

Outsourcing the Border Within

Private Citizens as Border Guards, State Sovereignty, and Civil Peace

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I Introduction

The state's sovereign power to criminalise, police, and punish within its jurisdiction extends to the limits of its territory. The policing of borders, no less than policing itself, is the state's primary preserve. Even if some public services are delegable without detriment to state authority,¹ some core functions are so central as to be inalienable.² Policing is one such function, even to the limits of the state's sovereign territory, where it is pursued through ever tougher immigration laws and border controls.³ Despite this forceful assertion of state sovereignty, in the UK as elsewhere, much border control has long been privatised. Today, security companies play a major role in border policing, immigration detention, escort services, and deportation.⁴ The contracting-out of border policing attracts much academic interest,⁵ and raises questions about the state exercise of sovereign power at the very margins of its jurisdiction.⁶

More complex questions arise in respect of newer modes of outsourcing. In the 2000s, the UK government began to co-opt civil society organisations and private individuals as partners in immigration control.⁷ This form of outsourcing relies not on contract, but on the imposition of positive obligations on civil society organisations

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¹ Daniel Philpott, 'Sovereignty' in *Stanford Encyclopedia of Philosophy* (2003) <<https://plato.stanford.edu/entries/sovereignty/>> accessed 21 December 2021.

² Malcolm Thorburn, 'Reinventing the Nightwatchman State' (2010) 60 *University of Toronto Law Journal* 425.

³ John C Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (CUP 2018) ch 1.

⁴ Ruben Andersson, 'Profits and Predation in the Bioeconomy of Border Controls' (2018) 30(3) *Public Culture* 413; Federica Infantino, *Outsourcing Border Control: Politics and Practice of Contracted Visa Policy in Morocco* (Palgrave Macmillan 2016).

⁵ Ashwini Vasanthakumar, 'Privatising Border Control' (2018) 38(3) *Oxford Journal of Legal Studies* 411; Lacin Idil Oztig, 'Rethinking Sovereignty: The Implications of the Role of Private Security Companies in the Prevention and the Regulation of Unauthorized Flows' (2020) 33(3) *Cambridge Review of International Affairs* 330; Daniel L Stageman, 'The Punishment Marketplace: Competing for Capitalized Power in Locally Controlled Immigration Enforcement' (2019) 23(3) *Theoretical Criminology* 394.

⁶ Alan James, 'The Practice of Sovereign Statehood in Contemporary International Society' (1999) 47(3) *Political Studies* 457.

⁷ Home Office, *Enforcing the Deal: Our Plans for Enforcing the Immigration Laws in the United Kingdom's Communities* (Home Office 2008) <<http://data.parliament.uk/DepositedPapers/Files/DEP2008-1595/DEP2008-1595.pdf>> accessed 16 November 2021.

and private citizens to monitor immigration status and report irregularities.⁸ Private citizens, including employers, landlords, health and charity workers, teachers, and professors, are now legally required to collaborate in checking immigration status to ascertain migrants' right to work, rent, and to access health, welfare, and education.⁹ These controls operate informally away from the border and are dispersed throughout society,¹⁰ prompting the insight that today, 'borders are everywhere'.¹¹

This chapter explores the role of private citizens in 'outsourcing the border within' to explore its implications for state–citizen relations, state sovereignty, and civil order. It first examines the interior network of controls created by the UK government's 'Hostile Environment' policy, in particular the co-option of private citizens to identify and report on immigration irregularities. It explores the political drivers of these recent developments, and examines their form and significance to ask what is, and what should be, the role of the state vis-à-vis non-citizens,¹² and whether imposing duties on private citizens to police immigration status can be defended. It next considers whether citizens obligated to enforce immigration checks act as agents of the state or as private actors and, if so, on whose authority they police. The chapter then traces the official shift to the so-called 'Compliant Environment', to consider the role of private citizens in compelling compliance. It suggests that the hurdles to entry thus created are more, not less, difficult for migrants to surmount. Finally, attention turns to the legal and ethical implications of co-opting private citizens in the policing of immigration. The chapter concludes by observing that, although citizens are called upon to fulfil public policing functions, the finding of the UK courts that they do so not as agents of the state, but as private actors for whom the state is not liable, constitutes a serious relinquishing of state sovereignty, injurious to social trust and civil peace.

II The Hostile Environment

Migrants contribute to economic prosperity,¹³ cultural diversity, and a more cosmopolitan society. While the wealthy and highly educated are welcomed, others are

⁸ Home Office, *Enforcing the Deal* (n 7); Gallya Lahav, 'Immigration and the State: The Devolution and Privatization of Immigration Control in the EU' (1998) 24(4) *Journal of Ethnic and Migration Studies* 675.

⁹ Ana Aliverti, 'Enlisting the Public in the Policing of Immigration' (2015) 55(2) *British Journal of Criminology* 215.

¹⁰ Aliverti, 'Enlisting the Public in the Policing of Immigration' (n 9); Vasanthakumar (n 5); Alpa Parmar, 'Arresting (Non)Citizenship: The Policing Migration Nexus of Nationality, Race and Criminalization' (2020) 24(1) *Theoretical Criminology* 28.

¹¹ Chris Rumford, 'Citizens and Borderwork in Europe' (2008) 12(1) *Space and Polity* 1; Arjen Leerkes, James D Bachmeier, and Mark A Leach, 'When the Border is "Everywhere": State-level Variation in Migration Control and Changing Settlement Patterns of the Unauthorized Immigrant Population in the United States' (2013) 47(4) *Immigration Migration Review* 910.

¹² Lucia Zedner, 'Is the Criminal Law only for Citizens? A Problem at the Borders of Punishment' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (OUP 2013) 43

¹³ See, eg OECD, 'Is Migration Good for the Economy?' <<https://www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%20.pdf>> accessed 16 November 2021.

shunned and excluded.¹⁴ In the face of rising migration, recent UK governments have promoted a deliberate 'Hostile Environment' policy designed to deter refugees and asylum seekers. While private sector involvement in immigration dates back to the first immigration centres in the 1970s, only in the 2000s did the UK government begin co-opting civil society organisations and private individuals as partners to reinforce immigration controls,¹⁵ as the Labour government imposed ever more stringent conditions on those seeking UK citizenship.¹⁶ Attitudes towards migration hardened further from 2010 when the Conservative-led coalition government determined to deter illegal immigrants by making life so difficult as to prompt their 'voluntary' departure.¹⁷ The then Home Secretary Theresa May declared, '[t]he aim is to create, here in Britain, a really hostile environment for illegal immigrants'.¹⁸ New laws limited access to housing, employment, health services, and other essentials of everyday life (including bank accounts and driving licences) for those lacking documentation. Enforcement relied increasingly on the systematic co-option of private individuals tasked with verifying the immigration status of employees, tenants, patients, and students. These statutory obligations (of which, more below) were accompanied by informal injunctions addressed to all citizens to report suspected illegal immigrants.¹⁹

