the political demands of the people and to the economic demands of capital.²¹

In the context of austerity politics following the 2007-08 financial crisis, the figure of the migrant has also taken on a new political signification, one that is related to the social rights of citizens rather than solely the labour demands of capital. Although Ngai observed that the 'citizen' is given meaning and privilege through the construction of the 'alien', more recent scholarship has illustrated the extent to which the 'demand' for migrant workers has been used to downgrade and restrict social entitlements available to citizens in the context of austerity budgets.²² The connection between welfare and migration was made explicit by then Prime

Migration in Canada (McGill-Queen's Press 2012) 33; *Taiwo v Olaigbe; Onu v Akwiwu* [2016] UKSC 31.

²¹ Surak (n 18) 86

²² Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton UP 2003). See also Bridget Anderson, "'Heads I Win. Tails you Lose.'" Migration and the Worker Citizen' (2015) 68 *Current Legal Problems* 179; Lydia Morris, 'Squaring the circle: domestic welfare, migrants rights, and human rights' (2016) 20 *Citizenship Studies* 693; Judy Fudge 'Justice For Whom? Migrant Workers in Canada' in Janine Brodie (ed) *Contemporary Inequalities and Social Justice in Contemporary Canada* (University of Toronto Press 2018).

Minister David Cameron, who in 2011 described what he considered to be an overgenerous welfare system and an out of control immigration system as ‘two sides of the same coin’.²³ Not only were the UK’s welfare benefits depicted as a beacon to European Union migrants, they were also portrayed as ‘paying British people not to work’ and, thus, creating a demand for migrant labour to fill low-paid and flexible jobs.²⁴ For both the 2010 Coalition and 2015 Conservative governments, the best way to forestall European migrants who were depicted either as ‘benefit scroungers’ or as ‘undercutting workers’ was to restrict and to deny benefits to both EU migrants and British citizens.²⁵ Morris explains how this political rhetoric, which was used to shape the moral standing of both migrants and British welfare recipients, was harnessed to ‘a drive to refashion the UK economy through a radical reduction of public spending, while eroding the public supplement to low pay [and] stringently disciplining the unemployed’.²⁶ In this way the vitriol against EU migrants as benefit scroungers and job stealers that was unleashed in the run up to

²³ David Cameron, ‘Prime minister’s address to Conservative party members on the government’s immigration policy (BBC News, 4 April 2014)

<<http://www.bbc.co.uk/news/uk-politics-13083781>> accessed 21 September 2017

²⁴ Ibid.

²⁵ Alex Balch, ‘Tightening the Grip: The Coalition Government and Migrant Workers’ in Steve Williams and Peter Scott (eds) *Employment Relations under Coalition Government: The UK Experience, 2010-2015* (Routledge 2016); Conservative Party Manifesto 2015, 25.

²⁶ Morris (n 22) 8-9

the UK's 2016 EU referendum also functioned to discipline British citizens and sort them into hierarchical categories of moral worth with British taxpayers and British workers at the apogee, descending to lawful migrants and welfare recipients, with illegal migrants and slave drivers located at the bottom.²⁷

B Illegal Migrants

As borders are increasingly turned into fortresses to keep out all but the most highly skilled and wealthy migrants, the amorphous 'illegal migrant' has become the exemplar of the disposable and unwanted surplus population.²⁸ This is so despite the fact that in a very real way irregular and illegal migration is built into the structure of the contemporary global economy.²⁹ The consolidation and expansion of international markets in goods, services and capital creates networks that connect people across borders, reduce the costs of movement and increase the

²⁷ Anderson (n 22). See also Bridget Anderson, 'Migration, immigration controls and the fashioning of precarious workers' (2010) 24(2) *Work, Employment and Society* 300, 314 for an early discussion of how targeting migrants may be an attempt at misdirection by the UK government.

²⁸ Mezzadra and Neilson (n 19) 132; Thomas Nail, *The Figure of the Migrant* (Stanford University Press 2015) 209

²⁹ Katharine M. Donato and Douglas S. Massey, 'Twenty-First-Century Globalization and Illegal Migration' (2016) 666 *The Annals of the American Academy of Political and Social Science* 7.

flow of information leading to surplus 'migrant flows that cannot be accommodated within today's restrictive immigration policy regimes'.³⁰ The result is a situation where irregular migration increases and a larger proportion of people crossing borders to escape violence or immiseration lack full legal status in the country in which they are seeking work. Moreover, the criminalisation of violations of the entire gamut of immigration controls and restrictions – from trafficking and smuggling to fake documentation and the conditions attached to work authorisations – means that there are growing populations of 'illegal' migrants in countries across the globe.

In his influential conception of 'migrant illegality', Nicolas De Genova offers an account of law's role that goes beyond its repressive power to create a category of legally precarious and, hence, cheap and tractable, reserve of labour.³¹ While the evidence is clear that precarious and illegal migrant statuses are attractive to capital by providing employers with a flexible and disposable workforce, De Genova's emphasis on law's productive power focuses on the political work that migrant illegality performs in a nation state's historically and spatially specific governance project. What distinguishes his account from generic claims that immigration law 'constructs, differentiates, and ranks various categories of "aliens"', is his focus on how the figure of the 'illegal migrant' is positioned within a specific set of state

³⁰ Ibid 14.

³¹ Nicholas P. De Genova, 'Migrant illegality and deportability in every day life' (2002) 31 *Annu Rev Anthropol* 419

policies and practices. He does not regard law 'as effectively definitive, coherent, and complete'; rather, he views 'the intricate history of law-making' as distinguished by the constitutive restlessness and relative incoherence of various strategies, tactics, and compromises that nation-states implement at particular historical moments, precisely to mediate the contradictions immanent in social crises and political struggles, above all, around the subordination of labor'.³²

Thus, instead of taking at face value the UK government's express aim of punishing and deterring illegal migrants as the goal of the most recent rounds of immigration law reform and critiquing it for failing to achieve its avowed purpose, De Genova's conception invites us to consider how the 'illegal migrant' and the new criminal offence of 'illegal' working function within the labour market strategies of the two most recent (Cameron in 2015 and May in 2016) Conservative governments.

C Liminal Legality and Legitimacy

De Genova's account of migrant illegality underlines the productive power of state immigration law. But, as Kubal notes, the simple binary between legal and illegal migration tends to obscure the differences between various illegal migrant statuses. Thus, she uses the concept of semi-legality to capture the range of migration

³² i lid 425.

statuses that are less than lawful.³³ She argues that ‘semi-legality should be viewed as a multi-dimensional space where legal status – migrants’ formal relationship with the state – interacts with various forms of their agency toward the law – their behaviours and attitudes’.³⁴ In a similar vein, Ruhs and Anderson conceptualise the ‘various legal “spaces of (il)legality”’, although they emphasise the agency of both migrants and employers regarding immigration controls.³⁵ They deploy the term ‘semi-compliance’ to refer to the employment of migrants who are legally resident but working in breach of the employment restrictions attached to their immigration status.

I will use the term ‘liminal legality’, which was coined by Menjívar to capture the ‘the grey area between legal categories’, to encompass both the complex nexus of immigration controls and employment conditions as well as the agency of employers, migrants, state enforcement officials and civil society organisations, such as advocacy groups and unions.³⁶ Liminal legality expresses the contentious and

³³ Agneiska Kubal, ‘Conceptualizing Semi-Legality in Migration Research’ (2013) 47 *Law & Society Review* 555.

³⁴ *Ibid*, 566-7.

³⁵ Martin Ruhs and Bridget Anderson, ‘Semi-Compliance and Illegality in Migrant Labour Markets: An Analysis of Migrants, Employers and the State in the UK’ (2010) 16 *Popul Space Place* 195, 195.

