

SIT Graduate Institute/SIT Study Abroad

SIT Digital Collections

Independent Study Project (ISP) Collection

SIT Study Abroad

Spring 2019

Criminalizing the Other: Exploring the Impact of The Netherlands' Adaptation of Prosecutorial Guidelines on Sentencing Disparities

Alia Nahra

Follow this and additional works at: https://digitalcollections.sit.edu/isp_collection



Part of the [Criminology and Criminal Justice Commons](#), [European Languages and Societies Commons](#), [International Law Commons](#), [Jurisprudence Commons](#), [Law and Race Commons](#), [Law and Society Commons](#), [Legal History Commons](#), and the [Migration Studies Commons](#)

Criminalizing the Other: Exploring the Impact of The Netherlands' Adaptation of Prosecutorial
Guidelines on Sentencing Disparities

Nahra, Alia

Academic Director: Byars, Jana

Advisor: Julia van der Made

Washington University in St. Louis
Sociology and Women, Gender, & Sexuality Studies

Europe, Netherlands, Amsterdam
Submitted in partial fulfilment of the requirements for
The Netherlands: International Perspectives on Sexuality & Gender,
SIT Study Abroad, Spring 2019

Access, Use, and Publication of ISP/Internship

Student Name: Alia Nahra

Email Address: anahra@wustl.edu

Title of ISP/Internship: Criminalizing the Other: Exploring the Impact of The Netherlands' Adaptation of Prosecutorial Guidelines on Sentencing Disparities

Program and Term/Year: Spring 2019

Student research (Independent Study Project, Field Study Project) is a product of field work and as such students have an obligation to assess both the positive and negative consequences of their field study. Ethical field work, as stipulated in the SIT Policy on Ethics, results in products that are shared with local and academic communities; therefore copies of ISP/FSPs are returned to the sponsoring institutions and the host communities, at the discretion of the institution(s) and/or community involved.

By signing this form, I certify my understanding that:

1. I retain ALL ownership rights of my ISP/FSP project and that I retain the right to use all, or part, of my project in future works.
2. World Learning/SIT Study Abroad may publish the ISP/FSP in the SIT Digital Collections, housed on World Learning's public website.
3. World Learning/SIT Study Abroad may archive, copy, or convert the ISP/FSP for non-commercial use, for preservation purposes, and to ensure future accessibility.
 - World Learning/SIT Study Abroad archives my ISP/FSP in the permanent collection at the SIT Study Abroad local country program office and/or at any World Learning office.
 - In some cases, partner institutions, organizations, or libraries in the host country house a copy of the ISP/FSP in their own national, regional, or local collections for enrichment and use of host country nationals.
4. World Learning/SIT Study Abroad has a non-exclusive, perpetual right to store and make available, including electronic online open access, to the ISP/FSP.
5. World Learning/SIT Study Abroad websites and SIT Digital Collections are publicly available via the Internet.
6. World Learning/SIT Study Abroad is not responsible for any unauthorized use of the ISP/FSP by any third party who might access it on the Internet or otherwise.

I have sought copyright permission for previously copyrighted content that is included in this ISP/FSP allowing distribution as specified above.

 05/11/19

Student Signature Date

Academic Director Signature Date

Abstract

This research explores the impact of the 2015 institution of prosecution guidelines in the Netherlands. Prior to this switch, the *Openbaar Ministerie* operated using a punishment point system, which provided a mathematical formula with which to decide sanctions. Though the motivation of this change was to make the overall system more efficient and enable individual prosecutors to consider each case in a customizable and more equitable form, this research demonstrates that the change has served instead as a perpetuator (and in some cases, facilitator) of the persistent ethnic and gender biases already at work in the Netherlands. The social and political history of the country has ensured generations of prejudice and disproportionate experiences within the criminal legal system, especially for racialized Others, which have resulted in discriminatory sentencing for those individuals. This paper shows that these experiences have not changed, or have become more aggravated, after the prosecution guidelines implementation.