The Hostile Environment policy was exemplified by the Home Office initiative 'Operation Vaken' (2013), in which vans bearing the slogan 'Go home or face arrest' toured areas of London with high migrant populations.²⁰ The billboards warned irregular migrants that they faced 'a near and present danger of their being arrested' and invited the general public to send text messages reporting 'illegals' within their community.²¹ Although Operation Vaken was withdrawn following public outcry, it set the tenor of a resolutely inhospitable environment that relied not only on the strict enforcement of border controls by immigration officials but also on the dispersal of controls throughout civil society. The following section analyses more prominent instances of this systematic outsourcing, whose effect, it will suggest, was to make border guards of private citizens.

¹⁴ Mary Bosworth, 'Border Control and the Limits of the Sovereign State' (2008) 17(2) *Social and Legal Studies* 199, 202–04; see also Mary Bosworth and Mhairi Guild, 'Governing through Migration Control' (2008) 48(6) *The British Journal of Criminology* 703.

¹⁵ Home Office, *Enforcing the Deal* (n 7).

¹⁶ See, eg Lucia Zedner, 'Security, the State and the Citizen: The Changing Architecture of Crime Control' (2010) 13(2) *New Criminal Law Review* 379; Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (CUP 2008); Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Routledge 2006).

¹⁷ Home Affairs Committee, *Immigration Policy: Basis for Building Consensus: Second Report of Session 2017–19* (HC 500, 2019) 20 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/500/500.pdf>> accessed 16 November 2021.

¹⁸ Laura Hood, 'Hostile Environment' (*The Conversation*, 26 April 2018) <<https://theconversation.com/hostile-environment-the-uk-governments-draconian-immigration-policy-explained-95460>> accessed 16 December 2021.

¹⁹ HM Government, 'Report an Immigration or Border Crime' <<https://www.gov.uk/report-immigration-crime>> accessed 16 November 2021; Ana Aliverti, *Policing the Borders within* (OUP 2021) 188.

²⁰ Simon Hatterstone, 'Why was the Scheme behind May's "Go Home" Vans called Operation Vaken?' *The Guardian* (London, 26 April 2018) <<https://www.theguardian.com/commentisfree/2018/apr/26/theresa-may-go-home-vans-operation-vaken-ukip>> accessed 16 December 2021.

²¹ Home Office, *Operation Vaken: Evaluation Report* (Home Office 2013) 2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254411/Operation_Vaken_Evaluation_Report.pdf> accessed 16 December 2021.

III Enlisting Citizens as Border Guards

The outsourcing of border control is by no means confined to the UK. In the US, for example, employers have long been required to verify the immigration status of prospective employees.²² In Australia, Weber observes that, '[r]esponsibility for migration policing is ... projected onto the population at large', by requiring employers to conduct visa checks and by inviting 'voluntarily provided "community information"' via a so-called 'Dob-in Service'.²³ Its effect was to produce forms of 'structurally embedded' migration policing, creating a 'ubiquitous border' throughout society.²⁴ In the UK, the Hostile Environment policy introduced a network of micro border controls exercised by private citizens required to check passports and paperwork, and report those with doubtful immigration status to the authorities. Affecting every aspect of daily life, from housing and employment to education and health, these controls rendered it ever more difficult for undocumented migrants to remain in the UK. Those in breach of immigration laws faced the threat of prosecution, detention, and, ultimately, deportation. In practice, it cast the net of control far beyond the ostensible target of undocumented migrants, as wary citizens subjected those with 'foreign' names, accents, or appearance to unwarranted suspicion and needless checks.²⁵ Significantly, the policy also subjected private citizens to scrutiny and sanctions for failure to fulfil the new obligations, burdening, above all, those who were themselves members of migrant communities.²⁶ The effect was radically to extend an existing trend towards creating positive obligations in criminal law,²⁷ which rendered citizens who failed to comply punishable by fines and imprisonment, raising the question whether outsourcing via the imposition of positive obligations constitutes a diminution of state power or its extension.

First, let us explore the range of statutory duties imposed, to consider the various ways in which private citizens have been co-opted. Recent legislation imposes multiple duties on health workers to police migrant access to the National Health Service (NHS). The Immigration Act 2014 (IA 2014), section 38 obliged health workers to enforce an 'immigration health charge', payable by those not 'ordinarily resident' in the UK, for non-emergency hospital treatment. In 2017, further regulations extended charging to community health services, and in 2018, doubled the fee payable. GPs and their staff had to carry out routine document checks on all prospective patients

²² Immigration Reform and Control Act 1986: see Jennifer M Chacón, 'Privatized Immigration Enforcement' (2017) 52 *Harvard Civil Rights–Civil Liberties Law Review* 1, 8–9.

²³ Leanne Weber, Amanda Wilson, and Jenny Wise, 'Cops and Dobbers: A Nodal Cartography of Onshore Migration Policing in New South Wales' (2013) 46(1) *Australian & New Zealand Journal of Criminology* 32, 42.

²⁴ *ibid* 47; see also Leanne Weber, *Policing Non-citizens* (Routledge 2013) ch 6.

²⁵ See Aliverti, *Policing the Borders within* (n 19) 187.

²⁶ Franck Düvell, Myriam Cherti, and Iryna Lapshyna, 'Does Immigration Enforcement Matter? Irregular Immigrants and Control Policies in the UK' (COMPAS University of Oxford 2018) 30 <<https://www.compas.ox.ac.uk/wp-content/uploads/DIEM-Irregular-Immigrants-and-Control-Policies-in-the-UK.pdf>> accessed 16 November 2021.

