Getting to the core of crimmigration: the imagined reality that is Schengen

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Getting to the Core of Crimmigration

The Imagined Reality that is Schengen

Zum Kern von Crimmigration vordringen. Die imaginierte Realität, die Schengen ist

The increased global movement of people continues to be a challenge to the European Union. As argued in the article, the European Union and in particular the Schengen Area should be seen as an imagined space of free movement and easy crossings of internal borders. A space that, on paper, is presented as such but which, in reality, is a space that can be travelled freely and without encountering bordering practices only by those who are not seen as the crimmigrant other. By reflecting on the interrelationship between the phenomenon of crimmigration and the notion of discretion, this article provides a somewhat grim critique of one of the main pillars of the European Union.

Keywords: Crimmigration, Schengen, European Union, discretion, bordering

Die Zunahme von Migrationsbewegungen bleibt eine Herausforderung für die Europäische Union. In dem Beitrag wird vorgeschlagen, die Europäische Union und insbesondere das Schengengebiet als imaginierten Raum der Freizügigkeit und des einfachen Übertritts der internen Grenzen zu betrachten. Dieser Raum wird auf dem Papier als solcher präsentiert, in der Realität aber gilt die Reisefreiheit und die Abwesenheit von mit Grenzen verbundenen Praxen lediglich für diejenigen, die nicht als krimmigrantische Andere angesehen werden. Indem dieser Beitrag die Wechselbeziehung zwischen dem Phänomen der Crimmigration und der Konzeption des Ermessens präsentiert, zeichnet er eine etwas düstere Kritik an einer der wichtigsten Säulen der Europäischen Union.

Schlüsselwörter: Krimmigration, Schengen, Europäische Union, Ermessen, Grenzen

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Introduction

While re-reading *de Sousa Santos*' "Law: A Map of Misreading. Towards a Postmodern Conception of the Law" (1987), I realized, once more, how useful it is to think about Europe and in particular the workings of the Schengen regulatory framework as a map. A map that *imagines* a certain reality, but a reality that is in many ways distorted. The *imagined* reality of Europe is that within the legal and geographical Schengen space – where internal border controls at the physical land borders between two countries have been abolished by mutual agreement – Europeans can traverse national borders without passport or identity checks. The *imagined* reality is that this inner open space, which guarantees the freedom of mobility, is protected by the simultaneous fortification of Europe's exterior borders (Zaiotti 2007; Oelgemöller/Vries/Groenendijk 2020).

This is one snapshot of "fortress Europe": an imagined political community with an interior borderland that is envisioned as open, liberal, and democratic, and an exterior borderline that is policed and protected against enemy-outsiders, including refugees, immigrants, asylum seekers and non- Europeans (Linke 2010). But this juxtaposition of internal openness and militarized exterior closure is misleading. In the process of monitoring, capturing, and detaining unwanted populations, the regime of borders in Europe is not confined to a fixed periphery, but comes into evidence as a decentered, dislocated, and ubiquitous process of exclusion and containment (Walters 2017; Koca 2019). Even though Schengen technically means that there are no borders inside, internal controls have not disappeared, but only been replaced by more diffuse measures or *ad hoc* police or immigration controls that enhance law enforcement capabilities to check movements of persons within the Schengen area (de Genova 2017; van der Woude 2020; Oomen et al. 2021).

The past eight years I have been trying to unravel the discrepancy between the image that Schengen and Europe want to convey and the reality of – in particular – the management of intra-Schengen cross border mobility and, as a result thereof, the obstacles that are created by states in those very places that are often presented as "borderless". One of these obstacles is the increased blurring of (legal) boundaries between migration law and criminal law, also known as the process of crimmigration (Stumpf 2006). The metaphor of the map continues to be helpful in making sense of the discrepancy. *De Sousa Santos* describes that it is only through *projection* that the curved surfaces of earth are transformed into imaginary flat surfaces. In the process of this transformation shapes are distorted and relationships distanced based on conscious choices and compromises reflecting the ideology of the "cartographers" and on the specific use intended for the map (de Sousa Santos 1987: 284). I will further unpack how this process of transformation plays out in the context of the management of intra-Schengen mobility and how this process relates to the process of crimmigration. In so doing, I will be loosely drawing from my research on border practices in Western Europe

– and in particular my fieldwork done with the *Dutch Military and Border Police* – by highlighting these moments of "distortion" and "distancing".

In the following, I will first discuss the emerging fields of border criminology and crimmigration scholarship and explain how insights from both fields are helpful in seeing through the imagined reality that is Schengen. This section will be followed by a short word on methodology, explaining the contours of the project that underpins this publication and the various methods of data collection that have been used. The article will then move into discussing how discretionary practices contribute to the process of distortion, while social sorting practices that are visible at the same time (and partially resulting from the discretionary practices), contribute to distancing. Together, these practices explain how the image that is Schengen looks very different for different types of travelers. The article will end with some closing reflections in crimmigration and bordering practices in the European Union.