³⁶ Cecilia Menjívar, ‘Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States’ (2006) 111 *American J. of Sociology* 999–1037, 1008; Jennifer Chacón, ‘Producing Liminal Legality’ (2015) 92 *Den U L Rev* 709; Leisy Abrego and

disputed nature of criminal prohibitions that seek to ban the combination of status (migrant) and activity (working) as well as emphasising the legal processes and practices that determine where the line is drawn in a particular case. The actions of migrants, their employers, state officials, civil society organisations and the media, as much as those of legislators and judges, draw the line between legal and illegal work.

The concept of liminal legality provides the conceptual space that enables us to probe the distinction between legitimacy and legality. Within liberal democracies such as the UK, laws tend to be regarded as legitimate utterances of state authority because of their democratic provenance and their association with liberal values. However, the legitimacy of law cannot simply be taken for granted; it must be instantiated and reinforced. Since 2000 media depictions of illegal migrants have suffused immigration laws that criminalise illegal working with a vital legitimacy.³⁷ But, media stories can also undermine attempts by the government to equate disputable migration status with illegality.³⁸ So, too, do the actions of state officials,

Sarah M. Lakhani, 'Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses' (2015) 37 *Law and Policy* 265.

³⁷ Scott Blinder and William L. Allen, 'Constructing Immigrants: Portrayals of Migrant Groups in British National Newspapers, 2010–2012' (2016) 50 *International Migration Review* 3.

³⁸ The series of stories in the *Guardian* illustrating how the Conservative government's attempt to create a hostile environment for 'illegal'

civil society organisations, employers and migrant workers who navigate the complex and contested borders of migrant illegality. Different kinds of state officials, such as, for example, police, border service agents and labour enforcement officers, develop enforcement and prosecution strategies that can transform liminal legality into illegal working. The indeterminacy over where state officials will draw the borders of illegality in practice allows them the flexibility to determine the 'harm' of illegal working, a calculation that is often rationalised in terms of strategies and priorities that are linked to different governance projects. This flexibility in

migrants had resulted in the rights of Commonwealth citizens, many of who were of Caribbean descent , who had been residing in the UK since the 1950s to reside, work, obtain public benefits or health care on the ground that they did not have lawful immigration status in the UK. The ensuing controversy led Prime Minister May to apologise in the House of Commons, Home Secretary Amber Rudd to resign and the government to change its policy. See 'Amelia Gentleman on Windrush: "I've felt like an immigration case worker"' The Guardian 20 April 2018, <<https://www.theguardian.com/membership/2018/apr/20/amelia-gentleman-windrush-immigration>>accessed 1 June 2018. However, according to a YouGov poll, even after what became known as the 'Windrush fiasco' Britons 'overwhelmingly support the "hostile environment" policy' Anthony Wells, 'Where the public stands on immigration' YouCov27 April 2018< <https://yougov.co.uk/news/2018/04/27/where-public-stands-immigration/>> accessed 1 June 2018.

determining the precise contours of illegal working provides leeway for state officials to deploy and coordinate different axes of labour regulation and labour disciplining through the practice of enforcement and prosecution. In this way, they can reinforce the legitimacy of formal law through enforcement practices, and their attendant circulation and publication through press releases and media portrayals.

3. Putting Illegal Working to Political Work

A Illegal Migrants and Labour Market Exploitation

The anti-migrant turn in recent UK political discourse was ignited by the increase in EU migrant workers after the 2004 enlargement of the EU and accelerated by the financial crisis of 2007/8.³⁹ The 2010 election that led to establishment of the Coalition government under David Cameron and his appointment of Theresa May as Home Secretary heralded the government's agenda 'to give illegal migrants a really

³⁹ Alex Balch and Ekaterina Balabanova, 'Ethics, Politics and Migration: Public Debates on the Free Movement of Romanians and Bulgarians in the UK, 2006–2013' (2016) 36 *Politics* 19. The Labour government regarded the UK's labour market as a magnet for illegal migration and strengthened immigration enforcement, Aliverti (n 16) 217.

hostile reception'.⁴⁰ In defending his government's 'crack down' on illegal migration then Prime Minister Cameron declared that is 'is a question of fairness – yes to the British people ... but also to those who have been shipped over here against their will, kept as slaves and forced to work horrendous hours'.⁴¹ As the UK government made lawful routes for immigration more restrictive, it used two stereotypes of migrants – the vulnerable victim and the manipulative abuser– to portray illegality in migrant labour markets.⁴² Along side the poor slave/trafficked worker, in its 2013 Guide to Employers on Preventing Illegal Working, the Home Office identified

⁴⁰ James Kirkup, and Robert Winnett, 'Theresa May interview: 'We're going to give illegal migrants a really hostile reception' (*The Telegraph*, 25 May 2012) <<http://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>> accessed 21 September 2017. The Coalition government blamed its predecessor, the Labour government, for its lax enforcement of immigration laws, Myriam Cherti, *Irregular Immigrants and Control Policies in the UK: The Policy Framework for Immigration Enforcement in the UK. Does Immigration Enforcement Matter (DIEM)?* Project Report 4, Oxford: COMPASS, 5.

⁴¹ David Cameron, Prime minister's address to Conservative party members on the government's immigration policy (*The Guardian* 14 April 2011) <<https://www.theguardian.com/politics/2011/apr/14/david-cameron-immigration-speech-full-text>>accessed 21 September 2017.

⁴² Bridget Anderson, 'Sex, slaves and stereotypes' (2008) 8 *Global Networks* 367

two other victims of illegal working: 'British businesses and their workers that stay within the law.'⁴³

However, instead of making it easier for workers to enforce their rights, the Coalition government did the opposite. It increased the service requirements for employees to be eligible for unfair dismissal protection and, by imposing hefty fees on individuals who sought to enforce their labour rights by bringing claims to Employment Tribunals, created barriers to the enforcement of most employment rights.⁴⁴ As a result of its 'Red Tape Challenge', the Coalition government reduced the funding to the few public agencies with responsibility for enforcing a very limited set of employment rights.⁴⁵ It also repealed mechanisms like the Agricultural Wages Board that tailored standards for some of the most vulnerable workers, many of whom were migrants.⁴⁶ Instead, it focused on the impact of 'low-skilled

⁴³ Ibid.

⁴⁴ Roger Welch, 'The Coalition Government and the Lifting of the Floor of Individual Employment Rights' in Steve Williams and Peter Scott (eds) *Employment Relations under Coalition Government: The UK Experience, 2010-2015* (Routledge 2016).

⁴⁵ Letter from the Prime Minister on cutting red tape, 7 April 2011, <<https://www.gov.uk/government/news/letter-from-the-prime-minister-on-cutting-red-tape>>_accessed 21 September 2017. Funding was cut for all of the public agencies responsible for enforcing labour standards, with the exception of HRMC, which enforces the minimum wage, see Barnard, Ludlow and Butlin (n 11) 24.

⁴⁶ ACL Davies, 'Migrant Workers in Agriculture: A Legal Perspective' in Cathryn Costello and Mark Feedland (eds), *Migrants at Work* (OUP 2014).

migrants' on the UK labour market, and in 2013 it commissioned the Migration Advisory Committee (MAC) to study this 'problem'.

