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## **Mobility, control and technology in border areas : discretion and decision-making in the information age**

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### **Citation**

Dekkers, T. J. M. (2019, March 20). *Mobility, control and technology in border areas : discretion and decision-making in the information age*. Retrieved from <https://hdl.handle.net/1887/70038>

Version: Not Applicable (or Unknown)

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**Title:** Mobility, control and technology in border areas : discretion and decision-making in the information age

**Issue Date:** 2019-03-20



## 5. Selection in Border Areas: Profiling Immigrants or Crimmigrants?<sup>68</sup>

The discourses discussed in Chapter 4 touch upon the subjects of profiling and what the goals of MSM checks should be. This chapter will focus on the profiling practices of RNLN officers during MSM checks. The indicators they use in their selection practices will be discussed as well as the reasoning behind those factors to gain insight in who RNLN officers stop for an MSM check and why. The findings will be placed in the organizational context of the RNLN and MSM in particular to gain a better understanding of the border practices of RNLN officers.

### 5.1 Profiling in migration control

How professionals deal with discretionary decision-making and what the consequences are is heavily debated in the academic literature (Spader, 1984; Lipsky, 2010; Gelsthorpe & Padfield, 2014). One of the central issues regarding discretion is the influence that biases or discriminatory beliefs could have. An area in which this is very prominent is that of police decision-making and police profiling. While profiling can take many forms (Van der Woude & Dekkers, 2017), I will focus on pro-active profiling. I will do so specifically in the context of migration control. The increased use of pro-active profiling strategies in policing in general as a result of working with computerized data has led to a fierce debate regarding its legitimacy, echoing the debate on discretionary decision-making (Gelman, Fagan & Kiss, 2012; Delsol & Shiner, 2015; Rodrigues & Van der Woude, 2016). Police organizations and their supporters emphasize the efficiency and effectiveness of profiling (Engel, Calnon & Bernard, 2002; Glaser, 2014). Critics on the other hand state that proactive profiling is not only ineffective or not proven to be effective, but also harmful as it often disproportionately targets minorities and erodes trust in the police and society at large (Harris, 1999; Baker, 2002; Gonzales, 2002; Harcourt, 2006; Gabbidon, Higgins & Nelson, 2012; Engel & Cohen, 2014; Delsol & Shiner, 2015).

<sup>68</sup> An earlier version of this chapter was published as: Dekkers, T.J.M. (in print). Selection in Border Areas: Profiling Immigrants or Crimmigrants?, in *Howard Journal of Crime and Justice*, Issue, x, Vol x.

Most research on profiling in law enforcement is (1) focused on regular police controls, often in the context of stop and searches or traffic stops, and (2) conducted in Anglo-Saxon countries with particular police-citizens relations and a particular discourse around police-race relations (cf. Bonnet & Caillaut, 2015). Yet, profiling is also utilized by organizations operating in other fields, other countries, within different contexts, with different histories and speech norms and it is unknown to what extent existing findings are generalizable. Migration control, for instance, has remained understudied (Pratt, 2010). While there is an abundance of normative debate and critical theoretical research in border and migration studies, empirical research on border practices such as profiling is far less common (Côté-Boucher, Infantino & Salter, 2014). This is surprising, as border security and migration control have been high on social and political agendas of countries both in the global north and the global south for some time now, not in the last place because of the so-called European 'migration crisis'.

This chapter aims to address this research gap by looking at the practice of decision-making in migration control by drawing from extensive fieldwork conducted with the Royal Netherlands Marechaussee (RNLM). The RNLM is a paramilitary organization responsible for migration control in the intra-Schengen border areas of the Netherlands. As laid down in article 23 of the Schengen Border Code, while systematic border control has been abolished member states are allowed to exercise police powers in border areas. In the Netherlands this has taken the form of the Mobile Security Monitor (MSM). These spot checks are aimed at combatting irregular migration and – both related to irregular migration - identity fraud and human smuggling in the intra-Schengen border areas (Van der Woude, Dekkers & Brouwer, 2016; Van der Woude, Brouwer & Dekkers, 2016). While the MSM is carried out on highways, trains and intra-Schengen flights at airports, the current study only involves the selection process at the highways.

In this chapter we seek to answer the question how RNLM officers select potential immigrants in the context of the MSM in the absence of a requirement of reasonable suspicion, how they deal with the legal complexity of the role of race and nationality in the selection process and the potential negative consequences of singling out certain groups while still adhering to the principle of free movement crucial to the Schengen Agreement and place these results in a broader organizational context. Based on observations during MSM checks combined with field interviews, focus groups and quantitative data the chapter aims to give insight into the profiling practices and views of RNLM officers on migration control and its organizational complexities against the background of literature on profiling, crimmigration and legal consciousness.

