



# A Patchwork of Intra-Schengen Policing: Border Games over National Identity and National Sovereignty

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## Abstract

By focusing on these “article 23 SBC checks”, this article will argue that the Schengen Agreement and the Schengen Border Code are—and always have been—incomplete policy responses to the tension that was felt from the very beginning of “Schengen” between (national) security and freedom of movement. In fact, by drawing from the work of Wonders on the flexibilization of state power which interlinks with Mofette’s and Valverde’s work on jurisdiction and interlegality as well as with the ideas around conscious incompleteness of agreements and regulation, the article will argue that member states as well as enforcement agencies have been consciously using the interplay between the normative regime on the European level and the normative regime and implementation and execution thereof on the national and local level.

## Keywords

Border-crossing, borders, migration, Schengen, sovereignty

## Introduction

The asylum and migration crisis that came to a head in Europe in the summer of 2015 was years in the making. Indeed, others have argued that such crises have historically marred European co-operation in asylum and migration policies (Alink et al., 2001; Schierup et al., 2006: 4). Migration scholars have highlighted that migration policy, both

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at the national and international levels, seems to be particularly prone to failure due to a combination of weak monitoring, lack of policy harmonization, low solidarity and absence of central institutions (Castles, 2004; Hollifield et al., 2014). The combination of low harmonization, weak monitoring, low solidarity and lack of strong institutions in EU migration policy became increasingly unsustainable during the 2015 crisis. As Jabko and Luhman (2019) rightly observe, the arrival into the EU of hundreds of thousands of refugees from the Syrian conflict in 2015 engendered a humanitarian crisis and threatened two institutions of border control: the Schengen Area and the Dublin Convention. The Schengen Area is an area without internal borders, while the Dublin Convention governs how asylum seekers are registered upon entering EU territory. Under Schengen and Dublin, states retained the right to unilaterally re-introduce border controls and to return asylum seekers to the first country of entry in order to protect an “essential aspect of sovereignty”; that is, control over frontiers (Schain, 2009). In 2015 however, the Dublin system ceased to be effective. Many member states lacked the capacity or the will to process so many asylum applications and even the most refugee friendly states responded by closing their borders. The crisis made it abundantly clear that, in the absence of strong institutions in the context of an internal borderless area, once inflows enter any state in Europe they are then able to move onwards, triggering unpredictable policy reactions, the efficacy of such reactions and the long-term consequences for Schengen and its principle of free movement, “one of the EU’s most cherished achievements” (Commission, 2016: 2) are far from positive.

Whereas the so-called crisis sparked a broad range of measures and policy debates, in this article I will focus on the different ways in which countries organized the monitoring of intra-Schengen border crossings. So, in other words, in what ways countries are policing intra-Schengen borders. After September 2015, several Schengen countries—Germany, Austria, Slovenia, Hungary, Sweden, Norway, Denmark and Belgium—invoked articles 25–27 and 28–30 of the Schengen Border Code (SBC) to reintroduce internal border checks. Although much of the international attention went to those countries that temporarily reinstated permanent border checks, it is important to realize that the SBC offers countries an alternative to this drastic measure. This alternative might be even more drastic in terms of monitoring mobility as article 23 of the SBC allows immigration and/or police checks to be carried out by national law enforcement agencies in border areas. By policing an area around the border, yet not performing checks at the physical border between two countries, these police or immigration checks are considered to be “Schengen proof”.

By focusing on these “article 23 SBC checks”, this article will argue that the Schengen Agreement and the SBC are—and always have been—incomplete policy responses to the tension that was felt from the very beginning of “Schengen” between (national) security and freedom of movement. Whereas the first ideas about an area without internal borders—stemming from the post-Second World War period—are built on the notion that borders were considered to be a paragon of nationalism and therefore responsible for war, and border control as a barrier to economic growth (Pudlat, 2010: 10), Schengen nowadays seems to be all about border control and bordering practices driven by concerns of national identity and sovereignty. The use of the “crisis” rhetoric in discussing the migration tragedy in Europe is illustrative for these concerns, as it directly places an

out-of-the-ordinary situation in a discourse that sees Europe as a continent under siege, a continent at war. Within this discourse, refugees and other migrants are ambivalently, and sometimes interchangeably, portrayed as victims and dangerous invaders—posing a threat to “our” safety, economic well-being, cultural identity, language and values (Baerwaldt, 2018).

By drawing from the work of Wonders (2008, 2016) on the flexibilization of state power which interlinks with Mofette’s (2018) and Valverde’s (2009) work on jurisdiction and interlegality as well as with the ideas around conscious incompleteness of agreements and regulation (see Jones et al., 2016; Scipioni, 2018), the article will argue that member states as well as enforcement agencies have been consciously using the interplay between the normative regime on the European level and the normative regime, implementation and execution thereof on the national and local level. By using the discretionary space in rules and regulations to the best advantage of their unique interests, the different national and local actors involved in intra-Schengen cross-border monitoring all seem to be involved in a complicated border game evolving around the demarcation of boundaries: the actual creation of boundaries to keep out the “crimmigrant” other and to preserve cultural homogeneity, but also the less visible process of sometimes actively creating and sometimes actively crossing boundaries between different jurisdictions and legal mandates.

By combining these various theoretical frameworks, this article explicitly moves beyond the national and local level as the venture point for reflection and analysis. By focusing too much on the national level of intra-Schengen bordering practices, in particular border policing, there is the risk of “overlooking” the way in which national jurisdictions operate within and interact with the larger jurisdictional unit that is Europe. In taking this approach, this work aims to contribute to a growing body of scholarship in the field of border criminologies that takes a more dynamic—a more holistic—approach in studying and understanding the reality of bordering practices and decision making (Aas and Bosworth, 2013; Aliverti, 2013; Barker, 2012, 2018; Bosworth et al., 2018; Segrave and Wonders, 2019; Weber and McCulloch, 2018; Wonders, 2017). Only through such a holistic approach does it become clear what the central role and use of different actors’ discretion is in playing border games, and with what aim these games are being played.

## **Different theoretical lenses to understand the border game**

When it comes to issues of border control and the management of cross-border mobilities, we see influences of both globalization and glocalization. On the one hand, the “voice” and agenda of the (supra)national government is strong and influential, whereas on the other, in implementing the state perspective, the dynamics of the local context where the measures should be implemented and thus felt most directly, local actors seem to play an important role as well. This multi-layered legal and governance structure that is especially strong in the context of the European Union (EU) renders explicit how the national scale (whether translated in legislation and policy or institutions) is an important yet hardly exclusive jurisdiction in bordering. Therefore, in making sense of bordering practices at the physical intra-Schengen borders, this article will use three different

perspectives. All three perspectives take the dynamic nature of these bordering practices into account, yet address slightly different aspects. In this section I will briefly describe all three frameworks and argue why this combined lens provides the necessary insights into fully understanding border games.