In their 2014 report *Migrants in low-skilled work*, the MAC concluded that 'the combination of non-compliance and insufficient enforcement can lead to instances of severe exploitation, particularly of vulnerable groups such as migrants'.⁴⁷ It also found 'that there was a low level of labour market enforcement across low-skilled jobs'.⁴⁸ One of problems the MAC had identified with enforcing labour standards in low-skilled sectors of the UK labour market was the fragmentation of enforcement between four different departments.⁴⁹ Unlike most jurisdictions, there is no central inspectorate and enforcement system for labour standards in the UK. The UK has instead embraced a two-tier model for enforcing employment standards. The vast majority of employment rights are only enforceable by individuals lodging claims at Employment Tribunals, a route that the government had made unattractive to employees by introducing hefty fees for lodging and pursuing claims.⁵⁰ The second tier of public enforcement covers a very modest number of employment standards. Enforcement is divided between four agencies: the Health and Safety Executive enforces occupational health and safety laws and aspects of the working-time regulations; HM Revenue and Customs

⁴⁷ Migration Advisory Committee (MAC), *Migrants in low-skilled work* (London 2014) 172.

⁴⁸ *Ibid* 178.

⁴⁹ *Ibid*, 178.

⁵⁰ Welch (n 44).

(HMRC) enforces the National Minimum Wage; the Employment Agency Standards Inspectorate (EAS) enforces rules governing the conduct of employment agencies; and the Gangmasters Licensing Authority (GLA) enforces legislation regulating the conduct of licensed gangmasters, a historical term used in the UK to refer to labour providers, in sectors such as agriculture and food processing.⁵¹

The government's solution to the problem of labour exploitation was to increase the catalogue of criminal and civil offences in immigration law directed at employers employing migrant workers who did not have proper authorisation to work. The Immigration Act 2014 not only doubled the penalties for employers employing migrants who did not have immigration authorization to work in the UK, it made it difficult for migrants without the proper authority to reside in the UK to rent lodgings and lawfully to drive a motor vehicle.⁵² The 2014 Act also continued the government's tactic of requiring private individuals to police immigration controls within the borders of the nation state by instituting landlord 'right to rent checks' parallel to the obligations it had already imposed on employers to scrutinize migrants 'right to work'.⁵³ At the same time, the Coalition government tabled the Modern Slavery Bill, which consolidated the offenses of slavery, forced labour, servitude and human trafficking in one piece of legislation and established an

⁵¹ MAC (n 47) chapter 6; Taylor (n 10).

⁵² Immigration Act 2014, c 22, ss 20-28 and ss 46-47

⁵³ Bernard Ryan, 'Employer Check of Immigration Status and Employment Law' in Cathryn Costello and Mark Feedland (eds) *Migrants at Work* (OUP 2014); Aliverti (n 16).

Independent Anti-Slavery Commissioner with the UK-wide remit to encourage good practice in the prevention, detection, investigation and prosecution of modern slavery offences.⁵⁴ Thus, it adopted a carceral and punitive approach to stamping out labour market exploitation.

Yet, the Conservative Party was not alone in using labour exploitation as 'means of addressing the difficult politics of immigration'; so, too, did the opposition Labour Party.⁵⁵ In the run up to the May 2015 election, both the Labour and Conservative parties promised to reduce low-skilled immigration and to toughen labour market regulation to prevent labour exploitation and illegal working.⁵⁶ The unexpected election of a majority Conservative government on 7 May 2015 appeared to provoke a reversal on the part of the Conservative Party from

⁵⁴ The bill was introduced to the House of Commons in draft form in October 2013 by James Brokenshire, Parliamentary Under Secretary for Crime and Security. The bill's sponsors in the Home Office were Theresa May and Lord Bates. It received Royal Assent and became law on 26 March 2015, Modern Slavery Act 2015, c 30. Caroline Robinson, 'Claiming Space for Labour Rights within the United Kingdom Modern Slavery Crusade' (2015) 5 *Anti-Trafficking Review* 129.

⁵⁵ Robinson (n 54).

⁵⁶ The Labour Party Manifesto 2015 14, 50, 66 < http://action.labour.org.uk/page/-/A4%20BIG%20_PRINT_ENG_LABOUR%20MANIFESTO_TEXT%20LAYOUT.pdf> accessed 22 September 2017; the Conservative Party Manifesto 2015, 29-32 <<https://www.bond.org.uk/data/files/Blog/ConservativeManifesto2015.pdf>> accessed> 22 September 2017. Robinson (n 55).

advocating labour market deregulation and the almost exclusive use of soft law techniques, such as naming and shaming, to enforce the minimum wage to endorsing a traditional command and control approach that increases penalties on employers as a technique of deterrence.⁵⁷ In his 21 May 2015 'high profile' speech on immigration Prime Minister Cameron confirmed his Party's conversion to the benefits of labour regulation. He also cemented the link between 'gangmasters' who lure migrant workers to the UK and then exploit them with businesses bringing in 'cheap labour that undercuts the wages of local people'.⁵⁸ Thus, he promised to create 'a new enforcement agency that cracks down on the worst cases of exploitation'.⁵⁹

⁵⁷ Doug Pyper, *The National Minimum Wage: rates and enforcement* (House of Commons Library CBP06898, 21 April 2017) 14.

⁵⁸ David Cameron, *PM Speech on Immigration*, 21 May 2015
<<https://www.gov.uk/government/speeches/pm-speech-on-immigration>>
accessed 22 September 2017.

⁵⁹ *Ibid.* Effective enforcement of the minimum wage was especially critical in light of the (then) Chancellor George Osborne's announcement that the government would be introducing a national living wage that would dramatically increase the national minimum wage for workers twenty-five years of age and older. According to him, taxpayers should not have to 'subsidise through the tax credit system the businesses who pay the lowest wages'. George Osborne, *Chancellor George Osborne's Summer Budget 2015 speech*, 8 July 2016.

B Illegal Working and Labour Market Enforcement

The Immigration Act 2016 was the Cameron Conservative government's attempt to resolve the tension between its on-going commitment to an ideal-type neoliberal social model and the political problem of addressing labour exploitation.⁶⁰ The new crime of 'illegal working' was inextricably linked by the government to both the distinct problem of enforcing labour standards in a neoliberal labour market and the perceived crisis of sovereignty caused by illegal migration. Coupled with the Modern Slavery Act 2015, the background papers in support of the Immigration Act 2016, the consultation documents associated with it and the lengthy parliamentary discussions of it created and circulated a triad of paired tropes –the slave/slave driver, the illegal worker/unscrupulous employer and the British worker/compliant employer – which were repeatedly invoked by the government and its officials to account for both the causes and harms of labour exploitation.⁶¹ As will be explained

<<https://www.gov.uk/government/speeches/chancellor-george-osbornes-summer-budget-2015-speech>>accessed> 22 September 2017.

⁶⁰ Damian Grimshaw and Jill Rubery, 'Reinforcing Neoliberalism; Crisis and Austerity' in Steffen Lehndorff (ed) *Divisive integration. The triumph of failed ideas in Europe — revisited* (ETUI 2014).

⁶¹ See, for example, Gower et al (n 6); Department for Business Innovation & Skills and Home Office, *Tackling Exploitation in the Labour Market – Consultation*

in the following sections, the practical and ongoing problem of drawing the lines between illegal working, labour exploitation and modern slavery requires state enforcement officials to grapple with the productive power of liminal legality .

i) Forging the link: The Immigration Bills 2015 and 2016

Throughout the lengthy legislative process that ultimately resulted in the Immigration Act 2016, the government emphasized that ‘illegal working encourages illegal immigration, undercuts legitimate businesses and is often associated with exploitation’.⁶² When the Bill was introduced in Parliament on 17 September 2015, its avowed purpose was ‘to tackle illegal immigration by making it harder to live and work illegally in the United Kingdom’.⁶³ Combatting labour exploitation was linked to migrant workers, who were depicted as ‘particularly vulnerable to labour market exploitation’, which the government believed to be ‘an increasingly organised criminal activity’.⁶⁴ Although it provided no evidence to support these claims, this

Document (BIS/15/549, 2015); Immigration Act 2016 Factsheet – Illegal Working (n 1).

⁶² Immigration Act 2016 Factsheet – Illegal Working (n 1); Theresa May, Hansard 28 May 2015, column 211.

