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## Going Dutch

### Drug Policy at the Crossroads

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Since the 1970s, Dutch drug law and policy have moved away from punitive prohibition toward a harm reduction model, with the objective of minimizing the harms associated with both drug abuse and drug policy. Scott Jacques, Richard Rosenfeld, Richard Wright, and Frank van Gemert (2016, this issue) investigate whether the de facto decriminalization of cannabis in the Netherlands, with its semi-licit system of licensed retail sales in “coffeeshops,” reduces the crime and violence often found in illicit drug markets. I say “de facto decriminalization” and “semi-licit system” because, as the authors note, the Dutch have made it effectively legal for anyone older than 18 years of age to walk in the front door of coffeeshops and buy small amounts of cannabis, but it remains illegal to bring supplies of that cannabis in the back door of coffeeshops. This “back door problem,” as the Dutch call it, has caused trouble for coffeeshop owners and growers and no shortage of debate in Parliament. But for decades, coffeeshops have functioned reasonably well within this legally ambiguous space, with cannabis finding its way to consumers with few problems and little policing.

To contextualize Jacques et al.’s (2016) contribution, it may be useful to recall how cannabis was criminalized and why the Dutch departure from criminalization is historically significant. Until the Netherlands shifted its drug policy toward harm reduction (*avant la lettre*) in 1976, cannabis was prohibited around the world on pain of criminal punishment (Levine, 2003). Cannabis criminalization began with “the malevolence assumption” (Gusfield, 1996: 38–43), which still serves as its logical fundament. In national legislative histories, deliberations over the United Nations’ (UN’s) drug control treaties that globalized cannabis criminalization, or current claims by those who still defend it, one finds the same premise: Cannabis is so dangerous it cannot be allowed to be legally available. Dutch cannabis policy is interesting largely because it challenges this premise.

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U.S. officials cultivated the malevolence assumption. The legal status of cannabis was initially transformed from a prescribed medicine into a proscribed vice by the moral entrepreneurship of the Bureau of Narcotics during the Great Depression (Becker, 1963; Dickson, 1968). A 1934 Bureau report to the League of Nations, for example, asserted that “fifty percent of the violent crimes committed in districts occupied by Mexicans, Turks, Filipinos, Greeks, Spaniards, Latin Americans and Negroes may be traced to the abuse of marihuana” (League of Nations, 1934; cited in Bonnie and Whitebread, 1974: 146–147). Beyond stoking racial and ethnic prejudice that demonized cannabis users, the Bureau also generated fear around the effects of cannabis itself. The report approvingly quoted a narcotics officer who claimed that “Marihuana has a worse effect than heroin. It gives men the lust to kill, unreasonably, without motive – for the sheer sake of murder itself” (League of Nations, 1934; cited in Bonnie and Whitebread, 1974: 146–147). In 1936, just prior to passage of the Marijuana Tax Act of 1937 that criminalized cannabis in federal law, the Bureau-sponsored film, *Reefer Madness*, depicted American youth smoking a few puffs of cannabis and quickly engaging in wild sex, assault, and even homicide. When cannabis use spread among White middle-class youth in the 1960s, however, the alleged malevolence shape-shifted: Then drug control officials claimed cannabis caused not violence but an “amotivational syndrome” that sapped energy and ambition, leaving a generation of stoners.<sup>1</sup> The Bureau helped lead the drive for global cannabis criminalization, which reached fruition in a 1961 UN drug control treaty (Bewley-Taylor, 2012; Bruun, Pan, and Rexed, 1975).

The Netherlands is a signatory to this treaty, so how did the Dutch manage—in splendid isolation until recently—to avoid the malevolence assumption and demonization and to effectively decriminalize cannabis (Scheerer, 1978)? Three bits of background will provide some context for Dutch decriminalization.

