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Die Sinnprovinz der Kriminalität

Zur Dynamik eines sozialen Feldes

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Criminal Law and Cultural Lag: Drug Prohibition as Anachronism

Craig Reinerman

Laws originally enacted as expressions of widely shared values sometimes fall out of step with evolving norms and so become anachronisms. In 1648, the laws of the American state of Massachusetts forbade both the worship of gods other than Jesus and being a “stubborn or rebellious son,” each crime punishable by death.¹ Until the 1980s Massachusetts retained “blue laws” that prohibited the sale of alcoholic beverages and playing music in cafes on Sundays.² My examples are drawn from US law, but every society will have its own such legal anachronisms, ranging from mischievous to barbarous.

American racial laws that once passed for common sense eventually came into conflict with evolving norms and were changed. In the 18th and 19th century, various state laws made it a crime for slaves to run away from their masters; the Constitution required citizens to “deliver up” such runaways to their owners. Southern states passed laws making it a crime, punishable by imprisonment, to teach slaves how to read and write. Long after slavery was officially abolished, the US Supreme Court upheld segregationist laws on grounds of the “separate but equal” doctrine³ that was not formally overturned as an oxymoron until the 1950s.⁴ Many states within the US maintained anti-miscegenation laws prohibiting inter-racial marriage until the Supreme Court finally ruled them unconstitutional in the 1960s.⁵

Laws regulating sexual behavior provide further illustrations. Until 1960, virtually all US states had laws that criminalized gay sex. As recently as the 1980s the Supreme Court upheld a conviction for homosexual sex on the grounds that anti-sodomy laws were “firmly rooted in Judeo-Christian moral and ethical

1 Hall et al. (2005, p.21-22.)

2 Most such blue laws were repealed when business lobbies convinced Massachusetts’ legislators that the state was losing sales and tax revenues to neighboring states that did not have such laws.

3 Plessey v. Ferguson 1896.

4 Brown v. Board of Education 1954.

5 Loving v. Virginia 1967.

standards.”⁶ Only in 2003 did the Court reverse itself, its majority acknowledging that societal norms had changed and concluding that a law criminalizing homosexual sodomy but not heterosexual sodomy “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”⁷

Such cases suggest that cultural practices can push norms beyond the boundaries of existing law. When behaviors defined as crimes in law become normalized in practice, the ineffectiveness of the law becomes clear.⁸ As Sebastian Scheerer (1978, p.586) has suggested with regard to drug law, legislators then face a choice: *re-affirm* the legitimacy of the law through increased penalties, intensified enforcement, and the like, or *reform* the law to accommodate the formerly deviant behavior. For example, US conservatives reaffirmed the legitimacy of conventional family structures and impeded progress toward legalization of gay marriage by passing the Defense of Marriage Act in 1996. Examples of reform include the abolition of slavery and the decriminalization of inter-racial marriage. Music can now be heard in Massachusetts’ cafes on Sundays. Some behaviors once defined as crime have been sufficiently domesticated by widespread cultural practices that the laws against them were washed away like Jurassic juridical residue; for other behaviors, however, criminal laws persist despite normative change.

Such gaps between norms and law can be seen as one form of what University of Chicago sociologist William F. Ogburn called “cultural lag” (1922). Ogburn wrote mostly about the ways in which non-material culture can lag behind technological innovations in material culture (e.g., the automobile). But he allowed that change sometimes flows in the opposite direction; “lag” does not necessarily mean that one part of culture is failing and must inevitably “catch up” to the other. In its most basic form, Ogburn’s hypothesis calls attention to the frictions or maladjustments that can arise when interdependent parts of a culture change at different velocities or to different degrees.⁹

One example is workers’ compensation law. In the early 20th century, Ogburn noted, rapid industrialization had given rise to an epidemic of factory-floor

6 Bowers v. Hardwick 1986.

7 Lawrence v. Texas 2003.

8 Criminologist Edwin Sutherland once remarked, “Where customs are strong, law is unnecessary; where customs are weak, law is useless.”