⁶³ Immigration Bill (74), Explanatory notes, 4
<<https://publications.parliament.uk/pa/bills/cbill/2015-2016/0074/en/74en01.htm>> accessed 22 September 2017.

⁶⁴ Ibid.

context shaped the government's commitment to improving labour market enforcement.⁶⁵

To coincide with the Bill's second reading on 13 October 2015, the two sponsors, the Department for Business Innovation & Skills (BIS) and the Home Office, released a consultation document called *Tackling Exploitation in the Labour Market* outlining the government's options for improving labour market enforcement.⁶⁶ In their respective forewords, the two secretaries of state set out their different concerns. Noting that the majority of employers in the UK comply with employment legislation, the (then) Secretary of State for BIS Sajid Javid identified the fragmentation between the three enforcement bodies as presenting an opportunity for 'rogue employers and employment agencies to get away with the deliberate exploitation of workers'.⁶⁷ Bringing such employers to task would, according to him, 'reduce illegal wage undercutting and unlock wealth creation by legitimate businesses, by releasing them from unfair competition by exploitive

⁶⁵ BEIS and Home Office, Impact Assessment (n 7) 4 refers to the National Crime Agency, National Strategic Assessment of Serious and Organised Crime 2015, June 2015, <<http://www.nationalcrimeagency.gov.uk/publications/560-national-strategic-assessment-of-serious-and-organised-crime-2015/file>>. However, the discussion of modern slavery does not provide any evidence that organized crime is the key cause of labour exploitation.

⁶⁶ *Tackling Exploitation in the Labour Market – Consultation Document* (n 60).

⁶⁷ *Ibid* 4.

rivals'.⁶⁸ An added benefit of targeted enforcement is that it 'offers an opportunity to reduce the burden that enforcing regulations can place on compliant business'.⁶⁹ By contrast, the (then) Home Secretary Theresa May placed the Immigration Bill 2015 within the Modern Slavery Act's focus on prosecuting organized criminals. She did, however, acknowledge that

exploitation can take various forms, and can occur in different contexts, and we must now expand our approach to deal with all forms of forced labour and abuses of employment law. Not only so that we can protect the vulnerable, but also to protect local workers and responsible businesses affected by those prepared to exploit cheap labour.⁷⁰

Thus, the Immigration Bill 2015 aligned the government's commitment to light touch regulation of the labour market with its new-found concern to stamp out labour market exploitation, which it saw primarily as a result of organized criminals exploiting migrant workers.

From the outset the government retreated from the Prime Minister's declaration that the public authorities responsible for enforcing labour rights would be consolidated into one agency. The consultation paper proposed: the creation of a new statutory Director of Labour Market Enforcement (DLME) who would be responsible for developing a labour market strategy and coordinating the enforcement activities of the minimum wage unit of HMRC, the GLA and EAS;

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid 5.

strengthening information sharing between the three labour market enforcement agencies; an expanded role for the Gangmasters Licensing Authority (GLA); and a new offence of aggravated breach of labour market legislation.⁷¹

In January 2016 the government released its response to its consultation, which gave short shrift to the broader criticisms of how labour standards are enforced in the UK and focused on its four proposals.⁷² Instead of going forward with a new offence of aggravated labour market breach, the government opted to create a new type of improvement notice to tackle the exploitation of workers. While the office of the DLME received lukewarm support from respondents, intelligence sharing and reforming the GLA polarized respondents.⁷³ A key concern was that information sharing would lead to an intermingling of the enforcement of labour standards and immigration controls. The problem was that this merging could undermine the ability of the Director and the GLA to enforce labour standards since undocumented workers who are at risk of labour exploitation would be unwilling to come forward to report violations of labour standards for fear of being penalized for 'illegal working'.⁷⁴ The GLA's core mission was administering a

⁷¹ The government treated the consultation as fulfilling its obligation to review the GLA within one year of the enactment of Modern Slavery Act 2015, s 55.

⁷² Department for Business Innovation & Skills and Home Office, Tackling Exploitation in the Labour Market: Government Response (BIS/16/11, 2016).

⁷³ Ibid, 10, 13-14.

⁷⁴ Ibid 14. For this reason, the International Labour Organization and the Council of Europe agree that it is critical to erect a firewall between the enforcement of labour

licensing regime for labour providers (gangmasters) in the agriculture, food and shellfish sectors, which required labour providers to demonstrate compliance with a range of labour standards in order to obtain a license. Most respondents highlighted the effectiveness of the GLA's licensing regime, and the majority agreed that the GLA's role should be expanded to other sectors and that the licensing criteria should be updated.⁷⁵ But some were concerned that a grant of police powers combined with a new mandate to enforce the Modern Slavery Act would transform the GLA from an agency that used licensing to enforce labour standards to one that used criminal law to target a narrow range of egregious forms of labour abuse.⁷⁶

standards and immigration controls (see François Crépeau and Bethany Hastie, *The Case for 'Firewall' Protections for Irregular Migrants Safeguarding Fundamental Rights* (2015) 15 *European Journal of Migration and Law* 157), a position that the UK has rejected, in part, on the ground that it would 'send the wrong message by rewarding breaches of immigration legislation'. Damian Green, written ministerial statement was laid in the House of Commons on 24 May 2011, <<https://www.gov.uk/government/speeches/eu-directive-on-sanctions-against-employers-of-illegally-staying-third-country-nationals>> accessed 23 September 2017.

⁷⁵ Ibid 21-22.

⁷⁶ Ibid.

Abolishing the provision making illegal working a crime was non-negotiable for the government, despite the Labour Party's attempt to delete it on the ground that it made unauthorised migrants more, and not less, vulnerable to exploitation.⁷⁷ Speaking at third reading, Theresa May, then Home Secretary, emphasised the importance of 'making illegal working a criminal offence' in order 'to use proceeds of crime powers to seize and confiscate the profits made by those who choose to break our immigration laws'.⁷⁸ However, she went on to make

clear that this measure is not intended to—nor will it—punish the vulnerable, such as those who are trafficked here and forced to work illegally. The safeguards provided in the Modern Slavery Act 2015 will continue to protect people in those circumstances.⁷⁹

What May did not mention were the criticisms that many victims of modern slavery simply were not identified as such and that the protections offered to the few who were identified were inadequate.⁸⁰

(ii) Cracking down on illegal working: The Immigration Act 2016

⁷⁷ HC Hansard, 1 December 2015, col 121.

⁷⁸ HC Hansard, 1 December 2015, cols 269.

⁷⁹ Ibid.

⁸⁰ House of Common, Work and Pensions Committee, Victims of modern slavery, Twelfth Report of Session 2016–17 (HC 803, 30 April 2017).

On 16 May 2016, three weeks before the EU referendum, the Immigration Act received Royal Assent. The Conservative government was able to use its majority to defeat attempts to soften the carceral approach to illegal working. It also watered down its commitment to enforcing labour standards. By inserting the 'labour market enforcement' provisions within the Immigration Act it cemented the connection between illegal working and labour exploitation.

The main thrust of the Immigration Act 2016 is to criminalise illegal working, for which the government devised a two-pronged attack. The first prong targets migrant workers by creating a new offence of illegal working. Under the Immigration Act 1971, it was already an offence for a person with limited leave to enter or remain in the UK to be in breach of any condition relating to his or her employment or occupation. It was also an offence for a person to either enter the UK unlawfully or overstay her or his leave.⁸¹ What the Immigration Act 2016 does is make it an offence, subject to imprisonment or a fine, for person who is subject to immigration controls to work when he or she knows or has reasonable cause to believe that he or she is not entitled to do so by reason of immigration status.⁸² The definition of working for the purpose of defining the crime is much wider than the scope of work that entitles a person to protection under employment protection

⁸¹ Immigration Act 1971, s 24(1) (e).