### **Tolerance, Labeling, Expediency**

First, the Netherlands has long been known for its culture of tolerance (*gedogen*<sup>2</sup>), which has deep roots (Buruma, 2007; Reinerman, 2010). With nearly half their land mass below sea level, the Dutch have always faced the primal threat of inundation. But as the enemy sea could not be defeated, they learned to accommodate it with dykes, pumps, and sluices that channel it in less harmful directions. The Netherlands also has a long history of bloody religious wars, being on the front lines of Europe’s Reformation battles. Slowly the Dutch developed a pluralist state structure in which Protestants, Catholics, and later others agreed to tolerate each other under the same civic roof to the benefit of all (Lijphart, 1968). The pragmatic advantages of pluralism and tolerance were further highlighted by centuries of

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1. The fact that said generation achieved unprecedented levels of educational and economic attainment has not dissuaded advocates of criminalization from deploying this stereotype.
  2. Dr. Frederik Polak, a psychiatrist at Amsterdam’s health department, once explained to me that *gedogen* means a policy that “allows what is not allowed.”

Dutch success in international trade (de Vries and van der Woude, 1997). Add to this history the painful experience of Nazi occupation during World War II and you can see why tolerance remains woven into the cultural DNA of the Netherlands. Their pioneering move to a harm reduction drug policy was a natural extension of Dutch *gedogen*.

Second, the officials who developed modern Dutch drug policy had an intuitive understanding of labeling theory and the risks of punitive prohibition. Their first moves toward cannabis decriminalization were based on reports from two expert national commissions in the late 1960s (Cohen, 1994). Neither expressed moral approval of drug use, but both paid close attention to evidence showing that although experimentation was common, addiction was rare and controlled use was the norm. The culture of tolerance allowed both commissions to distinguish between acceptable and unacceptable risks, which led them to propose separating the market for cannabis from the market for riskier drugs. And both emphasized the importance of avoiding punishments likely to stigmatize and marginalize users, thereby intensifying their deviance and making it harder to return to socially accepted lifestyles. These consequences were the type labeling theorists hypothesized—what Lemert (1951) called “secondary deviance” and Becker (1963) described as developing deviant identities and careers. Both commissions concluded that cannabis use should be removed from the province of criminal law.<sup>3</sup>

Third, there is flexibility in the Dutch legal culture, starting with a preference for informal over formal social controls whenever feasible (Blankenburg and Bruinsma, 1991). The Dutch legal system distinguishes between law (*wet*) and policy (*beleid*) and operates under “the expediency principle” (*het opportuniteits beginsel*), which is also part of European Union law; the words in Dutch denote something that is suitable and well timed. This principle allows prosecutors wide latitude to decide whether enforcing a law makes sense as practical policy “in the public interest” (Buruma, 2007: 89). As a matter of statutory law, cannabis remains criminalized, but the Dutch Prosecutors General have decided that enforcing that law is not expedient or practical and so have made it national policy to *not* enforce it. In short, Dutch policy makers had a more open juridical path to decriminalization than policy makers elsewhere.

### Findings and Future Research

Returning to the article at hand, Jacques et al.’s (2016) beginning premise is that “prohibition undercuts the state’s regulatory capacity by producing zones of virtual statelessness” where law and legal means of dispute resolution are not available, which in turn increases the likelihood of victimization and extralegal retaliation. The Dutch Opium Act of 1976 that allowed cannabis sales and “separation of markets” was designed to reduce some of these

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3. Cohen (1994) rightly noted that these commissions succeeded in reforming Dutch drug policy in part because their conclusions were not seen as radical but as in keeping with a broader policy *zeitgeist* of reducing police power and keeping law breakers out of prison whenever possible.

illicit market risks (Engelsman, 1989) and had the added virtue of constricting the geography of any potential “gateway” from cannabis to harder stuff. Jacques et al. hypothesized that illegal drug sellers would be more often victimized, and in response be least likely to mobilize law and most likely to retaliate; that legal sellers of alcohol in cafés (bars) would be least victimized, most likely to mobilize law, and least likely to retaliate; and that the semi-licit cannabis sellers in coffeeshops would fall in between.