²⁷ Andrew Ashworth, *Positive Obligations in the Criminal Law* (Hart 2013); Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012) 135.

accessing non-emergency care. One commentator suggests the intention was to effect a “cultural change” where doctors and nurses will become happy immigration enforcers.²⁸ Predictably, many health professionals were far from happy, protesting that they were ‘docs not cops’ and that there should be ‘no borders in the NHS’.²⁹ Health workers resisted the statutory duty to identify and impose charges on non-citizens as a contravention of their professional commitment to treat all on the basis of need, not immigration status.³⁰

Disquiet about the co-option of health workers was intensified by the 2016 agreement which gave UK Immigration Enforcement (IE) the power to issue ‘tracing requests’ on named individuals, obliging NHS staff to supply ordinarily confidential data.³¹ Despite promises that such data sharing would cease,³² the duty to share patient data continues.³³ During the COVID-19 pandemic, this obligation generated concerns that fear of being reported inhibited undocumented migrants from seeking healthcare, rendered them more vulnerable to the virus, hindered its containment, and increased risks to public health.³⁴ Concern that NHS complicity with Immigration Enforcement deterred migrants from seeking medical care provoked one harried health official to protest, ‘[w]e have long warned that NHS charging and data-sharing fundamentally undermines people’s trust in the NHS. As healthcare workers that trust is absolutely vital to our work.’³⁵

Health workers are not the only citizens subject to such obligations. Since the late 1990s, UK employers have been obliged to undertake ‘right to work’ checks, and since 2008, employers found in breach are liable to civil penalties up to £10,000 per illegal worker.³⁶ Whereas the test was previously whether an employer ‘knowingly’ employed someone illegally,³⁷ the Immigration Act 2016 (IA 2016), section 35(3) expanded the duty to require checks where the employer has ‘reasonable cause to believe’ an employee is disqualified by reason of immigration status. The government defended this extension on the grounds ‘that some employers are deliberately not checking whether their employees have the right to work. The Government believes that these employers

²⁸ Corporate Watch, ‘The Hostile Environment: Turning the UK into a Nation of Border Cops’ (*Corporate Watch*, 8 April 2017) <<https://corporatewatch.org/the-hostile-environment-turning-the-uk-into-a-nation-of-border-cops-2/>> accessed 16 December 2021.

²⁹ The ‘Docs not Cops’ campaign was established and championed by healthcare workers: see <<http://www.docsnocops.co.uk/>> accessed 30 May 2022.

³⁰ Düvell, Cherti, and Lapshyna (n 26) 22.

³¹ Sharing of NHS data is not ordinarily lawful, however, s 261(5)(e) of the Health and Social Care Act 2012 permits disclosure in connection with the investigation of a criminal offence.

³² Denis Campbell, ‘NHS will no Longer have to Share Immigrants’ Data with Home Office’ *The Guardian* (London, 9 May 2018) <<https://www.theguardian.com/society/2018/may/09/government-to-stop-forcing-nhs-to-share-patients-data-with-home-office>> accessed 16 December 2021.

³³ May Bulam, ‘Home Office still Using NHS Patient Data for Immigration Enforcement despite Suggesting it would End Practice’ *The Independent* (London, 3 February 2019) <<https://www.independent.co.uk/news/uk/home-news/home-office-nhs-data-sharing-immigration-enforcement-a8761396.html>> accessed 16 December 2021.

³⁴ Liberty, ‘Hostile Environment Risks Public Health during Coronavirus Outbreak’ (*Liberty*, 16 March 2020) <<https://www.libertyhumanrights.org.uk/issue/hostile-environment-risks-public-health-during-coronavirus-outbreak/>> accessed 16 December 2021.

³⁵ Dr Jessica Potter, quoted in *ibid*.

³⁶ Home Office, *Enforcing the Deal* (n 7) 14.

³⁷ Immigration, Asylum and Nationality Act 2006, s 21.

are not knowingly employing illegal workers, because they are choosing not to know.’³⁸ Section 35 was intended to facilitate prosecution of those employing undocumented persons, punishable by fines or up to five years’ imprisonment. Research suggests that overly cautious employers have unfairly restricted access to jobs by limiting vacancies to applicants with British passports, even though this practice is illegal.³⁹ Penalising employers for hiring undocumented workers has driven migrants into shadow labour markets, notwithstanding widespread public concern about worker exploitation, the health and safety risks of illegal working, and an official commitment to eradicating modern slavery.⁴⁰

The outsourcing of border controls also occurs in many other sectors. Teachers are obliged to monitor their pupils, and university staff must monitor overseas students or risk their university’s ‘trusted sponsor status’, essential to securing student visas.⁴¹ Academics must now report regularly on student attendance and share email communications with UK Visas and Immigration.⁴² In the financial sector, section 40 IA 2014 requires bank and building society employees to carry out ‘status checks’ to prevent ‘disqualified persons’ from opening bank accounts and, since 2016, to make quarterly checks on existing account holders.⁴³ Across the public sector, similar duties are imposed upon individuals in their professional roles. For example, DVLA⁴⁴ officials must carry out immigration checks in respect of driving licences (section 46 IA 2014), and registrars have a duty to report suspicious or ‘sham’ marriages and civil partnerships (section 56 IA 2014). These border control duties are extensive, yet private actors may be ill-disposed to carry out such checks or lack professional expertise or training to fulfil them effectively.⁴⁵ All these schemes have been beset by faulty decision-making; official errors result in individuals being falsely identified as ‘disqualified persons’ and wrongly denied access to services.⁴⁶ In consequence, migrants and all those who simply appear to be ‘foreign’ may face unwarranted suspicion and needless checks, which beset every aspect of their daily lives. Given the unfair burdens thus imposed, the following section poses questions concerning the standing of private actors to

³⁸ Immigration Act 2016, Explanatory Notes, ‘Policy Background’ <<https://www.legislation.gov.uk/ukpga/2016/19/notes/division/3/index.htm>> accessed 16 December 2021.

³⁹ Home Affairs Committee (n 17) 21.

⁴⁰ Virginia Mantouvalou, ‘The UK Modern Slavery Act 2015 Three Years on’ (2018) 81(6) *Modern Law Review* 1017.

⁴¹ Alexander Topping, ‘Universities being Used as Proxy Border Police, say Academics’ *The Guardian* (London, 2 March 2014) <<https://www.theguardian.com/education/2014/mar/02/universities-border-pol-ice-academics>> accessed 16 December 2021.

⁴² Formerly the UK Border Agency.

⁴³ Immigration Act 2016, sch 7.

⁴⁴ Driver and Vehicle Licensing Agency.

⁴⁵ Liberty, *A Guide to the Hostile Environment* (Liberty 2019) 9 <<https://www.libertyhumanrights.org.uk/issue/report-a-guide-to-the-hostile-environment/>> accessed 16 December 2021.