Border Criminologies, Crimmigration and Discretion

Various leading criminologists such as *Richard Sparks* (2020) and *Katja Franko* (2017) have highlighted the necessity for the field of criminology to look beyond the "boundaries" of the nation-state. Only in this way, would the scholarship be able to better address the new questions that arise for crime and justice research as a result of globalization. Although criminologists around the globe have grown to be more concerned with questions around human trafficking and modern slavery, the workings of international criminal networks, illegal antiquities and a "host of other illicit flows, both mundane and exotic", there is still plenty of unchartered territory to be discovered (Sparks 2020: 474). For the most part, the regulation of immigrants by various state and non-state actors has not been the object of much criminological inquiry. It was only in the late 1990s but mostly since the early 2000s that scholars began researching the intersections of immigration and criminal legal regulation, a field initially dominated by legal approaches (e.g. Kanstroom 2004; Miller 2003), with but a few criminological exceptions (e.g. Pratt 2005; Welch 1996). With the numbers of criminologists interested in questions and concerns around penal power and the governance of mobility now growing steadily, especially over the past five years, a new subfield seems to have developed: the field known variously as border criminology or the criminology of mobility. Under this label criminologists, criminal justice scholars, anthropologists, sociologists, immigration scholars, legal scholars and many others are brought together to reflect on the coercive tools to which non-members are subjected and how these tools can be used to recreate borders in an increasingly open world. This enterprise has led to a flourishing body of rich and critical scholarship that addresses concerns with the criminalization of migration, borders and bordering practices, detention, and deportation as responses to the perceived disruptive aspects of the mobility of people.

Crimmigration and the how of immigration and border control

Within this literature, the concept of crimmigration has been used to provide insight into *how* immigration and border control happen and take shape (Weber/McCulloch 2019). The concept of crimmigration law, introduced in 2006 by *Juliet Stumpf*, explains that it aims to highlight the way that "immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct" (Stumpf 2006: 376). Crimmigration law criminalizes immigration offenses, emphasizes the immigration consequences of criminal acts and super-sizes enforcement regimes. It securitizes borders, enhances enforcement and "force multiplies" with local police. Central to the crimmigration thesis is the observation that while the immigration procedure is turning more into a criminal procedure and, with that, the powers of immigration and criminal law enforcement agencies also becoming interchangeable, this has not resulted in an equal transfer of the due process protections that individuals enjoy under criminal law. Whereas border criminology and crimmigration scholarship are sometimes used as interchangeable concepts, contrary to border criminology, crimmigration scholarship finds its origins in the legal field. By looking at the intersection of immigration law and criminal law and questioning its implications in the light of the different procedural safeguards applicable to both legal fields, early crimmigration scholars were approaching the phenomenon predominantly from a legal perspective. By applying the crimmigration thesis, scholars have analysed legal and institutional convergences in law, policing (Weber 2013), security (Franko Aas 2011), legal process (Aliverti 2013) and incarceration (Beckett/Evans 2015). Over time, the "definition" of the concept has widened as the narrow legal scope was felt to be too limited to fully capture the developments that were observed. In later writing, *Stumpf* also broadens her focus to take into account the lived experiences of those subjected to crimmigration processes, noting that "[w]hen the government seeks to impose a penalty through crimmigration law, or noncitizens widely experience as punitive the procedural web that crimmigration has woven the process has become the punishment" (Stumpf 2013: 73). By no longer talking about crimmigration law but instead using crimmigration control, more socio-legal, discursive, and criminological dimensions were included (van der Woude/van der Leun/Nijland 2014) resulting in more interdisciplinary and richer scholarship. In analysing the convergence, but also the divergence (see for a discussion on this Moffette/Pratt 2020), of crime control and migration control, the concept of discretion has proven to be key.

Crimmigration & Discretion

Despite the different macro-level explanations that can account for the process of crimmigration, many scholars directly or indirectly refer to the central role of discretion. Discretion in this context is often understood as the space created by the legislature that allows for autonomous decision-making by

state agents. This can for instance happen through the creation of proactive police or immigration powers or the use of vague and open norms. Discretion in this context is also often understood – or presented – as something that is problematic and dangerous due to the potential for abuse. It is important to note that such an understanding of what discretion is and what its role is within the functioning of the (criminal) justice system, is too one-sided. As I have argued elsewhere, as much as the abuse of discretion can create injustice, discretion is also needed to do justice (van der Woude 2016; also see Spader 1984). What is crucial is *how* it is being used and *how* discretionary practices are being monitored. In the context of explaining the process of crimmigration, the freedom that law enforcement officials have to exercise choice on how to deal with an individual case because of being attributed discretionary powers that allow them to, has been flagged as a key moment in the context of crimmigration (van der Woude/van der Leun 2017). Crimmigration is often explained by referring to underlying trends such as over-criminalization – the frequently deplored tendency of criminal law to expand into areas for which its heavy-handed machinery seems ill suited (Sklansky 2012), the emergence of an overall cultural obsession with security and potential dangerous "others" (Garland 2001; Simon 2007), and the development of an enemy penology (Fekete/Webber 2010). Despite acknowledging the clear complexity and multitude of forces driving the process of crimmigration, *Motomura* (2011) claims that the discretion to stop and check individuals is the strongest driver behind the process of crimmigration, since it enables racial profiling and makes street-level officers responsible for funneling immigrants into systems dealing with immigration crime or criminal violations. His assessment of the pivotal importance of street-level decision-making in the process of crimmigration is widely shared among scholars, who often link it to selectivity based on racial stereotypes (Hernandez 2013; Koulish 2010; Miller 2003; Pratt 2010; Pratt/Thompson 2008; Stumpf 2006). Although the process of racial profiling by law enforcement officials is unmistakably connected with the process of crimmigration, it is unclear whether it can explain the process or whether it is an outcome of it, or both. The answer to this question depends on whether one approaches immigration control from a bottom up or top-down modus (Lind 2015). In line with *Motomura's* assessment, the bottom-up modus attributes power to the decisions made on the street level. Yet, in their assessment of the criminalization of migration, *Provine* and *Doty* (2011) observe that policy responses to unauthorized immigration reinforce racialized anxieties by creating new discretionary spaces of enforcement within which racial anxieties flourish and become institutionalized. In other words, although they do acknowledge the impact of racial anxiety on the enforcement level, potentially leading to racial profiling, they rather see this as the outcome of top-down policy-level decisions. Over the years, more attention has been drawn to the influence of the organizational factors shaping the discretionary decisions of front-line agents. Scholars have flagged that it is crucial to keep sight on the fact that the decisions and actions of these front line, or street-level agents "occur largely behind the closed doors of guarded government bureaucracies"