### *Lens 1: Flexibility and the multi-scalar dimension of legal governance*

While taking a critical criminological approach, Wonders (2008, 2016) reflects on the implications of globalization on the role of the state and the distribution of state power. She observes how, as a result of global processes, the scalar hierarchy centered in the national state (Sassen, 2007: 14) is fundamentally destabilized, leading to the creation of transnational spaces of governance. The EU is a prime example hereof: member states are not asked to give up their sovereignty, but to protect their sovereignty in a global world by rooting legitimacy in a transnational context, the context of the EU. By drawing on Chambliss' "dialectical approach to lawmaking" "[. . .] which considers the nation-state to be a crucial site for mediating class struggle, responding to the impacts of structural contradictions, and ensuring the long-run success of capitalism as a system", Wonders (2016: 204) argues that globalization has made state power become flexible, fluid and global "freed from the fetters of place & time". The development of this "just-in-time justice" is characterized by the flexibilization of the architecture of nation-states and the flexible application of law.

This growing flexibility combined with the supranational influence of the EU as a result of which the architecture of globalization has become more deeply embedded within European nation-states creates opportunities for nation-states to strategically negotiate the impact of globalization on sovereignty depending on the topic or theme at hand. Actors can actively "use" the transnational spaces of governance to avoid submitting their activities to state's jurisdiction. On the other hand, national courts and public international law remains in place, to be used selectively as needed. In this way nation-states can use law flexibly, just-in-time—or they can choose to make it utterly irrelevant (Sweet, 2004: 144). As it will be argued later on, this dialectic captured by states' use of law just-in-time is especially visible at intra-Schengen border areas and in the way in which nation-states have organized the monitoring of intra-Schengen cross-border mobility. It is in the border areas where nation-states are engaged in border reconstruction projects as a way to "respond to key structural contradictions within the global economy and to keep important aspects of state power intact while also extending power into new, transnational spaces" (Wonders, 2008: 34).

### *Lens 2: Jurisdictional games and interlegality*

The notion of scale is also central to the work of Valverde, who links it to questions of jurisdictions and the possibility to play jurisdictional games due to the multi-scaled nature of governance structures. Valverde (2009, 2010) argues that paying attention to the legal technicality that is jurisdiction can help us better understand the multi-scalar dimension of legal governance (also Mofette, 2018). But jurisdictions are also a tool to border different types of laws and authorities: as Valverde (2009: 141) explains, "the

allocation of jurisdiction organizes legal governance, initially, by sorting and separating” objects and realms of law in a way that eventually seems natural. It is the practice whereby legislators, courts and anyone who wants to summon or enforce the law, make claims about the “where”, the “who”, the “what”, the “when” and the “how” of law (Valverde, 2009) and provide rationales for why an act or a person, in a particular place, falls under the authority of a particular body and should be treated according to this or that kind of procedures. Just like borders, jurisdictions need to be performed. In his seminal work on territorial jurisdiction, Ford (1999) likens jurisdiction to a tango, a type of dance with a set of rules that define the role of each partner to negotiate—with a certain level of creativity and discretion—when to step forward, and when to let their partner make the move. Similarly, Wonders (2006: 64) describes borders as being “socially constructed via the performance of various state actors in an elaborate dance with ordinary people who seek freedom of movement and identification”

In his recent article on immigrant street vendors in Barcelona, Mofette (2018) illustrates the need to be aware of the multi-layered legal governance structures to account for the dynamic, asymmetric, and uneven legal intersections at play in immigration control. By introducing De Sousa Santos’ (1987) concept of interlegality—that is, the non-synchronic, unequal, and unstable play between various laws, techniques, and normative regimes, Mofette shows how jurisdictional games and the attribution of jurisdiction between actors can help us better understand the multi-scalar dimension of legal governance. As Mofette explains, “the concept of interlegality invites us to account for the plurality of actors and logics and produce readings of the varied intersections between distinct but multipurpose sets of legal technologies” (Mofette 2018: 13). Paying attention to the scale jumping practices and jurisdictional games of actors illuminates how coercive discretionary decisions and the negotiations over what belongs to immigration law, criminal law or other legal regime, are being made.

### *Lens 3: Conscious incompleteness*

Scholarship on public administration and public affairs provides important insights on European harmonization and the negotiations between “Europe” and its governing bodies and national state actors. In looking at the way in which Europe dealt with the 2015 so-called migration crisis, Scipioni (2018) observes that by advancing European harmonization and integration through incomplete agreements, the EU has created the very conditions for this crisis. While analyzing EU co-operation in asylum and migration, he concludes that much of the EU rules and regulations—the directives and agreements—take the form of “incomplete contracts” (Pollack, 2003) with details to be filled at a later stage, as “complete” contracts “would have to be impossibility long”, include “every possible contingency” and cover all possible applications (Caporaso, 2007: 393). On a similar vein, Jones et al. (2016) have argued that state governments consciously introduce incomplete governance structures through lowest common denominator bargains. From this perspective, important steps in the deepening of European integration—such as transferring new policy competences to the EU or delegating new powers to EU institutions in existing areas of competence—occur only as a result of lowest common

denominator bargaining among powerful member states, each pursuing its domestically determined self-interests (Moravcsik, 1993).

The ideas of incomplete governance structures and incomplete contracts partly overlap, and to understand similarities and differences it is useful to refer to how Caporaso (2007: 393) unpacks the “incomplete contract” metaphors by pointing out that, according to the case at hand, this might mean that something “is missing (incompleteness), open to multiple meanings (ambiguity), or simply unknown (risk or uncertainty)”.

The common denominator between all three lenses seems to be the notion of discretion: the increased flexibility of the law as a result of the increased multi-scalar dimension of legal governance will, at least partly, be the result of the increased use of open norms creating discretionary space to decide when to use what (legal) norm or jurisdiction. Discretion thus allows for the development for “just-in-time justice” driven by highly politicized motives. In order to understand how and why discretion is built into this multi-scalar dimension of legal governance, we need the lens of the incomplete contracts and incomplete governance structures as the incompleteness can—and most often will be—the result of deliberate deliberations and decisions by legislatures and policy-makers (Schneider, 1992; for an application of Schneider in the context of asylum policies see Weber, 2003). The very existence of discretion, on different levels, therefore allows states and state-actors to engage in the “scale jumping practices” and “jurisdictional games” to shape present national policies and practices in such a way that they are seen as most beneficial for the well-being and security of the country. Looking at the rise of nationalist and nativist political parties in Europe, the latter seems to be increasingly understood as preserving the land, culture, language, political institutions and way of life: preserving national identity (Van Der Woude, in press).

## Analyzing the supranational scale

As mentioned in the introduction, other than what is often implied, being a signatory of the Schengen Agreement does not mean that member states lose all control—and therefore sovereignty—over their intra-Schengen borders. If anything, in line with the creation of transnational spaces of governance, nations are not asked to give up their sovereignty, but rather to protect their sovereignty in a global world by rooting legitimacy in a transnational context that often dictates or trumps domestic law (Wonders, 2016: 210). Put differently, by signing the Schengen Agreement, member states agreed to the core idea of free movement and thus to relinquishing permanent border checks. Yet under certain conditions and circumstances performing permanent border checks was seen as legitimate as was the performance of non-systemic police checks for immigration or crime control purposes in border *areas*. Before looking more closely at the technicalities of the SBC to see to what extent it clearly demarcates the jurisdictional boundaries of the European legal framework versus the various national legal frameworks, it is important to take a closer look at the negotiations preceding the Schengen *acquis*.

