Copspeak, immigrant mobilities and racial profiling in the U.S.: How racially disproportionate policing drives immigration enforcement in the U.S.

MAT COLEMAN, The Ohio State University
AUSTIN KOCHER, Syracuse University, TRAC

Abstract: Over the past 20 years a rich scholarship on the criminalization of immigration – sometimes called "crimmigration" – has come to occupy center-stage in the broader literature on U.S. immigration policy (Armenta 2016; Beckett and Evans 2015; García Hernández 2015; Stumpf 2011). This literature insists that law enforcement has come to dominate U.S. immigration policy, whether at U.S. borders or in the U.S. interior, such that the 'how' of managing immigration flows is more or less synonymous with broad criminal law enforcement practices including arrest, prosecution, and incarceration (Abrego et al. 2017).

In terms of interior enforcement – that is, immigration enforcement away from U.S. borders and ports of entry, typically in places where immigrants are settled – the criminalization of immigration enforcement has entailed the devolution of the power to detain individuals on immigration grounds to an array of non-federal police agencies, partnered with federal immigration authorities. For example, now well-known programs such as §287(g), among others, work by enrolling state and local police in immigration enforcement, and by attaching immigration consequences to routine police-civilian interactions mostly focused on driving infractions. Indeed, although the U.S.-Mexico border is without doubt the key landscape in U.S. immigration policy, the devolution of immigration enforcement and the new focus on immigrant labor and social reproduction has, since 9/11, birthed and normalized a second key immigration enforcement landscape: U.S roadways. For undocumented immigrants in the U.S., the simple act of driving to work or to go grocery shopping can result in a traffic stop, which can lead to an immigration query, incarceration detention on civil immigration charges, and eventual removal from the country. As such, roads are now as much about the potential threat of immigrant immobilization as they are about immigrant mobility *per se*.

This new reality has put pressure on critical scholars to come up with ways to investigate and evaluate immigration enforcement in relation to immigrant automobility (Coleman 2016; Coleman and Kocher 2011, 2019; Coleman and Stuesse 2016; Stuesse and Coleman 2014). And as a result, most critical scholarship on U.S. immigration enforcement now engages squarely with the problem of racial profiling, i.e. the police surveillance of drivers on account of their purported race and/or ethnicity (Glaser 2015; Harris 2002). Indeed, proving the existence of racial profiling has become something of a gold standard for scholars working on §287(g) (Coleman

and Kocher 2019; Arnold 2007; Johnson 2004, 2010; Romero 2006; Sullivan 2008; García Hernández 2009).

Our goal in this chapter is to bring to light pronounced difficulties related to proving racial profiling in academic research on immigration enforcement, by reflecting on both our fieldwork findings and on more general methodological practices. We are indeed suspicious of accepted 'best' methodological practices in criminology, related to proving racial profiling, and which are readily used by critical scholars to talk about the 'how' of programs like §287(g). Using these 'best' practices to prove racial profiling is no easy matter in large part, as we argue, because they constitute 'police science', i.e. science in the service of the police. The bulk of our analysis focuses on how chasing the "gold standard" of racial profiling leaves racially discrepant policing on the table as an apparently unproblematic, or perhaps even defensible, outcome of policing – and that critical scholars should instead focus on the problem of racially discrepant or disproportionate police practices (Epp, Maynard-Moody, and Haider-Markel 2014) and, in particular, on the routine devaluation of non–White spaces in police work, when striving to talk about the police—race—immigration trifecta.

Keywords: §287(g), racial profiling, racial discrepancy, crimmigration

Chapter outline

1. **Introduction: "Mexican appearance" and racialized pretext in immigration enforcement (1,500 words)**

   In this opening section we set the stage for our chapter by introducing the reader to what we are calling the "disappearing act of racial profiling". By this phrase we mean the way in which racialized pretext in law enforcement is routinely inaccessible from a legal standpoint – i.e., secreted into a largely inaccessible void of subjective decision-making by officers, in the event that a criminal violation, or reasonable suspicion about a possible civil or criminal violation, is articulated by an officer as cause.