## 5.2 Crimmigration, profiling and legal consciousness

In her article *The Crimmigration Crisis* (2006), Stumpf was one of the first to observe that the two distinct fields of criminal and migration law were increasingly showing an overlap in the United States. Since the original publication the concept of crimmigration has developed and has evolved to include a broader meaning. As argued by Van der Woude, Van der Leun and Nijland, 'it is more accurate to see the process of crimmigration as a process transcending the purely legal realm, since legislative changes do not evolve in a vacuum and cannot be studied isolated from the social and political context in which they take place' (2014, pp. 562). Since legislation is driven by social and political developments, the convergence of criminal law and migration law reflects how migration is viewed in society. The literature that engages this broader societal view of crimmigration consistently points towards the same underlying issue: immigrants are increasingly associated with crime (Bosworth & Guild, 2008; Aas, 2011; Provine & Doty, 2011; Barker, 2012; Pickering & Ham, 2014; Nethery & Silverman, 2015).

Jiang and Erez (2017) state that, as part of the crimmigration process, the immigrant is increasingly seen as the symbolic assailant, referring to Skolnic's (1966) classic study on how police officers form suspicions of criminal behavior. The term refers to the stereotypical image – or profile – of what police officers envision a criminal looks like: young, male, of low socio-economic status, living in a high crime area and belonging to particular ethnic minority or racial groups. Officers would be on the lookout for individuals matching these criteria in their daily routines. Jiang and Erez' (2017) argue that due to association between crime and migration the classic perception of criminals has shifted to immigrants. Law enforcement officers would be increasingly policing and profiling immigrants (Armenta, 2017; Armenta & Alvarez, 2017).

A question Jiang and Erez' (2017) do not answer is how officers would recognize an immigrant. Immigrants are far from a homogenous group, making the distinction not a straightforward matter (Jones & Krzyżanowski, 2008; Wodak, 2008). The scant literature on profiling and selection in migration control could be a starting point to address this issue. Pratt and Thompson (2008) argue border guards at land ports of entry have little to go on compared to their colleagues at airports. They do not have preemptive access to passport information and travel routes as is common in border security at airports. In agreement with Hornquist (2006), Pratt and Thompson deduce that 'at land ports of entry, modes of profiling remain largely informal' (Pratt & Thompson, 2008, pp 624). It appears that the role of race in the selection process of migration control is crucial. Pratt concluded: 'while the distinction between race and nationality is produced and sustained at higher levels of the government, it becomes

increasingly muddled as you work your way down to the frontline' (2010, pp. 472). Similar conclusions can be found in other studies (Pratt & Thompson, 2008; Provine & Sanchez, 2011; Pickering & Ham, 2014). Whereas nationality might be relevant to make distinctions, stereotypes of race and nationality come to play an important role in selection processes. Officers would have ideas of what certain nationalities look like and act upon those ideas in their daily work. While this reduction of complexity is understandable considering officers do not have the time and resources to meticulously assess each individual they come into contact with (Burns, 2008; Lipsky, 2010), it does become problematic if these perceptual shorthands lead to discriminatory decision-making (Burns, 2008), even when this is unintended (Flam, 2008), possibly resulting in institutional discrimination.

However, as Hirsch and Kornrich state 'in practice, the boundary between discriminatory and fair conduct is difficult to locate. Whether a particular behavior or practice is deemed discriminatory is subject both to dispute and to change' (2008, pp. 1397). The concept of legal consciousness is an important factor in this. While legal consciousness started out as a way to explain the gap between the law in the books versus law in practice, the concept has taken on different meanings and definitions over time (Silbey, 2005). Ideas about the law, experiences of the law, how people understand the law and how people use the law have all been used in relation to legal consciousness (Silbey, 2005). Despite this, the definition often used is legal consciousness as the 'outcome of social processes through which meanings and identities are constructed' (Merry, 1990, pp 247), or in simpler terms a 'commonsense understanding of how the law works' (Young, 2014, pp 501). This includes how legal concepts such as racial discrimination are used and viewed in an individual's daily life (Hirsch & Lyons, 2010).

A criticism on the study of legal consciousness is that the focus is on the understanding itself and not the process of how the understanding comes to be (Silbey, 2005; Young, 2014). Legal consciousness is more than just an individual's belief and instead the result of a complex social process. The social context, such as an organization, in which discriminatory acts occur can influence the legal consciousness and subsequently determine how discriminatory acts are perceived. Establishing that racial profiling occurs is therefore only half of the story. To understand (racial) profiling in migration control, the organizational environment has to be taken into account. According to Hirsch and Kornrich (2008) several intra-organizational factors can contribute to differences in perceptions on discriminatory acts within the organization: (1) formalization of evaluation processes create objective criteria for decision-makers to prevent discriminatory acts; (2) control structures allow supervisors to keep

oversight of employees; (3) the racial and gender composition within an organization can influence how acts of discrimination are perceived and; (4) the extent to which minority groups are present in the management layers of the organization. Important to note is that Hirsch and Kornrich (2008) attribute these factors to discrimination within an organization, for example between officers of the same police organization, and not to discriminatory acts towards individuals outside of the organization, for example between an officer and a citizen. However, considering that legal consciousness as a commonsense understanding of the law would not limit actions to only organizational insiders, it can also be applied to organizational outsiders. This chapter will not only focus on the profiling and selection practices of RNLM officers, but also place those in the broader context of the organization of the RNLM and the legal framework of the MSM.