### *Political bargaining—negotiating compensatory measures*

Although the response to the 2015 migration “crisis” might seem extreme in terms of the measures that were taken and their duration, concerns about the “open borders”

between EU member states have been present from the very first moment in the deliberations about the Schengen Agreement. The viability of the principle of free movement was always questioned. While seeing—and wanting—the economic benefits of the lifting of border checks between member states, countries were also wary about the security deficit this would create. They had strong concerns about the ability to secure the external border of Europe so that it would become the protected and impenetrable fortress that it is often depicted to be. Interestingly—or rather, paradoxically—the emergence of a complex system of migration control in Western Europe, functioning, on the one hand, as a regulatory tool for legal entry and residence and, on the other, as a repressive tool against illegal entry and residence, can be traced back to the establishment of the Schengen Agreement in 1985. Ironically, the establishment of an area without borders has effectively stimulated border control, since the notion that European integration via the opening of internal borders would lead to an increase in crime and criminal organized groups became the shared belief underpinning Schengen (Bigo, 1996; Faure, 2008). In particular, third country nationals and irregular migrants were increasingly seen as potential safety risks. In response to the lifting of border checks between two Schengen countries—further referred to as intra-Schengen border checks—the signatory countries pushed for compensatory measures to counter the perceived risks of uncontrolled irregular migration and cross-border crime. Among these measures were the reinforcement of external border control as well as police and judicial cooperation, common visa and asylum policies and the use of databases such as the Schengen Information System (SIS) or the European Dactylographic System (Eurodac) to keep track of intra-Schengen mobility. The call for these “compensatory” measures seems to echo the more general sense of unease around immigration in Europe that can be traced back to the 1980s when immigration—and in particular asylum issues—started to become more and more politicized. It is from this moment onwards that migration is started to be identified as being one of the main factors weakening national traditions and social and cultural homogeneity. According to Ibrahim (2005: 166), it is as a result of this obsession with cultural homogeneity that immigrants have become increasingly linked with “the demise of the nation” and a rise of racism. Whereas in many European countries—as a result of the atrocities of the Second World War—the term “race” is not openly used, it is important to see and to acknowledge that it has been replaced by the term “culture” and the fear of cultural heterogeneity and the wish to preserve cultural homogeneity—in particular by societies in the Global North.

Concerns about the “borderless” Schengen Area were used to justify the need to protect the European community from the external enemy and build “Fortress Europe”, a project that from the very start was aimed at keeping migrants—refugees especially—at bay by implementing legal and physical barriers to obstruct entry to Europe and facilitate deportation from its territory (Huysmans, 2006). That the Schengen Agreement did not at all entail the giving up of intra-Schengen policing in border areas was only further affirmed in May 2005. In that year, seven member states (Austria, Belgium, France, Germany, Luxembourg, Spain and the Netherlands) signed a treaty in Prüm to enhance cross-border police and judicial cooperation, especially on the fight against terrorism, cross-border crime and illegal migration.

The deliberations and negotiations around the signing of the Schengen Agreement illustrate how national interests and supranational interests and principles were clashing and how, by “bargaining” compensatory measures, national governments try to get all the benefits of partaking in the Schengen *acquis* while limiting their national efforts and the risks of doing so. By agreeing to a moderately unified migration policy that liberalizes international travel within the Schengen Area while establishing restrictions on migration from nationals outside of the Area (Stumpf, 2015), the *acquis* has strengthened the “migration–security nexus”, framing migration from outside the EU and intra-Schengen migratory mobilities as a security concern (Pinyol-Jiménez, 2012: 39). Despite this unification, as will be discussed in the following section, the Schengen Agreement would still leave enough room for member states to exercise sovereign control over their intra-Schengen borders. This usage of discretionary space by national governments fits in with what Adler-Nissen and Gammeltoft-Hansen (2008: 15) call “sovereignty” games in which “states engage in new practices and modify their understandings of their own sovereignty”. In other words, member states are using the discretionary space to bargain about on what matter to give up some national sovereignty in order to gain or maintain on another.

### *A consciously incomplete supranational legal framework?*

The SBC contains only one article defining the modalities of free movement within the Schengen Area. Most of the articles adopted with the *acquis* have been presented as compensatory measures for free movement (among them reinforcement of external border control, police and judicial cooperation, common visa and asylum policies) (Bigo, 1996). This narrative of “protecting [external] borders to guarantee free movement in Europe”, as Fabrice Leggeri, director of Frontex recalled (Euractiv, 16 April 2018), is at the basis of immigration policies in Europe. As article 20 SBC states “[i]nternal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out”. According to the travaux préparatoires, this provision means that any control, whether systematic or by spot-checks, carried out solely for the reason of crossing an internal border, is incompatible with the idea of a single area without borders, and is therefore prohibited. Yet, article 23 SBC makes clear that lifting border controls does not mean giving up all forms of control and that there is a middle way between fully open and fully closed borders:

The abolition of border control at internal borders shall not affect the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks.

Indeed, national law enforcement agencies still have the possibility of carrying out controls in border areas. Over the past couple of years, many member states have introduced these types of checks, mostly identity checks, some more structurally than others. As a result of the use of these “scattered security checks”, one could state that the SBC allows for the border to be everywhere and nowhere at the same time (Atger, 2008).



Article 23 thus allows countries to exercise police powers—and to carry out identity checks in intra-Schengen border zones—as long as: (1) the exercise of these powers cannot be considered equivalent to the exercise of border checks, (2) the police measures do not have border control as an objective, (3) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime and, lastly, (4) as long as the measures are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders and are carried out on the basis of spot-checks. Looking at the SBC, it seems safe to say that it creates discretionary space for member states to autonomously decide how they want to carry out police checks, where, for how long and with what aim. This might be considered as problematic, or at least remarkable, given the “freedom of movement” principle and the lifting of formal border control as one of the key features of the European Project. These ambiguities in the SBC demonstrate that much of the actual implementation of these police checks has been left to the discretion of member states. And as has been argued before, considerable discretionary freedom in combination with the need to engage in “social sorting” (Lyon, 2007) leads to a “heightened potential for abuse and disrespect of fundamental rights” (Côté-Boucher, 2016).

## Analyzing the national scale

There are different opinions with regard to how much room European migration and border control policies leave for member states to develop their own—and therewith not per se harmonized—national practices. Interestingly enough, it is hard—if not impossible—to get one’s hands on an overview of the different actors involved in what type of checks at the intra-Schengen borders of all Schengen member states, let alone under what legal mandate and with what aim they operate. Such an overview is non-existent, as a result of which it is basically unclear *what* is happening at Europe’s intra-Schengen borders, and *why*, *when* and against *whom* border controls are exercised. These questions can solely be fully addressed by carrying out ethnographic fieldwork in the various intra-Schengen border areas, and although there is a growing number of studies shining empirical light on these—and other—questions (Barker, 2018; Casella Colombeau, 2015; Cheliotis, 2017; De Genova, 2017; Dekkers, 2019; Fabini, 2017; Franko and Gundhus, 2015; Pakes and Holt, 2017; Van Der Woude and Brouwer, 2017; Van Der Woude and Van Der Leun, 2017; Wonders, 2017), the empirical picture of what is actually happening in intra-Schengen border areas is still very limited. For the scope of this article, I will draw from the limited case law of the Court of Justice for the European Union (CJEU) on article 23 SBC and a recent query that was launched by the European Migration Network. Whereas the latter provides a modest bird’s-eye view insight into the ways in which different EU member states are monitoring intra-Schengen cross-border mobility from an institutional point of view, the three cases that have been brought before the CJEU provide more detailed information on the ways in which Germany, the Netherlands and France actually operate in the intra-Schengen border areas based on article 23 SBC. Where possible, insights into the “law in action” as can be drawn from the case law will be supplemented with findings from empirical scholarship.

