

## SEARCHING FOR “ILLEGAL” JUNK IN THE TRUNK: UNDERLYING INTENTIONS OF (CR)IMMIGRATION CONTROLS IN SCHENGEN’S INTERNAL BORDER AREAS

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*In the wake of the refugee crisis and the global war on terrorism, many European countries are revising their border control strategies. Despite having signed the Schengen Agreement, as a result of which all forms of internal border control within a large section of Europe have been abolished, many countries are exploring the legal possibilities to monitor cross-border mobility. By focusing on the case of the Netherlands, this article aims to assess one of these possibilities: carrying out so-called Schengen proof spot checks in the 20-km zone around the land borders with Belgium and Germany. In this article we aim to examine whether the Dutch Mobile Security Monitor is exercised justly and fairly. We will assess street-level discretionary decision making by officers of the Royal Netherlands Marechaussee, the Dutch border police organization responsible for carrying out the MSM, through the sociolegal lens of the principle of non-misuse of competence also known as détournement de pouvoir. Although the MSM is meant as an instrument of immigration control, based on our extensive qualitative fieldwork this article will show a different picture.*

**Keywords:** border control, crimmigration, Schengen, stop and search, noble cause, détournement de pouvoir

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## INTRODUCTION

Since the summer of 2015, an unprecedented influx of refugees is shaking the foundations of the European Union, causing many E.U. Member States to revise their position and policies toward internal border control. With the “refugee crisis” turning into a Schengen border crisis, in December 2015, the Presidency of the European Council issued a document entitled the “Integrity of the Schengen area.”<sup>1</sup> In this document the Presidency acknowledges that the attacks in Paris on November 13, 2015, have only complicated the various crises, further mixing a dose of terror threat into the already fairly toxic mix. To avert a collapse of the Schengen Agreement that lifted internal border controls between European states, the Presidency calls for, among other things, Member States to use their powers to check people regarding their immigration status within their own borders under Article 23 of the Schengen Border Code (SBC), which allows checks in the border areas between two Member States.

This policy differs from the temporary border checks that can be reinstated under Articles 25–28 SBC, as has been done by Germany, Austria, Slovenia, Sweden, Norway, France, and Malta since the start of the crisis. Whereas the latter allow Member States to temporarily reinstate 24/7 border controls at the former land borders between two Schengen states, the former technically cannot have border control as an objective. Instead, border checks should be carried out as nonsystematic spot checks and should be based on general police information and experience regarding possible threats to public security. Unlike Articles 25–28 SBC, Article 23 does not oblige the Schengen states to inform the European Commission or other Member States of their practices. Within the framework of the SBC, it is left to the discretion of individual states on how to shape these checks legally and practically. As argued elsewhere (Woude & Berlo, 2015), against the broader context of the securitization—or even more so, terrorization—of migration, the checks in the internal border areas of the European Union deserve more scrutiny (Mitsilegas, 2015). Increasing police checks inside E.U. Member States is likely to cause new tensions within states, as the already heightened concerns about terrorism by Islamic State sympathizers is giving rise to increased identity controls on Muslims in

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1. Council Document 14300/156, 1 December 2015. Retrieved from <http://statewatch.org/news/2015/dec/eu-council-schengen-integrity-14300-12-2015.pdf>

some parts of the European Union. It is therefore important for the checks to be used in a “just and fair” way (Guild, Brouwer, Groenendijk, & Carrera, 2015).

In the steadily growing body of scholarship on the securitization of migration, “just and fair” is often assessed through the lens of ethno-racial profiling and the overrepresentation of minorities in the outcome of various law enforcement practices (Miller, 2005; Stumpf, 2006; Pratt, 2010; Pratt & Thompson, 2008; Koulisch, 2010; Hernandez, 2013). Yet, it is important to realize that “just and fair” comprises more than law enforcement officers applying their powers in a nondiscriminatory way. It also entails that they use their powers for the purpose for which they were formally created.

In this article we aim to examine whether the Dutch version of the Article 23 SBC checks, known as the Mobile Security Monitor (MSM), are exercised *justly and fairly*. Since The Netherlands is part of the Schengen Agreement and has not temporarily reinstated permanent border checks at the land borders with Belgium and Germany, the MSM checks are currently the main instrument to monitor cross-border mobility. Although MSM checks are carried out on roads, airports, boats, and trains, the underlying fieldwork for this article focused on the checks at highways and other roads in the Dutch border areas. We will assess street-level discretionary decision making by officers of the Royal Netherlands Marechaussee (RNM), the Dutch border police organization responsible for carrying out the MSM, through the sociolegal lens of the principle of *non-misuse of competence* also known as *détournement de pouvoir*.

This so-called principle of good governance entails that government officers act based on the authority attributed to them by the state and use the powers flowing from this authority in line with their underlying purpose(s). It is unlawful to use discretionary powers to achieve a purpose other than that for which the power was conferred (Tamir, 2006). Thus, while stopping cars under the Road Traffic Act, law enforcement officers can only check for compliance with this particular act: Are people speeding? Are they carrying their driver’s license? Are they driving while intoxicated? Traffic stops cannot be used as an easy way to also search the cars for drugs or other illegal items or activities, as that would require having reasonable suspicion of a criminal act being committed, as established in Article 27 of the Dutch Code of Criminal Procedure. Derived from the principle of legality, *détournement de pouvoir* mandates that law enforcement officers should always correctly apply the laws in order for it to be

clear to citizens why and to what type of investigative powers they are being subjected. This is important in ensuring due process and preventing prejudicial or unequal treatment. By applying a sociolegal approach, this article addresses the pressing need for more empirical and ethnographic examinations of street-level bureaucrats involved in border policing (Cote-Boucher, Infantino, & Salter, 2014; Loftus, 2015).

## I. METHODOLOGY

This paper is based on data collected for a larger project on the legitimacy of the MSM and decision making by Dutch RNM officers.<sup>2</sup> The project as a whole uses a mixed methods research design, involving policy discourse analysis, semistructured focus group interviews with RNM officers, interviews with higher-ranked administrative staff, and observations of routines and procedures during MSM site visits and ride-alongs. A key feature of mixed methods research is its methodological pluralism, which offers the advantage of incorporating the strengths of different methodological strategies. For this article, we will draw from observational data as well as focus group data.