9 Ogburn was criticized as a technological determinist because his theory of social change had culture “catching up” to technological innovation. But as Weber suggested with religion, Ogburn noted that non-material culture could drive change in the material world. Ogburn often neglected the many instances in which there was conflict rather than consensus about cultural norms; reforms seen as a victory for one faction were often seen as a defeat for another. Gusfield (1963) called attention to the “status politics” involved in such conflicts, particularly the Temperance Crusade against drink. I am grateful to Harry G. Levine for this point.

injuries. Yet few states had laws stipulating that injured workers be cared for and compensated. Business interests initially resisted taking responsibility for such collateral casualties. But as more and more workers launched strikes and filed lawsuits over loss of life or limb, corporations faced mounting and unpredictable expense. In time, more corporations came to believe that their long-run interests required an insurance system to rationalize such costs (cf. Weinstein 1971). Between 1912 and 1921, nearly all US states passed workers’ compensation laws.

A more recent example is the spread of cell phone technology, which similarly raced ahead of the etiquette and culture of cell phone users. Norms had to be developed to reduce the more annoying cell phone use practices. Movie theaters now remind viewers to turn off their phones before films begin. Televised public service announcements tell us that “texting while driving” is dangerous and legislators are drafting laws to make it a crime.¹⁰ Such efforts reduce cultural lag by bringing traffic law more into synch with cell phone technology, just as workers’ compensation law caught up with industrial manufacturing technology.

For my purposes here, cultural lag is a useful metaphor in that it helps make legible the anachronistic character of drug prohibition laws. In what follows I argue that punitive drug laws are out of synch with both the pharmaceutical technology for altering consciousness and the myriad ways in which people commonly deploy that technology in modern societies. I then return to Scheerer’s *reaffirm/reform* question by considering how the legitimacy of drug laws gets reaffirmed and how, despite this, many such laws have been reformed.

Drugs as quotidian technologies of the modern self

Foucault’s famous phrase, “technologies of the self,” is generally taken to mean a mode of “governmentality” or social control that individuals have internalized as part of self-control. But it does not mean merely that. “Technologies of the self,” he wrote, “permit individuals to effect by their own means...a certain number of operations on their own bodies and selves in order to attain a certain state of happiness, purity, wisdom...” (1994, p.225). This definition is sufficiently broad to include the meaning I intend here for drugs: tools for managing or regulating the self, moods, and consciousness.

Since the pharmaceutical revolution of the 1950s, drugs have proliferated as technologies of the self in mundane medical practice and daily life. Valium, Librium, and the so-called minor tranquilizers (benzodiazepines) found their way

10 Similarly, legislators and courts struggle with how to treat the growing amounts of intimate information stored in cellphones and coveted by police and prosecutors (see Sengupta 2012).

into the medicine cabinets of middle America, prescribed for an expanding array of anxieties. In the 1960s Benzedrine and other amphetamine-type stimulants were widely prescribed for fatigue, weight loss, and mood control. Since the 1980s physicians have written millions of prescriptions for Ritalin, Adderall, and other amphetamine-based drugs for children thought to be afflicted with Attention Deficit Hyperactivity Disorder to improve their ability to focus and function (see De Grandpre 1999). Prozac (fluoxetine) and its chemical cousins, a new class of anti-depressants called selective serotonin re-uptake inhibitors or SSRI's, were also quickly prescribed to millions, including many whose symptoms did not meet the criteria for bipolar depressive disorder but who simply liked themselves better when taking an SSRI (Kramer [1993,p.15] called this "cosmetic psychopharmacology"). In addition to the metastasizing market for espresso drinks sparked by Starbucks, corner stores and supermarkets now sell new "energy drinks" like *Red Bull*, *Monster Energy*, and *6-Hour Power*, which consist largely of concentrated doses of caffeine and sugar.¹¹ Since the 1990s there has been an "epidemic" of insomnia and a quadrupling of prescriptions for Ambien, Lunestra, and other sleeping pills.