### *European migration network query: A patchwork of actors, mandates and goals*

Upon request of the principal investigator of the research project underlying this publication,<sup>1</sup> on 4 June 2018, the Dutch National Contact Point (NCP) of the European Migration Network (EMN) launched an ad hoc query about intra-Schengen border monitoring and border control, with the aim to provide a first insight into what is happening at Europe's intra-Schengen borders.<sup>2</sup> EMN National Contact Points and the European Commission use ad hoc queries to collect information from member states and Norway in a relatively short time on a wide range of asylum- and migration-related issues (e.g. legal migration, irregular migration, borders, return, visas, etc.). Twenty countries responded to the query by filling out the six questions that were aimed at collecting very basic and descriptive data such as: the national actor(s) and/or institution(s) involved in the monitoring of intra-Schengen border mobility; the actual measures taken to monitor the mobility and their aim; the legal mandate and relevant case law.<sup>3</sup> The quality of the responses varied greatly, with some countries providing more elaborate answers than others and with some countries closely following the wording of the SBC and others seemingly responding more "openly" by providing more insight into describing the actual border practices.<sup>4</sup>

*Actors and institutions.* First of all, the query shows that all countries that responded are indeed doing "something" at their intra-Schengen borders. This immediately illustrates the false premise of free movement in the Schengen Area. The query also shows that in most countries, the responsibility for the monitoring and control of intra-Schengen cross-border mobility lies with a combination of actors: in almost all countries the national/federal (and regional and/or local) police will be involved with either immigration authorities, customs or border guard agencies, or a combination of all three. The Netherlands deserves a specific mention in this respect as the responsible agency for intra-Schengen border control is the Royal Netherlands Marechaussee, a police force with military status who are responsible for carrying out immigration checks in the intra-Schengen border regions. The only other countries that also report the involvement of armed forces are Portugal and Italy. In Austria, the armed forces are primarily used to monitor the "green border" in the region around Nickelsdorff<sup>5</sup>—within the framework of the assistance deployment decided by the Federal Government.

*Legal mandate.* Apart from EU legal provisions, like the Schengen Borders Code, almost all the countries mention that the legal mandate under which the agencies and institutions perform intra-Schengen border checks is a mixture of administrative and criminal law. There are also countries that report only an administrative mandate.<sup>6</sup> Some countries report Border Control, Border Patrol or (Federal) Police acts as (part of) the legal foundation upon which checks are being performed.<sup>7</sup> The dual mandate that many of the countries have attributed to the responsible agencies and actors involved in intra-Schengen border policing makes sense in the light of the dual aim of the measures to be implemented. Yet, as explained by Sklansky (2012), equipping enforcement agencies with both crime control and immigration control powers and responsibilities can in practice

lead to unwanted inconsistencies between the application of criminal law and immigration (also see Van Der Woude and Brouwer, 2017).

*Measures and aims.* The different agencies are furthermore involved in different types of measures: police checks,<sup>8</sup> immigration checks<sup>9</sup> and traditional border control in those countries that have temporarily reinstated permanent border checks under article 29 SBC.<sup>10</sup> In describing the aim of the measures implemented, it becomes clear that the measures are driven by a logic of risk for national security and prevention. Some countries report that technological devices or risk assessment analysis are being used as part of, or to support, the checks that are carried out. For instance, Finland reports the use of risk analyses on different levels (strategic, operational, tactical). Estonia also reports making use of risk management in order to decide what type of check is necessary at a given time. A smart camera system, called “Amigo-boras”, is being used in the Netherlands, and in Italy video surveillance is integrated in the management and control of border mobility.

While asked to describe what the aim of the various measures that are being carried out at the intra-Schengen borders is, all countries report a mixed aim for the measures that are taken: on the one hand, the checks are carried out to prevent irregular stay in and irregular migration into the country, and on the other, the checks also serve a crime control or public order purpose. Germany lists four specific aims: “to prevent and suppress illegal secondary migration, to identify smugglers of migrants and other forms of organised unauthorised entry, to avert risks to public safety and health risks, to prevent property crime”. Some countries specifically address the pre-emptive aim of the different checks in relation to, among other things, the lack of external border control. Austria for instance mentions that:

Due to existing grave deficits in the protection of the external border and uncontrolled, illegal secondary migration a serious risk to the public safety and security persists. The measures therefore target the prevention of illegal migration for migration and security policy reasons—as a preemptive measure. Reducing border controls in the current situation would send wrong signals to illegal migrants and organisations active in the field of human trafficking.<sup>11</sup>

Wonders (2016) describes how security regimes explicitly manufacture states of exception as a way to enhance the flexibility of the law to respond to—or preventatively avert—legitimacy threats. The strong prevalence of the language of risk, prevention and preemption in the ways in which countries describe the aim of their intra-Schengen border activities illustrates this. Countries are feeling the pressure in their intra-Schengen borders and actively adopt a language of risk and develop rhetorical campaigns based on fear, such as the “war on terrorism” or the “war on migration”, in order to foster the securitization of national and transnational spaces and to provide an enduring excuse for potential violation of European rules and regulations (McCulloch and Tham, 2005). (National) security threats are a particularly useful tool for nations in a globalized world since risk aversion to “threat” both justifies the suspension of the law and the use of law just-in-time, in some cases even before any harm or crime has occurred (McCulloch and Wilson, 2015). In the case of intra-Schengen border policing, the rhetoric of risk and

prevention seems to be used as a justification to have a permanent presence of law enforcement in the intra-Schengen border areas who are operating in a highly discretionary way while having access to a mixed “toolbox” of administrative and criminal law-based powers.

### *In focus: The Netherlands, France and Germany*

As mentioned earlier, the CJEU has been asked to judge about the national application of article 23 SBC in three cases. France, The Netherlands and Germany all had cases brought before the CJEU as the legitimacy of their intra-Schengen police practices was brought into question. In discussing the different country cases the assessment of the national laws and practices by the CJEU will be discussed as well. Through this joint discussion the interaction between the national scale and the supranational scale and therewith the interplay between the different jurisdictions will be illustrated (also see Van der Woude, 2018).

## **The Netherlands**

The Netherlands has introduced the so-called Mobile Security Monitor (MSM) since 1994. The MSM, which is the Dutch “implementation” of article 23 SBC, is carried out by the Royal Netherlands Marechaussee (RNM), the Dutch military constabulary which also functions as the Border Police. Based on the Aliens Law (Vreemdelingenwet) and the Aliens Decree (Vreemdelingenbesluit), the RNM have the authority to patrol in a 20 km zone around the Dutch–German and Dutch–Belgian borders. In this 20 km zone, law enforcement officers can request people entering Dutch territory (either by train or by motor vehicle) for their identification papers and residence permits without a reasonable suspicion.<sup>12</sup> Whereas the original goal of the MSM was to prevent illegal entry and irregular stay by aliens,<sup>13</sup> over the course of the years its scope has widened to combating identity fraud by crossing the border with a fake ID and human smuggling.<sup>14</sup> Both crimes were seen as related to the act of crossing the border “illegally”. Whereas the MSM initially was performed 24/7, as a result of a ruling of the Court of Justice of the EU in the *Adil* case<sup>15</sup> the frequency and intensity of the MSM have been limited.