As expected, they found that illicit dealers were most often victimized and in response mobilized the law least often and retaliated most often. But unexpectedly, the fully licit café operators reported roughly double the instances of victimization as semi-licit coffeeshop operators, and neither mobilized the law nor retaliated often. In the following discussion, I add a few points to the overview of these findings to suggest possible future research.

### *Drug, Set, and Setting*

That cafés selling alcohol experienced more crime than coffeeshops selling cannabis would not shock American police. Pharmacology matters, as Jacques et al. (2016) suggest, albeit always mediated by culture. At the macro level, there is a well-known correlation between drinking and crime, although it varies significantly across cultures (MacAndrew and Edgerton, 1969), and different cultures have specific repertoires of intoxication (Alasuutari, 1992).<sup>4</sup>

Culture matters, too, in the micro sense; the normative architecture of the *settings* of drinking or drug use interact with user expectation sets to affect behavior under the influence.<sup>5</sup> Dutch cafés, like American bars, tend to be spaces of spirited disinhibition; Dutch coffeeshops tend to aspire to a more contemplative ethos, disinhibition in a mellow tone. Future research might usefully extend Jacques et al.’s (2016) work by varying pharmacology (beer and wine vs. “full bar” and distilled spirits), type of setting (local vs. tourist coffeeshop; cafés with food service vs. without), and culture (strong vs. weak association between drinking and crime).

### *Extending Experiments in Drug Policy*

Most illicit drug market-related crime occurs where heroin (and other opioids), cocaine (including crack), and methamphetamine are sold, all of which remain criminalized in the Netherlands. Despite their reputation as having “legalized drugs,” the Dutch have decriminalized only one “soft drug,” cannabis. For years the Netherlands provided the only clear natural experiment in drug policy, but recent drug policy reforms have created additional

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4. In France and Italy, for example, wine is considered a food, an intrinsic part of meals (Montanari, 2006), which helps explain why per capita consumption is higher than in other European societies while rates of alcohol-related problems tend to be lower.

5. See Zinberg (1984) on the crucial importance of settings of use as they interact with the psychological sets of users and the drugs used in shaping felt effects and consequences.

possibilities. Jacques et al. (2016) rightly point to the “growing variety of decriminalized contexts across the world” as opening up new opportunities for such comparative research. For example, recent comparative analyses of states that allow medical cannabis with other states that do not found no increases in cannabis use among youth that could be attributed to the new laws (Hasin et al., 2015; Wall et al., 2016). Future research might compare drug markets in the Netherlands with those in Portugal, which decriminalized all drugs in 2001 (Hughes and Stevens, 2010), and France, which has retained criminalization more intensely than many other European nations (Boekhout van Solinge, 2004; Padwa, 2012). Such a study would introduce even more methodological complexities than the authors faced in Amsterdam, but it could provide an additional direct test of their hypotheses.

### *Decriminalization as Social Control*

The flip side of prohibition creating “zones of statelessness” where law is unavailable is that decriminalization can *expand* the regulatory capacity of the state. This happened in the Netherlands as its cannabis policy evolved from informal toleration of “house dealers” inside some clubs into formally licensed coffeeshops (Leuw, 1994) and into subsequent refinements that gave officials greater control, for example, tightening license requirements, raising the minimum age for purchase, and banning advertising (MacCoun and Reuter, 2001).

As more U.S. states and other nations legalize cannabis, some are concerned that greater availability could cause greater abuse (Kleiman, Caulkins, and Hawken, 2011: 23–30). The Dutch experience does not support this hypothesis, but instead it supports the counterintuitive argument that legalization can provide more, rather than less, social control. Street dealers generally do not check IDs, but as Jacques et al. (2016) suggest, Dutch coffeeshop operators do because their licenses and incomes are contingent on following the rules. In the United States, by contrast, criminalized cannabis is easier for many high-school students to obtain than tobacco, alcohol, or prescription drugs, which are legal but regulated (Center for Addiction and Substance Abuse, 2012: 37–41).