(Vega 2018: 2546) and the fact that their decisions are shaped by the "moral economy" (Fassin 2005) of their work lives. In other words, in understanding decisions of (frontline) state agents, one needs to take into consideration the economy of the normative values and ideals of the organization within which they operate. This calls to look beyond the individual of the street-level agent and also beyond the level of the legislature to better understand the complex variety of factors and actors that influence the way in which discretionary decisions are made. This resonates with the call for what *van der Woude* (2016), following *Hawkins* (1992), has named a more "holistic approach" towards understanding (discretionary) decision-making practices by street-level state agents. As will be illustrated in the sections to come, it is only through such an understanding in which decisions taken on the legislative level, decisions taken on the organizational level and decisions taken on the street level are taken into joint consideration that we can come to realize *how* distorted the image that is Schengen really is.

A word on the underlying data

Although this article is more reflective in nature and thus more loosely draws upon empirical material, it is important to shine light on the data leading to these reflections. This data has been collected over the past ten years and in the context of several – closely related – research projects looking into the ways in which different Schengen member states are managing intra-Schengen cross border mobility, with a special focus on the case of the Netherlands and thus on the bordering practices as deployed by the *Dutch Military and Border Police* (*DMBP*).[2] The different projects all focused on the different types of "controls" Member States are carrying out in those areas where there – due to the Schengen Agreement – should in practice not be any border checks. Of particular interest has been the way in which Member States have interpreted and implemented article 23 of the Schengen Borders Code – the article that allows Member States 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 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. These checks can thus not be carried out *at* the physical border but in an area around the physical border (land inwards) instead, which makes them interesting as they could potentially create a very fluent and invisible, yet continuous, border.

2 Apart from the Netherlands, data has been collected in Poland, Germany, Belgium, France and Spain.

The fieldwork data – (focus group) interviews and (structured) observations – has been gathered in collaboration with various PhD students and senior researchers. Over the years (2013-2021), this has resulted in a rich data collection of qualitative and thick empirical data, in particular (focus group) interviews with street level officials as well as with policy officials, interviews with individuals subjected to bordering practices, (structured) observations of police and immigration stops (based on article 23 SBC) performed in intra-Schengen border areas, organizational guidelines and internal documents of enforcement agencies, NGO reports, (European and national) policy documents, European and national case law and legislation and a survey issued through the *European Migration Network*.[3]. The aim of the data collection has consistently been to shine light on both the law in the books – the pluralistic world of rules and regulations – as well as on the law in practice, in other words, the way these rules are playing out in the *real* world and how they are perceived and experienced. In so doing, attention has been paid both to the experiences and perceptions of those having to enforce the rules as to those of the people subjected to them. By acknowledging the multi-layered nature of bordering and the various actors involved in the process and thus by obtaining a holistic approach, the projects have contributed to a realistic image of the state of "free movement" and mobility control in the Schengen area (Wonders 2017; van der Woude 2020; also see van der Woude/Staring 2021).

For the purpose and scope of this article, I will most directly refer to the fieldwork that was carried out in the Netherlands, with the *Dutch Military and Border Police*. During the period 2013-2015, together with two PhD students, a total of 57 Article 23 SBC patrols were observed, which resulted in a total of 800 hours as patrols lasted several hours from the moment of pre-patrol briefing to post-patrol debriefing. The observations were always carried out by two researchers. In order to get an in depth understanding of how the article 23 checks were conducted and to be able to draw generalizable conclusions, multiple brigades – each responsible for a designated part of the Dutch border area were visited for observations. Observations were supported by using a structured observation form that mapped characteristics of the check such as characteristics of the vehicle, the person(s) in the vehicle as well as the general dynamics between the *DMBP* officer(s) and the individual(s) in the vehicle. The impressions that were gathered through the observations were furthermore discussed during 13 focus groups. For each brigade at least one focus group was organized with on average 8-0 participants. Lastly, a series of in – dept interviews were carried out both in 2014-2015 and in 2020-2021 in which explicit attention was paid to certain policy decisions, collaborations with other EU countries as well as to rather sensitive topics such as the abuse of discretionary power, discrimination, and ethno-racial profiling.

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3 Van der Woude (2018), OPEN Summary of EMN Ad-Hoc Query No. 2018.1303 Intra-Schengen border monitoring and border control. 30-11-2018 prepared by NL EMN NCP. Brussels, (European Commission).