In the case, Mr Adil, an Afghani national, contests the lawfulness of his administrative detention. He argued that the MSM check which established he crossed into the Netherlands without a valid ID, was a form of border control and thus prohibited under the Schengen Agreement. The court decided that, in the absence of clear national legislative framework, this could be the case and thus urged the Netherlands to take action. As a result, article 4.17a of the Aliens Decree states that RNM officers cannot carry out the MSM for more than six hours a week, and for 90 hours a month. During the RNM checks, they are only allowed to stop a selection of the vehicles crossing the border. Yet, when there are “concrete indications” of “a significant increase in illegal residence after crossing the border”, under article 4.17b of the Aliens Decree, the Dutch authorities can temporarily, for no longer than four weeks, expand the possibilities of carrying out the MSM. Instead of the previously mentioned six hours a day with a maximum of 90 hours a month, road checks can be carried out for 12 hours a day with a maximum of 180 hours

a month. In response to concerns expressed by the Advisory Committee on Migration Affairs on the vagueness of the grounds for expansion, the grounds have to be specified and substantiated to such an extent that the legitimacy of the expansion can be reviewed by a judge.<sup>16</sup>

In practice, the MSM has proved to be somewhat problematic. Although, following the CJEU case law, there are now—to a certain extent—formal safeguards in place that should prevent the MSM from being used as a hidden form of permanent border control, research has shown that the discretionary nature of checks seems to allow racial profiling and the abuse of investigative powers (Brouwer et al., 2018a, 2018b).

## France

Following the adoption of the Schengen Implementing Convention in 1990, French Interior Minister Charles Pasqua proposed a new measure to “compensate” for the lifting of internal borders inside the Schengen Area: the creation of a “Schengen zone” in which identity checks would be facilitated.<sup>17</sup> A line was drawn inside French territory, 20 km away from the border; inside this zone, police officers from the Police Aux Frontières (PAF), the French border police, are allowed to carry out checks without any justification. As in the Netherlands, also after Schengen, the control of people’s movement in France was still entrenched at the edges of the territory (Colombeau, 2017). The legislative amendment essentially resulted in adding an exception to the Code of Criminal Procedure, which otherwise specifies precise cases in which identity checks may be conducted. The checks carried out inside this zone, on the other hand, are exceptional and legitimized by the border’s proximity.<sup>18</sup> Pursuant to article 78-2, fourth paragraph, of the French Code of Criminal Procedure police authorities, within the 20 km area from the internal land border with another Schengen state, are permitted to check the identity of any person in order to ascertain whether they carry and produce papers and documents. Their purpose is to establish the identity of a person, either in order to prevent the commission of offences or disruption to public order, or to seek the perpetrators of an offence. Those controls are also based on general information and police experience which have shown the particular benefit of checks in those areas. The checks are carried out on the basis of police information—coming from previous police inquiries or from information obtained in the context of cooperation between the police forces of different member states—which guide the placement and timing of the control as a result of which they have the character of non-systematic spot checks.

The French way of policing intra-Schengen borders was called into question in the combined cases of *Melki* and *Abdeli*.<sup>19</sup> On Monday, 22 March 2010, the PAF pulled over a Citroën C4 with five adult males of northern African origin in it and the officers proceeded to question everyone in the car. No weapons were found and there was no resistance to interrogation or physical inspection, but they did find that two of the men—Mr Aziz Melki and Mr Sélim Abdeli—were unlawfully residing in France. Both men were arrested during one of the intra-Schengen checks carried out by the Police Aux Frontières near Saint-Aybert—a pre-Schengen frontier post between France and Belgium (Caruso and Geneve, 2016). Mr Melki and Mr Abdeli nevertheless challenged the legitimacy of their arrest by claiming that the PAF were performing permanent border checks. When

brought before the CJEU, in line with the Dutch *Adil* ruling, the court stated that despite the fact that the French checks were not carried out at the border, details and limitations on the policing powers—in particular in relation to the intensity and frequency of the controls which may be carried out on that legal basis—were lacking. Therefore, according to the CJEU, France was not able to guarantee that the spot checks in practice were not carried out with an effect equivalent to border checks.

## Germany

Germany, like the Netherlands, has a long tradition of strictly controlling citizens and non-citizens at the border. Like the Royal Netherlands Marechaussee, the Bundesgrenzschutz (BGS), the German Border Police, are allowed to perform checks on individuals in a 30 km zone behind the borders. According to paragraph 23(1) of the “Gesetz über die Bundespolizei” the German Federal Police may check the identity of a person “[. . .] within 30 kilometres of the border for the purpose of preventing or terminating any unauthorized entry into Federal territory or preventing criminal offences within the meaning of points (1) to (4) of Paragraph 12(1)”. The offences the article refers to are all related to border crossings and border security. In Germany, we also see a combination of crime and immigration goals being met through the performance of intra-Schengen police checks. In the 2017 judgment in the case of “A”, the CJEU found the German police checks as carried out by the Bundespolizei not in line with article 23 SBC.<sup>20</sup> After crossing the bridge from Strasbourg (France) to Kehl (Germany), “A” was stopped by the BGS for an identity check. He aggressively resisted cooperation with the BGS and was arrested under the offence of resisting an enforcement officer.<sup>21</sup> The Amtsgericht Kehl (Local Court, Kehl, Germany) ruled that in order to convict and punish “A” for the offence it needs to be established that the acts of the police officers acting in the performance of their official duties were lawful. Whereas the Amtsgericht was of the opinion that the check by the Federal Police officers on the identity of “A” based on paragraph 23(1) of the Law on the Federal Police was lawful, it had doubts as to the compatibility of the provisions with EU law which has priority. If those doubts were well founded, the use of force by “A” to avoid a check on his identity would not be punishable under paragraph 113 of the German Criminal Code. The Amtsgericht therefore referred the case to the CJEU for a preliminary ruling on the lawfulness of the intra-Schengen identity checks as performed by the BGS. According to the CJEU, a clear and precise framework “guiding” the responsible officers in the enforcement of their task was lacking in Germany. As a result, the CJEU had no proof—and thus no reason—to rule out the possibility that the practical exercise of the police powers granted under German law results in controls that would have an effect equivalent to border checks.

## *A multi-scalar power struggle?*

The EMN data show a clear lack of “unity” and harmonization with regard to migration and border control in Europe. This lack of unity seems to be at odds with the overarching idea of “Europe” as a unified and harmonized entity with fortified external borders but barely noticeable internal borders and calls for a closer scrutiny of the different national

border practices and policies. This diagnosis lends support to Traynor's observation in 2015 when he said that:

If the euro proved to be a fair-weather currency whose structures and rules buckled and nearly collapsed in a storm, the same is now evident on immigration. The system is flimsy, not fit for purpose in an emergency. There is no 'European' immigration policy or regime. There is a mish-mash of national policies, a patchwork of systems and criteria which are contradictory, incoherent, fragmented.

One could state that the patchwork that Traynor speaks of is the result of the incomplete nature of the SBC that offers limited guidance with regard to the way in which member states legally formalize, let alone practically shape, the Schengen-proof police checks. Its intentional "open" nature can be seen as an example of what Schneider (1992) refers to as rule-compromise discretion: discretion intentionally built into the decision-making systems of member states as a result of general EU norms. This allows member states to shape their national legislation in such a way that it can do justice to the specific demographic, institutional, legal characteristics. The responsibility to meet the requirements of the SBC is intentionally passed to the national legislator since it would be impossible for the supranational rule-makers to come up with an all-encompassing legal framework that would fit all member states.