### 5.3 Methods

This chapter draws on extensive empirical research to gain insight in the selection practices of RNLM officers within the framework of MSM checks. Observational data, semi-structured interviews, focus groups and quantitative data are combined to create a mixed methods research approach as a combination of methods enables a more complete view of the subject at hand. This way, by integrating in-depth qualitative data with large scale quantitative data compared to a single method research approach, 'numbers and stories' can be combined (Sherman & Strang, 2004). As Tashakkori and Creswell (2007) point out, integrating is the keyword. The use of different approaches that complement each other allows for the triangulation of data, which become more robust (Lewis-Beck, Bryman & Liao, 2003).

The majority of the data for the underlying research was obtained through observations during ride-alongs with the RNLM. In the period of October 2013 – March 2015, two researchers were present at MSM checks at highways near the borders with Belgium and Germany. Depending on the capacity of the RNLM and the events during the checks, shifts lasted between four and seven hours. The fieldwork registered a total of 800 hours of observation during fifty-seven tours on seven different locations, at which the point of saturation was reached. Each location was visited at least six times. The MSM checks varied in size, ranging from four officers to thirty officers present, all of which could be approached by the researchers.

During the MSM checks researchers observed a single stop of a vehicle at a time. Similar to Alpert et al's (2004) study on officers' discretionary decision-making, an observation form (see Appendix 1) was used to write down observable characteristics of the vehicle, occupants and events during the check. In addition, RNLM officers were

asked what made a stopped vehicle interesting enough to check. When a vehicle was cleared and allowed to continue, researchers used a new form for the next vehicle that was stopped. This resulted in a total of 330 completed observation forms. During the observations there was also time for conversations with the officers. Although there was no specific topic list or a structured approach for these conversations, they would often be about what was happening during the checks or the work of the officers in general. The informal nature of the conversations and the familiar setting decreases the chance of politically correct answers. Valuable information from these conversations was recorded in field notes and later analyzed using Atlas-ti, a computer program for qualitative data analysis.

More qualitative data was collected through focus groups, held after a year of ride-alongs. A topic list (see Appendix 2) was used during the focus groups and RNLN officers were asked to give their opinions on certain phenomena or respond to statements made by other officers the researchers had heard and observed during the fieldwork. A total of thirteen focus groups was organized at seven different locations, resulting in twenty five hours of conversation. The officers who took part in the focus groups were a mix of experienced and less experienced officers as well as officers with different positions and ranks within the organization. On average eight officers took part in the focus groups, ranging from six to twelve officers. The transcripts of these focus groups were also analyzed in Atlas-ti.

In addition, the RNLN provided quantitative data on MSM checks at the request of the researchers which contained information on the vehicles and its occupants stopped during MSM checks in the period January 2011 – August 2015. The RNLN does not use a single database to register information related to MSM checks. Instead, separate systems were used to register migration related cases and crime related cases. For all cases related to migration law, or the Dutch Aliens Act to be specific, The Foreign Nationals Basic System (FNBS) is used. For the underlying research of this chapter, data from this system was used to create a data set which contains 98.623 cases, including 15.837 unique individuals and 3.839 unique vehicles. All cases related to criminal law are registered in the Basic Booking System (BBS). This data set contains 83.748 cases, including 23.892 unique vehicles. The number of unique individuals is unknown, as the data set provided by the RNLN does not contain a unique identifier variable. It is important to note that the data from these systems only shows information on individuals and vehicles that were in violation of either the Aliens Act or criminal law. Information on the vehicles and persons that were stopped during MSM checks, but who were cleared because they had the right paperwork on them – valid ID, passport or visa - was not recorded. A direct comparison between the data from FNBS and BBS

and the observation forms is therefore not possible, as the observation forms also include stops during which no migration or criminal offences were found.

#### **5.4 The legal complexity of the MSM: an ambiguous mandate and unclear case-law**

Although the Netherlands as a member of the Schengen area has abolished systematic border control, the Schengen Border Code – the regulatory framework governing all border practices in the supposedly ‘border free’ Schengen Area – does allow policing in border areas per article 23, be it with limitations. The Mobile Security Monitor is the Dutch interpretation of this provision for border policing. In article 4.17a of the Dutch Aliens Act, the RNLN is authorized to check cross-border traffic, aiming to combat irregular migration and cross-border crime (Dekkers, Van der Woude & Van der Leun, 2016). While the cross-border crime aspect may seem to imply the RNLN can combat any form of crime in the border area, article 4 sub 1g of the Police Act states that in this case cross-border crime is limited to human smuggling and identity fraud. In the context of MSM checks on the highways this means that officers will select vehicles in order to establish identity, nationality and residential status of the occupants. Only when officers encounter another type of criminal offence during an MSM check are they allowed to take further action. As stated in article 4 sub 4 of the Police Act, RNLN officers will not actively engage in combatting these other forms of crime. Vehicles should therefore be selected with the combatting of irregular migration, human smuggling and identity fraud in mind. In addition to the limitations of the focus of the MSM, there are legal limitations to the scope of the checks, as the Schengen Border Code aims to prevent member states to use police checks in border areas as a ‘veiled’ form of forbidden permanent border control. As laid down in article 4.17a of the Dutch Aliens Act, MSM checks on highways must take place within twenty kilometer from the border and can take no longer than six hours a day on a single highway. There is also a monthly limit for MSM checks for each highway, as all MSM checks combined cannot exceed ninety hours for a particular highway.