⁸² The offence carries a maximum term of imprisonment of up to six months or a fine, or both.

legislation.⁸³ In fact, the government intended the definition to be broad enough to include informal arrangements without a contract, an element that has been the *sine qua non* of employment protection legislation.⁸⁴

In light of the complex interaction of the UK's very prescriptive immigration controls and work authorisations, just how punitive the new regime of illegal working will be in practice will depend upon how police and UK border authorities interpret the term 'have reason to believe' regarding a migrant's entitlement to work. In this way officials have some flexibility in defining the boundaries of liminal legality.

The flexibility that state officials have in drawing the boundaries of legality is illustrated by how courts have developed the doctrine of illegality, which is based on the principles that a person should not benefit from his/her own wrong and that integrity of the law should be preserved, in the context of employment law. In *Hounga v Allen*, the Supreme Court narrowed the UK's previously broad approach to the doctrine of illegality in the context of immigration law under which they refused to enforce protective employment legislation if the worker was in violation of

⁸³ See Immigration Act 2016, s 34. ACL Davies, 'The Immigration Act 2016' *Industrial Law Journal* 431, 438.

⁸⁴ Immigration Act 2016, Explanatory Notes, 13
<<http://www.legislation.gov.uk/ukpga/2016/19/notes/contents>> 22 September 2016.

immigration law.⁸⁵ Although split on the appropriate approach to the doctrine of illegality the Court agreed that Ms. Hounga's status as an unauthorised migrant worker should not defeat her claim for racial discrimination. The findings that she was a victim of human trafficking and had not committed a crime were factors that persuaded the Court to reject the employer's defence of illegality. Notably, the Court of Appeal's decision to uphold the Employment Tribunal's rejection of her claims for breaches of employment legislation and her employment contract unfair dismissal, breach of contract and unlawful deductions from wages and holiday pay on the ground that they arose under an illegal contract of employment was not appealed to the Supreme Court.⁸⁶ In a subsequent review and restatement of the applicable principles in the doctrine of illegality in *Patel v Mirza*, a majority of the Supreme Court stated that the deployment of illegality as a defence should be dependent upon trio of necessary considerations, which are: 1) the underlying purpose of the statutory prohibition which has been transgressed, 2) any other countervailing

⁸⁵ *Hounga v Allen* [2014] UKSC 609. See Elaine Dewhurst, 'The Right of Irregular Immigrants to Back Pay' and Alan Bogg and Tonia Novitz, 'Links between Individual Employment Law and Collective Labour law' in Cathryn Costello and Mark Feedland (eds) *Migrants at Work* (OUP 2014).

⁸⁶ *Hounga v Allen* [2012] EWCA Civ 60. For a critical discussion of the issue of illegal contractual performance see Alan Bogg, 'Illegality in Labour Law after *Patel v Mirza*: Retrenchment and Restraint' in Sarah Green and Alan Bogg (eds) *Illegality after Patel v Mirza* (Hart Publishing 2018).

public policies, and 3) proportionality.⁸⁷ Relying on the *Patel* framework for dealing with a defence of illegality, in 2018 the Employment Appeal Tribunal rejected an employer's contention that an employee was not entitled to bring the claims for breaches of employment legislation and her employment contract on the ground that the employment contract was illegal since the employee was in breach of immigration law. It ruled that, if the contract of employment was that which had been entered into before the employee was in the UK, there could be no suggestion that it had been illegal at inception and that, even if there had been a new contract, the immigration provisions which the employer had relied on did not prohibit the employee's contract of employment.⁸⁸

It is unclear the extent to which the crime of illegal working established in the Immigration Act 2016 will stop this incremental judicial narrowing of the doctrine of illegality for unauthorised migrant workers who seek to avail themselves of employment protection legislation.⁸⁹ Under the *Patel* approach a court must balance the legislative purpose of making illegal working a crime against the countervailing purpose of protecting migrant workers who are vulnerable to exploitation in a way that is proportionate. Thus, the zone of liminal legality remains indeterminate, and its borders will be drawn both by judges when they apply the

⁸⁷ *Patel v Mirza* [2016] UKSC 42, para [101].

⁸⁸ *Okedina v Chikale* [2018] UKEAT 0152_17_1501.

⁸⁹ *Patel v Mirza* [n 88].

illegality doctrine in specific cases and prosecutors when they decide whether or not to seek to confiscate illegal workers wages as a proceeds of crime.⁹⁰

Another effect of the criminal offence of illegal working contained in the Immigration Act 2016 may be to shift the site of liminal legality to a determination of whether or not the illegal workers is a slave under the Modern Slavery Act. In the UK, migrant workers without lawful status may seek redress if they are designated victims of slavery or trafficking under the Modern Slavery Act 2015, where there is recourse to a reparation order under s 8. Although the Home Secretary claimed that the Modern Slavery Act would protect vulnerable workers, most commentators, including the National Audit Office, disagree.⁹¹ In fact, in the context of dismissing a

⁹⁰ The victims of modern slavery can rely on the statutory defence in s. 45 of the Modern Slavery Act 2015. The UK government's approach runs in the opposite direction to that adopted by the EU in the Sanctions Directive, which requires Members States that are subject to it to provide a mechanism for undocumented workers to obtain unpaid wages. Directive 2009/52/EC of the European parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, [2009] OJ L168/24.

⁹¹ Jason Haynes (2016) 'The Modern Slavery Act (2015): A Legislative Commentary' (2016) 37 *Statute Law Review* 33-56; Amy Weatherburn, 'Using an integrated human rights-based approach to address modern slavery: the UK experience' (2016) *European Human Rights Law Review* 184; National Audit office, *Reducing Modern Slavery*, HC 630 Session, 2017–2019, 15 December 2017.

claim for discrimination brought by two illegal migrant workers on the ground that migrant status did not amount to the protected characteristic of race, the UK Supreme Court observed that 'Parliament may well wish to address its mind to whether the remedy provided' under the Modern Slavery Act 2015 'is too restrictive in its scope.'⁹² Despite the new crime of illegal working, a range of legal officials, including prosecutors and judges, still have the discretion to draw the borders of liminal legality in ways that are more finely attuned to questions of legitimacy and specific governance projects when it comes to sanctioning migrants who work without proper immigration authorisation.

The second prong of the government's attack on illegal working targets employers. Although the Immigration, Asylum and Nationality Act 2006 allows individuals to be prosecuted for 'knowingly' employing an illegal worker, the government believes that some employers are deliberately not checking whether their employees have the right to work in order to escape criminal prosecution and be subject only to civil penalties.⁹³ Thus, the Immigration Act 2016 broadens the crime of employing illegal workers to include 'having reasonable cause to believe' that the individual does not have the right to work in the UK and increases the maximum penalty from two to five years' imprisonment.⁹⁴ However, in contrast to

⁹² *Taiwo* (n 20) [34].

⁹³ Immigration, Asylum and Nationality Act 2006, s 21; see Katie Bales, 'Immigration Raids, Employer Collusion and the Immigration Act 2016' (2017) 46 *Industrial Law Journal* 279, 280-1.

⁹⁴ Immigration Act 2016, s 35.

the offence of illegal working, the employer's offence is confined to 'employing' an illegal worker, and employment is defined in the restrictive sense as 'employment under a contract of service or apprenticeship'.⁹⁵ Although the Immigration Act 2016 does not specifically refer to seizing the profits of an individual guilty of employing an illegal worker, as it does regarding the earnings of illegal workers, it is possible for a prosecutor to see a confiscation order. The Act also creates a new enforcement tool called 'illegal working closure notices', which allows an immigration official who is visiting an employer's premises for the purpose of enforcement to close the premises for up to 48 hours in cases where the employer has previously been given a civil penalty or has been prosecuted for employing illegal workers.⁹⁶ The official is required to apply for an 'illegal working compliance order' during the temporary closure, which may extend the closure for up to 24 months, require the employer to conduct additional right to work checks or be subject to an immigration investigation.⁹⁷ This mechanism is designed to prevent employers with a history of employing illegal migrants from continuing to do so.