Over the same decades there has been a parallel rise in illicit or "recreational" drug use. In the US as well as globally, the most common illicit drug is cannabis. More than 100 million Americans report lifetime prevalence of cannabis use, over 40% of the population age 12 and older (SAMHSA 2012). Nearly one in five are current users. Prevalence continues to climb in part due to the recent re-discovery of a growing range of therapeutic effects of cannabis and the passage of medical marijuana laws that effectively blur the boundary between recreational and medicinal use (e.g., Reinarman et al 2011). Millions more Americans report use of Ecstasy (MDMA), methamphetamine, LSD, and other illicit drugs. Non-medical use of pain relievers, particularly the synthetic opiate Oxycodone, has become the fastest growing and second most prevalent form of illicit drug use (SAMHSA 2012, 91).

Politicians and drug control officials ritualistically invoke the imaginary of a "drug-free America" in part because all trends have been moving in precisely the opposite direction for half a century. They are making an incantation against the tide of cultural practice. Certainly the widespread use of licit and illicit drugs entails risks, but there is little evidence to suggest that criminal law is an effective means of reducing those risks, never mind putting the drug genie back in the bottle. Indeed, there is growing evidence that drug use, licit and illicit, has be-

11 The US Food and Drug Administration has received reports on 18 deaths, 150 injuries, and 13,000 hospital emergency room visits in which these "energy drinks" are cited (Meier 2012).

come "normalized" in modern societies – widely consumed not just among the marginalized or in deviant subcultures but in the everyday lives of educated, employed, engaged citizens, most of whom never fall into the much-predicted abyss of addiction.¹² That UN drug control treaties and national drug laws lag behind these trends, and continue to produce mass arrests and imprisonment of drug users, can be taken as a rough indicator of their legal anachronicity.

How is the legitimacy of punitive prohibition laws sustained?

Given the widespread and growing use of drugs as technologies of the self and the well-known collateral costs and casualties of mass incarceration, the persistence of punitive drug laws begs for explanation. How is the legitimacy of such laws sustained in the face of their failure? There are many pieces to this puzzle, but here I focus on two key factors that help hold prohibition laws in place. Both are drawn from the US experience, but they apply in some measure to most countries that are signatories to the UN drug control conventions advocated by the US.

The first is what I shall call the *drug control industrial complex*. One key reason why laws can become anachronisms is that institutional interests continue to defend them well past the point at which they were in synch with norms. Drug use was first formally criminalized in the US after World War I. Alcohol Prohibition passed in 1919 and some of the Treasury Department's prohibition agents were charged with developing drug policy. They actively sought to criminalize drug use and to export drug prohibition to other countries.¹³ The new Bureau of Narcotics stoked race and class prejudices to create fear of "alien" drugs and deviant users in a process of reciprocal demonization. From their inception until today, US drug laws have been enforced in a racially discriminatory manner, functioning as mechanisms for the social control of the dangerous class *du jour*.¹⁴

After drink was legalized again by the repeal of alcohol prohibition in 1933, narcotics agents became more zealous in their suppression of other drugs. The Bureau expanded its power and purview by criminalizing cannabis in 1937. A generation later when President Nixon declared "war on drugs," drug law enforcement expanded further, reaching into more agencies and levels of the state.¹⁵ By 2000, drug arrests had become the largest category of arrests, helping to quadruple the

12 For compelling empirical evidence of such normalization, see, e.g., Parker et al. (1998) and Eisenbach-Stangl et al. (2009).

13 Among the best sources on this are Bewley-Taylor (2001) and Levine (2003).

14 See, e.g., Musto (1973) and Alexander (2010).

15 Epstein (1977) provides the most detailed history of the Bureau's expansion.

U.S. incarceration rate to the highest in the world, five to ten times higher than comparable industrialized democracies.¹⁶ The number of Americans incarcerated specifically for drug offenses increased ten-fold between 1980 and 2006.¹⁷ The US currently imprisons more citizens for drug offenses than all original member states of the European Union together imprison for all offenses combined, despite the EU's larger population.