Acknowledgements

I would like to thank my advisor, Julia van der Made, for the kindness and care with which she took me under her wing. She provided a Dutch legal insight that I had been striving to find for months, and for that I am very grateful. I would also like to thank Jana Byars, who in an official-but-also-unofficial capacity improved this paper endlessly. Jana has served as an emotional and intellectual guide throughout this journey, and I am quite indebted to her. Finally, I would like to thank Morgan Jones, Hilde Wermink, and Rianne van der Hulst for agreeing to participate in this research.

Table of Contents

Chapter I: Introduction

The Dutch Criminal Justice System _____	3
Legislative History _____	5
2015 Designation Framework for Criminal Proceedings and Prosecution _____	7

Chapter II: Literature Review

Sentencing Research _____	8
Dutch Racial Culture _____	11
<i>Allochtoon</i> vs. <i>Autochtoon</i> _____	15
Crimmigration _____	16

Chapter III: Theoretical Frameworks

Focal Concerns Theory _____	18
ZSM-Process _____	19
Colonialism and the Other _____	20

Chapter IV: Methodology

Language of Sources _____	22
Accessing Data _____	22
Interviews _____	23
Courtroom Observation _____	23

Chapter V: Results and Analysis _____	24
--	----

Chapter VI: Discussion and Conclusion _____	30
--	----

Bibliography _____	35
---------------------------	----

Appendix _____	39
-----------------------	----

Chapter I: Introduction

Five years ago—on November 24, 2014—I paced my bedroom on a school night listening to the radio. This is not something I did often, not in small part because my bedroom only contains enough space for about two and a half steps in either direction before turning back around. But this night was different, because Robert McCulloch was announcing the grand jury’s decision on the case of Darren Wilson, who earlier that year had murdered Ferguson, Missouri teenager Michael Brown. The grand jury decided not to indict. I stopped moving, silently processing what had just happened. Halfway across the country, this decision failed to acknowledge the already broken policing system in Missouri, and the St. Louis area in particular. It prompted the rise of the Black Lives Matter movement, as well as a number of investigations into the St. Louis police forces that brought supposed progress within the criminal legal system of the area. Two years after that night, I began my career as an undergraduate student at Washington University in St. Louis, an institution with complicated ties to its community that was just beginning to revamp its Sociology department with a staff of young, talented, urban sociology-minded professors. I quickly became enamored by the department, swept up in its passion and vigor for learning about the school, its city, and the relationships between them.

As a first-year student, I was interested in the policing system around St. Louis, but figured there had been so much scrutiny after Ferguson that loads of research must have already been done; changes must have been made. That sentiment wasn’t altogether false, but it certainly was naïve. The policing system in St. Louis County, which is comprised of 90 distinct municipalities and around 66 different police departments, is a complicated mess of jurisdiction-confusion and poverty-targeting profit systems. The more time I spent in St. Louis, the more aware I became that the fight was nowhere near over. My interest in discriminatory experiences

within the criminal legal system is heavily influenced by the milieu in which my academic passions have been fostered, but it extends beyond St. Louis. I am interested in exploring the ways in which different communities' struggles with bias and discrimination are manifested in their legal systems and am especially invigorated by the possibility of altering legal structures to ensure a more equitable existence. But pursuing this passion has also required stepping beyond the legal system I grew up understanding, it entails searching for a more international understanding of criminal legal models and uncovering the potential for far-away places to inspire positive change in each other. This brought me to the Netherlands, which has been made famous for its low crime rate and even lower incarceration rate. News stories about the Netherlands' criminal legal system often center around the closing of prisons, or the innovative ways in which prisoners are treated. I wanted to know how true this perception of the Netherlands was—is it really such a haven for criminal legal reform? If so, could it serve as a model for the United States or other countries? In addition, comparative analysis would be able to aid in understanding how policy affects practical outcomes in both settings. Too often, stellar reputations are exposed as myths. The Netherlands is one of those cases.