Data for the project were collected between October 2013 and March 2015. During this period, three researchers went on 57 site visits or ride-alongs with RNM officers who were exercising their discretionary powers in the context of the MSM. While present on site or in a patrol car, the researchers—always operating in teams of two—were able to observe the way in which the MSM was enforced and the street-level decisions that were made by individual officers. Observational research has a long history and is known as a good and valuable research method to study the behavior of law enforcement officers in a “natural” setting (Reiss, 1971). It can be used as a scientific research method to gather detailed and so-called thick descriptions (Geertz, 1973). These can illuminate the actions of members of a certain group and the way in which actions should be interpreted. By

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2. This is the project “Crimmigration & Discretionary Decision-making in EU Border Areas.” The empirical fieldwork for the project was jointly conducted by Jelmer Brouwer, Tim Dekkers, and Maartje van der Woude. The project is initiated and coordinated by Maartje van der Woude; the dissertations resulting from the project are co-supervised with Joanne van der Leun. All members of the research team are affiliated with Leiden Law School, the Netherlands.

being part of the setting in which actions take place, information is not only gathered about the persons being studied, but also about the (organizational) context of those actions. Ride-alongs and site visits were carried out at the seven RNM brigades that are responsible for carrying out the MSM in the border areas with Belgium and Germany. All brigades were visited at least six times, with extra visits carried out at the larger brigades. The recurring nature of the visits, which increased the feeling of trust between researchers and the participants, combined with the fact that it was made very clear beforehand that the researchers were in no way affiliated with or hired by the RNM, often resulted in a relaxed atmosphere in which the RNM officers were more than willing to share their views. The often informal nature of the conversations and the familiar setting in which they took place decreased the chance of politically correct answers (Krueger, 1994; Krueger & Casey, 2000; Finch, Lewis, & Turley, 2013).

Each site visit or ride-along visit lasted between 4 to 7 hours, resulting in a total of 800 person-hours of observational fieldwork. During the site visits, data was collected in two different ways, observations and focus groups. By using a structured observation form, the researchers systematically collected a variety of operational data on (1) discretionary decisions made by officers during a check, (2) characteristics of the people and vehicles selected for a check, and (3) the interactions between officers and the people that were checked. Besides collecting data systematically, during the site visits and ride-alongs, the researchers also had plenty of time to chat more informally with the RNM officers. During these informal chats taking place over lunch break or while having a cup of coffee, they would often speak freely about their job. Since this information often contained valuable information, it was recorded by the researchers in field notes. These notes also included personal reflections of the researchers on what they had heard and seen, following Maanen (1979, p. 542), making these data more presentational in nature. Valuable information from the ride-alongs and the informal conversations were recorded in the researcher's field notes. After the shifts, these field notes were written down in a detailed and structured manner in order to be coded.

Focus group interviews were conducted to gather more in-depth information on specific subjects related to discretion and street-level decision making in the context of the MSM. Focus group interviews are useful for exploring and examining what people think, how they think, and why they think the way they do about the issues of importance to them, without

pressuring them into making decisions or reaching a consensus. Focus groups permit researchers to search for the reasons why particular views are held by individuals and groups. The method also provides insight into the similarities and differences of understandings held by people (Krueger, 1994; Krueger & Casey, 2000; Finch, Lewis, & Turley, 2013). A total of thirteen focus groups with six to ten participants each were divided over all seven brigades, resulting in 25 hours of conversation. All focus groups consisted of a mixture of more and less experienced officers involved in the MSM on an operational level. During most focus groups, all RNM officers present participated in the discussion—some more actively than others, which is one of the most important limitations of focus group interviews (Krueger & Casey, 2009). Yet, knowing this pitfall, the moderator directly intervened in such instances. Being a military organization, younger and less experienced or lower-ranked officers often kept a somewhat low profile. Again, when noticed by the moderator, these officers would be explicitly asked to respond. The focus group interviews were audiotaped, transcribed verbatim, and coded; the quotations included in this article originated in this project, some from focus group interviews and some from ride-alongs. All data were analyzed with software for qualitative analysis, Atlas-Ti.

## **II. DÉTOURNEMENT DE POUVOIR AND NOBLE CAUSE DECISION MAKING**

While executing the MSM, officers enjoy a great amount of discretion since they do not need to have reasonable suspicion to check a vehicle. This flexibility makes them powerful street-level bureaucrats in charge of the final implementation of public policy (Lipsky, 2010). Many scholars have identified discretion—and more so the abuse of it (Weber, 2003; Motomura, 2011; Wadhia, 2015; Hernandez, 2013; Eagly, 2011; Reyes, 2012; Woude & Leun, in press)—as an important driver behind the process of crimmigration: the merger of crime control and immigration control (Stumpf, 2006, 2011, 2013; Aliverti, 2014; Chacón, 2014; Sitkin, 2014; Spena, 2014).

Discretion is a necessary tool for the welfare and regulatory functions of modern government (Davis, 1971). As Weber notes (2003), “While high levels of discretion are often associated with failure to meet the most basic

requirements of justice (that is, that decisions should be fair and not arbitrary) it is recognized that a certain amount of discretion can bring positive benefits” (p. 250). In other words, by enabling decision makers to mitigate the unintended outcomes of the application of rules in individual cases, discretion can contribute to justice (Schneider, 1992). Obviously, it is precisely this same flexibility with regard to applying the rules that makes discretion susceptible to misuse and abuse, and thereby potentially contributing to *injustice*, for instance, by favoring certain social groups over others. Discretion is a sphere of autonomy within which decisions are to some degree a matter of personal judgment and assessment (Galligan, 1986). In that sphere the public officer who has the authority is free to make the choice between possible courses of action or inaction, between using a certain power illegally or not. The principle of *détournement de pouvoir* can be seen as the legal embodiment of the notion that discretion can be easily misused or even abused. By explicitly underlining the fact that state officers are also bound by the restrictions of the law, and thus the restrictions of their powers, the principle lies at the heart of the rule of law. As Hawkins (1992, 2003) has noted, street-level discretionary decision making is influenced by many factors on the organizational, political, legislative, social, and individual level. This is definitely also the case for the decisions made by RNM officers during the MSM (Dekkers, Woude, & Leun, 2016; Woude & Leun, in press). In this article we are not so much looking to identify these factors but to understand the intentions and rationalizations behind certain street-level decisions.