Across the US and globally, drug control agencies share intelligence, equipment, technical knowledge, professional lore, a specific anti-drug ideology, and, not least, material interests. Funding for these agencies and the careers of the political appointees and agents who staff them depends on a perpetual threat of "drugs" and on the claim that only more drug law enforcement will finally eliminate the evil. The Bureau of Narcotics created criminalization, and criminalization in turn created a drug control industry. The network of inter-linked agencies of the state involved in drug control, together with the many corporate entities that sell related products and services, constitutes a drug control industrial complex.

This complex is the most essential political force sustaining prohibition laws. To give one illustration, after the crack cocaine scare faded in the early 1990s (Reinerman and Levine, 1997), cannabis arrests skyrocketed to new records each year, doubling between 1980 and 2010 (FBI 2011).¹⁸ This upsurge was *not* driven by increased cannabis use, which was stable or declining, but by the increased capacity of the drug control industry. The Reagan and Bush-I administrations dramatically expanded the drug war. The Clinton administration further increased drug war funding to support local police departments, contingent upon "effectiveness" as measured by drug arrests. With cannabis by far the most commonly used illicit drug, cannabis users were the low-hanging fruit. The Drug Enforcement Administration has continued to raid medical marijuana dispensaries in defiance of President Obama's stated policy of non-interference with such dispensaries in states that have legalized them.¹⁹ When drug policy reform activists succeeded in gathering enough signatures to get a marijuana legalization measure on the 2010 ballot in California, the California Police Chiefs Association, the California Narcotic Officers' Association, and police union lobbyists led the opposition. Whenever punitive prohibition laws have been threatened by reform, the drug control industry has defended them.

16 Cooney and Burt (2008); International Center for Prison Studies (2012).

17 Bureau of Justice Statistics (2007), Table 4.1.

18 On the crack scare, see Reinerman and Levine (1997); on the rise in cannabis arrests, see Federal Bureau of Investigation (2011).

19 US Department of Justice 2009.

The second factor holding prohibitionist drug laws in place, ironically, is an effect of those very laws: The direct and indirect consequences of criminalization on labeling and stigmatizing drug users tends to marginalize them, to push them underground, outside the orbit of conventional society. This amplifies the deviance and helps produce the conditions and contexts in which drug use takes more problematic forms and appears to be associated with feared effects. In this way, criminalization creates its own constituency.

For example, three of the problems that people fear most about illicit drugs are crime, overdose deaths, and the spread of debilitating diseases like HIV/AIDS and Hepatitis-C. The media, politicians, and citizens typically speak of these problems as if they are "caused" by illicit drug use, but they are actually driven at least as much by drug *laws*. Research has long shown that much "drug-related crime" by opiate addicts is engendered by the dehumanizing funnel of narrowing options and deepening desperation that result more from the context of criminalization than from addiction per se. What were called "crack-related homicides" turned out to result less from the effects of the drug than from the exigencies of black markets in impoverished inner cities—widespread unemployment, high profit potential, intense competition, easy availability of guns, and no recourse to legal means of dispute resolution.²⁰ Similarly, most overdose deaths are a function of the absence of potency labeling and quality controls in illicit drug markets, and the refusal of drug law enforcers to allow the distribution of opioid antagonists like Naloxone, which can reverse overdoses and save lives. And the spread of HIV/AIDS and Hepatitis-C among injection drug users stems from the criminalization of injection equipment, which makes it artificially scarce and thereby encourages unsafe injection practices such as syringe sharing.

The point is that drug prohibition laws persist, despite long-standing evidence of their ineffectiveness, in part because they create a *self-fulfilling prophecy*. The drug control industrial complex, abetted by the media and political elites, has framed drug use so as to create public fear and moral condemnation, which are then mobilized to justify and intensify criminalization. The punitive drug laws that result, in turn, help create the conditions and consequences that appear to confirm the fears and thus the need for punitive drug laws.