Distortion through discretionary decisions on multiple levels

Looking at the situation in the European Union, and in particular in the Schengen area, I would like to argue that one of the biggest challenges contributing to the distortion of the perfect image of an open Schengen area has proven to be the existence of discretion on various jurisdictional levels and the interaction between discretionary decisions that are made on these subsequent levels (van der Woude 2020). In order to understand the distorting workings of the multilayered discretionary system that Schengen has proven to be, it is important to go beyond the discretion that is most often studied: the discretionary decisions by border guards, immigration officers or other law enforcement agencies (also see Weber 2003). As explained earlier, whereas these so-called street-level discretionary decisions are perhaps the most directly visible and experienced, in many ways, these decisions give substance to the conscious choices by the European legislature, national legislatures and organizational policy officials.

The vague wording of the Schengen acquis enables Member States and enforcement actors to act against the spirit of Schengen but still, legally, in compliance with it. The fact that the role of the Court of Justice of EU in helping to enforce the Schengen framework is very restricted as it can only demand adherence to the current legal framework and only concerning the measure presented before the Court, certainly doesn't help either in pushing back against the unjust use of discretionary powers on the national level. The latter is, for instance illustrated, by the implications of the judgement of the Court in the *Touring Tours und Travel* Case in which Germany was urged to do away with national legislation allowing private actors (international bus companies) to conduct permanent border checks and to thus adhere to the current legal framework of the Schengen Border Code. Despite this demand by the Court, the national legislation allowing for this to happen is still in place (Stiller 2021).

In looking at the way in which Europe dealt with the so-called migration crisis, one could argue that by advancing European harmonization and integration through what in the literature have been called consciously incomplete agreements (Caporaso 2007), the EU has created the very conditions for this crisis. While analyzing EU co-operation in asylum and migration, *Scipioni* (2018) 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 impossibly long", include "every possible contingency" and cover all possible applications (Caporaso 2007: 393). On a similar vein, *Jones*, *Kelemen* and *Meunier* (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). These "incomplete contracts" are often ambiguous in their exact scope and are – intentionally – left open to multiple interpretations. An example of such an incomplete agreement that was the result of intense bargaining between member states on how much of their national sovereignty they were willing to give up for the "greater good" that is Europe, is the Schengen Border Code (also see van der Woude 2020). Despite providing a general framework, when looking closely at those provisions that are said to manage the mobility of people throughout the Schengen Area, it is clear that a lot is left to the discretion of Member States.

National governments have been – and still are – able to use the ambiguity of the Schengen Border Code to shape national policies and practices in such a way that they are seen as most beneficial to the wellbeing of and security of the country. This can – and does – mean very different things for different EU states, but looking at the growing voice of nationalist and nativist political parties in Europe, what is seen as "most beneficial" can translate into doing whatever is necessary to preserve the land, culture, language, political institutions and way of life: In other words, anything that is necessary to preserve the national identity and security of a country. All over the map that is Schengen, National Governments are holding on to, from both a legal and humanitarian point of view, disputable measures to monitor cross-border mobilities in their intra Schengen borderlands. Migrants, activists, and NGOs have criticized the prolonged reintroduction of internal border controls into France and into Italy as well the execution of police checks in border regions, which amount to racial profiling and result in pushbacks (Amigoni et al. 2021; Chiodo/Dotti 2020; Casella Colombeau 2017). Various scholars and the European Parliament have repeatedly argued that the still ongoing reintroduction of border controls at the Austrian-German border – based on the ongoing threats stemming from secondary movements and shortcomings at the external borders – is not in compliance with the strict limitations regarding extent and durations set of such controls, as set out in the Schengen Borders Code (Bossong/Etzold 2018; Schlikker 2018; European Parliament 2018; Hruschka 2019). With regards to the situation in Germany, *Stiller* (2021: 351) observes that "there is an extended use of discretionary power in the execution of police checks, a continuously prolonged reintroduction of internal border controls" which, according to *Hruschka* (2019) is illustrative of the national implementation of the EU securitization process.

What is important to note, is that the dynamics of conscious ambiguity through incomplete agreements that allow for a lot of discretionary space does not only play a role on the level of the European or that of the national legislature. The impact of strategic ambiguity – the intentional equivocality in management decisions and communication to foster abstract agreement in an organization, while simultaneously allowing a variety of opinions –

within enforcement agencies should also not be underestimated (Kalkman/ Molendijk 2021). While a lack of clear guidance might, in some cases, be a case of higher-level failure to translate strategic ambiguity into clear orders and procedures, it can also be intentionally introduced and maintained throughout the power structures and hierarchies of organizations. Although pragmatically useful in some respects, strategic ambiguity may complicate employee moral decision-making and obscure accountability for unjust, immoral, and inhumane organizational behavior (Sonenshein 2009).