For many years, policing scholars have analyzed the problematic nature of discretion for street-level bureaucrats by focusing on the central ethical dilemma the police face in a democracy. On one hand, they are bound to procedural law of due process. On the other hand, they are occupationally and morally committed to the “good end” in the sense that they are responsible for arresting and removing dangerous individuals from society (Klockars, 1983; see also Alderson, 1998). Both factors do not always go hand-in-hand. Brown (1981) describes how police officers tended to see their work as a game of cops and robbers, in which the police sometimes had to break the rules in order to catch the robbers. In line with Brown’s findings, Skolnick (1982) shows how police officers seemed to be more concerned with the production of arrests and confessions than with truth-finding, making them resort to quite undemocratic behavior (Skolnick, 1982, 1994). In an attempt to better characterize why police officers

committed to achieving good outcomes would at some point in their careers willingly and knowingly break the law to do so, Crank, Flaherty, and Giacomazzi (2007) introduced the concept of “noble cause.” Meese and Ortmeier (2003) defined the “noble cause” as a commitment to do something to prevent illegal human behavior and apprehend criminal offenders. It inspires officer values and morally justifies their actions. Caldero and Crank (2004, p. 29) similarly defined the “noble cause” as “a moral commitment to make the world a safer place to live. Put simply, it is getting bad guys off the street.” These two definitions share the common theme that the noble cause is a moral conviction associated with the public safety function of police work that emphasizes ends-oriented action.

As Crank and colleagues (2007) note, the noble cause is almost always presented in negative terms. The good end, negatively described, may be used to justify controversial and even illegal behavior when it serves a larger purpose (see for example, Barker, Friery, & Carter, 1994). Most scholarship on the noble cause has focused on the negative aspect, commonly called “noble cause corruption,” and described in terms of the evasion or violation of procedural constraints in order to control crime and disorder (see Caldero & Crank, 2004). Less dramatic but equally important, one can view the noble cause as a commitment to achieve the good end and still act legally, using policy and law as resources to achieve a broader good (Crank et al., 2007). From this perspective, the noble cause is a positive attribute associated with police professionalism, and provides a moral center for ethical decision making (Meese & Ortmeier, 2003). It remains to be seen which of the two interpretations of noble cause policing is most applicable to the case of the MSM.

### III. SELECTING AND SEARCHING VEHICLES

The MSM checks are the Dutch legal translation of Article 23 SBC. In the period January 2011 to August 2015, the RNM has carried out a total of 30,190 MSM checks on the roads and highways in the border areas with Germany and Belgium. As this policy is also being carried out on trains and in airports and ports, this number does not reflect the total number of MSM checks. As the table shows, the number of checks per year is not stable.



**Table 1. Number of MSN checks on roads and highways per year in absolute numbers**

<i>Year</i>	<i>Number</i>
2011	6.757
2012	7.813
2013	7.217
2014	5.646
2015*	2.757
<b>Total</b>	<b>30.190</b>

\* Until August 2015. *Source:* Royal Netherlands Marechaussee

The fluctuations per year are most likely the result of changes in the available capacity for the MSM. Performing both civic and military duties and falling under three different ministries—the Ministry of Defense, the Ministry of Security & Justice, and the Ministry of Internal Affairs—the RNM is a rather complicated organization with a wide range of different tasks. Besides the MSM, they also control the country’s external border at airports and other ports of entry, join military missions abroad, and are responsible for security at various locations in the Netherlands, including airports, royal palaces, and other high-risk security sites. In total 5,846 RNM officers can be sent to different places to perform different tasks, based on where they are needed the most. Since the available data do not cover the period in which the “refugee crisis” started and developed, nor the attacks in Paris and Brussels, it will be interesting to see the numbers for the last quarter of 2015 and the first couple of months of 2016, since the use of the MSM checks has been intensified ever since (Woude, 2015).

### **A. The “Crimmigrant” Nature of the MSM**

The MSM was originally created in response to the lifting of the internal borders following the Schengen Agreement. Its legal foundation is laid down in Article 50 of the Dutch Aliens Act (AA; 2000) and Article 4.17a of the Aliens Decree (AD). It is not the only form of immigration control in the Netherlands, as another organization, the Aliens Police, is responsible for immigration controls inside the Dutch territory. Looking at the legal foundation of the MSM and its formal aim—combating illegal entry and stay in the Netherlands after crossing the border—shows that it is meant as an

instrument of administrative immigration control. The MSM checks are carried out on the highways and other roads in the Dutch borderlands with Germany and Belgium. Since the SBC forbids actual border checks, the MSM can be carried out in a 20-km area around the land borders, in the form of nonsystematic spot checks. Cars can be selected for the MSM only when it is clear that they actually crossed the border to enter into the Netherlands.