20 See, e.g., Goldstein et al. 1997

The cultural and political base of drug law reform

If drugs are increasingly used as technologies of the self and normalized in modern societies, and if, in spite of this, political elites continue to support punitive prohibition, then we arrive back at Scheerer's question: Will this contradiction, or what I have described as the cultural lag between norms and law, lead legislators to reaffirm the legitimacy of prohibition laws with new fervor, or instead to reform the laws to accommodate formerly deviant drug use?

Scheerer posed this question in his seminal comparative analysis of shifts in Dutch and German drug law. He sought to understand why, in response to the rise of illicit drug use in the 1960s, German political elites chose to reaffirm punitive prohibition laws while Dutch elites chose legal reforms that accommodated illicit drug use. He hoped to identify the conditions of possibility for the decriminalization of drug use. He found crucial differences in the role played by moral conservatives, in interest group structure, and in the extent to which political parties politicized drug issues for electoral gain. He found that such differences in political culture gave the Dutch a greater capacity for creating space within conventional norms for emerging subcultural challenges.

Scheerer noted one distinct difference in Dutch political culture – *whose views were considered* – that is, in my view, turning out to be an important element in drug policy reform successes elsewhere. As Scheerer showed, where German legislators invited testimony only from conservative experts who supported criminalization, Dutch legislators solicited a wide range of views including those of illicit drug users themselves.²¹ Dutch drug user activists from the “respectable” classes – people with some power to challenge labeling and resist stigmatization – asserted the legitimacy of their own practices and were heard in elite forums.

This leads me to suggest that the increasing use of drugs as technologies of the self and the normalization of drug use in non-deviant populations have created a *cultural and political base for drug law reform*. The increasingly educated, employed, engaged citizens who use drugs have the cultural capital and political power to contest the stigmatizing stereotypes of the state. With use spreading into more pharmacological categories and across more segments of the population for more purposes, labels like “pothead” and “junkie” that are often deployed to dismiss drug users as mere deviants and to justify jailing them lose much of their adhesive force.

21 The Netherlands' first drug policy commission included a representative of the Dutch *junkibond* [junkie union] as a member (Prof. Louk Hulsman, interview, 7/2/91).

I take as evidence of this cultural-political base the reform trend seen in many countries in the past 20 years, which has moved drug laws in the Dutch direction.²² While most politicians in the US continue to reaffirm the legitimacy of punitive prohibition laws, many have supported reforms that accommodate modes of drug use once defined as criminal. Syringe exchange programs, for example, operate in over 150 US cities as practical public health measures – in defiance of federal laws but usually with the support of local governments. Since 1996 voters in 18 states and Washington, DC, have passed laws allowing the medicinal use of cannabis. Numerous US cities have passed referenda making cannabis law enforcement the lowest police priority.²³

Gallup and other public opinion polls have shown for the first time that a majority of Americans support decriminalizing cannabis and regulating it like alcohol.²⁴ In California in 2010 46% of voters supported a ballot initiative to legalize and regulate cannabis. In 2012, a majority of voters in Colorado and Washington State did pass similar cannabis legalization measures. This sets up a constitutional confrontation²⁵, but at the very least these new legalization laws will force an unprecedented drug policy debate in the US. Even the current Supreme Court, the most ideologically conservative in generations, ruled that the harsh laws passed during the national hysteria over crack cocaine had led to discriminatory sentencing patterns, and therefore that judicial departures from the long mandatory sentences mandated by those laws are justified.²⁶ Congress later passed the Fair Sentencing Act of 2010 to reduce these sentencing inequities. From the national to the local level, there is growing support for treatment rather than imprisonment for problematic drug users.