Conducting this research did not come easily. I am an American student studying temporarily in the Netherlands. I speak barely any Dutch and have no personal connection to the country's criminal proceedings. And it quickly became clear that the Dutch legal system contains plenty of flaws, especially around its treatment of minority individuals. As a white, cis-gendered, able-bodied, wealthy, somewhat-educated young woman, I have entered this situation with a number of privileges that are not afforded to many of the individuals whose lives are most affected by the system I am studying. But I also soon found that my privilege within this structure served as an advantage, to some degree, because my interest in the subject is perceived

less as navel-gazing than some of the more personally-invested Dutch researchers.

Acknowledging my outsider-status, and the pros and cons that accompany it, was key to being able to get started on this project. I have certainly found my limitations in time, resources, language, and connections to be a challenge, but I have also decided that this research is meaningful in spite of, and somewhat because of, these restraints.

The rest of this introduction will serve to present and contextualize the Dutch legal history and procedure. In the second chapter, I introduce the intellectual and academic conversations to which I contribute, specifically sentencing research, the Dutch racial culture, the debate around *allochtoon* and *autochtoon*, and crimmigration. The third chapter will describe the theoretical frameworks through which I approach this research, namely focal concerns theory, the ZSM-process, and colonialism/Othering. Chapter four introduces the methodology of this research, which combines legal evaluation, aggregate data analysis, interviews, and courtroom observation. In the analysis section, I will investigate the question of whether or not the 2015 switch to prosecutorial guidelines has impacted discriminatory experiences in the criminal legal system. The final chapter will discuss the findings of this project, as well as consider the implications of these findings and calls for further research.

The Dutch Criminal Justice System

The Dutch have an efficient, streamlined legal framework that focuses on the individual under review. The Dutch justice system differs considerably from the American version, about which the majority of past sentencing research has been conducted. To begin with, there is no jury system in the Netherlands. Professional judges hear court cases, then decide on both guilt and punishment. Cases that go to court can be argued before a single judge, who will pass

judgement on the case immediately, or a panel of three judges, who are allowed a maximum of two weeks to come to consensus on both culpability and penalty. While there are vague outlines of acceptable vs. unacceptable punishments for crimes, judges maintain a large degree of personal discretion in their verdicts. The panel option is generally reserved for the most serious cases, and a large percentage of criminal cases are settled by the prosecution service before a judge is involved at all¹. There are no mandatory minimum sentences in the Dutch system, beyond the requirement that any prison sentence must be longer than a single day. The most severe penalty possible for a convicted adult is life imprisonment, and the maximum sentence for crimes without the possibility of life imprisonment is 30 years. There are no plea bargains, which ensures that prosecutors are not tempted to provide a sentencing/charging concession in exchange for a guilty plea. Defendants are also not tempted to falsely confess to avoid the threat of harsher punishment, which has been a persistent problem in the American legal system.

In 2008, in order to further simplify and expedite the Dutch legal system, prosecutors were given authority to impose almost all punishment in criminal cases. Prosecutors can levy sentences of community service or transactional fines, or they can recommend a case go before a judge for more serious punishment such as incarceration. Defendants are able to officially object to a case being called before a judge if they feel there are insufficient grounds for a public trial. Prosecutorial sentencing decisions are also open to challenge by the accused; if a defendant wishes to appeal against a penalty imposed by a prosecutor, then that case will be brought before a court. Defendants are entitled to professional legal counsel at all stages if they so choose. Low-income defendants are able to apply for subsidized legal aid, ensuring that the government

¹ P. J. P. Tak, *The Dutch Criminal Justice System*. Nijmegen, NTH: Wolf Legal Publishers (2008).

will pay for their legal counsel. However, it is not uncommon for an individual to show up to court for a minor infraction without a lawyer.

Legislative History

The Dutch tend to be quite conservative with their legal system, maintaining its core essence through hundreds of years of political, social, and global turmoil. The original Code of Criminal Procedure for the Netherlands was introduced in 1838, establishing a formal structure through which to settle disputes between the government and an individual suspect. The criminal adjudication process was more of a community-restoration process than a settler of individual disputes, as victims of crime were not considered active participants in the proceedings. The government was put in charge of deciding whether or not a wrongful deed had been committed, and it was up to that government to decide what to do with a suspect once the person was caught. Individual aspects of the code have been adjusted and modernized over time, but the currently ongoing legislative overhaul of the complete code is the first time that the entire body of law has been examined and edited at once.