   We discuss the "disappearing act of racial profiling" in the context of well-known border zone cases about U.S. Border Patrol search and seizure, and how these cases compare to immigration enforcement in the interior, for example via §287(g). By virtue of cases like *U.S. v Brignoni Ponce*, the apparent fact of "looking Mexican" has become central to investigatory stops – either vehicular or pedestrian – by the Border Patrol, for immigration and customs purposes. Indeed, 4th amendment cases concerning immigration enforcement by the Border Patrol have licensed rather than outlawed racialized law enforcement, and overall have sutured race to reasonable suspicion in the 100 mile-deep U.S.-Mexico border zone. In contrast, race cannot legally figure as grounds for an investigatory stop

beyond the U.S.-Mexico border zone. As a result, if race figures as reasonable suspicion in immigration-related investigatory stops beyond the U.S.-Mexico border zone, this fact must be camouflaged; it cannot be legible. This is especially the case for investigatory stops by state and local law enforcement via §287(g), or similar programs. However, if race can be veiled as pretext – meaning the material that informs policing and yet which doesn't get narrated – how do researchers go about trying to make sense of racial profiling and law enforcement? This is the central question that animates our chapter.

We articulate our core claim: *critical immigration scholars might rethink a core focus on 'proving' or documenting racial profiling in programs like §287(g), and instead focus on the problem of racialized discrepancy*. Inspired by scholars such Epp et al. (2014), we argue that racialized discrepancy is often overlooked by critical scholars in their search for the 'gold standard' of racial profiling. We also point to the ways in which racialized discrepancy is excused as a legitimate component of policing by mainstream criminologists. Indeed, drawing on our own original fieldwork findings, we argue for careful attention to the ways in which police-friendly methodological narratives about race and law enforcement in criminology – which we refer to as "copspeak" (Correia and Wall 2018) – constrain what critical scholars can say about the intersection of race and immigration enforcement, especially with respect to §287(g). As a mode of "copspeak", we suggest that the criminology-based threshold at which police practices can be rearticulated as racialized, via the charge of racial profiling, is a methodological infrastructure that legitimizes police practices and that provides few avenues for critical discussion of racialized law enforcement. As such, we argue that mainstream police science methodological practices are not helpful, and should be jettisoned. Unlike police science, we believe that racialized discrepancy provides a robust and legible basis on which to problematize programs like §287(g).

2. The many lives of §287(g) (1,500 words)

In this section we provide a brief genealogy of §287(g), focused on the legislative and practical mechanics of this program since its initial deployment in the aftermath of 9/11. We draw attention to various 'rollout' and 'rollback' moments in the life of the program.

We highlight important changes in the way that §287(g) works – including the task force and jail enforcement models, and more recently, the warrant service officer model. We situate our overview of the changing modes of §287(g) in terms of broader questions about the power of local law enforcement to police immigration violations in the interior (Keblawi 2003; Kretsedemas 2008), as well

as other local immigration enforcement programs such as Secure Communities and the Criminal Alien Program.

We suggest that because of its many 'rollout' and 'rollback' guises, §287(g) has become a structurally near-permanent practical aspect of local and state law enforcement. In this context, attempts to characterize the policy as the product of a specific political universe overlook the ways in which §287(g) has grown over the past twenty years, and wound itself into the everyday, practical mechanics of local and state law enforcement.

3. Race and roadblocks (2,000 words + tables and maps)

In this section we review our fieldwork-derived findings on the deployment of roadblocks by §287(g) agencies in one of the original §287(g) jurisdictions in the U.S. – central North Carolina, during the mid-2000s through mid-2010s. Our research in the region shows that §287(g) agencies deployed roadblocks in ways which systematically disadvantaged Latinx communities, and which differentially exposed latinx drivers and passengers to police queries about immigration status. These findings are based in public records requests, interviews, and site visits, and provide a ready illustration of the centrality of racialized discrepancy to §287(g) enforcement.