The case law of the CJEU illustrates further how countries are trying to use the incompleteness—the discretionary space—built into the SBC and how they play with the multi-scalar nature of the EU in the absence of clear jurisdictional boundaries between the national and the supranational legal frameworks that govern intra-Schengen border control. Yet, the case law also shows that the CJEU seems to follow a rather clear and strict line of reasoning by consistently stating that the national framework that member states use to act in line with article 23 SBC must "guide the discretion that national authorities enjoy in the practical application of their powers" and prevent these checks from being a "veiled" form of permanent border control. Whereas the CJEU is clearly concerned about leaving too much discretion to organizations and street-level officers responsible for these intra-Schengen police checks, its concern does not seem to be linked to potential practices of ethno-racial profiling but more so to the fact that member states could easily abuse article 23 SBC to circumvent the principle of free movement and therewith one of the core values of the EU. In other words, it aims to solve a tension between the national and the supranational scale and the specific interests these scales represent. The CJEU states that the checks should be carried out randomly and based on "general police information" and "experiences regarding possible threats to public security", but these conditions are still very open and rather vague. As a result, it is unclear whether the criteria set by the CJEU will prevent abuses in the exercise of state power.

## **Games over borders are games over sovereignty and national identity**

Border protection with its control and monitoring measures serves different purposes, including crime fighting and protection against threats, fiscal aspects (customs),

migration control, traffic safety and environmental protection. Furthermore, it is an expression of state sovereignty. Under the Schengen Agreement, systematic border control between the participating states has been removed. Yet, as this article has illustrated, in practice this does not imply the end of the monitoring of cross-border mobility. Border control in the Schengen Area has been continued and even strengthened in the form of patrols and police and immigration controls in the hinterland, special operations, preliminary inquiries/investigations, observations, public relation activities, cross-border cooperation between police forces and deportations of irregular migrants. Police capabilities have been widened: cross-border observations and chases have been made possible as well as the exchange of data (fingerprints, DNA, vehicles) between those police authorities benefitting from the treaty of Prüm. In particular, the Schengen process implies a significant increase in international police cooperation. In doing so, especially crime fighting and migration control are pursued at a high level. Under the pressure of growing numbers of migrants making their way into the European continent, tensions between sovereignty practices and the ideal of free movement across intra-Schengen borders reached an all time high. National and EU leaders engaged in politicized debates about sovereignty and dramatized the need for significant reconfigurations of sovereignty practices. This has not only led to the re-introduction of border checks at the actual physical borders between Schengen states, but also to a proliferation of the usage of article 23 of the SCB. It became crystal clear that border control was seen as the “business card” of state sovereignty: the state demonstrates its claim to power and signals its ability to fulfil its duties (Pudlat, 2010: 8). As Jabko and Luhman (2019) observe, while holding on to the sovereignty of the control of their intra-Schengen borders, member states were quite supportive of the further strengthening of EU oversight at the external borders through the extension of Frontex’s mandate and to transform it into a fully fledged European Border and Coast Guard Agency. While member states gave up some of their sovereignty in favour of the European Border and Coast Guard Agency, they still retained sovereign control over their intra-Schengen borders.

But border control is much more than a business card of state sovereignty. As argued, border control and bordering practices are also seen as an important defense mechanism to ensure the survival of national cultures (Sassen, 1999). To give up control of territorial borders is to relinquish one powerful instrument in the production of national cultures, as borders mitigate social pluralization, which in turn is a political challenge to the hegemony of state-sanctioned modes of national existence (Vasilev, 2014).

National identity can only be established through contradictions and exclusions. Border zones are sites of social sorting and delineate who belongs and who does not (Brouwer et al., 2017). Border zones and the border practices taking place in these zones therefore should also be seen as serving a nation-building and identity establishing function. Borders and mobility policing are not only used as inclusionary and exclusionary mechanisms in this respect, they also symbolically visualize state power and national identity. As Gundhus and Franko (2016: 501) observe, “borders and the policing of borders and border zones not only serve to define the nature of a polity”. By policing the mobility brought about by the ongoing globalization of society, local order and security regimes are created and shaped by local notions of social order and belonging. While seemingly preoccupied with mundane questions of border control, ID documents, visas



and residence permits, mobility policing revolves around questions of social boundaries, distinguishing between members and non-members within the territory and expelling the unwanted presence of non-members.

Franko (2016: 353) writes, “[t]oday, questions of criminal law and criminal justice are increasingly becoming international, overcoming the confines of traditional jurisdictional constraints”. This is particularly the case for matters of migration and border control in Europe, as the EU aims to create unity in the ways in which its member states handle these matters. The ways in which migration and border control are being put into practice are not determined solely by individual member states, but also by “Europe” who by issuing the SBC demarcates the legal “boundaries”—or lack thereof—within which member states can autonomously organize their matters. This is an important observation as it shows the limited—or perhaps even disruptive—impact of “Europe” in creating a common and shared approach toward intra-Schengen border control. It also shows that, when studying a European country—or several European countries—it is important to be aware of both the national and supranational actors, powers and decision-making processes. The involvement of multiple actors at different levels leads to political struggles over values, agendas and interpretations (Lavenex and Kunz, 2008) in diverse local settings (e.g. Andersson, 2014; McCann and Ward, 2013). A holistic approach is required for analyzing the multiple actors and the multiple scales and stages of law and policymaking in order to understand the process of formation, translation and implementation. In this holistic approach, the concept of interlegality is of great value because it “invites us to account for the plurality of actors and logics and produce readings of the varied intersections between distinct but multipurpose sets of legal technologies” (Mofette, 2018: 13). The concept shines light on the ways in which the different jurisdictional frameworks—the supranational and the national—as well as the (political) actors involved together constitute the socio-legal reality at the intra-Schengen borders by highlighting the interactions and intersections between these frameworks as well as the struggles and decisions resulting from it. In so doing, attention must be paid to the level of inter-state relations and the positions of states within the European order. Just “making the jump” to the global level does not suffice (Franko, 2016: 358). It is only by paying attention to these inter-state relations and the power dynamics and dialectics of control that play a role in these relations within the context of the EU that we can better understand the how, the why, the when and the who of intra-Schengen border control in the different European member states (Weber and McCulloch, 2018).