In my fieldwork with the *Dutch Military and Border Police*, the role of strategic ambiguity around the implementation of the Schengen Border Code, but also related to national laws, organizational policies and procedures was a recurring theme. Contributing not only to confusion about one's role as immigration officer or law enforcement official in the borderlands and, as a result thereof, confusion about how to enforce what laws, but also to consciously overstepping legal boundaries just "because we can" or because "we [the *Military and Border Police*] are responsible for the security of the state". One of the most valuable aspects of doing my fieldwork has been to get to know the humans behind the border agents and to see how strategic ambiguous decisions contributed to the emergence of experienced moral challenges and how different agents dealt with these challenges differently, which was not all "bad" nor "good". What was interesting to observe and hear through my interviews is the extent to which border agents were aware of the political and symbolic nature of their actions and how some of them were more or less comfortable with starring in the border spectacle (de Genova 2016). Nevertheless, the straitjacket of working in a military organization with a strong hierarchical power structure combined with a deeply and widely felt moral obligation to protect the "Company the Netherlands" made that many of the border agents I spoke to felt little agency to really "push back". As one respondent mentioned: "When push comes to shove, we are military who follow orders." This illustrates how strongly the actions of *DMBP* officers are, amongst other things, influenced by the moral economy of their work lives.

Distancing through othering and profiling

As I have illustrated, discretion plays a clear role in distorting the perfect picture that is Schengen by allowing national and organizational politics to influence the interpretation, application, and protection of the principle of free movement. This role can only be understood by looking at the interplay between the creation of discretion and discretionary decisions that are made on the various jurisdictional scales that are at play in this context (Valverde 2010). Besides distortion, the closely related process of *distancing* is also important to understand why the imagined reality of Schengen looks rather different in practice.

While going back to *de Sousa Santos'* analogy of laws as maps, he describes how relationships can distance as a result of transformation. In many ways,

by the very creation of Schengen and the idea of the enemy outsider that needed to be kept at bay from the European insider, historically racialized relationships were only further affirmed, making racialization a continuous subtext to bordering practices. The idea of Europe, as *Goldberg* notes, "excludes those historically categorized as non-European, as being not white" (2006: 347). In a post-national Europe, the realities of ethnic diversity and cultural pluralism have unraveled the idea of citizens as a homogenous or undifferentiated group. As Europe strives to achieve political and economic unity in the 21st century, there seems to be a concurrent push toward inequality, exclusion, marginalization and therewith the conscious distancing between in-groups and out-groups. The legacies of colonialism and nationalism continue to imprint the privilege of whiteness onto the new map of Europe and sustain the political fortification of Europe as a hegemonic white space (Linke 2010). Within the post-9/11 European Union, the promotion of this ethnopolitical project can be documented in "the state-specific forms of attack against asylum, asylum seekers, and foreigners, and the ways in which fundamental rights are being legally altered and police powers built [or expanded] in specific states" (Glick Schiller 2005: 527). Immigrants are forced to inhabit the figure of the illegal alien, the enemy outsider, the terrorist, the welfare sponger, pimp or prostitute, drug dealer and the diseased body (Boukala 2019). Identified as criminals and/or as threats to society, the body politic and national security, they are treated accordingly.

Racialized bordering practices were something that I definitely observed in my fieldwork with the *Dutch Military and Border Police*. Due to the aforementioned ambiguity whether Dutch *MBP* officers are tasked with immigration control, crime control or both, there was a lot of room for "crimmigrant stereotypes" to develop (Brouwer/van der Woude/van der Leun 2018) and influence the discretionary decisions made by the officers while performing the article 23 SBC checks.

The strong infatuation of a substantial group of my respondents with being seen more so as crime fighters than as immigration officers – they would call themselves cowboys – resulted in people being targeted based on a connection that was made between their ethnicity and criminal behavior. Various agents expressed the idea that "Moroccan", or more generally "North-African", young men were disproportionally involved in – especially drugs-related – crime. Agents pointed to arrest and prison statistics as concrete evidence of this overrepresentation. Thus, while North-African looking people were regularly stopped because of potential illegal entry or stay, especially when their car had a foreign license plate, officers also indicated a few times that a stop involving young Moroccan-looking men was primarily based on crime-related reasons. A North-African background could thus be a factor in stops both related to migration control and crime control. However, in the Netherlands there is a large population with a Moroccan background that can no longer be seen as foreigners or immigrants. Instead, they are typically born in the country and hold Dutch citizenship.

Although North-African young men were regularly linked to various forms of crime, most commonly and openly associated with criminal behavior were people from CEE countries – primarily Bulgarians, Albanians, and Romanians, to a lesser extent also Hungarians and Polish. Such perceptions were usually said to constitute "known facts" and being based on "evidence". The targeting of these groups was primarily based on the origin of the license plate, as this was an easy visible marker, and the nationality of individuals from Eastern European Member States are generally harder to recognize on the basis of physical characteristics. Nonetheless, officers said it was a particular challenge to also be able to select Eastern European people when they were driving a vehicle with another license plate, something that regularly happened. For example, during one of the controls researchers were sitting in the back of the vehicle when a car with a German license plate was stopped. According to the officer he had stopped the car because he believed the driver and passengers to be Albanian, and Albanians were often involved in crime in the Netherlands. Justifications for such stops were based on the merging of a variety of crime risks that range from mobility-related offences such as human trafficking and false identification papers to more mundane crimes as pickpocketing and theft. Overall, there was a common understanding among DMBP officers that "there is almost always something wrong" with members of these groups once they appear in the borderlands (for a more elaborate discussion see Brouwer/van der Woude/van der Leun 2018).