⁴⁶ Independent Chief Inspector of Borders and Immigration, *An Inspection of the ‘Hostile Environment’ Measures Relating to Driving Licences and Bank Accounts* (ICBI 2016) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICBI-hostile-environment-driving-licences-and-bank-accounts-january-to-july-2016.pdf> accessed 30 May 2022; Independent Chief Inspector of Borders and Immigration, *An Inspection of the ‘Right to Rent’ Scheme* (ICBI 2018) 40 <<https://www.gov.uk/government/publications/an-inspection-of-the-right-to-rent-scheme>> accessed 30 May 2022.

police and explores how these questions have been resolved by the courts in recent cases in respect of the fundamental need to put a roof over one's head.

IV On whose Authority do Private Citizens Monitor Immigration Status?

Like many of the services already discussed, housing is essential to enable people to live in dignity and full enjoyment of their rights. Nonetheless, 'right to rent' checks, introduced by section 21 IA 2014, jeopardise this basic need by requiring landlords to verify the immigration status of prospective tenants. Failure to fulfil these checks may result in penalties of up to £3,000 per disqualified tenant, and non-payment risks criminal prosecution.⁴⁷ IA 2016, section 39⁴⁸ replaced the existing civil penalty scheme with new criminal offences that penalise landlords for failure to report an existing tenant who is disqualified or whose 'leave to remain' has expired. Landlords failing to fulfil these obligations risk a fine, and default can lead to up to five years' imprisonment.⁴⁹ Rates of prosecution appear low, but are impossible to ascertain as the Home Office does not keep records of offender occupation type.⁵⁰ Yet, the impact on landlords and prospective tenants is significant.

The 'right to rent' duty increases the risk of racial discrimination. In 2017, the Mayor of London, Sadiq Khan, wrote, 'I am concerned that it presents the very real risk that people who have a legal right to be in this country, including British citizens from black and minority ethnic communities, will be discriminated against in the rental market.'⁵¹ A 2018 survey revealed that 44 per cent of landlords were less likely to let to those without British passports and 53 per cent were less likely to rent to someone with time-limited permission to stay in the UK, even if they had the right to rent.⁵² The outcome is a rental market in which it 'takes BME people and migrants up to twice as long to find a home to rent as a white British person.'⁵³ As one NGO objected, '[t]he Government hasn't considered the concerns of landlords who don't want to become border guards.'⁵⁴ While prejudice toward migrants and ethnic minority citizens is hardly new, the threat of sanctions further inclines landlords to discriminate.

⁴⁷ Immigration Act 2014, s 23.

⁴⁸ Amending Immigration Act 2014, s 33A.

⁴⁹ Immigration Act 2016, Explanatory Notes (n 38), s 39.

⁵⁰ Nor does the Home Office collect statistics on removals of those disqualified following right to rent checks: Noora Mykkanen and Tom Simcock, *The Right to Rent Scheme and the Impact on the Private Rented Sector* (Residential Landlords Association 2018) 13.

⁵¹ Mayor of London/London Assembly, 'The "Right to Rent" Scheme and Racial Discrimination within the Private Rental Sector' (22 March 2017) <<https://www.london.gov.uk/questions/2017/1749>> accessed 16 November 2021.

⁵² *ibid* 9; Richard Ekins, 'The High Court's "Right to Rent" Decision is a Travesty' (*The Spectator*, 2 March 2019) <<https://www.spectator.co.uk/article/the-high-court-s-right-to-rent-decision-is-a-travesty>> accessed 16 November 2021.

⁵³ Note, BME refers to Black and Minority Ethnic people. Mayor of London/London Assembly (n 51) 19; The Joint Council for the Welfare of Immigrants, 'Right to Rent' (JCWI 2020) <<https://www.jcwi.org.uk/right-to-rent>> accessed 16 November 2021.

⁵⁴ The Joint Council for the Welfare of Immigrants (n 53).

Where landlords seek to avoid sanction by discriminating against those whom they believe to be foreign nationals, these tenants fall prey to unregulated, unsafe, and otherwise substandard housing.⁵⁵ In 2019, the Joint Council for the Welfare of Immigrants (JCWI) brought a legal challenge that led to a High Court ruling that the right to rent scheme was unlawful on the grounds it had a 'disproportionately discriminatory effect', even though it had 'little or no effect' on the control of immigration.⁵⁶ The ruling was controversial because it exacerbated existing constitutional tensions around the role of the judiciary, particularly in the realm of human rights. In the press, one critic deplored the judgment as an 'unavoidably political one of whether the right to rent scheme was justified', which was 'not a fit question for a court to decide' and regretted the tendency of 'courts to stray into the political realm'.⁵⁷ This reaction is symptomatic of a growing legal dispute about state sovereignty and judicial power: some criticise 'interventionism' by judges in the parliamentary prerogative to determine policy,⁵⁸ while others insist that judicial review is essential to ensure accountability and uphold the rule of law.⁵⁹

In 2020, the government challenged the right to rent decision, and the Court of Appeal upheld the Home Secretary's appeal.⁶⁰ The Court did not deny that, as a result of the scheme, 'those who had a right to rent, but did not have British passports ... were the subject of discrimination on the basis of their actual or perceived nationality'.⁶¹ However, it found such discrimination to be 'proportionate to the legitimate aim' of identifying unlawful migrants and therefore held the scheme was justified.⁶² Significantly, the Court held that 'any discrimination is exclusively that of landlords as private citizens for which the state bears no responsibility'.⁶³ It elaborated that, '[a]lthough the Scheme requires them to perform checks ... that does not make landlords agents of the state for these purposes: they engage in discrimination in implementing a statutory scheme as private citizens'.⁶⁴ The Court's finding that landlords carrying out border checks do so not as agents of the state and therefore the government is not responsible for their decisions, raises the obvious question: in whose name do they act? If landlords are not acting as agents of the state, it is unclear in what capacity and with what standing they carry out immigration checks. To argue, as the Court did, that if 'landlords are choosing to discriminate in the way suggested then

⁵⁵ David Bolt, *An Inspection of the 'Right to Rent' Scheme* (HMSO 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695273/An_inspection_of_the_Right_to_Rent_scheme.pdf> accessed 16 November 2021.

⁵⁶ *R (on the application of Joint Council for the Welfare of Immigrants) v SSHD* [2019] EWHC 452 (Admin) [123].

⁵⁷ Ekins, 'The High Court's "Right to Rent" Decision is a Travesty' (n 52).

⁵⁸ Policy Exchange, 'Judicial Power Project' <<https://judicialpowerproject.org.uk/>> accessed 16 November 2021.

⁵⁹ Owen Bowcott, 'UK Needs Judges to Limit Government Power, Says Lord Kerr' *The Guardian* (London, 19 October 2020) <<https://www.theguardian.com/law/2020/oct/19/uk-needs-judges-to-limit-government-power-says-lord-kerr>> accessed 16 November 2021.