In line with the central aim of the MSM, the main task of RNM officers is to check the identity and resident status of people by checking their legal documentation (e.g., passport, European ID card, and visa). Despite the right to free movement throughout the European Union, people are still required to carry valid documentation while travelling through Europe. Over the years, both the goal of the MSM and its legal framework expanded slightly to include fighting human smuggling and identity fraud as forms of cross-border crime that could be directly linked to the original goal of combating illegal stay (Woude & Leun, *in press*). Whereas the MSM used to be an instrument solely focused on immigration control, this inclusion has slightly opened the door to crime control as well. The extension of powers was driven by an efficiency rationale. Under the new rules, when encountering a case of human smuggling or identity fraud during an MSM check, RNM officers no longer had to consign the case to the National Police, but had the authority to deal with these cases themselves. Around the same time its name changed from Mobile Aliens Monitor to Mobile Security Monitor, suggesting a broader aim than illegal immigration only. Yet, the law is very clear on the fact that the “crime control” authority of the RNM while performing the MSM is strictly limited to these two forms of crime. Attributing these dual powers—immigration control and crime control—to RNM officers can be seen as troublesome from a crimmigration perspective. Not only does it seem to imply a link between certain forms of crime and immigration, it also fits in within the more general tendency toward “ad hoc instrumentalism” (Sklansky, 2012) that is visible within both criminal and administrative law, as RNM officers are able to choose which powers they employ depending on the situation at hand. According to Sklansky (2012), “ad hoc instrumentalism” is one of the important driving factors behind crimmigration. He defines ad hoc instrumentalism as

a manner of thinking about law and legal institutions that downplays concerns about consistency and places little stock in formal legal categories, but instead sees legal rules and legal procedures simply as a set of interchangeable tools. In

any given situation, faced with any given problem, [officers] are encouraged to use whichever tools are most effective against the person or persons causing the problem. (p. 161)

As we will elaborate upon in the following sections, despite the fact that the Dutch legislature aimed to clearly distinguish between circumstances under which RNM officers act as crime control officers or immigration control officers, our observations showed that this distinction wasn't always reflected by the actions of officers enforcing the MSM on the street.

## **B. Lawfully Frisking and Searching**

Once a vehicle has been stopped for an MSM check, following Article 50 of the Dutch Aliens Act in conjunction with Article 4.21 of the Aliens Decree, RNM officers are entitled to ascertain the identity, nationality, and immigration status of the driver and his or her passengers. This will typically be done by asking the occupants for their passports or other valid ID and/or status documentation. A driver's license is not considered a valid ID under the Aliens Decree (Art. 4.21 AD). If one of the occupants cannot hand over any of the required documentation, and only if it has been impossible to ascertain their identity otherwise (Sect. A2/3, Aliens Circular 2013)—by using less intrusive means—an officer can search the person concerned by checking their clothing, their bags, or their body for any information that might shed light on their identity and/or immigration status (Art. 50, Sects. 1 & 5, Aliens Act; in relation with Sect. A2/3, Aliens Circular 2013). Since July 1998, RNM officers are also allowed to search vehicles, a competence laid down in Article 51 of the Dutch Aliens Act. According to this article, they are allowed to search a vehicle if, based on objectively measurable facts and circumstances, they have a reasonable suspicion that the vehicle transports persons falling under the scope of the MSM. Section A2/2 of the Aliens Circular (AC) identifies three objectively measurable sources upon which the required reasonable suspicion can be based:

- Facts or circumstances of the situation under which the person is stopped;
- Indications on the person that is stopped (with indications referring to known police information on the vehicle or the person);
- Experience of the RNM officer performing the MSM.

The above criteria are rather vague and elastic. In practice it comes down to individual officers' discretion on how and when to exercise their stop-and-search powers. So even despite the required "reasonable suspicion," RNM officer enjoy a great amount of discretion in their decision making on whether or not to search a car. Nevertheless, the law is very clear on the fact that both the discretionary power to frisk a person or to search a vehicle *only* could be exercised when the occupant(s) of a vehicle is/are unable to hand over their documentation.

### C. Switching Hats and the Complicated Continued Application of Powers

According to the principle of *détournement de pouvoir*, RNM officer are allowed to use the powers attributed to them under the MSM only to combat illegal stay, identify fraud, or combat human smuggling. They are *not* allowed to stop a vehicle based on suspicions of any other form of cross-border crime, such as human trafficking or drug smuggling. Doing so would constitute a misuse of competence by employing the discretionary power to stop and search a vehicle under the MSM to achieve a purpose other than that for which that power was originally conferred. It is important to distinguish between this illegal practice and the situation in which an RNM officer, unprompted, stumbles upon a criminal act—other than identity fraud or human smuggling—while performing the MSM check. The latter could, for instance, be the case, if an RNM officer sees a weapon or drugs in the car while asking the driver for their ID. Whereas the reasons to originally select and check the car fall under the scope of the MSM, while performing his legal powers under the MSM, the RNM officer is put in the situation where he spontaneously comes across a criminal act not falling under the scope of the MSM. Since it would be highly undesirable to ask RNM officers to ignore this, the Dutch Supreme Court has ruled that in these circumstances law enforcement officer, including the RNM, have the authority to "switch hats" from administrative control to crime control (Luchtman, 2007). The latter means that the RNM officer has to notify the driver of the changed nature of the check, and that he or she is now suspected of having committed a certain crime and has the right to remain silent. In Dutch, this practice is referred to as the *leer van de voortgezette toepassing*, or the "continued application of powers" doctrine.

Although it may sound rather straightforward to distinguish between these two situations, in practice it is quite difficult to prove whether a law enforcement officer acted with improper purpose, breaching the principle of *détournement de pouvoir* (Borgers, 2011). Under Article 359a of the Dutch Code of Criminal Procedure, obtaining evidence by acting with improper purpose can lead to the exclusion of that evidence in court. In a vast line of case law the Dutch Supreme Court has ruled that, to prove improper purpose, one has to show that a certain power was indeed applied with improper purpose.<sup>3</sup> In a recent ruling by the Court of Appeal in Amsterdam,<sup>4</sup> the National Police was found to structurally abuse their power to stop cars under the Traffic Act for crime control instead of traffic control purposes. According to the Court the National Police was found guilty of “criminal fishing expeditions: investigative activities based on vague risk characteristics without any form of reasonable suspicion of a criminal act, as a result of which they had obtained information that would not normally be accessible.” All results and gains of this illegal and unjust fishing expedition were excluded from the evidence.