The combination of criminal and civil penalties, along with the closure notices, are designed not only to punish employers of illegal workers, but also to

⁹⁵ Immigration Act 2016, s 35 refers to employment and the Act does not change the definition of employment relating to the offence of employing an illegal worker, which is defined as 'employment under a contract of service or apprenticeship' under the Immigration, Asylum and Nationality Act 2005, s 25.

⁹⁶ Immigration Act 2016, s 38.

⁹⁷ Ibid.

encourage them to cooperate with immigration officials.⁹⁸ Although employers are not under a legal obligation to assist immigration officials in pursuing illegal workers, the example of Byron Burgers, which cooperated ‘with a Home Office raid by helping to arrange “arrest by appointment meetings” for staff’ in July 2016, demonstrates that ‘where employers cooperate with immigration enforcement, full responsibility for the “illegal working” is transferred from the employer onto the worker as civil penalties are reduced or removed in exchange for cooperation.’⁹⁹ Liminal legality may work to the advantage of employers who offer to help officials detect illegal migrants.¹⁰⁰

(iii) Improving labour market enforcement: The Immigration Act 2016

A subsidiary goal of the Immigration Act 2016 is to improve labour market enforcement, which it proposes to do in three main ways: it expands the remit of the GLA, now called the Gangmasters and Labour Abuse Authority (GLAA), and

⁹⁸ Given the difficulty in establishing the criminal burden of proof, it is likely that the government will continue to utilise civil penalties more than criminal penalties since the former are a simpler and more cost effective way to enforce the law than the latter. Immigration Act 2016 Explanatory Notes (n 83) 7.

⁹⁹ Bales (n 94) 288.

¹⁰⁰ Evidence that an employer has reported an illegal worker or is actively cooperating with the Home Office will result in a £5000 reduction in the penalty Home Office, *Code of practice on preventing illegal working* (2014) 9.

increases its powers; it adds to the enforcement toolkit by introducing a new type of labour market enforcement (LME) undertaking and order; and establishes the DLME, who is supposed to provide strategic direction for three organisations responsible for regulating the UK labour market. I will begin by focusing on the GLAA because, as I will explain, the shift in orientation the GLA as a result of the 2012 Red Tape Challenge from licensing all labour providers towards a combination of voluntary schemes for compliant businesses combined with tackling serious and organized crime is likely to prefigure the GLAA's future direction.¹⁰¹

The GLA was established on 1 April 2006 with a mandate to safeguard the welfare of workers by licensing and monitoring labour providers horticulture, food processing, shellfish gathering and forestry sectors.¹⁰² The GLA did not establish new employment rights for workers contracted by labour providers nor provide a

¹⁰¹ Department of Environment Food and Rural Affairs, GLA Triennial Review 2014 April 2014, Executive summary; Gangmasters Licensing Authority, Annual Report and Accounts 1 April 2014 to 31 March 2015, 12.

¹⁰² Gangmasters (Licensing) Act 2004, c 11. Despite a good deal of evidence of labour exploitation in the fresh produce sector in the UK from 1997 onwards, it took the death in 2004 of 23 Chinese migrant workers who drowned while harvesting shellfish in the notoriously dangerous tides of Morecambe Bay to prompt the then Labour government to enact legislation to deal with labour abuse associated with labour contracting. Kendra Strauss, 'Unfree Again: Social Reproduction, Flexible Labour Markets and the Resurgence of Gang Labour in the UK' (2013) 45 *Antipode* 180.

labour inspectorate for the sectors to which it applied. Instead, it makes it an offence to operate as a labour provider without a license or to use an unlicensed labour provider, and it provides a mechanism for revoking licenses. The granting of a license is conditioned upon a labour provider's compliance with labour standards. Although it has power to revoke a license, thereby driving a labour provider out of business, or to impose conditions on the issuance of a license, the GLA has no ability to vindicate employees' rights such as retrieving lost wages.

From the perspective of UK labour regulation, what was distinctive about the GLA was the breadth of application to both workers and labour providers in the sectors that it covered as well as the range of labour standards incorporated in the licensing requirements. The term 'gangmaster' is defined broadly to include anyone who supplies or uses a worker for another person, in connection with services provided to another person or for her or his own business, and it includes any person at any point in the supply chain.¹⁰³ Not only is there no need for the labour provider to have a direct relationship with either the worker or the end user, the definition of worker does not require either a contract of employment or any form of contract. This definition is much wider than that contained in all other employment-related legislation, and simply means 'an individual who does work to which this Act applied.'¹⁰⁴ Most significantly, in keeping with its mission to protect

¹⁰³ Davies (n 47) 89-90.

¹⁰⁴ Gangmasters (Licensing) Act 2004, s 23 (1) and Davies (n 47) 90.

vulnerable workers, the GLA also marked a departure from UK employment law by making a worker's immigration status irrelevant.¹⁰⁵

The licensing regime imposes eight standards on labour providers, which include amongst others, a general 'fit and proper' requirement, an obligation to pay prescribed wages and taxes, and standards prohibiting forced labour. Notably, as part of the record-keeping standard, labour providers must conduct right to work checks.¹⁰⁶ Failure to comply with each of the standards attracts a specific score, and in deciding whether or not to grant a license, the GLA scores the applicant and inspects it. Licenses are valid for one year, and must be renewed, but renewals do not automatically attract an inspection. Thus, monitoring is highly dependent upon the GLA's ability to gather information, and its main sanction is its power to revoke licenses.

Despite some criticism of the GLA, especially of its limited field of application and its inability directly to redress violations of workers' rights, there was a general consensus in government, among trade unions and in the industries falling under its remit that it had been successful in ensuring that labour providers operated within

¹⁰⁵ Gangmasters (Licensing) Act 2004, s 26(2): 'A person is not prevented from being a worker for the purposes of this act by reason of the fact that he has not right to be, or to work, in the United Kingdom.'

¹⁰⁶ Gangmasters Licensing Authority, Licensing Standards, May 2012, Standard 7.2 A worker's visa restrictions must be complied with. In the event that it is discovered that a worker is not legally entitled to work in the UK, this standard will not be failed if the license holder has established and retained a statutory defence.

the terms of the law.¹⁰⁷ However, the 2010 Coalition government, which established the Red Tape Challenge process, broke this consensus. The GLA was directed to focus ‘on gross abuse of workers by unscrupulous gangmasters’ and to reduce burdens on those who are compliant, GLA staff were cut, and the licensing model, although it survived intact, was downplayed.¹⁰⁸ As a result of the GLA’s top objective is to ‘target, dismantle and disrupt serious and organised crime/early identification of human trafficking’.¹⁰⁹ The shift from an employment-focused approach to regulating sectors in which workers are notoriously vulnerable to abuse to a migration- and criminal-regulatory regime was confirmed when responsibility for the GLA was transferred from the Department for Environment, Food and Rural Affairs to the Home Office in April 2014.¹¹⁰ Moreover, in 2015 the composition of

¹⁰⁷ Strauss (n 103) 191.

¹⁰⁸ Davies (n 47) 96. The licensing requirement for the forestry sector was abolished and in 2013 the GLA moved from mandatory to discretionary inspections of labour providers as part of the licensing process. Gangmasters Licensing Authority, GLA Brief Issue 28 2013 Discretionary approach to application inspections, <<http://www.gla.gov.uk/media/2352/gla-brief-issue-28-final.pdf>> accessed 23 September 2017.