As Van der Woude (2018) explains, such regulations are intended by the Court of Justice of the European Union (CJEU) to ‘guide’ discretionary decision-making in border policing on a national level in order to prevent instruments such as the MSM from turning into systematic and unlawful border control. Although the CJEU seems to be concerned with the issue of border policing inhibiting free travel in the Schengen Area, their considerations do not seem ‘to be linked to potential practices or ethno-racial profiling’ (Van der Woude, 2018, pp. 12). This, however, is a relevant topic in the context of border policing and MSM checks in particular. During MSM checks officers have to make a selection out of the cross-border traffic that usually

pass by at high speed. Due to the absence of a requirement of reasonable suspicion, officers can stop any vehicle they think is worth checking. A clear legal framework for selection practices is lacking. Rodrigues and Van der Woude (2016) argue that (inter) national legislation and jurisprudence do limit the scope of controls, but do not give a concise answer on what role race and nationality can play in the selection process of law enforcement officials. Distinctions are made between (1) direct and indirect discrimination based on race and nationality, with different requirements for both; (2) the legitimate use of these factors considering the goals of the law enforcement organization in question and; (3) the proportionality and subsidiarity of using race and nationality. The complexity of rules and regulation could lead to confusion for law enforcement officials with respect to when nationality or race can and cannot be used as a legitimate selection factor.

The above illustrates that the legal context of MSM checks leaves some ambiguity both for the goals of the MSM and the role of ethnicity and nationality in the selection process. Following Lipsky (2010), it is in this exact grey area that street-level bureaucrats such as RNLM officers have the most influence on how policy is translated into practice. Ambiguity leaves space for discretionary decision-making in deciding who gets stopped and for what reason and makes legal consciousness a key factor, as officers' 'commonsense understanding' of the law will have a significant impact on how they will use their discretion. In the remainder of this chapter I will explore how RNLM officers decide who to stop for an MSM check and how their decisions can be understood in the broader context of the legal and organizational framework that influence legal consciousness.

### **5.5 Profiling and selection by the RNLM**

During the fieldwork officers were found to use a wide range of indicators for their selection process. The indicators referred to by the officers during observations and conversations could for the most part be placed in two main categories: the vehicle and the individuals in the vehicle. For the vehicles, old, beat up cars were considered to be 'control magnets' associated with human smuggling and irregular migration. According to officers irregular immigrants would not have a lot of money and therefore would not be able to afford expensive vehicles. In addition, several officers believed that people who did not take good care of their car were also the type of people who did not take rules and regulations very seriously in general, resulting in a high likelihood of finding unpaid fines for the drivers. On the other side of the spectrum, expensive vehicles also attracted attention. Brands such as BMW, Mercedes and Audi were associated with human trafficking and money laundry.

Other categories of vehicles indicated by officers were vans, small but fast cars and coaches. Vans were stopped regularly during the MSM checks, because it was possible to smuggle anything in a van, from irregular immigrants to drugs. This was not visible from the outside and therefore needed to be checked. Smaller vehicles were highly associated with drug related crime. According to the officers criminals would prefer such vehicles as they were cheap, easily available and do not immediately stand out in traffic. Coaches on the other hand were associated with human smuggling, as they offered a cheap and easy way to cross borders, making it a popular form of transportation for irregular immigrants and people who facilitated their travels.

Besides vehicle type, more detailed vehicle characteristics were of importance to RNLM officers. Mentioned most frequently were tinted windows. Similar to vans it was not possible to see who or what was in the vehicle due to the tinted windows, which was cause for a check. This was supported by the observations: 19,7% (N=65) of the observed vehicles had tinted windows. Other vehicle characteristics mentioned, although less frequently, were customized vehicles with large rims or low suspension due to associations with unpaid traffic fines and vehicles with overloaded suspension could indicate that something heavy would be in the trunk of the car, such as a person or stolen goods.