Although it might be possible to prove that a certain power was applied with mixed motives, establishing that it was consciously and solely applied improperly would be difficult. In the above mentioned case, several police officers had testified about the true goal of traffic stops, leaving no doubt about their mixed motives. This type of evidence is rare. As a result, Dutch legal scholars disagree about the extent to which mixed motives should actually result in the verdict of *détournement de pouvoir*. According to Aler (1982, p. 27), as long as the dominant motive is the specified purpose of the power, it will not matter that an ancillary purpose is also achieved. However, Keijzer (2002) offers a slightly different perspective. He argues that to claim that someone acted with improper purpose, the court must assess the extent to which the legislature has attributed a certain power exclusively for a certain purpose and whether applying this power for other purposes was explicitly forbidden. If this exclusivity is lacking, one can only speak of improper purpose if it can be established that a power was applied solely for purposes other than the legislature intended (Knigge, 1988).<sup>5</sup>

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3. Dutch Supreme Court, 21 November 2006, ECLI: NL: HR: 2006: AY9670, *NJ* 2006, 653 (“Gypsy women-verdict”).

4. Court of Appeals in Amsterdam, 21 December 2015, ECLI: NL: GHAMS: 2015: 5307.

5. Section 26-18 of the conclusion, HR 6 November 2001, *NJ* 2002, 189.

#### IV. IN SEARCH OF SOMETHING ILLEGAL

Having observed 330 MSM checks and having spoken to many RNM officers about the various decisions they made during a check, in this section we will share our findings on what underlying rationalizations seemed to influence an RNM officer's decision to search a vehicle. Before zooming in on the decision to search a vehicle or not, it is important to mention that we found great differences among participants regarding their perception of what their core task was—or should be—while performing the MSM. The street-level perceptions on the aim of the MSM and one's task while enforcing it are rather diffuse, as officers disagreed on the exact aim and scope of the controls and therewith also on the use of their powers. Whereas the majority of those we spoke with during the site visits and the focus groups seemed aware of the legal framework of the MSM and the fact that the MSM is predominantly meant to be an instrument of immigration control, a fair number of officers thought the scope of the MSM was broader. They believed that the MSM was predominantly an instrument of crime control, focusing on all forms of cross-border crime. When asked for an explanation, this group would always refer to fact that the "S" in MSM stood for "Security" and that they were thus expected to enforce security (Woude, Dekkers, & Brouwer, 2015; Woude & Leun, in press). In line with the different perspectives on the core business of the MSM, during the fieldwork respondents would refer to some colleagues being more "immigrant-prone" and others more "crime-prone," meaning that some officers focused more on detecting potential illegal immigrants, whereas others tended to be primarily interested in catching criminals. The majority of the RNM officer who were aware of the fact that the MSM's crime control potential was limited to human smuggling and identity fraud still held the opinion that their crime control powers under the MSM should be widened.

##### A. A "Creative" Use of the Limited Discretionary Power to Search a Vehicle

During the fieldwork we regularly asked why a certain vehicle was stopped and/or searched, especially in those cases when there appeared to be no reason to do so under the legal framework of the MSM, because the driver and other vehicle occupants were in possession of a valid ID and or

passport. In response, respondents would regularly refer to the necessity of “being creative” with their powers while enforcing the MSM. “Being creative,” they made clear, did not mean abusing or overstating their power; instead, it referred to being savvy about “knowing what powers to use and when.” This strategy was illustrated when a car with a Dutch license plate and three Dutch men was stopped. The father and his two sons lived nearby and were known to some of the officers for their past involvement in various criminal activities. The driver possessed only a driver’s license, which is not officially a valid ID. Even though the officers knew the men and that they were all Dutch citizens, they nonetheless decided to conduct a thorough search of the vehicle. Although technically this strategy was lawful, it was clear that the original aim of the power to search—namely, to find documents to prove someone’s identity or residence status—played no role here.

Knowing that they were legally allowed to search a vehicle only as a last resort to identify its occupant(s) or when there is reason to suspect that a crime was committed, RNM officer described various creative ways to circumvent these legal restrictions posed by the Aliens Act. One of the ways that was often mentioned was the use of the possibility to search a car under Article 9 of the Dutch Opium Act. Under Article 9, smelling marijuana or seeing a small amount of marijuana constitutes the necessary reasonable suspicion to “look through” a vehicle. It is not possible to completely strip search a car and all someone’s belongings based on this article.

When I see a blunt lying in the car, a crime was committed and that’s when the Code of Criminal Procedure allows you to search through a car.

When you smell something [like marihuana], you just tear apart the whole vehicle.

As both quotes illustrate, the officers concerned are aware of the existence of legal powers to access a car through the presence of marijuana, but are lacking knowledge about important details such as (1) the formal legal ground and (2) the limited scope of an Article 9 search.

Another alternative legal basis to search a vehicle for which there is no ground to do so under the legal framework of the MSM, would be under the Arms and Ammunitions Act, if a person is carrying an illegal weapon. In finding such an “illegal weapon,” RNM officers indeed proved to be rather creative. It was standard practice at some of the brigades to open the

driver's car door the moment a car was pulled over, even before a driver would have had the chance to hand over their ID or passport. Although this practice can technically be seen as the start of a car search, the respondents did not seem to view it as such. For them it was a way to look inside the front of the car and check for the presence of illegal substances or illegal weapons. They often justified this practice by referring to the need to think about their own safety. In defining what could be considered an illegal weapon, RNM officers also were quite resourceful. Aside from the few actual illegal weapons (tasers and large knives) that were found over the course of the fieldwork, officers considered other objects as potentially dangerous as well: various tools, small knives, baseball bats. Although the presence of these objects would not ordinarily result in an official search of the vehicle, while referring to the fact that it was "unnecessary" and "somewhat suspicious," RNM officers asked the driver to put these objects in the trunk. That way, they would be able to take a look in the trunk without needing an official "legal" reason. Another option some officers mentioned was to simply ask people if they wanted to open the trunk for them, reasoning that this meant that the driver gave permission if he or she indeed opened the trunk. There was, however, disagreement among officers about this tactic, as others argued that this would too easily be considered as an order instead of a question, and people would not really feel like they have the option to say no.