¹⁰⁹ Davies (n 47) 96; Alistair Geddes et al., *Forced Labour in the UK* (Joseph Rowntree Foundation 2013) 49-52; 101. Data also indicates a shift from license revocation to criminal prosecutions, Barnard, Ludlow and Fraser Butlin (n 10) 28.

¹¹⁰ In making the announcement, then Prime Minister David Cameron stated that the move would ‘strengthen its enforcement and intelligence capabilities’ by putting

the GLA's board was reconstituted via secondary legislation so that it no longer included representatives of trade unions and employers, but only nine members, all appointed by the Secretary of State.¹¹¹

As the Modern Slavery Bill progressed through Parliament, calls for the Coalition government to expand the licensing regime were addressed by a provision in the Modern Slavery Act 2015 (s 55) requiring the government to publish a consultation paper on the GLA by May 2016. The Cameron Conservative government met this requirement by folding the GLA consultation into its *Tackling Exploitation* consultation, thereby strengthening the GLA's immigration and criminal law orientation. The new name for the GLA, the Gangmasters and Labour Abuse Authority, confirmed both its new orientation and signaled its expanded scope, which extends to the entire UK labour market. The GLAA now has the authority to enforce the provisions of the Modern Slavery Act 2015 that make slavery, servitude and forced labour a crime as well as the criminal prohibition against human trafficking for labour exploitation. Bolstering this emphasis on enforcing the criminal law, Labour Abuse Prevention Officers with investigatory powers under the

it directly alongside the considerable resources of the National Crime Agency. David Cameron, 'Tougher enforcement action and stronger penalties for unscrupulous employers' 9 April 2014 <<https://www.gov.uk/government/news/tougher-enforcement-action-and-stronger-penalties-for-unscrupulous-employers>> accessed 23 September 2017.

¹¹¹ At the same time, the number of board members was reduced from 19 to 9. The Gangmasters (Licensing Authority) Regulations 2015, SI 2015/805.

Police and Criminal Evidence Act have been created and the GLAA can ask assistance from a chief constable, the Director of the National Crime Agency or an immigration officer. Moreover, in a demonstrable shift from its mandate of protecting vulnerable workers regardless of their immigration status, illegal workers are no longer protected and a chief constable and immigration officer can ask, but not require, the GLAA to assist them.¹¹²

It is clear that the GLAA's new emphasis is on tackling modern slavery and that it has a harsher approach to illegal working. Moreover, the extent to which the GLAA will be involved in enforcing labour standards across the UK labour market is not yet clear. What the GLAA's expanded remit entails and any additional functions for which the GLAA is responsible depends upon the issuance of secondary legislation under either the Gangmasters Licensing Act 2004 or the Immigration Act 2016.¹¹³ The GLAA now has the power to enforce the offence-related provisions of the Employment Agencies Act 1973 and the Minimum Wage Act 1998, and in doing so it can utilise the new scheme of Labour Market Enforcement Undertakings (LMEUs) and Labour Market Enforcement Orders (LMEOs) that is intended for more serious or persistent offenders, although there is a question as to whether the cumbersome and redundant scheme is fit for purpose.¹¹⁴ Moreover, the future of the licensing regime, which was the distinctive feature of the GLA's approach to labour

¹¹² Immigration Act 2016, s 13.

¹¹³ Davies (n 84) 434

¹¹⁴ David Metcalf, Director of Labour Market Enforcement, *United Kingdom Labour Market Enforcement Strategy 2018/19*, HM Government, May 2018, 64.

market regulation, is uncertain. Margaret Beels, the Chair of the GLAA, is clear ‘that licensing helps to prevent labour exploitation and to create a level playing field for business’, but the Immigration Act 2016 allows the Secretary of State, on the advice of the DLME ‘to “Dial up” or “Dial Down” the scope of licensing.’¹¹⁵ The government is ambivalent about the value of licensing, regarding it as both ‘a valuable compliance tool [that] aids in enforcement operations against serious exploitation’ and as creating ‘burdens on compliant businesses’.¹¹⁶ Here the DLME plays a critical role in assessing which sectors should be covered by the licensing regime.¹¹⁷ In the final instance, the scope of the licensing regime is a political judgment, requiring the Secretary of State to lay secondary legislation before Parliament, which would necessitate a further impact assessment.

The government has also delegated devising the enforcement strategy to the DLME, who now has oversight over three of the four enforcement agencies. The enforcement strategy is controversial. Not only must the DLME decide how to balance resources between the three agencies,¹¹⁸ the strategy must also determine

¹¹⁵ Margaret Beels, Preventing Labour Exploitation (Warwick Papers in Industrial Relations 107, May 2017) 9.

¹¹⁶ Government Response (n 73) 29.

¹¹⁷ Ibid.

¹¹⁸ Significantly, he was Chair of the MAC when it issued its 2014 report on low-skilled migrants and their impact on the UK economy. Noting that HMRC enforcement resources have been doubled over the past two years and that the GLAA was allocated substantial increases to reflect its expanded mandate and new

how to target enforcement across a spectrum of noncompliance ranging from occasional and unintentional to severe exploitation such as that caught within the modern slavery offence. Moreover, the DLME must persuade two political masters, the Home Office, which is concerned with enforcing immigration controls and the criminal law, and Business, Energy and Industrial Strategy (which replaced BIS in 2016), which supports light touch regulation and a flexible labour market, to endorse the strategy before it is tabled in Parliament.

In January 2017, the government announced that it had appointed Sir David Metcalf, a former academic whose background straddles labour market and immigration issues, as the first DLME.¹¹⁹ The DLME's Introductory Report, released in July 2017, echoed the government's concern to create a 'level playing field by targeting businesses which illegally undercut their legitimate competitors to gain an unfair advantage' and the mantra that 'our flexible labour market has served us well'.¹²⁰ However, it questioned the basis for the Home Office and GLAA's belief that the nature of labour market non-compliance had shifted over the past ten years

power, the DLME made it clear that there would be a heavy burden to persuade him to change the existing allocation of resources. David Metcalf, *United Kingdom Labour Market Enforcement Strategy - Introductory Report* 1 April 2016 - 31 March 2017 (ID 14071703 07/17, July 2017) 65.

¹¹⁹ Metcalfe was an industrial relations academic, has a long history of advising governments from a range of political parties both as a founding member of the Low Pay Commission and former Chair of the Migration Committee from 2007 to 2016.

¹²⁰ Metcalfe (n 120) 38.

‘from abuses of employment regulation towards increasingly organized criminal activity.’¹²¹ In his first Labour Market Enforcement Strategy 2018/19, the Director emphasised that the purpose of the strategy was first to protect vulnerable workers and second to ensure that the majority of good non-complaint firms are not undercut.¹²² Moreover, he made it very clear that his ‘focus is on targeting and penalizing unscrupulous **employers**, and protecting and providing effective redress for workers whose rights have been abused. **Immigration enforcement therefore does not fall directly within this remit.**’¹²³ He also recommended increasing the risk of inspection and the size and types of penalties imposed on non-compliant employers, as well as some steps towards improving accountability and leverage throughout the supply chain and pilot schemes to extend the GLAA’s licensing requirements to hand care washes and nail bars.¹²⁴

Two themes characterise the Conservative government’s approach to labour market enforcement. The first is that it is primarily the responsibility of workers, and not the state, to enforce labour rights, which is the basis for the two-tier system of labour enforcement. The second is its emphasis on fairness to employers instead of on enforcing labour rights. By depicting fairness almost exclusively in terms of compliant employers and maintaining a level playing field, it appears that the government is only prepared to make a business, and not human or labour rights,

¹²¹ Ibid 62.