More important than drug law reforms in the US is what Bewley-Taylor (2012) aptly calls the “fracturing” of the international consensus supporting the global

22 Paradoxically, amidst all this movement in the Dutch direction, the Dutch government stepped back from their path-breaking decriminalization policy with a 2011 law that restricts cannabis sales to Dutch citizens. Neighboring governments concerned about drug tourism pressured a new, conservative Dutch governing coalition comprised of the dominant free market party, the VVD, and the anti-immigrant party, PVV. This coalition came to power in 2010 and collapsed in 2012. The 2012 election brought to power a new coalition which reduced the influence of the PVV and increased that of the labor party, the PVDA. Implementation remains incomplete, and the new law has led to a resurgence of street dealing and resistance at the local level, notably by the Burgemeester of Amsterdam. It remains to be seen what drug policy the new government will adopt.

23 For a useful overview of US drug law reforms in 2012, see Newman (2012).

24 See, e.g., ABC News 2009; Gallup 2012.

25 In an earlier medical cannabis case, the Supreme Court reaffirmed the supremacy of federal over state drug laws (*Gonzales v. Raich* 2006).

26 *Kimbrough v. United States* 2007.

prohibition regime that the US engineered. For the first time there is serious discussion of revising the UN drug control treaties to allow countries to "opt out." Meetings of the UN Committee on Narcotic Drugs, which monitors implementation of the treaties, have been marked by more and more country representatives arguing on public health and human rights grounds against continued prohibition and in favor of harm reduction strategies. There have been a growing number of what Bewley-Taylor calls "soft defections" from parts of the UN treaties, as well as "domestic normalization of harm reduction" in at least 70 countries, including perhaps 20 that have adopted some form of partial decriminalization. The Global Commission on Drug Policy – a distinguished body that included former UN Secretary-General Kofi Annan, several former presidents and prime ministers, and Reagan administration Secretary of State George Schultz and Federal Reserve Bank Chairman Paul Volcker – issued a report calling for an end to criminalization and for experiments with legal regulation of drugs (2011). Decriminalization is taking a variety of forms and is developing at different velocities, but it is a clear trend.²⁷

What journalist Alma Guillermoprieto called the "rebellion in Cartagena" provided further evidence of this fractured consensus. At a conference of North and South American states in 2012, the presidents of Columbia, Guatemala, and Costa Rica openly challenged punitive prohibition laws as harmful anachronisms. This discursive rupture was "a startling, unprogrammed and rebellious discussion" which, "for the first time in forty years challenged the United States' dominance on drug issues." Heads of state "openly debated ... whether the best way to stop the rolling disaster was an end to the US-sponsored and -dictated war on drugs and at least partial legalization.... The very word 'legalization' has been taboo for so long that it was a shock to hear it mentioned as a sensible option by unimpeachable allies of the United States." Guillermoprieto reached the "inescapable" conclusion that "race, inequality, and class segregation, which cut across all aspects of Latin American societies, underpinned" their drug problems. Representing the US, President Obama was put on the defensive but continued to reaffirm the legitimacy of prohibition laws, insisting that legalization is not a viable option. Nonetheless, Guillermoprieto wrote, "Something important happened.... A taboo was broken, a conversation began...." The war on drugs "has become too destructive to be defensible" (2012, p.39-41).

How are we to understand this seemingly sudden turn from formerly silent leaders who had long acquiesced in US drug policy hegemony? An adequate answer would have many parts but would certainly include: a drug war that impris-

27 See, e.g., Rosmarin and Eastwood 2012.

ons hundreds of thousands and yet fails on its own terms and has led to 50,000 dead in Mexico alone; the continued spread of HIV/AIDS; the extraordinary organizing work by knowledgeable interest groups and NGOs like the Drug Policy Alliance to open up the debate, change public opinion, and promote drug law reform; and support for such efforts by some business elites and moral conservatives.

To this list I would add growing millions of "respectable" citizens who have found both licit and illicit drugs to be functional technologies of the self, and who now constitute the cultural and political base for drug law reform. The drug control industrial complex and other state interests will continue to reaffirm the legitimacy of punitive drug laws. The difference is, they now face the fierce headwinds of cultural practices that can no longer be dismissed as deviant.

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