These examples illustrate that participants were very clever when it came to finding their ways around the limitations of the Aliens Act in order to search a car without outright *abusing* their powers by not even trying to find a legal ground to legitimate their actions. Other than by spontaneously stumbling upon something that allows them to switch hats from immigration control to crime control, they are actively searching for something allowing them to do so. It is exactly this active searching and rather extensive interpretation of "spontaneously stumbling upon" a potential criminal offense that constitutes the creative nature of RNM officers' actions. Some respondents during the focus groups stated that, according to them, a stop should always end at the moment a persons' identification was established, and one should never be actively looking anymore for other ways to get access to a car. However, this was clearly a minority standpoint.

I don't understand why they're giving us such a hard time with these trunks, why don't they just change it [the Aliens Act]. Just let us check these trunks, in the end it's all about safety and security.



I just think we should be able to search everything. They are crossing the border, they are travelling to the Netherlands. I am of the opinion that we should be able to search through everything: dashboard, trunk, luggage and if necessary also frisk the people inside the car.

RNM officers clearly believed that crime control is an important part of the MSM and that the formal powers granted to them are insufficient. The possibility of finding drugs or weapons were perceived as especially important reasons to search a vehicle. Although human smuggling actually *does* fall under the scope of the MSM, officers did not refer to it as a reason to open the trunk more often. Although some officers did mention the possibility to open a trunk based on the suspicion of human smuggling, they were quick to add that, in order to justify this, one would actually need more indicators than just a gut feeling, and this was rarely the case.

Whereas respondents were reluctant to admit that being creative with their discretion to search a car could be a misuse of power, they also knew they needed to be careful about how to justify their “creativity” when writing a report. Yet, while flagging this as important, officers were also quick to add that it was not very difficult: referring to having acted based on “professional knowledge and experience” would “do the trick.” They also knew that the RNM as an organization did not crack down on potential misuse of powers since “no one will be fired for such a thing.”

## **B. Intentionally Overstepping Legal Boundaries**

Whereas respondents regarded their strategies as “creative” use of their discretionary powers, and therefore justified, they also offered some examples in which they willingly and knowingly overstepped their discretionary powers. In those cases, even though they risked having the illegally obtained evidence excluded from proceedings, respondents stated that to them it was more important to make sure that certain illegal goods would not make it to the consumer market. As various officers explained, in these cases the end justified the means.

Showing your driver’s license is not sufficient. It doesn’t show the residence status. In that case, we’ll search the trunk. We also searched through the garbage bags in the trunk and found 10 stolen GPS systems, together worth 15,000 euros. But we did know his identity based on his license, so according to the Aliens Circular the search was illegal. The prosecutor released the guys, but the GPS systems remain confiscated by the state.

So we pull over his car because his brake light wasn't working and without any reason we go through his trunk. 10 KG of weed and we have a case. The case completely collapsed, but the weed was off the streets.

Despite some discussion of whether the situations referred to in the abovementioned quotes were dealt with correctly by their colleagues, in general all respondents felt highly responsible for the national security of the Netherlands. Given that strong desire to protect the nation state from "all danger," officers felt frustrated about the fact that they were so limited by the law. The following quote aptly captures this strongly felt frustration:

We're based in these border areas and the name is mobile SECURITY monitor. We're the first ones to guarantee the security of the Netherlands, that's the focus of our organization. And if that's your target, to monitor the security in the Netherlands while also saying that I cannot fully use my crime control powers because that's not what I am here for . . . Well hello, I need to know who is entering my country? I need to create a secure situation. That is my task, isn't it?"

Indeed, many officers not only felt a strong need to protect the Dutch state against all sorts of risky invaders, but also believed that the formal powers granted to them were not always enough to fulfill this task. This perception leads some RNM officers to be creative with their powers or even to overstep their legal boundaries.

Whereas the observations and focus group interviews show a clear emphasis on crime control among the larger part of the participants, even among those who know that the crime control part of the MSM is limited to ID fraud and human smuggling, this emphasis is also reflected by statistical data on the outcomes of MSM operations. As shown in Table 2, the number of non-MSM-related crime control entries as a result of MSM road and highway checks—being entered in the system for anything other than human smuggling and ID fraud—is significantly higher than the number of entries for MSM-related crime control incidents. In the same period only 2002 irregular migrants were found.

Since the system from which the data were retrieved also functions as a database of information that might be helpful for future MSM checks, being included in the database does not necessarily equal an actual crime or any form of punishable criminal behavior. It could also entail more subjective information on a car or person that an individual RNM officer thought was acting suspicious without being able to label it as such. The

**Table 2. Crime control entries in the period January 2011 to August 2015 (MSM on the roads)**

<i>Crime control entries</i>	<i>Number</i>	<i>Percentage</i>
Falling under scope of MSM	2.622	6.2
Not falling under scope MSM	39.544	93.8
<b>Total</b>	<b>42.166</b>	<b>100.0</b>

Source: Royal Netherlands Marechaussee.

strong emphasis on including information on actual incidents falling outside the official scope of the MSM is a convincing indicator of the strong focus on crime and not so much on migration.

## CONCLUSION: THE NOBLE SECURITY MONITOR?

Knowing that they are allowed to switch hats from immigration control to crime control while spontaneously stumbling upon a criminal act during MSM checks, RNM officers have also proven to be creative in increasing the possibilities to do so. When asked about this, they seem to make a distinction between what they believe to be flat-out abuse of power and “just knowing how to be creative with the law.” Assessing these practices in light of the principle of *détournement de pouvoir*, the central question is whether the powers attributed to the RNM under the MSM are used for other purposes than those intended by the legislature. Based on the fieldwork, the answer is positive. With some exceptions, the MSM is largely used as an easy way to pull over vehicles after crossing the Dutch border to ensure that they are not up to *anything* illegal, rather than making sure that occupants are not entering the country illegally (i.e., irregularly). By explicitly stating that it is important to be aware of how to justify their actions in reports, officers seem to realize this is questionable practice. One could argue that the underlying reasons for this misuse of the MSM are rather noble. There is a firm belief among RNM street-level officers that they are the frontline of national defense and that it is their core duty to keep the country safe. Being creative is seen as a small price to pay for achieving this greater good. In the case of the MSM, and perhaps in slight defense of the street-level RNM officers, it should be noted that the existing legal framework of the MSM is indeed complex. Also, the strong emphasis on security is most likely fuelled by the organizational decision to change the name of the monitor from Mobile

Aliens Monitor to Mobile Security Monitor. Nevertheless, this does not take away the unjust nature in the way the MSM seems to be enforced.