¹²² Metcalf (n 120) 12

¹²³ Ibid 28, bold in original.

¹²⁴ Ibid 4-6.

case for enforcing labour standards. The beauty of a business case for enforcement is that it neatly avoids any reference to the level at which the field is set for workers; a field that is level for employers and business may still be one that is very low for workers.

The extent to which the DLME's strategy can shift the dominant universe of political discourse in which illegal workers and unscrupulous employers are the key problems for the UK labour market depends upon how the volatile political situation unfolds. It is clear that the DLME would prefer to carve out a protective space of liminal legality for migrant workers. Although the resignation of David Cameron as Prime Minister after the EU referendum and the subsequent elevation of Theresa May to that position initially suggested that combatting illegal working would continue to be one of the Conservative government's primary ways of deflecting attention away from more robust and effective regulation of labour standards, it is possible that the minority Conservative government might need to adopt a more protective approach to labour market regulation.

So far the evidence of the May government's commitment to more regulated labour market is mixed. It appointed an 'independent' review of modern working practices, chaired by Matthew Taylor, to address the almost daily reports of self-employed and 'gig' workers who are being paid at rates below the national minimum wage and who fall outside the scope of any employment protection.¹²⁵

¹²⁵ Although called independent, BEIS staff provided all of the research and logistics for the review panel, and one of its four members was Paul Broadbent, the Chief

Released in July 2017, the Taylor Review extolled the UK's flexible approach to labour market regulation – what it termed the 'British way' – as resulting in high employment and providing individuals with choice over how best to arrange their work. Instead of endorsing new rights or national regulation, it advocated 'responsible governance, good management and strong employment relations within the organization' as the best way to achieve better work.¹²⁶ Although it endorsed the UK's two-tier enforcement framework, it recommended that HMRC's and EAS's remit be extended.¹²⁷ However, it did not recommend that the Employment Tribunal fees be abolished or reduced, only proposing that fees be waived for preliminary determinations of employment status and that robust penalties be put in place to deal with employers who choose to ignore the courts' awards. Later that month, the UK Supreme Court ruled that the employment tribunal fees regime introduced in 2013 was unlawful on the basis that it effectively prevented access to justice.¹²⁸

More pressure was placed upon the government to step up enforcement and to ensure employers comply with labour standards when the House of Commons'

Executive of the Gangmasters Licensing Authority (GLA). The Review was called the Taylor Review, after the Chair, Matthew Taylor. See Taylor (n 10).

¹²⁶ Ibid 111.

¹²⁷ Ibid 64.

¹²⁸ *UNISON, R v Lord Chancellor* [2017] UKSC 51 The Court quashed it with immediate effect, although it left open the possibility that a revised (and reduced) fee schedule might pass muster.

Work and Pensions and Business, Energy and Industrial Strategy Committees issued a joint report entitled 'A framework for modern employment' in late 2017.¹²⁹

Covering much the same ground as the Taylor report, the Joint Committee Report also urged the government to provide the DLME with 'adequate resources to take a more proactive approach to identifying and deterring abuses'.¹³⁰ In its response to the Taylor and Joint Committee's reports, the government re-iterated its commitment to the two-tier enforcement approach, in which 'those who are most open to exploitation and abuse see their rights enforced by the state whereas as others are able to bring their cases to employment tribunals'.¹³¹ It also noted that the Supreme Court did not find that charging fees for workers to access the tribunal system was wrong in principle, and the government left open the possibility that it

¹²⁹ House of Commons Work and Pensions and Business, Energy and Industrial Strategy Committees (2017) A Framework for Modern Employment. Second Report of the Work and Pensions Committee and First Report of the Business, Energy and Industrial Strategy Committee of Session 2017–19. HC352
<https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/352/352.pdf>> accessed 3 June 2018.

¹³⁰ Ibid 27.

¹³¹ BEIS, Good Work: A response to the Taylor review of modern working practices, February 2018, <<https://www.gov.uk/government/publications/government-response-to-the-taylor-review-of-modern-working-practices>> 17, accessed 3 June 2018.

might reintroduce fees in the future.¹³² However, it agreed that the mandate of some of the enforcement agencies should be expanded slightly, that the process by which employees enforce tribunal awards be simplified and that employers who failed to pay awards should be subject to additional sanctions.¹³³ It also set up a consultation process to consider the ways of implementing those proposals of the Taylor committee it accepted.

The Conservative government has been forced to articulate a ‘fairer flexibility’, which although prioritizing individual choice about how to structure work arrangements, tries to restrict the employers’ ability to characterise workers as self-employed and thus deny them statutory benefits.¹³⁴ It has also delegated the task of developing an enforcement strategy to the Director of Labour Market Enforcement. However, so far, the Conservative government remains committed to a light touch and flexible labour market, and it simply proposes to tinker at the edges in cases where flexibility invites exploitation. Increasingly the GLAA’s resources are directed at tackling egregious labour exploitation, which the government regards as caused by illegal workers and unscrupulous employers associated with criminal gangs.¹³⁵

¹³² Ibid 50.

¹³³ Ibid.

¹³⁴ A Haldane, Labour’s Share. Speech to Trade Union Congress, 12 November 2015. Available at: <https://www.bis.org/review/r151203a.pdf>, cited in Metcalf (n 120) 10.

¹³⁵ Metcalf (n 120) 21, 22 and 24.

4. Conclusion

The focus of this article has not been on the plight of the illegal migrant worker nor on the UK state and government's assertion of sovereignty over its territorial border. Instead, I have concentrated on how the figure of the migrant has been co-opted in, and harnessed to, an internal governance project, which is both to lower the social wage of British subjects and to justify the state's unwillingness to exercise sovereignty over its labour market – that is, to tame the 'free' market with democratic and political norms of fairness – except in the cause of driving out 'foreign' exploitation. After the UK leaves the UK, it is likely that European Union and European Economic Area citizens entering the UK post-Brexit will be subject to immigration controls that are similar to the very restrictive immigration controls directed at third-country nations, which will create an ever greater pool of potentially 'illegal' workers.¹³⁶ Nail claims that 'the migrant is political figure of our time' and my concern has been to explore the political conditions that give rise to the migrant's specific instantiation as the illegal worker in the UK.¹³⁷

In order to understand the political work that making illegal working a crime performs in the Conservative government's labour market governance strategy, it is

¹³⁶ The draft Home Office post-Brexit immigration policy document in full (*Guardian* 5 September 2017)< <https://www.theguardian.com/uk-news/2017/sep/05/the-draft-home-office-post-brexit-immigration-policy-document-in-full>>27 September 2017

¹³⁷ Nail (n 28) 235.

important to place it within the overlapping contexts of the UK's febrile anti-migrant discourse and its deregulated labour market. By treating the problem of labour exploitation as inextricably linked to that of illegal working, the Immigration Act 2016 is part of an attempt by the government to persuade British workers that the Conservative Party is willing to assist the growing population toiling at the sharp end of the UK's neoliberal labour market. At the same time as it moralizes and criminalizes labour market exploitation through the criminal provisions of the Modern Slavery Act 2015 and Immigration Act 2016, it simultaneously obfuscates the structural causes of labour abuse and legitimates 'light touch' labour market regulation. Moreover, by appointing a Director of Labour Market Enforcement with the responsibility for developing a strategy for enforcing labour regulation, the Conservative government has adopted a flexible approach to policing illegal working that delegates defining the precise contours of liminal legality to a wide range of public authorities from police officers and border officials to labour market enforcement officers. In this way, state officials can respond to and shape popular perceptions of the harm of 'illegal working', as well as reinforce or disrupt media depictions of deserving workers, poor slaves and criminal exploiters. Thus, the crime of illegal working creates a zone of liminal legality in which the state's coercive authority over migrants can be both calibrated and contested.