⁶⁰ *SSHD v Joint Council for the Welfare of Immigrants* [2020] EWCA Civ 542.

⁶¹ *ibid* [66].

⁶² *ibid* [151]; Richard Ekins, 'The Court of Appeal's Powerful "Right to Rent" Judgment' (*The Judicial Power Project*, 4 May 2020) <<https://judicialpowerproject.org.uk/the-court-of-appeals-powerful-right-to-rent-judgment/>> accessed 16 November 2021.

⁶³ *SSHD v Joint Council* (n 60) [80].

⁶⁴ *ibid* [148]. The JCWI immediately announced their intention to take their appeal to the Supreme Court.

they are not acting within their postulated “authority” at all⁶⁵ leaves unanswered the question of on whose authority landlords impose right to rent checks. If the authority of landlords to check immigration status is uncertain, surely so too is their standing to demand that tenants furnish their passports. This uncertainty leaves the legitimacy of the entire scheme in question.

The discriminatory impact of right to rent checks has rendered migrant access to housing more difficult, leaving many in precarious shelter or homeless. Yet, the imperatives of immigration control have also made border guards of individuals working with rough sleepers or volunteering for homeless charities. Outreach workers for some of the largest UK homeless charities, including Thames Reach and St Mungo's, have been implicated in immigration control, sharing information about rough sleepers, and even carrying out joint street patrols with Immigration Enforcement (IE) teams.⁶⁶ Here too the courts have intervened.

In 2017, following an action for judicial review, the High Court in *Gureckis*⁶⁷ found that rough sleeping was not an ‘abuse’ of EU freedom of movement rights and held that the Home Office policy of detaining and removing rough sleepers was discriminatory and unlawful. Although the judgment led to the halting of joint IE patrols with homeless charities, data sharing between charity workers and the state continued, in 2018, under a new government initiative, the Rough Sleeping Support Service (RSSS). The Home Office attempted to refute claims that charity workers ‘were “secretly” sending rough sleepers’ personal information to the Home Office’ and denied that the Service was ‘designed to undertake enforcement action’, but acknowledged that immigration enforcement ‘may be considered on a case-by-case basis’.⁶⁸ Continued reliance on charity workers sharing information about rough sleepers without consent led the rights organisation Liberty to brand the RSSS, ‘a secret scheme to turn homelessness outreach workers into border guards, oxymoronically called the “Rough Sleeping Support Service”’.⁶⁹ In the view of Liberty and other rights organisations, the RSSS was an initiative designed ‘to co-opt ... charities into the delivery of immigration control’.⁷⁰

Here again, the question of whether charity workers acted independently or as agents of the state was contested. Problematic protocols dispensed with the requirement for charity workers to secure consent to share personal information with RSSS on the dubious grounds that they were engaged in ‘carrying out a specific task in the public interest laid down by law. The task in question would be delivering immigration

⁶⁵ *SSHD v Joint Council* (n 60) [163].

⁶⁶ Liberty, *A Guide to the Hostile Environment* (n 45) 51 <<https://www.libertyhumanrights.org.uk/issue/report-a-guide-to-the-hostile-environment/>> accessed 30 May 2022.

⁶⁷ *Gureckis, R (on the Application Of) v SSHD* [2017] EWHC 3298 (Admin) [106], [113]–[114].

⁶⁸ Home Office, *Factsheet: Rough Sleeping Support Service* (Home Office 2019) <<https://homeofficemedia.blog.gov.uk/2019/07/10/factsheet-rough-sleeping-support-service/>> accessed 16 November 2021.

⁶⁹ Liberty, ‘How the Home Office is Turning Homeless Workers into Border Guards’ (*Liberty*, 12 July 2019) <<https://www.libertyhumanrights.org.uk/issue/how-the-home-office-is-turning-homeless-workers-into-border-guards/>> accessed 16 November 2021.

⁷⁰ Public Interest Law Centre, ‘Rough Sleeping Support Service and Migrant Rough Sleeper Rights’ (*PILC*, 25 September 2019) <<https://www.pilc.org.uk/news/story/rough-sleeping-support-service-and-migrant-rough-sleeper-rights/>> accessed 16 November 2021.

controls.⁷¹ Designating information sharing as a 'public task' evaded the need for consent and yet undermined the privacy rights of rough sleepers. It prompted Liberty to declare, '[i]f any document more aptly demonstrates the breadth of Home Office ambition to turn everyone in society into agents of immigration enforcement, we have yet to see it.'⁷² However, the primary concern of the homeless charity St Mungo's was less that their workers were entangled in immigration control, and more with the serious 'reputational risk' this imposed on their organisation.⁷³

In 2020, following critical media scrutiny, the RSSS was relaunched with a new stipulation that charities should henceforth secure 'fully informed consent' by requiring rough sleepers to sign a form that acknowledged deportation as a possible outcome before they consented to receiving help. The new consent form states that 'the service is not intended to identify or locate immigration offenders', but blandly notes the 'possibility that you may be required to leave the UK'.⁷⁴ Emphasising the vulnerability of rough sleepers, one barrister observed, '[t]he person giving them this form is not someone who has Home Office or Border Force written on their tabard. It is somebody who they've turned to for help.'⁷⁵ The Home Office rejoinder that, '[t]he purpose is to resolve their status and identify any additional support they may need'⁷⁶ does little to conceal the fact that volunteers and charity workers are thereby rendered complicit in triggering a process that may lead to deportation.

In sum, while landlords making 'right to rent' checks have been held to act solely as 'private citizens', by contrast, homeless charity workers sharing information with RSSS are deemed to be engaged in a 'public task' on behalf of the state. Why the question of whether individuals engaged in border controls are acting as private citizens or as agents of the state attracts such inconsistent responses remains unclear. One cynical but plausible answer is that the state seeks either to assert its authority or to disassociate itself by outsourcing border control to private actors expediently according to the vested interests at stake. Whatever the case, the result is further to blur the lines between public and private exercise of border controls.⁷⁷

⁷¹ Liberty, 'Home Office Rough Sleeping Support Service Information Sharing Proposal' FOI MGLA290519-3560 (26 June 2019) <<https://www.pilc.org.uk/wp-content/uploads/2019/09/MGLA290519-3560-FOI-response.pdf>> accessed 16 November 2021.

⁷² Liberty, 'How the Home Office is Turning Homeless Workers into Border Guards' (n 69).