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2. The European Migration Network is an EU network of migration and asylum experts who work together to provide objective, comparable policy-relevant information. It was legally established under Council Decision 2008/381/EC, as amended. The EMN gathers objective, policy-relevant, comparable and up-to-date information and knowledge on emerging issues relating to asylum and migration in Europe. It produces reports, studies and policy briefs with analysis of policy and legislative development and implementation. The EMN publishes the latest news in a regular bulletin and maintains a glossary of migration and asylum-related terms.
3. The countries that responded were: Austria; Belgium; Croatia; Cyprus; Czech Republic; Estonia; Finland; Germany; Hungary; Italy; Latvia; Lithuania; Luxembourg; Netherlands; Poland; Slovak Republic; Slovenia; Sweden; United Kingdom; Norway.
4. A summary of the findings of the query can be found at the website of the EMN: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2018.1303\\_-\\_intra-schengen\\_border\\_monitoring\\_and\\_border\\_control.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2018.1303_-_intra-schengen_border_monitoring_and_border_control.pdf) (last accessed July 2019).
5. The term “green border” is often used for border crossings that are exclusively used by people on foot and/or on bikes or to indicate border crossings where there is no clear road or path.
6. AT, BE, CZ, EE, FI, HR, IT, LU and NO.
7. SK, LV, SI, HU, CZ and LT.
8. AT, PL, PT, BE, CZ, EE, DE, LT, SI, SK, SE, IT all report the use of police or crime-control checks in intra-Schengen border areas.
9. PL, PT, BE, EE, FI, DE, HU, LV, LT, LU, NL, SK, SE, NO, IT all report the use of immigration or immigration-related checks in intra-Schengen border areas.
10. AT reports such checks, as do PT and SE. DE states that no temporary checkpoints are set up on the borderline as a rule but that there is visual surveillance of the cross-border traffic at the border.
11. [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2018.1303\\_-\\_intra-schengen\\_border\\_monitoring\\_and\\_border\\_control.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2018.1303_-_intra-schengen_border_monitoring_and_border_control.pdf).
12. Art. 50 Dutch Aliens Act in conjunction with art. 4.17 section 1 Dutch Aliens Decree.
13. Kamerstukken II 1994/95, 19 637, 115; Kamerstukken II 1994/95, 23 900, 2.
14. Kamerstukken II 2011/12, 19 637, 1393; Kamerstukken II 2011/12, 19 637, 1485; Kamerstukken II 2010/11, 32 317, 68.
15. CJEU 19 July 2012 C-278/12 Adil, ECLI: C: 2012:508.
16. Advisory Committee on Migration Affairs (2014) “Advies toezicht ter bestrijding van illegaal verblijf na grensoverschrijding”, 15 May 2014. See for the report (in Dutch): <https://acvz.org/pubs/advies-over-toezicht-ter-bestrijding-van-illegaal-verblijf-na-grensoverschrijding/>.
17. It was created by Law 93-992 of 10 August 1993 and applies to every national French border inside the Schengen Area.
18. The provision also applies to airports and international train stations.
19. CJEU 22 June 2010, C-188/10 Melki & Abdeli, ECLI: C: 2101:363.
20. CJEU 21 June 2017, C-9/16, ECLI:EU:C:2017:483.
21. According to Paragraph 113(1) of the Strafgesetzbuch (Criminal Code, BGBI. 1998 I, p. 3322), a person who, by force or by threat of force, offers resistance to or attacks a public official or soldier of the German armed forces charged with the enforcement of

laws, regulations, judgments, judicial decisions or orders and acting in the performance of such official duty will be liable to a sentence of imprisonment of up to three years or a fine.

## References

- Aas KF and Bosworth M (2013) *The Borders of Punishment: Migration, Citizenship and Social Exclusion*. Oxford: Oxford University Press.
- Adler-Nissen R and Gammeltoft-Hansen T (2008) *Sovereignty Games*. London: Palgrave Macmillan.
- Alink F, Boin A and T'Hart P (2001) Institutional crises and reforms in policy sectors: The case of asylum policy in Europe. *Journal of European Public Policy* 8(2): 286–306.
- Aliverti A (2013) *Crimes of Mobility: Criminal Law and the Regulation of Immigration*. Abingdon: Routledge.
- Andersson R (2014) *Illegality, Inc.: Clandestine Migration and the Business of Bordering Europe*. Oakland, CA: University of California Press.
- Atger A (2008) *The abolition of internal border checks in an enlarged Schengen Area: Freedom of movement or a scattered web of security checks?* CEPS Challenge Paper No. 8, 20 March.
- Baerwaldt N (2018) The European refugee crisis: Crisis for whom? Available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/03/european-refugee> (accessed July 2019).
- Barker V (2012) Global mobility and penal order: Criminalizing migration, a view from Europe. *Sociology Compass* 6(2): 113–121.
- Barker V (2018) *Nordic Nationalism and Penal Order: Walling the Welfare State*. Abingdon: Routledge.
- Bigo D (1996) *Polices en Réseaux: L'expérience Européenne*. Paris: Presses de la Fondation Nationale des Sciences Politiques.
- Bosworth M, Aas KF and Pickering S (2018) Punishment, globalization and migration control: “Get them the hell out of here”. *Punishment & Society* 20(1): 34–53; Criminal Justice, Borders and Citizenship Research Paper No. 3166879. Available at SSRN: <https://ssrn.com/abstract=3166879>.
- Brouwer J, Van Der Woude M and Van Der Leun J (2018a) Border policing, procedural justice and belonging: The legitimacy of (cr)immigration controls in border areas. *British Journal of Criminology* 58(3): 624–643.
- Brouwer J, Van Der Woude M and Van Der Leun J (2018b) (Cr)immigrant framing in border areas: Decision-making processes of Dutch border police officers. *Policing and Society* 28(4): 448–463.
- Caporaso JA (2007) The promises and pitfalls of an endogenous theory of institutional change: A comment. *West European Politics* 30(2): 392–404.
- Caruso D and Geneve J (2016) Melki in context: Algeria and European legal integration (June 15, 2015). In: Davies B and Fernanda N (eds) *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*. Cambridge: Cambridge University Press; Boston University School of Law, Public Law Research Paper No. 15-23. Available at SSRN: <https://ssrn.com/abstract=2618544>.
- Casella Colombeau S (2015) Policing the internal Schengen borders: Managing the double bind between free movement and migration control. *Policing and Society* 27(5): 480–493.
- Castles S (2004) Why migration policies fail. *Ethnic and Racial Studies* 27(2): 205–227.
- Chambliss WJ (1993) On lawmaking. In: Chambliss WJ and Zatz MS (eds) *Making Law: The State, Law and Structural Contradictions*. Bloomington, IN: Indiana University Press, 290–314.