It was interesting to observe the normalcy of using nationality as a legitimate proxy for risky – criminal – behaviour, and thus as a ground for stopping a person, whereas the majority of my respondents were very clear on the fact that ethnic or racial profiling was an unacceptable basis of discretionary risk assessment and that it would do more harm than good. This response is not only illustrative for a legal ambiguity that is currently being debated in court about the extent to which (proxies of) ethnicity and race cannot play a role at all in a decision to stop and check someone or whether they cannot be a sole factor upon which such as decision is based, but the decision is also illustrative for the moral conflict that most of my respondents experienced and expressed when talking about racial profiling and discrimination and the inhumanity of practices like that (van der Woude 2020). Having been made aware of the shortcomings of their own moral frames of reference with regards to what constitutes discrimination and how their actions could be experienced as deeply harmful, some respondents were confused and unsure of the right thing to do whereas others expressed a sense of anger for being caught in a "legal crossfire" whereas they were "just trying to keep the country safe". In both instances frustration was felt for being "stuck" in a military organization that – in my respondents' experience – would make it difficult for them to really do something to address this moral conflict. As one of my very few non-white respondents mentioned: "It has nothing to do with being in the military I think, the problem is that we have an organization in charge of border control that is made up of 99 % white people who are not aware of

their colonial history and whose image of Europe and Europeans most likely looks very different than mine."

Concluding reflections

Although the empirical examples in this paper are drawn from the Dutch case study, there is ample evidence that the processes of distortion and distancing are not unique to the Netherlands. The survey that was issued with help of the *European Migration Network* (*EMN*) illustrated very clearly that all countries that responded to the query are doing "something" aimed to managing the (secondary) movement of potential "dangerous others" that are passing through the intra-Schengen borderlands. By framing secondary migration as an important threat, national governments, state agencies and state officials, are justifying these control measures that are underlining the merger of crime control and migration control. Crimmigration control practices, in other words, have become a key identifier of bordering practices deployed in intra-Schengen borderlands. Nevertheless, there is very little known about these different practices due to the combined impact of discretionary space that has been attributed through the wording of the Schengen Border Code to the Member States and the discretionary space that national legislatures have attributed to (law) enforcement agencies in charge of managing the intra-Schengen borderlands through the application of article 23 SBC. No systematic data is collected on the how, the where, the when and the how often of these checks, which in itself is an interesting choice of the *European Commission* as one would think that, in the light of the freedom of movement as one of the fundamental pillars of the European Union, at least some oversight would be desirable.

Whereas *John Lennon* in 1971 sang "Imagine there's no countries….it isn't hard to do…", he could not foresee how very difficult this actually would be after the implementation of the Schengen acquis in 1995. As illustrated by the BREXIT vote, but also by the already mentioned rise of nationalist political parties and anti-immigration sentiments throughout the Schengen countries – also in those countries that are traditionally known to be "tolerant" or "open" – in securocratic Schengen the politics of race are closely entangled with past histories of empire, social engineering and bio-political experimentation.

Schengen has always been an *imagined* reality in the sense that the openness it aims to represent was only meant for those who are seen to belong to the in-group and that the solidarity and collaboration it aims to represent are mostly a paper reality. As *Stuart Hall* has observed, the

> "largely unspoken racial connotations of national belonging in Europe are encoded by a cultural logic of othering that promotes either assimilation or exclusion. In this volatile terrain, European nation-states are finding themselves caught between the need to enforce sameness and the fear of absolute difference, with no middle ground." (Hall 2000)

And, what we see and what I have aimed to highlight, is that through an interconnected web of discretionary decisions, European states are trying to manage that volatile terrain by erecting boundaries for those who are seen as crimmigrant others or vagabonds, while allowing bonafide travelers to move as freely as possible (Bauman 1996).

There is a lot of work to be done by scholars focusing on the securitization of mobility in the European Union, in further unpacking racialization as a continuous subtext to bordering and in finding ways to counter the detrimental implications of a multiplier effect of discretionary practices that are the result of the multiscalared nature of European bordering practices. In so doing, it will be significant to combine in-depth national case studies that demystify national practices with more comparative and cross-national analyses as these analyses allow scholars to ascertain whether immigration enforcement policies and practices are significantly influencing punitiveness and penalty changes across wide continental or sub-continental regions (Brandariz 2021; Bosworth/Franko/Pickering 2018; van der Woude/Barker/van der Leun 2017).

References

Aliverti, Ana (2013): Crimes of Mobility: Criminal Law and the Regulation of Immigration. Abingdon.

Amigoni et al. (eds.) (2021): Debordering Europe. Migration and Control Across the Ventimiglia Region, Cham.

Bauman, Zygmunt (1996): Tourists and vagabonds: Heroes and victims of postmodernity, Vienna.

Beckett, Katherine/Evans, Heather (2015): Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation, in: Law & Society Review 49, 241-277.

Bosworth, Mary/Franko Aas, Katja/Pickering, Sharon (2018): Punishment, globalization and gigration control: 'Get them the hell out of here', in: Punishment & Society 20, 34-53.

Bossong, Raphael/Etzold, Tobias (2018): The Future of Schengen, SWP Comment, in: Stiftung Wissenschaft und Politik – German Institute for International and Security Affairs, <https://www.swp-berlin.org/publications/products/comments/2018C44_Bsg_Etz.pdf> [15.01.2022].

Boukala, Salomi (2019): European Identity and the Representation of Islam in the Mainstream Press, Cham.