⁷³ Liberty, 'Email Communication from St Mungo's to the Home Office (03 May 2019)' FOI MGLA290519-3560 (26 June 2019) <<https://www.pilc.org.uk/wp-content/uploads/2019/09/MGLA290519-3560-FOI-response.pdf>> accessed 16 November 2021.

⁷⁴ Mark Townsend and Aaron Walawalkar, 'Home Office Revives Plan to Deport Non-UK Rough Sleepers' *The Guardian* (London, 27 March 2021) <<https://www.theguardian.com/uk-news/2021/mar/27/home-office-revives-plan-to-deport-non-uk-rough-sleepers>> accessed 16 November 2021.

⁷⁵ *ibid.*

⁷⁶ Liberty, 'Home Office Signs up Charities to Scheme that could Lead to Deportation of Rough Sleepers' (27 March 2021) <<https://libertyinvestigates.org.uk/articles/home-office-signs-up-charities-to-scheme-that-could-lead-to-deportation-of-rough-sleepers/>> accessed 16 December 2021.

⁷⁷ For further discussion of statist and non-statist accounts of border control, see Thorburn, in this volume.

V From the Hostile Environment to the Compliant Environment

The Hostile Environment was a major factor in the ongoing scandal concerning treatment of the ‘Windrush generation’ of Commonwealth immigrants who had arrived in the UK before the 1970s, and who had the right to live in the UK, but lacked documentation to prove it. Failings in Home Office data and other egregious errors led many of the Windrush generation to suffer exclusionary practices and, in at least sixty-three documented cases, wrongful deportation after decades living and working in the UK.⁷⁸ Public outrage that longstanding UK residents were threatened with deportation without adequate notice or capacity to contest the decision,⁷⁹ was intensified by the fact that delegating immigration checks to private citizens made it impossible to assess the true impact of the policy or the number of individuals adversely affected.⁸⁰ Public outcry prompted the government to commission an independent review,⁸¹ and the then Home Secretary, Sajid Javid, to promise a ‘fairer, more compassionate’ immigration system.⁸²

In 2018, the UK government announced a shift to the ‘Compliant Environment’, acknowledging that the term ‘hostile’ was ‘unhelpful and ... does not represent our values as a country.’⁸³ Journalist Laura Hood observed, ‘[t]he latest change in language from “hostile” to “compliant” aimed to detoxify policies that are reaching deeper and deeper into everyday life, drawing ordinary people into the roles of border guards.’⁸⁴ Although the move to talk of ‘compliance’ appears to be significant, the term is ubiquitous in immigration control, and it is doubtful how much this rhetorical shift changes in practice.⁸⁵ While sustained protests brought an end to Immigration Enforcement

⁷⁸ House of Lords Library, *Research Briefing: Impact of ‘Hostile Environment’ Policy Debate on 14 June 2018* (House of Lords Library 2018) <<https://lordslibrary.parliament.uk/research-briefings/lln-2018-0064/>> accessed 16 December 2021; Aliverti, *Policing the Borders within* (n 19) ch 6.

⁷⁹ Home Affairs Committee (n 17) 21.

⁸⁰ Baroness Williams of Trafford acknowledged, ‘it is not possible for the Government to accurately estimate the number of individuals who have been impacted by these measures’ <<https://www.parliament.uk/written-questions-answers-statements/written-question/lords/2018-04-23/HL7145>> accessed 16 November 2021.

⁸¹ Wendy Williams, *Windrush Lessons Learned Review* (HC 2020, 93) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876336/6.5577_HO_Windrush_Lessons_Learned_Review_LoResFinal.pdf> accessed 16 December 2021.

⁸² Amelia Gentleman, ‘Sajid Javid Plans “Fairer, More Compassionate” Immigration System’ *The Guardian* (London, 6 June 2018) <<https://www.theguardian.com/uk-news/2018/jun/06/sajid-javid-plans-fairer-more-compassionate-immigration-system>> accessed 16 December 2021.

⁸³ Dulcie Lee, ‘Javid Ditching “Hostile” was Wise, but “Compliance” won’t Humanise the Home Office’ (*New Statesman*, 1 May 2018) <<https://www.newstatesman.com/politics/2018/05/sajid-javid-home-secretary-office-compliant-hostile-environment>> accessed 16 December 2021.

⁸⁴ Georgie Wemyss, ‘“Compliant Environment”: Turning Ordinary People into Border Guards’ (*The Conversation*, 20 Nov 2018) <<https://theconversation.com/compliant-environment-turning-ordinary-people-into-border-guards-should-concern-everyone-in-the-uk-107066>> accessed 16 December 2021.

⁸⁵ In 2020, a public inquiry into the hostile environment policies and their compliance with the public sector equality duty (under s 31 of the Equality Act 2006) was launched by the Equality and Human Rights Commission, *Assessment of Hostile Environment Policies* (EHRC 2020) <<https://www.equalityhumanrights.com/en/inquiries-and-investigations/assessment-hostile-environment-policies>> accessed 16 November 2021.

officials' access to NHS non-clinical personal data in 2018,⁸⁶ health workers are still required to check the immigration status of those seeking hospital care.⁸⁷ Elsewhere, practices of 'everyday bordering' continue to require employers, landlords, bank officials, and charity workers to verify immigration status in their daily interactions with prospective employees, tenants, clients, and the general public.⁸⁸ The claim that the ending of the Hostile Environment constituted an important 'cultural change'⁸⁹ is undermined by the fact that ordinary citizens remain subject to wide-ranging obligations to police immigration status.⁹⁰

Although the Compliant Environment suggests willing acquiescence, it is enforced by draconian consequences for non-compliance. Private individuals, by virtue of their role or profession, are still required to identify and report possible illegal immigrants or face civil proceedings, or even prosecution and punishment. Migrants too must fulfil reporting requirements, furnish passports and papers on demand, and conform to other strictures imposed by a complex array of immigration laws. Official promises of a 'more compassionate' approach⁹¹ mask the exclusionary impact of the multiple micro-hurdles that a citizen army of border guards must place in the path of those whose only wish is to comply. In December 2020, for example, new immigration rules gave officials discretion to refuse or cancel permission to remain in the UK 'where ... a person has been rough sleeping',⁹² a move that provoked protests, not least for its failure to acknowledge the widespread loss of jobs and homes during the COVID-19 pandemic. Rather than ushering in a less antagonistic approach to immigration, the Compliant Environment fails on its own terms; sold as enabling greater conformity with immigration laws, it has made it more difficult for migrants to regularise their status, not less.