4. 'Nonlegislative' vs 'legislative' approaches to policework and race (2,000 words)

In this section we explore the bigger methodological universe of rules that conditions what can be said about our fieldwork, recapped in the prior section. Our conclusion is that there is nothing in our fieldwork findings that meets the mainstream criminology-based methodological ruleset for racial profiling – which requires evidence of racial discrimination, racial animus, and/or explicit police bias. Differently, our research on roadblocks shows that there is a basic racialized disparity or discrepancy in the location of police operations – such that Latinx drivers in some key jurisdictions face sometimes pronounced odds of coming into contact with police. But this finding says nothing about racial animus, and hence falls short of the racial profiling benchmark.

We focus on two basic approaches to understanding the police – what we call 'nonlegislative' and 'legislative'. The nonlegislative approach sees police practice as guided by neutral police policies, procedures, and guidelines, which themselves are defined in an apparently disinterested manner in reference to ostensibly objective law enforcement contexts and conditions. We call this approach 'nonlegislative' because from this standpoint police are understood as enforcers of a reasoned and rationalized policy. The legislative approach suggests differently

that policing is an experimental as well as discretionary practice. From this standpoint, police policies, and especially narratives about the community conditions that drive specific policies, are developed or narrated after the fact to justify police practices. We call this approach 'legislative' because police are not so much guided by policies as they constitute policies by virtue of engaging in policecraft which is subsequently codified in terms policy.

We argue that mainstream criminology's approach to policing and race – i.e., in terms of discrimination, animus, or bias – is largely a function of its nonlegislative understanding of policework. Indeed, building on scholarship that emphasizes policing in terms of discretion and experimentation – such as Neocleous (Neocleous 2000; Neocleous, Rigakos, and Wall 2013), Wagner (2010) and Lipsky (2010) – we show how the nonlegislative storyline about policework treats racialized discrepancy as a defensible outcome of apparently reasoned police policies. For example, if order maintenance and/or hotspot policies narrate the uneven deployment of police resources in terms of pre-existing community conditions (lawlessness, disorder), they also explain away racially discrepant policing as the unfortunate outcome of an otherwise defensible or pragmatic allocation of scarce policing resources in specific neighborhoods. In this way racial profiling is elevated as the only 'true' benchmark for evaluating how policing is racialized. Discrepancy is bracketed as an unfortunate but essentially permissible byproduct of legitimate policework.

5. The many lives of racial discrepancy (2,000 words)

In this section, we explore the implications of these research findings for analyzing both the constantly-evolving nature of the §287(g) immigration enforcement program and racialized policing more broadly. Although the underlying data for this research was shaped by the historical and geographical conditions under which it was constructed, we argue that our central thesis—that racial discrepancy rather than racial profiling *per se*, should be more central to analyses of policing—provides a crucial analytical foothold for *how* scholars might productively critique §287(g) in its many forms.

We suggest that our grounded analysis of the routine practices of racially discrepant policing can be mobilized to understand how other racially discrepant policing technologies (including stop and frisk, anti-gang enforcement, parking tickets, truancy enforcement, car impoundment, etc.) also become enrolled in new forms of immigration enforcement, as in our discussion of roadblocks. We are specifically interested in how this expanded range of discrepant police practices overlaps with the newer warrant service officer §287(g)s. We urge scholars to take up a research agenda that is carefully attuned to racial discrepancy and

localized policing, particularly in regions such as Florida and southeast Texas where the bulk of new §287(g) agreements have been rolled out.

Finally, we extend these findings beyond immigration enforcement itself. As we argued above, legal scholars' perseveration on a strict racial profiling framework lets police off the hook on a wide range of equally problematic and even more systematic forms of racialized policing far beyond immigration enforcement. Therefore, we propose that our findings can be used for even more ambitious ends: a renewed interest in racially discrepant policing across a wide variety of domains, including the racial implications of policing sex workers, day laborers, drug use, etc.

6. Conclusion: beyond science in the service of police (500 words)

Our goal in this chapter has been to bring to light pronounced difficulties related to proving racial profiling in academic research on immigration enforcement, by reflecting on both our fieldwork findings and on more general methodological practices. We are indeed suspicious of accepted 'best' methodological practices in criminology, related to proving racial profiling, and which are readily used by critical scholars to talk about the 'how' of programs like §287(g). Using these 'best' practices to prove racial profiling is no easy matter in large part, as we have argued, because they constitute 'police science', i.e., science in the service of the police. The bulk of our analysis has focused on how chasing the benchmark of racial profiling leaves racially discrepant policing on the table as an apparently unproblematic, or perhaps even defensible, outcome of policing – and that critical scholars should instead focus on the problem of racially discrepant or disproportionate police practices and, in particular, on the routine devaluation of non–White spaces and populations in policework.