### *Criminalization as a Mechanism of Marginalization*

Criminologists well understand that criminalization can amplify inequality. In describing their interviewees, Jacques et al. (2016) report that although two thirds of their coffeeshop and café operators are White, three fourths of their street dealers are Black, the latter also more often immigrants who reported lower levels of education and a higher frequency of criminal records. Rational choice theory suggests that if criminalization laws are designed to make illicit drug selling as dangerous as possible to deter would-be dealers, we should not be surprised when those who enter that line of work are more desperate.

Choices are always made under the constraints of context. Although the Netherlands has substantially less inequality than the United States (Keeley, 2015), immigrants and ethnic minorities there still have fewer licit opportunities. The hypothesis would follow that the marginalized are more likely to find their way into the illicit crevices created by

prohibition, where there is often lower cost of entry, higher income, and greater autonomy and dignity (Bourgois, 1995) than in the legal economy. Moreover, in the United States, well-documented patterns of racially discriminatory drug law enforcement (Levine and Small, 2008) have made minor drug arrests a key gateway to mass incarceration, with all the negative consequences that flow from that. More research is needed to see whether this is the case in other comparable democracies. Future studies would perform a great service if they investigated the degree to which prohibition laws function as an adjunct mechanism of marginalization in other societies. If they do not, it would be even more important to learn how this tendency was avoided.

### *Relevance of Prevalence*

Jacques et al. (2016) observe that Dutch decriminalization of cannabis does “not appear to have increased cannabis use by natives.” Indeed, in 2009, the latest year for which national data are available, 25.7% of the Dutch population reported lifetime prevalence of cannabis use, whereas 7% reported last-year prevalence (van Laar et al., 2011: 39). In the United States, by contrast, where roughly 700,000 citizens are arrested for marijuana possession each year, the latest data available show that 44.2% of the population reported lifetime prevalence of cannabis use, whereas 13.2% reported last-year prevalence (Substance Abuse and Mental Health Services Administration, 2015: Table 1.1B).

It is worth noting, too, that despite hundreds of coffeeshops and decades of claims about cannabis serving as a “gateway” to harder drugs, the Netherlands has lower prevalence of other illicit drug use than the United States and many other European societies (European Monitoring Center for Drugs and Drug Abuse, 2016; MacCoun and Reuter, 2001; Reinarman, Cohen, and Kaal, 2004: 840). The Dutch evidence runs counter to the foundational claim of cannabis criminalization; prevalence data indicate that availability is not destiny after all. Although governments committed to criminalization are unlikely to fund such studies, much more research is needed on the relationship between drug policy (e.g., arrests or incarceration days for drug offenses per 100,000 population) and drug use prevalence and problems (Reuter and Trautmann, 2009, provide a rare example).

### *Comparing Dutch and U.S. Drug Policies: Conclusions and Speculations*

Jacques et al. (2016) rightly argue that the “best way to adjudicate competing claims about the consequences of drug law reform is to conduct research in the settings where the reforms have taken hold.” Their argument centers on the effects of decriminalization on crime and violence in illicit markets. Their findings can be read as mixed. Future researchers will likely generate new findings that support, complicate, and qualify those reported here, showing variation across time, space, cultures, and the complex conjunctures of conditions that shape drug use patterns. But in one sense, the key policy significance of Jacques et al.’s study is simply that it was *conducted at all* because its core question rests on a consequentialist conceptualization of drug policy: that drug policies must be evaluated on

the basis of their actual consequences, not on their intent. Dutch drug policy has opened to empirical examination what has until recently too often remained unquestioned drug war orthodoxy.