The license plate could sometimes be used to determine if a vehicle was a rental or not, which was mentioned often during the fieldwork as something that officers kept their eye on. As an officer explained during a focus group:

*'If you have been working here for a while, then you know that [rental vehicles] are often used for criminal activities. The owner is not traceable, the driver is not traceable and the occupants are often our target demographic.'* FG7

Regarding the occupants of the vehicles, males were considered a target demographic. In the eyes of the officers males were more likely to break the law compared to females. This selection criterion is also reflected in the observational data: 94,4% (N=310) of the observed drivers and 79,2% of the passengers were male. The data from the FNBS and BBS system give a comparable division: respectively 77,8% and 84,4% of individuals registered in the systems were male. On the subject of age officers gave a unanimous view as well. Their eyes were set on younger individuals, as they were more likely to be breaking the law. Senior citizens would not even be considered in the vast majority of cases, officers stated.

Clothing could be part of the selection process as well. Officers listed baseball caps and track suits regularly as something they kept an eye out for as these were associated crime or unpaid traffic fines. On the other end of the spectrum were what officers called 'business people', which usually were middle aged individuals with a neat appearance, often wearing suits. This category was mostly dismissed as a target for MSM checks. On multiple occasions during the fieldwork a vehicle caught the officers' eye, but once they noticed an individual fitting the business person category was behind the wheel it was decided not to stop the vehicle.

The last indicator regarding the occupants was the number of occupants in the vehicle. Vehicles with more than one person were considered to be more interesting compared to solo travelers. The officers' reasoning was straightforward: human smuggling by definition has multiple people involved, making people traveling alone less relevant to the MSM. Several officers added that it was also more efficient to stop vehicles with multiple occupants, as more people meant a higher chance of finding offences or unpaid fines. The observations support these statements: 84,2 % (N=278) of the observed vehicles contained two or more occupants.

It is important to note that officers explained that although many factors were part of the selection process, a single factor was not enough to stop a vehicle. The decision to stop was a result of a process officers called 'adding up.' During a focus group an officer explained:

*'It's several factors together. The foreign license plate you, yeah... A dark skinned person can be a plus, state of the vehicle can be a plus [...] or a taxi. [...] And that's how you start to add things up. The more you can add up, the better the chance you'll find something.'* FG5

Although vehicles would pass by at a high speed, officers were able to observe several factors in that short frame of time. When enough factors could be added up, the decision was made to stop the vehicle. What was considered to be enough to stop a vehicle was never fully explained by officers, as it was very dependent on the situation and which factors were involved. Some factors were more important than others and the importance could change depending on the presence of other factors. As illustrated by an officer:

*'Well, some factors add up fast. If there's an extremely expensive Mercedes with Albanians in it, yeah, that's two factors, but that's instantly full alert, so to speak.'* FG3

Officers did mention specific combinations of factors for human trafficking, money laundering or drug dealers. These common sense profiles were explained consistently by different officers on separate occasions.

The above leads to two observations. First, officers use a wide range of indicators in their selection process. Second, the last two quotes illustrate that race, ethnicity and nationality, also referred to by mentioning skin color or 'foreign appearance', can indeed be part of the selection process. As these factors are crucial but also more complex than, for instance, types of vehicles, we will take a more detailed look at these in the section below.

### **5.6 Race, ethnic background and nationality as indicators**

Nationality was often discussed as a selection criterion during the fieldwork. As one of the main goals of the MSM was to combat irregular migration, officers were keeping an eye out for individuals they thought were not Dutch. A proxy for determining nationality was the license plate, which proved to be a key factor in the selection process of RNLM officers. As an officer stated during a focus group:

*'One of the first indicators, at least for me, is the nationality of the vehicle.<sup>69</sup> [...] Well, after all, you're there to enforce immigration law. It would make more sense that you, yeah, stop vehicles with a foreign license plate.'* FG4

Dutch license plates were considered to be less relevant as the vehicles concerned most likely contained Dutch individuals. Instead officers explained they were looking for non-Dutch license plates and especially Romanian, Bulgarian and other Eastern European countries were mentioned often during both the observations and focus groups.

Taking this into consideration one would expect that few 'Dutch vehicles' would be stopped for MSM checks. Yet, the observations show that a sizeable part of the observed vehicles did in fact have a Dutch license plate (20,6%, N=68) surpassed only by German vehicles (24,5%, N=81). These findings are supported by the FNBS and BBS data, with Dutch vehicles even topping the list in BBS. What officers said during the

<sup>69</sup> Although vehicles do not have a nationality, this was a phrase commonly used by RNLM officers.



focus groups and field interviews about their selection criteria did not always fully match the observations and the quantitative data of the RNLM.