Cited work

Abrego, L. J., M. Coleman, D. E. Martínez, C. Menjívar, and J. Slack. 2017. Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IRRIRA Era. *Journal on Migration and Human Security* 5 (3):694-715.

Armenta, A. 2016. Racializing Crimmigration. *Sociology of Race and Ethnicity* 3 (1):82-95.

Arnold, C. L. 2007. Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law. *Arizona Law Review* 49 (1):113-142.

Beckett, K., and H. Evans. 2015. Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation. *Law & Society Review* 49 (1):241-277.

Coleman, M. 2016. State power in blue. *Political Geography* 51 (1):76-86.

Coleman, M., and A. Kocher. 2011. Detention, deportation, devolution and immigrant incapacitation in the U.S., post 9/11. *Geographical Journal* 177 (3):228-237.

———. 2019. Rethinking the Gold Standard of Racial Profiling: 287(g), Secure Communities and Racially Discrepant Police Power. *American Behavioral Scientist* 63 (9):1185-1220.

Coleman, M., and A. Stuesse. 2016. The Disappearing State and the Quasi-Event of Immigration Control. *Antipode* 48 (3):524-543.
Correia, D., and T. Wall. 2018. *Police: A Field Guide*. London: Verso.
Epp, C. R., S. Maynard-Moody, and D. Haider-Markel. 2014. *Pulled Over: How Police Stops Define Race and Citizenship*. Chicago: University of Chicago Press.
García Hernández, C. C. 2009. La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border. *Notre Dame Journal of Law, Ethics and Public Policy* 23 (1):167-196.
———. 2015. *Crimmigration Law*. Chicago: American Bar Association.
Glaser, J. 2015. *Suspect Race: Causes and Consequences of Racial Profiling*. Oxford: Oxford University Press.
Harris, D. A. 2002. *Profiles in Injustice: Why Racial Profiling Cannot Work*. New York: New Press.
Johnson, K. R. 2004. Racial Profiling After September 11: the Department of Justice's 2003 Guidelines. *Loyola Law Review* 50 (1):67-87.
———. 2010. How Racial Profiling in America Became the Law of the Land: *United States v. Brignoni-Ponce* and *Wren v. United States* and the Need for Truly Rebellious Lawyering. *Georgetown Immigration Law Journal* 98 (6):1006-1077.
Keblawi, J. 2003. Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted? *Catholic University Law Review* 53 (1):817-853.
Kretsedemas, P. 2008. What Does an Undocumented Immigrant Look Like? Local Enforcement and the New Immigrant Profiling. In *Keeping Out the Other*, eds. D. C. Broterton and P. Kretsedemas, 334-373. New York: Columbia University Press.
Lipsky, M. 2010. *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*. New York: Russell Sage Foundation.
Neocleous, M. 2000. *The Fabrication of Social Order: A Critical Theory of Police Power*. London: Pluto Press.
Neocleous, M., G. Rigakos, and T. Wall. 2013. On Pacification: Introduction to the Special Issue. *Socialist Studies/Études socialistes* 9 (1-6).
Romero, M. 2006. Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community. *Critical Sociology* 32 (2):447-473.
Stuesse, A., and M. Coleman. 2014. Automobility, Immobility, Altermobility: Surviving and Resisting the Intensification of Immigrant Policing. *City & Society* 26 (1):51-72.
Stumpf, J. 2011. Doing Time: Crimmigration Law and the Perils of Haste. *UCLA Law Review* 58 (6):1705-1748.
Sullivan, A. 2008. On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy. *Hastings Race and Poverty Law Journal* 1 (1):101-145.
Wagner, B. 2010. *Disturbing the Peace: Black Culture and the Police Power After Slavery*. Cambridge: Harvard University Press.