VI Implications for the Rule of Law and Civil Peace

The co-option of private citizens as agents of immigration control raises fundamental questions about the exercise of state sovereign power at the border and beyond—first, concerning *accountability* and *transparency*. Co-opting citizens as border guards may allow for more effective, economical immigration control but it achieves efficiency by circumventing the constraints of regulation and accountability that limit and guide

⁸⁶ Including protests by Doctors of the World, Docs not Cops, and the National AIDS Trust.

⁸⁷ Peter Pannier, 'NHS Data-sharing U-turn is Welcome—But More to do to Scrap the 'Hostile Environment' (*Open Democracy*, 1 May 2018) <<https://www.opendemocracy.net/en/our-nhs/data-sharing-u-turn-is-welcome-but-more-to-do-to-scrap-hostile-environment-in-n/>> accessed 16 December 2021.

⁸⁸ Wemyss (n 84).

⁸⁹ Caroline Nokes (Minister for Immigration), HC Deb 12 July 2018, col 1119 <<https://www.theyworkforyou.com/debates/?id=2018-07-12b.1112.5#g1117.0>> accessed 16 November 2020.

⁹⁰ Ashworth (n 27).

⁹¹ Peter Walker, 'Priti Patel Promises "Compassionate" Home Office after Windrush Scandal', *The Guardian* (London, 21 July 2020) <<https://www.theguardian.com/uk-news/2020/jul/21/priti-patel-promises-compassionate-home-office-after-windrush-scandal>> accessed 16 November 2021.

⁹² Rules 9.21.1 and 9.21.2 in *Statement of Changes to the Immigration Rules* (HC 2020, 813) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/928751/CCS001_CCS1020373376-001_Statement_of_changes_in_Immigration_Rules_-_HC_813__PRINT_.pdf> accessed 16 December 2021.

the conduct of state actors. Venue shopping is a well-known means of seeking a more propitious legal environment in which to achieve policy goals; delegating police powers to private citizens acting in the community is another such example.⁹³ Co-opting citizens as informers spins the immigration surveillance web throughout civil society, but the promotion of 'remote control' immigration policy⁹⁴ detaches liability from state officials, freeing them of responsibility for the decisions of third-party actors. Regulatory oversight, reporting requirements, and scrutiny of public officials is largely lost when discretionary decision-making passes to private citizens.⁹⁵ Their low visibility combines with extensive discretion to obscure how citizens make immigration checks, against whom, and on what grounds. The difficulty of establishing how citizens exercise their powers raises the risk that rules are inappropriately, or over-extensively, applied.

Secondly, outsourcing has occurred with little regard for *fairness* and *impartiality*. The state seems largely indifferent to the knowledge, capacity, competence, or motivation of private citizens to perform their immigration duties justly and lawfully. There are no background checks, training, or accreditation, and little guidance to ensure citizens are equipped to undertake the tasks assigned. In consequence, discriminatory attitudes, overt prejudice, and unconscious bias may incline citizens to act against those who simply appear 'foreign'. Citizens fearful of sanctions for non-compliance may discriminate by relying on crude indicators of accent, appearance, or family name to refuse tenancies and employment to a larger population of 'visible minorities'⁹⁶ than those who are formally the targets of immigration laws. Some citizens, motivated by hostility to migrants as undeserving of access to housing, social, or healthcare services, take the opportunity to overcomply. Others evade reporting obligations by resorting to informal, extralegal arrangements that offer few protections, and promote a clandestine market in illegal employment, housing, and other services. Illicit migrants, those yet to regularise their status, and even those lawfully resident, risk being denied healthcare; or consigned to unregulated jobs in conditions barely distinguishable from modern slavery; or housed in substandard, unsafe accommodation. These divergent practices of overcompliance and evasion compound the wider tendency of the Compliant Environment to foster social division and inequality.

Thirdly, co-option has profound implications for *citizenship*. Enlisting the public in policing immigration has been said to enhance qualities of citizenship, instil civic responsibility and civic values, and 'to recuperate the coherence of citizenship and nationhood'.⁹⁷ But, as Aliverti observes, although it 'conveys expectations about the duties that come with being a good citizen—including the active cooperation in law enforcement' and appeals to ideas of social cohesion, it does so 'by mobilizing the exclusionary side of citizenship'.⁹⁸ Citizen compliance is secured by threat of sanctions

⁹³ Virginie Guiraudon and Gallya Lahav, 'A Reappraisal of the State Sovereignty Debate: The Case of Migration Control' (2000) 33 Comparative Political Studies 163, 177.

⁹⁴ *ibid* 185.

⁹⁵ Chacón (n 22) 9.

⁹⁶ Düvell, Cherti, and Lapshyna (n 26) 20.

⁹⁷ James Walsh, 'Report and Deport: Public Vigilance and Migration Policing in Australia' (2020) 24(2) Theoretical Criminology 276, 278.

⁹⁸ Aliverti, 'Enlisting the Public in the Policing of Immigration' (n 9) 226.

rather than any attempt to engender a positive commitment to state immigration policy. No wonder that, rather than embracing their role as 'active citizens', Düvell and colleagues found that 'employers and landlords have developed diverse practices to prevent detection and have to some extent become resilient to the threat of enforcement actions'.⁹⁹ Enlisting individuals may be an attempt to responsabilise citizens to engage in practices of control and to collaborate with state enforcement officials.¹⁰⁰ However, punishing failure to comply promotes an environment prone to suspicion and fear, not only for those formally targeted but also those citizens tasked with enforcement, many of whom are themselves from minority backgrounds.

Fourthly, outsourcing migration controls to citizens undermines *social trust* well beyond irregular migrants to all whose appearance, accent, or name raises doubts about their status.¹⁰¹ Wary of immigration restrictions and regulations, some landlords and employers make discriminatory decisions that compound existing mistrust of migrants and foreigners. Obligations on lecturers and teachers to monitor student activities and report class attendance to immigration authorities undermines the trust of students, which is so essential to their education.¹⁰² Similarly, co-opting charity workers to report homeless foreigners to immigration authorities radically erodes trust among society's most vulnerable communities, with serious adverse consequences for the welfare of rough sleepers and for public health—a fact made stark during the COVID-19 pandemic.¹⁰³ Generally, tasking citizens with duties to identify and report irregular migrants has the effect of exacerbating wider communal distrust of aliens and outsiders.¹⁰⁴

Finally, a damaging consequence of mobilising 'categorical suspicion'¹⁰⁵ against migrants is their *marginalisation*, which in turn inhibits their democratic engagement, and undermines social harmony and civil peace. One study reported concerns that 'irregular migrants might avoid health services, which means that contagious diseases could remain untreated which also represents a threat for society'.¹⁰⁶ These prescient comments had serious implications during the COVID-19 pandemic. To make migrants, whatever their legal status, especially in already marginalised, vulnerable migrant and minority communities, wary of accessing public health services undermines state efforts to contain the virus.¹⁰⁷ The tangible harms inflicted on health, welfare, and

⁹⁹ Düvell, Cherti, and Lapshyna (n 26) 12.