**Table 5.1: five most registered origins of license plates in the observation forms, FNBS and BBS**

Observations			FNBS			BBS		
Origin	%	N	Origin	%	N	Origin	%	N
Germany	24,5	81	Germany	41,2	1573	Netherlands	34,8	6846
Netherlands	20,6	68	Belgium	21,5	820	Germany	23,7	4673
Belgium	17,3	57	Netherlands	15,5	591	Belgium	19,8	3892
Poland	6,7	22	France	7,9	302	France	3,6	718
France	5,5	18	Poland	1,8	68	Bulgarian	3,2	635

The above could possibly be explained by another key factor in the selection process: the appearance of the occupants. Officers were aware that the researchers were interested in selection criteria as well as of the sensitivity of the role of appearance and especially race or ethnic background in this matter. Many officers were therefore inclined to give their view on this subject and how it fit into the context of migration control. An almost unanimously shared perspective was that stopping and checking individuals who looked like they were Dutch citizens would not make much sense with the mission statement of the MSM in mind. Because the officers' job was to look for irregular immigrants, they were looking for individuals who in their eyes did not 'look Dutch.' Officers had an idea of what a Dutch person looked like in general and especially race or ethnic background - the majority of the Dutch population is white - was an important factor in this. During the focus groups officers gave several examples of their perspective on this issue:

*'We are there, of course, to find irregular immigrants, making someone's appearance and skin color<sup>70</sup> important factors. These can't be the only factors of course, I know that and I agree with that.'* FG1

*'No matter how you look at it, skin color is just an indicator for us.'* FG2

<sup>70</sup> It must be noted that both speaking about 'appearance' or 'skin colour' and referring to the overrepresentation of certain ethnic groups in certain types of crime are common practice in the Dutch law enforcement discourse (Bonnet and Caillaud, 2015), whereas the term race is not commonly used.

As it was assumed by officers that most Dutch individuals would be white, non-white individuals would be less likely to be Dutch, equaling 'Dutchness' to whiteness. Officers would be more inclined to stop a vehicle with a Dutch license plate if a 'non-Dutch looking' individual was in the vehicle.

Despite the officers belief in using appearance as a proxy for nationality, their logic contains an obvious flaw: appearance cannot be used to determine nationality. Much like Pratt's (2010) observation for Canadian migration officers, the Dutch officers were mixing up race, ethnicity and nationality, causing them to act on *presumed* nationality or ethnic background based on appearance. There are plenty of arguments of ethical nature to be brought up against this method, but the downside of acting on such presumptions can also be made more tangible based on the available data. As visible in table 5.2, contrary to the officers' explanation most drivers stopped for an MSM check during the observations were Dutch (19,4%, N=64). Important to note is that while these individuals were Dutch, most did not fit the officers' description of a Dutch person, i.e. they were not white. Comparable results regarding nationality were found in the BBS data. The FNBS system presents a different image, as can be expected from a system aimed solely at registering migration related information.

**Table 5.2: nationality of the drivers as registered in the observation forms, FNBS and BBS**

Observations			FNBS			BBS		
Nationality driver	%	N	Nationality occupant	%	N	Nationality occupant	%	N
Dutch	19,4	64	Unknown	7,2	1,064	Dutch	26,6	14,466
German	11,8	39	Syria	6,6	966	Belgian	6,1	3,339
Belgian	10,0	33	Morocco	5,8	849	German	5,2	2,811
Polish	8,2	27	Afghanistan	5,2	768	Romanian	3,1	1,705
Romanian	5,8	19	Yugoslavia	4,7	692	Turks	2,6	1,417

The officer's process of determining a person's nationality was therefore largely dependent on two factors: the license plate of the vehicle and the appearance of the individuals in the vehicle. While officers were convinced this was the best way to differentiate between Dutch and non-Dutch individuals, the data gives solid reason to doubt the effectiveness of appearance as a selection criterion, as a large percentage of individuals stopped for an MSM turned out to be of Dutch nationality.

The issue with selection based on assumed nationality goes beyond the question of effectiveness, however. During the observations and focus groups it became clear that officers were not just looking for anyone fitting the category of 'non-Dutch looking.' Instead officers kept an eye on specific nationalities which they associated with crime. Especially Eastern Europeans were mentioned often, with an emphasis on Romanians and Bulgarians. These nationalities were heavily associated with human trafficking, identity fraud and theft, as officers explained during the focus groups:

*'That has to do with the crime over there. We get a lot of false documents from Romanians and Bulgarians. A lot of fake id-cards.'* FG6

*'I think there is evidence that when you say human trafficking, that's the Bulgarians.'* FG4

Officers would look for license plates from these countries as well as for individuals who they thought looked like they were from Eastern Europe. When asked how one could differentiate an Eastern European person from, for example, a Western European person, officers usually stated that it was hard to explain in exact words, but would often refer to specific skin tones or differences in facial features such as noses and jaw lines. Besides Eastern Europeans, several African nationalities were considered to be relevant to the MSM. Nigerians, Eritreans and Somalians were associated with not having proper documentation and officers referred to past experiences regarding overstaying visas or traveling without any documentation. North African nationalities, especially Moroccans, on the other hand were associated with drug offences. An important part of the drug runner profile were young North African men, for example.

*'If you pick Moroccans, for example, than you know there's a chance of drugs. If you pick Lithuanians or whatever, maybe a stolen vehicle or something. Each group has its own things.'* FG6

*'Yeah, a Danish vehicle with four Somalians in it, that is a ninety percent chance of success.'* FG1

Similar to identifying Eastern European nationalities, officers referred to specific skin tones and facial features common for each African nationality. Officers used national stereotypes based on skin color, facial features or race to identify 'high-risk nationalities' in order to combat the crimes associated with those nationalities (see also: Brouwer, Van der Woude & Van der Leun, 2017). This further problematizes

selection based on appearance, as not only is appearance equated to nationality but also to risk and dangerousness.