Brandariz, José Angel (2021): An Expanded Analytical Gaze on Penal Power: Border Criminology and Punitiveness, in: International Journal for Crime, Justice and Social Democracy. Advance online publication. <https://www.crimejusticejournal.com/article/view/1659/1015> [15.01.2022].

Brouwer, Jelmer/van der Woude, Maartje/van der Leun, Joanne (2018): (Cr)immigrant framing in border areas: decision-making processes of Dutch border police officers, in: Policing and Society 28, 448-463.

Caporaso, James A. (2007): The promises and pitfalls of an endogenous theory of institutional change: A comment, in: West European Politics 30, 392-404.

Casella Colombeau, Sara (2017): Policing the internal Schengen borders – managing the double bind between free movement and migration control, in: Policing and Society 27, 480-493.

Chiodo, Serena/Dotti, Anna (2020): The Brutal Side of the French Riviera, <https://www.rosalux.eu/kontext/controllers/document.php/433.7/5/414cc8.pdf> [15.01.2022].

De Genova, Nicholas (ed.) (2017): The Borders of "Europe": Autonomy of Migration, Tactics of Bordering, Durham.
De Sousa Santos, Bonaventura (1987): Law: A Map of Misreading. Toward a Postmodern Conception of Law, in: Journal of Law and Society 14, 279-302.
European Parliament (2018): Annual Report on the Functioning of the Schengen Area, <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0228_EN.pdf> [15.01.2022].
Fassin, Didier (2005): Compassion and Repression: The Moral Economy of Immigration Policies in France, in: Cultural Anthropology 20, 362-387.
Fekete, Liz/Webber, Frances (2010): Foreign nationals, enemy penology and the criminal justice system, in: Race and Class 51, 1-25.
Franko Aas, Katja (2011): 'Crimmigrant' bodies and bona fide travelers: Surveillance, citizenship and global governance, in: Theoretical Criminology 15, 331-346.
Franko, Katja (2017): Criminology, Punishment and the State in a Globalized World, in: Liebling, Alison/Maruna, Shadd/McAra, Lesli (eds.): Oxford Handbook of Criminology, Oxford, 353-372.
Garland, David (2001): The Culture of Control: Crime and Social Order in Contemporary Society, Chicago.
Glick Schiller, Nina (2005): Racialized nations, evangelizing Christianity, police states, and imperial power, in: American Ethnologist 32, 526-532.
Goldberg, David Theo (2006): Racial Europeanization, in: Ethnic and Racial Studies 29, 331-364.
Hall, Stuart (2000): A Question of Identity (II), in: The Observer, 15 October. <http://www.guardian.co.uk/uk/2000/oct/15/britishidentity.comment> [15.01.2022].
Hawkins, Keith (1992): The Uses of Discretion, Oxford.
Hernandez, César C. G. (2013): Creating crimmigration, in: Brigham Young University Law Review 2013, 1457-1516.
Hruschka, Constantin (2019): Grenzkonstruktionen und Raumdimensionen, in: Im Dialog – Beiträge aus der Akademie der Diözese Rottenburg-Stuttgart, <https://imdialog.akademie-rs.de/ojs/index.php/idadrs/article/view/235> [15.01.2022].
Jones, Erik/Kelemen, Daniel/Meunier, Sophie (2016): Failing forward? The Euro Crisis and the Incomplete Nature of European Integration, in: Comparative Political Studies 49, 1010-1034.
Kalkman, Jorie. P./Molendijk, Tine (2021): The Role of Strategic Ambiguity in Moral Injury: A Case Study of Dutch Border Guards Facing Moral Challenges, in: Journal of Management Inquiry 30, 221-234.
Kanstroom, Daniel (2004): Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th 'Pale of Law', in: North Carolina Journal of International Law and Commercial Regulation 29, 639-670.
Koca, Burcu T. (2019): Bordering Practices Across Europe: The Rise of "Walls" and "Fences", in: Migration Letter, 16, 183-194.
Koulish, Robert (2010): Immigration and American Democracy. Subverting the Rule of Law, New York.
Lind, Dara (2015): The government can't enforce every law. Who gets to decide which ones it does?, in:VOX, 31. March. <http://www.vox.com/2015/3/31/8306311/prosecutorial-discretion> [15.01.2022].
Linke, Uli (2010): Fortress Europe: Globalization, Militarization and the Policing of Interior Borderlands, in: TOPIA: Canadian Journal of Cultural Studies 23, 100-120.
Miller, Teresa A. (2003): Citizenship and Severity: Recent Immigration Reforms and the New Penology, in: Georgetown Immigration Law Journal 17, 611-666.
Moffette, David/Pratt, Anna (2020): Beyond Criminal Law and Methodological Nationalism: Borderlands, Jurisdictional Games, and Legal Intersections, in: Côté-Lussier, Carolyn/Moffette, David/Piché, Justin (eds.): Contemporary Criminological Issues: Moving Beyond Insecurity and Exclusion, Ottawa, 15-40.
Moravcsik, Andrew (1993): Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach, in: Journal of Common Market Studies 31, 473-524.