Besides being unjust and illegal, the application of the MSM as a means of crime control fuelled by the seemingly noble motivation of keeping the country safe is also problematic from the perspective of crimmigration. To identify dangerous individuals—immigrants and criminals both fitting this category—on the legislative level a hybrid web of social control is spun in such a way that street-level law enforcement officers have the liberty—or take the liberty—to choose between their criminal and administrative—immigration law—powers. Whichever route they take, crime control or migration control, does not really matter, as long as their actions are effective (Miller, 2005; Stumpf, 2006; Chacón, 2012; Woude, Leun, & Nijland, 2014). With the misuse of powers under the MSM resulting only in the exclusion of evidence and not in any disciplinary sanctions, RNM officers are not encouraged to respect the boundaries of the law. Something that we have not touched upon in this article is the question of how the crime control focus of RNM officers performing their MSM duties relates to their general perceptions of immigrants. In the light of our findings and the dominant securitization of migration discourse throughout the European Union, various ethnic and national groups are predominantly targeted based on their “foreign” appearance or alleged involvement in various forms of crime. Whereas North African-looking people were regularly stopped because of potential illegal 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. It was commonly believed that young men with Moroccan or, more generally, North African backgrounds are disproportionally involved in crime, particularly drug-related offenses. However, most frequently and openly associated with criminal behavior were people from Central and Eastern European countries, primarily Bulgarians and Romanians, and to a lesser extent Hungarians and Polish. This was reflected in the relatively large number of vehicles stopped that had Eastern European license plates. Officers regularly indicated that a Bulgarian or Romanian license plate was sufficient reason for them to make a check, driven by a variety of risks that range from mobility-related offenses like human trafficking and false identification papers, to more mundane crimes such as pickpocketing and theft (Brouwer, 2016).

Whereas the Presidency of the European Council encourages Schengen Member States in the wake of the current refugee crises to increase their use

of Article 23 SBC, the Dutch case has shown that these “Schengen proof” police or immigration checks are not without problems. Their highly discretionary nature makes the checks susceptible to misuse and even abuse, whereas the population primarily targeted by these checks—non-nationals—is less likely to notice this because of their limited knowledge of the national legislation containing the exact rules for Article 23 SBC checks. Further, other than a Member State’s decision to temporarily reinstate internal border checks, Article 23 SBC checks can largely remain invisible to the European Commission since they are seen as national matter as long as the national framework governing them is in line with the SBC. Despite some scholars questioning the legitimacy of Article 23 SBC checks, they mistakenly remain largely under-scrutinized on a European level.

## REFERENCES

- Alderson, J. (1998). *Principled policing: Protecting the public with integrity*. Winchester, England: Waterside Press.
- Aliens Act, Netherlands. (2000). Retrieved from <http://hrlibrary.umn.edu/research/Netherlands/Alien%20Act%202000.pdf>
- Aliverti., A. (2014). Making people criminal: The role of the criminal law in immigration enforcement. *Theoretical Criminology*, 16(4), 417–434.
- Barker, T., Friery, R., & Carter, D. (1994). After L.A., would your local police lie? In T. Barker & L. Carter (Eds.), *Police deviance* (3rd ed., pp. 155–168). Cincinnati, OH: Anderson.
- Brouwer, J. (2016). *(Cr)immigrant framing in Dutch border areas*. Border Criminologies Blog. Retrieved from <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/02/crimmigrant>
- Brown, M. (1981). *Working the streets: Police discretion and the dilemmas of reform*. New York: Russell Sage Foundation.
- Caldero, M., & Crank, J. (2004). *Police ethics: The corruption of noble cause* (2nd ed.). Cincinnati, OH: Anderson Lexis/Nexis.
- Chacón, J.M. (2012). Overcriminalizing Immigration. *The Journal of Criminal Law and Criminology*, 102(3), 613–652.
- Chacón, J.M. (2014). Immigration Detention: No Turning Back? *South Atlantic Quarterly*, 113(3), 621–628. doi:10.1215/00382876-2692209
- Cote-Boucher, K., Infantino, F., & Salter, M.B. (2014). Border security as practice: An agenda for research. *Security Dialogue*, 45(3), 195–208. <http://doi.org/10.1177/0967010614533243>
- Crank, J., Flaherty, D., & Giacomazzi, A. (2007). The noble cause: An empirical assessment. *Journal of Criminal Justice*, 35, 103–116.
- Davis, K.C. (1971). *Discretionary Justice: A Preliminary Inquiry*. Chicago: University of Illinois Press.
- Dekkers, T.J.M., Woude, M.A.H. van der, & Leun, J.P. van der. (2016). Exercising Discretion in Border Areas: On the changing social surround and decision field of