### **5.7 Legal consciousness and the organizational context of the RNLM**

The above leads to several observations. First, officers made a direct connection between nationality or ethnic background and crime and perceived combatting those forms of crimes as their task (see for more: Brouwer, Van der Woude & Van der Leun, 2017). As by law MSM checks are meant to combat irregular migration, identity fraud and human smuggling, officers were going beyond the official scope and legal boundaries of the MSM, resulting in a prime example of crimmigration. Second, due to the officers' association between crime and nationality, their selection practices showed more resemblance to ethnic profiling in the context of policing than that of migration control as officers relied on crimmigrant stereotypes for their selection process. Third, as race and ethnicity were linked to nationality and nationality subsequently linked to crime, this boils down to 'if you do not look Dutch, you must be a risk.' Although the concept of race is not commonly used in the Netherlands, these findings tie in with a very vast international literature on policing and ethnic or racial profiling (Rojek, Rosenfeld & Decker, 2012; Tillyer & Engel, 2013; Carroll & Gonzalez, 2014; Delsol & Shiner, 2015). On a first glance it would be easy to attribute these observations solely to the beliefs of the individual officers. However, it is important to study the processes behind the beliefs in a broader organizational context (Silbey, 2005; Young, 2014). In the remainder of this section we will do so using the factors as explained by Hirsch and Kornrichs (2008).

Starting with the *formalization of evaluation processes* to create objective criteria for decision-makers to prevent discriminatory acts, RNLM officers did not have a clear set of rules of what could and could not be used for selection purposes. As explained in section four, the legislation is lacking in prescribing a framework for selection criteria. This showed during the fieldwork as officers were aware of potential accusations of discrimination and ethnic profiling, but they were also convinced that appearance was essential to their work. It was perceived as a necessary evil. When discussed with officers, a much heard reply was: how else would you recognize an irregular immigrant? At the same time officers were aware of the optics of their selection practices and sometimes anticipated accusations of discrimination during MSM checks. For instance, when only vehicles containing non-white occupants were at the checkpoint, officers would stop vehicles with white occupants. This would allow them to deflect accusations of discrimination by showing MSM checks were not aimed at just non-white individuals.

Besides issues regarding on how to make a selection, there were issues on why to make a selection as well. During the focus groups, officers stated that the goal of MSM checks was broader than combatting irregular migration, human smuggling and identity fraud and illustrated this by giving examples of what they thought the MSM was about:

*'Human trafficking, human smuggling, money laundry and drugs.'* FG1

*'There are officers, I'm one of them, I catch everything I see. I don't care if it's a foreigner, an article 8 [drunk driving, TD] or a weapon or an uninsured vehicle, that doesn't matter.'* FG6

During the fieldwork this was observed in practice, as vehicles were stopped based on suspicions of money laundry and human trafficking but also less serious infractions such as broken tail lights and speeding. Some officers even described individuals suspected of drug offences as their 'typical target demographic.' Although not all officers held such broad interpretations of what the goals of the MSM and legal powers of RNLN officers could and should be, on average officers thought that the migration focused goal of the MSM was a missed opportunity to combat crime at the border and interpreted the aspect of cross-border crime broader than expressed in the official documentation and legislation (see for more: Van der Woude, Brouwer & Dekkers, 2016).

While this could be viewed as abuse of power of the individual officers, again the organizational aspect in this is important. First, it should be noted that a much heard phrase was 'the police is for the safety of the streets, the RNLN for the safety of the state.' Many officers saw it as their duty to protect the Netherlands from dangerous individuals, whatever the danger in question would be. Such views were reinforced by the briefings before MSM checks, during which wanted or potentially dangerous individuals were shown, often related to drugs or violent crimes. This tendency to emphasize crime control was further legitimized on the basis of the change in the name of the MSM. Before 2010 the Mobile Security Monitor was called the Mobile Foreigners Monitor (Dekkers, Van der Woude & Van der Leun, 2016). While the change from foreigners to security seems to imply a change in the goals of the instrument and an expansion of legal powers for officers, this is officially not the case. The name change was formally only that, a change of name, yet many officers interpreted the transition from monitoring foreigners to security as the inclusion of crime control in the MSM.