¹⁰⁰ Pat O'Malley, 'Responsibilization' in Alison Wakefield and Jenny Fleming (eds), *The Sage Dictionary of Policing* (SAGE 2009) 276–78.

¹⁰¹ Ana Aliverti, *Policing the Borders within* (n 19) 133 and *passim*.

¹⁰² Karen Hodgson and others, 'Checks on Students Undermine Trust' *The Guardian* (2 March 2014) <<https://www.theguardian.com/education/2014/mar/02/checks-on-students-undermine-trust>> accessed 16 November 2021.

¹⁰³ Louise Casey and Niamh Mohan, 'It's Taken the Coronavirus Crisis for People to see Rough Sleeping for the Public Health Emergency it is' (*KCL News Centre*, 6 April 2020) <<https://www.kcl.ac.uk/news/its-taken-the-coronavirus-crisis-for-people-to-see-rough-sleeping-for-the-public-health-emergency-it-is>> accessed 16 November 2021.

¹⁰⁴ Barbara Hudson, 'Punishing Monsters, Judging Aliens: Justice at the Borders of Community' (2006) 39(2) *Australian & New Zealand Journal of Criminology* 232, 239; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 226.

¹⁰⁵ Richard Ericson, *Crime in an Insecure World* (Polity 2007) 71.

¹⁰⁶ Düvell, Cherti, and Lapshyna (n 26) 20.

¹⁰⁷ *ibid* 21.

education provision exacerbate social divisions created by outsourcing 'everyday security'.¹⁰⁸ As Vaughan-Williams observes, mobilising citizens 'constitutes a new form of generalised borderwork whereby "good" subjects are constantly on the look-out for "suspicious" or "risky" subjects'.¹⁰⁹ Enlisting citizens as informers and gatekeepers creates a 'climate of suspicion'¹¹⁰ that only increases the difficulties faced by non-citizens. Far from creating a more benign, compassionate milieu, the Compliant Environment raises the risk of non-compliance, and compounds the problem of 'making people illegal'.¹¹¹

VII Conclusion

What are the implications of outsourcing border control for citizenship and state sovereignty? Does co-opting private individuals as border guards extend state power over its citizens and enhance state sovereignty?¹¹² Is 'governing at a distance' a more efficient tool of regulatory governance unfettered by democratic accountability?¹¹³ Or is it better understood as delegating the state's sovereign right to police to private citizens, who act largely beyond state oversight and control? Outsourcing to private firms is subject to powerful, though scarcely infallible, legal regulation and contract terms that specify standards and enforce adherence. By contrast, outsourcing to private citizens lacks effective regulatory oversight, is enforceable only by sanction, and cedes control to a far greater extent. As Walsh observes of the Australian 'dob-in' scheme, the state, '[i]n summoning citizens to govern others ... authorizes dobbers to wield the state's sovereign powers to classify, decide, and exclude',¹¹⁴ such that 'the sovereign state is no longer the sole executor of territoriality, but one, albeit critical, actor in a patchwork of practitioners'.¹¹⁵

The implications for state sovereignty are complicated by the fact that the question of whether citizen border guards are agents of the state or independent actors is contested, and the assumption that private citizens derive their authority from the state has been challenged in the courts. The Court of Appeal's finding that landlords are 'private individuals',¹¹⁶ whose discriminatory application of statutory 'right to rent' checks cannot be imputed to the state, has led some to suggest that the case

¹⁰⁸ Adam Crawford and Steven Hutchinson, 'Mapping the Contours of "Everyday Security": Time, Space and Emotion' (2016) 56(6) *The British Journal of Criminology* 1184, 1190 ff.

¹⁰⁹ Nick Vaughan-Williams, 'Borderwork beyond inside/outside? Frontex, the Citizen-detective and the War on Terror' (2008) 12(1) *Space and Polity* 63, 64.

¹¹⁰ *ibid* 68.

¹¹¹ Dauvergne (n 16).

¹¹² David Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36(4) *British Journal of Criminology* 445; Georg Menz, 'Neo-liberalism, Privatization and the Outsourcing of Migration Management' (2011) 15(2) *Competition and Change* 116.

¹¹³ David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Penguin 1992).

¹¹⁴ A 'dobber' is 'a person who secretly tells someone in authority that someone else has done something wrong' <<https://dictionary.cambridge.org/dictionary/english/dobber>> accessed 16 December 2021; Walsh (n 97) 285.

¹¹⁵ Walsh (n 97) 278.

¹¹⁶ *SSHD v Joint Council* (n 60) [148].

involved unwarranted ‘political evaluation’ by judges of immigration policy set by Parliament.¹¹⁷ Allegations of judicial overreach seek to limit the scope of judicial power and purport to uphold parliamentary sovereignty. However, a more persuasive view is that the question of upon whose authority citizen border guards act is not a political matter beyond the jurisdiction of the courts, but a legal one that goes directly to state sovereignty. If citizen border guards do not derive their standing from the state, nor act as its agents, but act independently as private citizens, then the outsourcing of border control surely engages and diminishes state authority to police its sovereign territory.

How private citizens perceive their responsibilities, on what grounds they apply checks, and when and why they evade these duties remains little known, although it appears that fear of sanctions inclines some to be overly vigilant or outright discriminatory. In consequence, outsourcing to private citizens has had the effect of extending border checks well beyond their ostensible target of undocumented migrants to all who appear ‘foreign’. By assigning responsibility to private agents who lack professional training and expertise, and who are largely unregulated, the state not only cedes power, but it also undermines its own legitimacy. Against claims that state power is enhanced or extended by enlisting private agents who can police immigration more flexibly, cheaply, and efficiently,¹¹⁸ this chapter has suggested that in deploying private citizens as border guards, the state has significantly ceded dominion over its ultimate prerogative to determine who has access to citizenship. Outsourcing border control to private individuals undermines state sovereignty, delegitimises its authority, and far from enhancing efficiency has created a system lacking in the basic prerequisites of good governance, all of which is injurious to social trust, mutual tolerance, and civil peace.

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¹¹⁷ Ekins, ‘The Court of Appeal’s Powerful “Right to Rent” Judgment’ (n 62).

¹¹⁸ Oztig (n 5).

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