The Rise of Automated Policing

Author : Jennifer Chacón

Date : March 24, 2014

Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, **74 Ohio St. L.J. 1105** (2013).

Scholars analyzing immigration enforcement often do so in a way that treats the matter as separate from more general trends and developments in law enforcement. In fact, however, many of the trends in immigration enforcement are mutually reinforcing of, and in evidence throughout, various law enforcement domains. Anil Kalhan neatly captures that reality in his article *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*. In so doing, he opens up a discussion that has significant implications for both criminal justice and immigration law scholarship.

In his article, Kalhan critiques the phenomenon that he labels "automated immigration policing." As he defines them, "[a]utomated immigration policing initiatives deploy interoperable database systems and other technologies to automate and routinize the identification and apprehension of potentially deportable noncitizens in the course of ordinary law enforcement encounters and other moments of day-to-day life." (P. 1108.) As his article makes amply clear, reliance on automated-policing techniques is not limited to immigration policing. He draws upon the work of numerous federalism, privacy, and criminal procedure scholars to highlight the ways in which automated immigration policing is of a piece with general developments in governmental surveillance and law enforcement. In immigration policing, as in other law enforcement endeavors, a broad—and elastic—range of law enforcement agents access growing stores of personal data accumulated by local, state, federal, and private actors, in the service of multifarious and open-ended law enforcement ends.

Kalhan argues that "[b]y using technology to make determinations of immigration status and the collection, storage, and dissemination of personal information for immigration enforcement purposes automatic, widespread, and continuous, automated immigration policing effects a basic shift in the nature of both 'immigration federalism' and ordinary law enforcement activities." (P. 1109.) To illustrate his point, Kalhan begins by examining the history of state and local participation in immigration policing. He argues that, notwithstanding the rhetoric of the Court's recent decision in *U.S. v. Arizona*, over the past two decades, an equilibrium had developed that allowed states and localities to opt into immigration policing under the supervision of the federal government. This equilibrium also created space for states and localities to develop integrationist policies and to opt out of cooperative immigration enforcement. He argues that recent developments have undercut that equilibrium. Federal automated immigration policing initiatives, including the Secure Communities program and the National Crime Information Center's (NCIC) Immigration Violators File, undermine this equilibrium by making "immigration status determinations by law enforcement automatic, pervasive, and effectively mandatory." (P. 1110.) With the national implementation of Secure Communities, every arrestee is automatically checked against a DHS database for potential immigration violations. The NCIC Immigration Violators File reveals immigration status to any officer running standard database checks, whether or not that information is desired or sought by the officer, her supervisors, or the local electorate.

Kalhan's insight is that what is happening in immigration policing is part of a much-broader trend toward automated policing and that it carries many of the same downside risks, including the "costs

[that] arise from the inherent fallibilities of automation, the tendency of surveillance mechanisms to be used for purposes beyond those for which they were initially implemented, the displacement of state and local control over information that states and localities collect and share with federal authorities, and the (negative) everyday effects of these initiatives on both law enforcement agencies and the communities being monitored." (P. 1110.) In the article, he elaborates upon each of these risks in some detail. The problems that Kalhan identifies have been noted and theorized in other contexts—particularly by scholars focused on issues of privacy and constitutional criminal procedural protections—but Kalhan's article performs a significant service in analyzing immigration enforcement through these existing lenses. Drawing upon the works of immigration scholars, Kalhan points out that the downsides of this method of policing are amplified in the context of immigration policing, "given the heightened vulnerabilities of noncitizens and the limited procedural protections afforded in immigration proceedings." (Pp. 1134–35.)

Kalhan's critique forms an important part of a broader discourse concerning the failure of courts to properly conceptualize automated policing systems and the use of big data in policing. Parallels can be seen, for example, in Erin Murphy's recent analysis of *Maryland v. King*. Murphy criticized the Court's application of the Fourth Amendment in a case involving the DNA swabbing of an arrestee. Among other things, she lamented the fact that the Court's analysis treated this type of investigation as "discretionless," when in fact the precipitating arrest and charging decisions are nothing if not discretionary.[1] In the same way, Kalhan notes (with a hat-tip to Hiroshi Motomura) that the government has promoted the Secure Communities program as eliminating state and local police discretion in immigration screening, when in fact, the "discretion that matters" lies entirely in the hands of officers who can and sometimes do exercise this discretion in ways that undermine equal protection goals. (P. 1141.) In another parallel, Murphy critiques *King*, and the Court's recent Fourth Amendment jurisprudence more generally, for failing to adequately address the risks and harms created by governmental databases and for being overconfident in the infallibility and accuracy of those databases.[2] Kalhan's article not only points out that this is also a problem in immigration databases but also illustrates how that problem has spillover effects into general crime control efforts and affects citizens as well as noncitizens. (Pp. 1136–41.) In short, the inadequacies of the Fourth Amendment doctrine to deal with shifts in policing tactics are alive and well in the context of immigration policing.

To address the equal protection, privacy, liberty and federalism concerns that are raised by automated immigration policing, Kalhan ends his article with some suggestions. He calls for "context-appropriate constraints on the collection, use, storage, and dissemination of personal information for immigration enforcement purposes, including limits on secondary uses of information that were not originally contemplated." (P. 1157.) He also calls for giving states and localities a greater ability to limit the ways in which they use immigration data in policing (P. 1160) and for increasing transparency, oversight, and accountability of automated policing practices. (P. 1162.) These suggestions echo many that have been made in the context of more general policing policies. But far from being duplicative, Kalhan's work highlights the importance of looking beyond core policing functions to understand the potential scope and the full risks of automated-policing practices.

1. Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 Harv. L. Rev. 161, 188–91 (2013).
2. Murphy, *supra* note 1, at 194–96.

Cite as: Jennifer Chacón, *The Rise of Automated Policing*, JOTWELL (March 24, 2014) (reviewing Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, **74 Ohio St. L.J. 1105** (2013)), https://crim.jotwell.com/the-rise-of-automated-policing/.