A second factor related to legal consciousness are the *control structures* which allow supervisors to keep oversight of employees. During MSM checks a senior officer was always present at the checkpoint. However, as the selection process took place at a different location away from the checkpoint itself, direct control over who was stopped and for what reason was difficult to achieve. That being said, it remains the question if supervision over the selection process by a senior officer would result in significant changes. Officers learned the profiling practices from each other and senior officers were considered to be very knowledgeable making them influential in the learning process. Profiling practices were passed on by older generations to newer generations, including biases. The conflation of migration control and crime control was observed among team leaders as well, for example by discussing criminal suspects during briefings or boasting about finding large quantities of drugs during MSM checks. Some of those in positions of control during MSM checks stimulated actively combatting crime. In addition, making selections was considered an important and respectable skill by officers. It took time to hone the 'gut feeling' that was needed to make proper selection and officers took pride in having these intuitive skills. Regardless, the RNLN has implemented an intelligence-led policing program to make MSM checks less reliant on experience and knowledge of officers in the field and more on information and information technologies (see for more: Dekkers & Van der Woude, 2016; Dekkers, Van der Woude & Koulis, 2018). Officers perceived this development as taking away part of their much valued discretionary space and the attempt to implement such a control structure faced resistance on the street-level.

Regarding third and fourth factor - the *racial and gender composition* within an organization and the extent to which *minority groups are present in the management layers* of the organization - the observations showed that the vast majority of RNLN officers were white males, both on the operational and management level. It should be noted that the composition of the organization came up during the focus groups and the homogeneity of the RNLN was considered to be a problem by officers. A more diverse organization would be beneficial, but despite efforts to recruit officers from different backgrounds the RNLN had not been very successful in the eyes of the officers.

## **5.8 Conclusion and discussion**

The aim of this chapter was to investigate how RNLN officers select potential immigrants in the context of the MSM in the absence of a requirement of reasonable suspicion, how they deal with the legal complexity of the role of race and nationality in the selection process and the potential negative consequences of singling out certain groups while still adhering to the principle of free movement crucial to the

Schengen Agreement and place these results in a broader organizational context. Although legislation puts restrictions on the use of race, ethnic background and nationality in the selection process, it remains unclear what these restrictions are in migration control and the literature on migration control gives reason for concern in using these two factors. However, since empirical research on the topic is scarce, this leaves the question what other factors are used for profiling and selection in the context of migration control, how officers give meaning to their practices and which organizational factors play a role in creating and sustaining practices. The results of fieldwork with Dutch migration officers gives opportunity to reflect further on these issues.

Based on the results of the fieldwork it would be easy to characterize the actions and perceptions of the individual RNLM officers as discriminatory and to a certain extent this would be justified. Working with stereotypes or perceptual shorthands does result in these outcomes. However, taking the broader organizational context into account shows that the RNLM officers are placed in a precarious position without much guidance. Officers are given a large discretionary space to make decisions on who to stop for MSM checks, but are not handed concrete guidelines on how to use that discretionary space. There seemed to be a lack of direct oversight over the selection process and an evaluation of the effectiveness thereof, leaving an absence of feedback for the officers. At the same time there were factors that amplify the observed issues regarding the use of discretion in the selection process: officers did not get formal training on selection but learned from each other, communication about the goals of MSM checks was ambiguous and the homogeneity of the organization limits alternative perspectives on the potential harms of profiling practices. As a result officers were granted a large discretionary space but lacked sufficient guidance to ensure these discretionary powers were properly put to practice. This study shows that in situations such as these officers' perceptions of their task and their understanding of the law is imperative, further emphasizing the importance of legal consciousness and the underlying processes in the study of both immigration and profiling practices.

While the research results mirror the concerning results of other studies on profiling in migration control, the question how migration officers *should* profile immigrants if not based on (ideas about) race or nationality, is still largely unanswered. RNLM officers have been given the difficult task of distinguishing legitimate travelers from potential harmful individuals, but have to do so with limited time and resources. Especially in the EU this is a demanding task as the Schengen Agreement has abolished permanent border control which does not make migration control any

easier. Profiling as part of the larger development of risk management strategies in migration control is often as seen by authorities as one of the ways to address this issue. By distinguishing patterns in characteristics and behavior of past offenders, high risk individuals can be targeted in the flow of mobilities crossing the border to prevent future harm. What this study shows is that in the context of migration control, distinguishing a pattern could prove to be challenging. Not only did the problematic criteria of race, ethnicity and presumed nationality prove to be of questionable effectiveness, many of the factors used by RNLM officers had more to do with profiling criminals than irregular migrants. Maybe the question how migration officers *should* profile irregular immigrants should be if they *could* profile irregular immigrants without resorting to racial profiling based on national stereotypes and negative associations between crime and nationality.

As Pratt states, migration officers' discretionary decisions 'are between a hunch and a hard place: they are neither wholly scientific nor anti-scientific, expert nor lay' (2010, pp. 476). Further research is needed to move profiling in migration control away from the hunch and more towards the hard place. It could give further insight in the feasibility of profiling in this context, as this study gives reasons to question the assumptions behind profiling practices in migration control. If feasible, research could make profiling more effective by establishing reliable indicators for officers to use. This would also require organizational interest in the actual outcome of decisions, which is now largely lacking. When there would be more evidence for the added value of profiling based on certain factors this would in turn enable more concrete regulation as to which factors are acceptable but also tools to guide officers' discretionary decision-making. As right now, the hunch appears to do more harm than good.

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