- internal border control in the Netherlands. *International Journal for Migration and Border Studies*, 2(4), 382–402.
- Finch, H., Lewis, J., & Turley, C. (2013). Focus Groups. In J. Ritchie, J. Lewis, C. McNaughton-Nicholls, & R. Ormstom (Eds.), *Qualitative Research Practice: A Guide for Social Science Students and Researchers*. London: Sage.
- Geertz, C. (1973). *The interpretation of cultures: Selected essays*. New York: Basic Books.
- Galligan, D.J. (1986). *Discretionary Powers: A Legal Study of Official Discretion*. Oxford: Clarendon Press.
- Guild, E., Brouwer, E., Groenendijk, K., & Carrera, S. (2015, December). What is happening to the Schengen borders? *CEPS Paper in Liberty and Security in Europe* No. 86.
- Hawkins, K. (1992). The Use of Legal Discretion: Perspectives from Law and Social Science. In K. Hawkins (Ed.), *The Uses of Discretion*. Oxford: Clarendon Press.
- Hawkins, K. (2003). Order rationality and silence: Some reflections on criminal justice decision-making. In L. Gelsthorpe & N. Padfield (Eds.), *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (pp. 186–216). London: Routledge.
- Hernandez, C.C.G. (2013). Creating Crimmigration. *Brigham Young University Law Review*, 6, 1457–1516.
- Klockars, C. (1983). The Dirty Harry problem. In C. Klockars (Ed.), *Thinking about police: Contemporary readings* (pp. 428–438). New York: McGraw Hill.
- Koulish, R. (2010). *Immigration and American Democracy: Subverting the Rule of Law*. New York: Routledge.
- Krueger, R.A. (1994). *Focus Groups: A Practical Guide for Applied Research*. Thousand Oaks CA: Sage Publications.
- Krueger, R.A., & Casey, M.A. (2000). *Focus Groups: A Practical Guide for Applied Research* (3rd ed.). Thousand Oaks CA: Sage Publications.
- Lipsky, M. (2010). *Street-Level Bureaucracy, 30th Annual Edition: Dilemmas of the Individual in Public Service*. New York: Russell Sage Foundation.
- Loftus, B. (2015). Border regimes and the sociology of policing. *Policing and Society: An International Journal of Research and Policy*, 25(1), 115–125. <http://doi.org/10.1080/10439463.2013.802788>
- Luchtman, M.J.J.P. (2007). *Grensoverschrijdende sfeercumulatie*. Nijmegen: Wolff Legal Publishers.
- Maanen, J. van. (1979). The fact of fiction in organizational ethnography. *Administrative Science Quarterly*, 24(4), 539–550.
- Meese, E., & Ortmeier, P. (2003). *Leadership, ethics, and policing: Challenges for the 21st century*. New York: Prentice Hall.
- Miller, T.A. (2005). Blurring the Boundaries Between Immigration and Crime Control After September 11th. *Boston College Third World Law Journal*, 25(1), 81–123.
- Mitsilegas, V. (2015). The law of the border and the borders of law: Rethinking border control from the perspective of the individual. In L. Weber (Ed.), *Rethinking Border Control for a Globalizing World: A Preferred Future* (pp. 15–31). London: Routledge.
- Motomura, H. (2011). The Discretion that Matters: Federal Immigration Enforcement State and Local Arrests and the Civil-Criminal Line. *UCLA Law Review*, 58, 1819–1858.
- Pratt, A. (2010). Between a Hunch and a Hard Place: Making Suspicion Reasonable at the Canadian Border. *Social & Legal Studies*, 19, 461–480.

- Pratt, A., & Thompson, S.K. (2008). Chivalry, Race and discretion at the Canadian border. *British Journal of Criminology*, 48, 620–640.
- Reiss, A.J., Jr. (1971). *The police and the public*. New Haven, CN: Yale University Press.
- Reyes, M.I. (2012). Constitutionalizing Immigration Law: The vital role of judicial discretion in the removal of lawful permanent residents. *Temple Law Review*, 84: 637–700.
- Schengen Border Code. (March 2016). Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399>
- Schneider, C.E. (1992). Discretion and rules: A lawyer's view. In K. Hawkins (Ed.), *The Uses of Discretion*. Oxford: Clarendon Press.
- Sitkin, L. (2014). Coordinating internal immigration control in the UK. *International Journal of Migration and Border Studies*, 1(1), 39–56.
- Sklansky, D.A. (2012). Crime, Immigration and Ad Hoc Instrumentalism. *New Criminal Law Review*, 15, 157–223.
- Skolnick, J. (1982). Deception by the police. *Criminal Justice Ethics*, 1, 40–54.
- Skolnick, J. (1994). A sketch of the policeman's working personality. In J. Skolnick, *Justice without trial: Law enforcement in democratic society* (3rd ed., pp. 41–68). New York: Wiley.
- Spena, A. (2014). Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law. *Criminal Law and Philosophy*, 8, 635–657.
- Stumpf, J.P. (2006). The crimmigration crisis: Immigrants, crime, and sovereign power. *American University Law Review*, 56, 367–419.
- Stumpf, J.P. (2011). Doing time: Crimmigration law and the perils of haste. *UCLA Law Review*, 58, 1705–1748.
- Stumpf, J.P. (2013). The process is the punishment in crimmigration law. In K. Aas & M. Bosworth (Eds.), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (pp. 58–75). Oxford: Oxford University Press.
- Tamir, M. (2006). Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review. *Texas Journal on Civil Liberties and Civil Rights*, 12, 43–99.
- Wadhia, S.S. (2015). *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*. New York: New York University Press.
- Weber, L. (2003). Down that Wrong Road: Discretion in Decisions to Detain Asylum Seekers Arriving at UK Ports. *Howard Journal of Criminal Justice*, 42(3), 248–262.
- Woude, M.A.H. van der. (2015, September 16). The Dutch Response to the Refugee Crisis. Border Criminologies Blog. Retrieved from <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/dutch-response>
- Woude, M.A.H. van der, & Berlo, P. van. (2015). Crimmigration at the Internal Borders of Europe? Examining the Schengen Governance Package. *Utrecht Law Review*, 11(1), 61–79.
- Woude, M.A.H. van der, Dekkers, T.J.M., & Brouwer, J. (2015). Over crimmigratie en discretionair beslissen binnen het Mobiel Toezicht Veiligheid . . . of Vreemdelingen . . . of Veiligheid? [On Crimmigration and Discretionary Decision-making in the context of the Mobile Security Monitor . . . or Aliens Monitor . . . or Security Monitor?] *Tijdschrift voor Veiligheid*, 14(2), 19–35.
- Woude, M.A.H. van der, & Leun, J.P. van der. (in press) Crimmigration checks in the internal border areas of the EU: Finding the discretion that matters. *European Journal of Criminology*.
- Woude, M.A.H. van der, Leun, J.P. van der, & Nijland, J. (2014). Crimmigration in the Netherlands. *Law and Social Inquiry*, 39(3), 560–579.