- Cheliotis LK (2017) Punitive inclusion: The political economy of irregular migration in the margins of Europe. *European Journal of Criminology* 14(1): 78–99.
- Colombeau S (2017) Policing the internal Schengen borders: Managing the double bind between free movement and migration control. *Policing and Society* 27(5): 480–493.
- Commission (2016) Enhancing security in a world of mobility: Improved information exchange in the fight against terrorism and stronger external borders. COM(2016) 602 (Brussels).
- Côté-Boucher K (2016) The paradox of discretion: Customs and the changing occupational identity of Canadian border officers. *British Journal of Criminology* 56(1): 49–67.
- De Genova N (2017) *The Borders of “Europe” Autonomy of Migration, Tactics of Bordering*. Durham, NC: Duke University Press, Paper ISBN: 978-0-8223-6916-5 / Cloth ISBN: 978-0-8223-6888-5.
- Dekkers TJM (2019) *Mobility, control and technology in border areas: Discretion and decision-making in the information age*. PhD Thesis, Leiden University, The Netherlands. Available at: <https://openaccess.leidenuniv.nl/handle/1887/70038>.
- Fabini G (2017) Managing illegality at the internal border: Governing through “differential inclusion” in Italy. *European Journal of Criminology* 14(1): 46–62.
- Faure A (2008) *The abolition of internal border: Checks in an enlarged Schengen Area: Freedom of movement or a web of scattered security checks?* CHALLENGE Research Paper No. 8, Centre for European Policy Studies, Brussels.
- Ford RT (1999) Law’s territory (a history of jurisdiction). *Michigan Law Review* 97(4): 843–930.
- Franko K (2016) Criminology, punishment and the state in a globalized world. In: Liebling A, Maruna S and McCra L (eds) *Oxford Handbook of Criminology*. Oxford: Oxford University Press, 353–372.
- Franko K and Gundhus H (2015) Policing humanitarian borderlands: Frontex, human rights and the precariousness of life. *British Journal of Criminology* 55(1): 1–18.
- Gundhus H and Franko K (2016) Global policing and mobility: Identity, territory, sovereignty. In: Bradford B, Jauregui B and Loader I (eds) *The SAGE Handbook of global Policing*. London: SAGE Publications, 497–514.
- Hollifield JF, Martin PL and Orrenius PM (2014) *Controlling Immigration*. Stanford, CA: Stanford University Press, 43–63.
- Huysmans J (2006) *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. New International Relations Series. London: Routledge.
- Ibrahim M (2005) The securitization of migration: A racial discourse. *International Migration* 43(5): 163–187.
- Jabko N and Luhman M (2019) Reconfiguring sovereignty: Crisis, politicization and European integration. *Journal of European Public Policy* 26(7): 1037–1055.
- Jones E, Kelemen RD and Meunier S (2016) Failing forward? The Euro crisis and the incomplete nature of European integration. *Comparative Political Studies* 49(7): 1010–1034.
- Lavenex S and Kunz R (2008) The migration–development nexus in EU external relations. *Journal of European Integration* 30(3): 439–457.
- Lyon D (2007) Surveillance, security and social sorting: Emerging research priorities. *International Criminal Justice Review* 17(1): 161–170.
- McCann E and Ward K (2013) A multi-disciplinary approach to policy transfer research: Geographies, assemblages, mobilities, and mutations. *Policy Studies* 34(1): 2–18.
- McCulloch J and Tham J (2005) Secret state, transparent subject: The Australian security intelligence organization in the age of terror. *Australian and New Zealand Journal of Criminology* 38(9): 400–415.
- McCulloch J and Wilson D (2015) *Pre-Crime: Pre-Emption, Precaution and the Future*. New York: Routledge.

- Mofette D (2018) The jurisdictional games of immigration policing: Barcelona's fight against unauthorized street vending. *Theoretical Criminology*. DOI: 10.1177/1362480618811693.
- Moravcsik A (1993) Preferences and power in the European Community: A liberal intergovernmentalist approach. *Journal of Common Market Studies* 31: 473–524.
- Pakes F and Holt K (2017) Crimmigration and the prison: Comparing trends in prison policy and practice in England & Wales and Norway. *European Journal of Criminology* 14(1): 63–77.
- Pinyol-Jiménez G (2012) The migration–security nexus in short: Instruments and actions in the European Union (February 14, 2012). *Amsterdam Law Forum* 4(1): 36–57.
- Pollack MA (2003) *The Engines of Integration*. Oxford: Oxford University Press.
- Pudlat A (2010) Perceptibility and experience of inner-European borders by institutionalized border protection. *Questions Geographicae* 29(4): 7–13.
- Sassen S (1999) *Guests and Aliens*. New York: New Press.
- Sassen S (2007) The spaces and the places of the global: An expanded analytic terrain. In: McGrew A and Held D (eds) *Globalization Theory: Approaches and Controversies*. Cambridge: Polity Press.
- Schain M (2009) The state strikes back: Immigration policy in the European Union. *European Journal of International Law* 20(1): 93–109.
- Schierup C-U, Hansen P and Castles S (2006) *Migration, Citizenship, and the European Welfare State*. Oxford: Oxford University Press.
- Schneider CE (1992) Discretion and rules: A lawyer's view. In: Hawkins K (ed.) *The Uses of Discretion*. Oxford: Clarendon Press.
- Scipioni M (2018) Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis. *Journal of European Public Policy* 25(9): 1357–1375.
- Segrave M and Wonders NA (2019) Introduction: Transforming borders from below: Theory and research from across the globe. *Theoretical Criminology* 23(2): 133–135.
- Skalsky DA (2012) Crime, immigration and ad hoc instrumentalism. *New Criminal Law Review* 15: 157–223.
- Stumpf J (2015) Crimmigration: Encountering the Leviathan. In: Pickering S and Hamm J (eds) *The Routledge Handbook on Crime and International Migration*. London: Routledge, 237–250.
- Sweet AS (2004) Islands of transnational governance. In: Ansell CK and Palma G Di (eds) *Restructuring Territoriality*. Cambridge: Cambridge University Press, 122–144.
- Traynor I (2015) Refugee crisis: East and West split as leaders resent Germany for waiving rules. *Guardian*, 5 September. Available at: <http://www.theguardian.com/world/2015/sep/05/migration-crisis-europe-leaders-blame-brussels-hungary-germany> (accessed 3 July 2019).
- Valverde M (2009) Jurisdiction and scale: Legal “technicalities” as resources for theory. *Social and Legal Studies* 18(2): 139–157.
- Valverde M (2010) Practices of citizenship and scales of governance. *New Criminal Law Review* 13(2): 216–240.
- Van Der Woude MAH and Brouwer J (2017) Searching for “illegal” junk in the trunk: Underlying intentions of (cr)immigration controls in Schengen's internal border areas. *New Criminal Law Review* 20(1): 157–179.
- Van Der Woude MAH and Van Der Leun JP (2017) Crimmigration checks in the internal border areas of the EU: Finding the discretion that matters. *European Journal of Criminology* 14(1): 27–45.
- Van Der Woude MAH (2018) Border policing in Europe and beyond: Legal and international issues. In: Boer M den (ed.) *Comparative Policig from a Legal Perspective: Research Handbooks in Comparative Law*. Cheltenham: Edgar Elgar Publishing, 255–271.

- Van Der Woude MAH (in press) Euroscepticism, nationalism and the securitization of migration in the Netherlands. In: Koulis R and Van Der Woude MAH (eds) *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders*. New York: Fordham University Press.
- Vasilev G (2014) Open borders and the survival of national cultures. In: Weber L (ed.) *Rethinking Border Control for a Globalizing World*. New York: Routledge, 98–115.
- Weber L (2003) Down that wrong road: Discretion in decisions to detain asylum seekers arriving at UK ports. *The Howard Journal* 42(3): 248–262.
- Weber L and McCulloch J (2018) Penal power and border control: Which thesis? Sovereignty, governmentality, or the pre-emptive state? *Theoretical Criminology*. Epub ahead of print 9 October 2018. DOI: 10.1177/1462474518797293.
- Wonders NA (2006) Global flows, semi-permeable borders and new channels of inequality: Border crossers and border performativity. In: Pickering S and Weber L (eds) *Borders, Mobility and Technologies of Control*. Dordrecht: Springer, 63–86.
- Wonders NA (2008) Globalization, border reconstruction projects, and transnational crime. *Social Justice* 34(2): 33–46.
- Wonders NA (2016) Just-in-time justice: Globalization and the changing character of law, order, and power. *Critical Criminology* 24(2): 201–216.
- Wonders NA (2017) Sitting on the fence—Spain’s delicate balance: Bordering, multiscale challenges, and crimmigration. *European Journal of Criminology* 14(1): 7–26.

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