The Dutch case is complicated, and there is no guarantee that their model could simply be exported to other nations with the same relatively benign results. But the Netherlands provides as good a window as we have on what an alternative drug policy future may look like. As cannabis becomes legalized in more places, its commercialization may yet cause the sky to fall. But the evidence to date, both from the Netherlands and U.S. states, suggests no need to duck for cover just yet.

Jacques et al. (2016) note that reducing crime and violence in illicit drug markets is not the only objective of Dutch drug policy nor, I would add, the most important. The “other objectives” their study does not directly address include avoiding or reducing the harms of stigma, marginalization, and other negative consequences of criminal punishment (Engelsman, 1989; Leuw, 1994).

Two odd metaphors catch at the difference between Dutch and U.S. drug policy in this regard. President Lyndon Johnson once famously said of FBI Director J. Edgar Hoover, “better to have him inside the tent pissing out than outside the tent pissing in.” For a century, the United States has pursued drug policies designed to deter use by stigmatizing, punishing, and ostracizing users. In effect we push them out of the societal tent and then are perplexed when they cause problems, so we pass tougher laws, and so on (Frydl, 2013).

Since 1976, drug policy in the Netherlands has been designed to keep illicit drug users *inside* the societal tent. Compared with the United States, the Netherlands has a stronger welfare state, more social housing, national health care, and greater accessibility of treatment, which result in less poverty, homelessness, addiction, and crime (Cohen, 1997). In thinking about U.S. drug policy, my Dutch colleagues often use “a stopped-up sink” metaphor: “Americans keep feverishly mopping the floor, but the faucet is still running.”

The day I was finishing this article, two stories appeared simultaneously in the *New York Times* (April 19, 2016). The first was about an extraordinary letter to UN Secretary General Ban Ki-moon on the eve of the UN General Assembly Special Session on Drugs. The letter urged an end to the war on drugs as a failed public health policy and a human rights disaster. It attracted more than 1,000 signatures, including those of former UN Secretary General Kofi Anan; former President Jimmy Carter; Hillary Clinton; senators Bernie Sanders, Elizabeth Warren, and Cory Booker; legendary business leaders like Warren Buffett, George Soros, and Richard Branson; former presidents of Switzerland, Brazil, Ireland, and ten other former heads of state; former Federal Reserve Chair Paul Volcker; hundreds of legislators and cabinet ministers from around the world; Nobel Prize winners; university professors; and numerous celebrities. All attendees at the Special Session were given copies of the letter. The UN ordered all copies confiscated (Sengupta, 2016).

The second article provided vivid testimony as to why such a letter was necessary: The U.S. Supreme Court refused to hear the appeal of a 75-year-old disabled veteran serving

a mandatory sentence of life without parole for growing two pounds of cannabis for his own medical use, a fact uncontested by the prosecutor (*Brooker, Lee C. v. Alabama*, 2016; Wegman, 2016).

Such grave injustices have allowed the Drug Policy Alliance and a growing number of other nongovernmental organizations to mount a drug policy reform movement of unprecedented scale. Stopping the drug war and the mass incarceration it helped spawn has become a top priority for the civil rights movement, from the NAACP to Black Lives Matter. Voters in the United States and elsewhere are slowly taking matters into their own hands. Medical marijuana laws have been passed in 24 states, and cannabis has been legalized under state law in Colorado, Washington, Alaska, Oregon, and Washington, DC. Voters in California, Arizona, Massachusetts, and perhaps other states are set to vote on cannabis legalization initiatives in November 2016. Most European countries have embraced at least some harm reduction policies. Portugal, Uruguay, Australia, the Czech Republic, Italy, Germany, and Switzerland have moved toward decriminalization of cannabis in one form or another. Former drug war allies across Latin America are in revolt against U.S.-style prohibition. These are the sounds of the American drug war consensus collapsing. Global drug policy is at an historic inflection point, and it is trending Dutch.

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