Motomura, Hiroshi (2011): The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line, in: UCLA Law Review 58, 1819-1858.
Oelgemöller, Christina/Vries, Leonie A. D./Groenendijk, Kees (2020): The crafting of a paradox: Schengen inside and out, in: International Journal of Migration and Border Studies 6, 7-25.
Oomen et al. (2021): Of bastions and bulwarks: A multiscalar understanding of local bordering practices in Europe, in: International Journal for Crime, Justice and Social Democracy 10, 16-29.
Pratt, Anna (2005): Securing borders: Detention and deportation in Canada, Vancouver.
Pratt, Anna (2010): Between a Hunch and a Hard Place: Making Suspicion Reasonable at the Canadian Border, in: Social & Legal Studies 19, 461-480.
Pratt, Anna/Thompson, Sara K. (2008): Chivalry, 'Race' and Discretion at the Canadian Border, in: British Journal of Criminology 48, 620-640.
Provine, Doris Marie/Doty, Roxanne L. (2011): The Criminalization of Immigrants as a Racial Project, in: Journal of Contemporary Criminal Justice 27, 261-277.
Schlikker, Michael (2018): Eine Grenze ist eine Grenze ist keine Grenze?, in: VerfBlog, 21. June. <https://verfassungsblog.de/eine-grenze-ist-eine-grenze-ist-keine-grenze/> [15.01.2022].
Scipioni, Marco (2018): Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis, in: Journal of European Public Policy 25, 1357-1375.
Simon, Jonathan S. (2007): Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear, New York.
Sklansky, David A. (2012): Crime, Immigration, and Ad Hoc Instrumentalism, in: New Criminal Law Review 15, 157-223.
Sonenshein, Scott (2009): Emergence of Ethical Issues During Strategic Change Implementation, in: Organization Science 20, 223-239.
Spader, Dean J. (1984): Rule of law v. rule of man: The search for the golden zigzag between conflicting fundamental values, in: Journal of Criminal Justice 12, 379-394.
Sparks, Richard (2020): Crime and justice research: The current landscape and future possibilities, in: Criminology & Criminal Justice 20, 471-482.
Stiller, Marlene (2021): Strengthening Schengen against German and other unilateral policies: CJEU, judgment of 13 December 2018, Touring Tours und Travel, Asiel en Migrantenrecht, nº 6/7, 348-352.
Stumpf, Juliet P. (2006): The Crimmigration Crisis: Immigrants, Crime and Sovereign Power, in: American University Law Review 56, 367-419.
Stumpf, Juliet P. (2013): The process is the punishment in crimmigration law, in: Franko Aas, Katja/Bosworth, Mary (eds.): The Borders of Punishment: Migration, Citizenship, and Social Exclusion, Oxford, 58-75.
Valverde, Marianne (2010): Practices of Citizenship and Scales of Governance, in: New Criminal Law Review 13, 216-240.
Van der Woude, Maartje. A. H./van der Leun, Joanne. P./Nijland, Jo-Anne. A. A. (2014): Crimmigration in the Netherlands, in: Law & Social Inquiry 39, 560-579.
Van der Woude, Maartje. A.H. (2016): Chain Reactions in Criminal Justice: Discretion and the Necessity of Interdisciplinary Research, Den Haag.
Van der Woude, Maartje. A.H./van der Leun, Joanne P. (2017): Crimmigration checks in the internal border areas of the EU: Finding the discretion that matters, in: European Journal of Criminology 14, 27-45.
Van der Woude, Maartje. A.H. (2020a): A Patchwork of Intra-Schengen Policing: Border Games Over National Identity and National Sovereignty, in: Theoretical Criminology 24, 110-131.
Van der Woude Maartje A.H. (2020b): Ethnicity based immigration checks: crimmigration and the how of immigration and border control, in: Gatta, Gian Luigi/Mitsilegas, Valsamis/Zirulia, Stefano (eds.): Controlling Immigration Through Criminal Law. European and Comparative Perspectives on "Crimmigration". Hart Studies in European Criminal Law London, London, 141-164.

Van der Woude, Maartje. A.H./Staring, Richard (2021): Guest Editorial: Transforming Borders and the Discretionary Politics of Migration Control, in: International Journal for Crime, Justice and Social Democracy 10, i-viii.
Vega, Irene. I. (2018): Empathy, morality, and criminality: the legitimation narratives of U.S. Border Patrol agents, in: Journal of Ethnic and Migration Studies 44, 2544-2561.
Walters, William (2017): Live governance, borders, and the time–space of the situation: EUROSUR and the genealogy of bordering in Europe, in: Comparative European Politics 15, 794-817.
Weber, Leanne (2003): Down that Wrong Road: Discretion in Decisions to Detain Asylum Seekers Arriving at UK Ports, in: Howard Journal of Criminal Justice 42, 248-262.
Weber, Leanne (2013): Policing non-citizens, London.
Weber, Leanne/McCulloch, Jude (2019): Penal power and border control: Which thesis? Sovereignty, governmentality, or the pre-emptive state?, in: Punishment & Society 21, 496-514.
Welch, Michael (1996): The Immigration Crisis: Detention as an Emerging Mechanism of Social Control, in: Social Justice 23, 169-184.
Wonders, Nancy A. (2017): Sitting on the fence–Spain's delicate balance: Bordering, multiscalar challenges, and crimmigration, in: European Journal of Criminology 14, 7-26.
Zaiotti, Ruben (2007): Revisiting Schengen: Europe and the emergence of a new culture of border control, in: Perspectives on European Politics and Society 8, 31-54.

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