Throughout the history of Dutch law, the prosecution service has retained full discretion over prosecution decisions, though the nature of their role has evolved as it would in any country. The method through which prosecutors make decisions most recently shifted from a sentencing points model (instituted in 2001) to the current guidelines model (2015, updated 2019). In the former model, a baseline crime translates to a certain number of points; for instance, a burglary is 60 points. Additional circumstances, such as the inclusion of a weapon, particular brutality, or serious injury, add more points to the base. A burglary at knifepoint that caused no injury would be 77 points. Discriminatory intent—what Americans term a hate

crime—and other circumstantial aspects of the criminal act add a certain percentage to the total points. So, robbing someone with a knife because they were a transactivist could increase the points to 96.25. Eventually, points are added and converted to a total sentence. Each point may lead to a fine of €22, two hours of task penalty, or one day of imprisonment. Below 30 points, a prosecutor could simply impose a fine and avoid a public trial. Between 30 and 60 points, a prosecutor may only impose a task penalty transaction. Above 61 points, the public prosecutor must indict and request a task penalty (less than 120 points) or a prison sentence (more than 120 points). Individual prosecutors may deviate from these mathematical structures, but they must provide an explicit reason for doing so. Uniform requests from the prosecution service to the judiciary, following this model, are intended to lead to more uniform sentences from the court system. However, as domestic and international developments prompted more and more caveats to the points system, increased differentiation served as a rationale for reevaluating OM procedure in tandem with a consideration of how well the Dutch legal system fits into the European Union's (EU) expectations.

As a member of the EU, the Netherlands is obligated to comply with the organization's changing frameworks and legal expectations as they progress. Toward the end of the 20th century, views on criminality shifted on a global scale, arguably in response to a rising social (and consequently, legal) emphasis on civil rights as a worldwide priority. In the Netherlands, these evolutions resulted in amendments to the Code of Criminal Procedure in the 1980's and 90's in order to allow victims of crime to play a more active role in criminal cases. The EU then introduced the Framework Decision in 2001, which outlined global minimum rights for crime victims in criminal proceedings. This decision was followed by the Dutch Victim Care Guideline in 2011, which tasked public prosecutors with providing care and support to victims of

crime throughout the all stages of criminal proceedings. In 2012, the EU released a directive mandating participation rights for crime victims, the Dutch implementation of which was partially incorporated into the 2015 release of prosecutorial guidelines. This shift towards victims' rights has been controversial in the Netherlands, especially when considering the victim's right to speak in the courtroom—the latest extension of victim rights includes the ability to speak in an unlimited way not only about the crime itself, but also about the entire court process. This includes suggestions for punishment or reflections on the courtroom proceedings, an addition that criminal defense lawyers often view as biasing against a defendant.

2015 Designation Framework for Criminal Proceedings and Prosecution (Aanwijzing kader voor strafvordering en OM-afdoeningen)

As part of a general overhaul of its criminal code and related legislative content, the Dutch government introduced a framework of prosecutorial guidelines in 2015. These guidelines shifted away from the punishment point system, which provided prosecutors with a mathematical model to be utilized to determine appropriate sanction recommendations. A draft of the new guidelines was sent to several *Openbaar Ministerie* (OM) offices before enactment, in order to ensure that it accurately reflected the intentions of the OM. The 2015 system provides one overarching framework of general principles to be used in adult criminal cases, as well as 74 common-offense-specific guidelines. Given that the OM holds a monopoly right over prosecuting criminal offenses, prosecutorial discretion plays a key role in the functioning of the justice system in the Netherlands. This decision-making is meant to be guided by the common good, which includes both victim and defendant, if applicable. Prosecutors are able to dispose of

cases for reasons of technical consideration (e.g. evidentiary concerns) or practical public interest—they can even customize out-of-court sanctions to avoid judicial involvement.

Traditionally, the Dutch legal system prioritized sentencing around preventing retaliation, general deterrence, and special prevention (e.g., individual security or resocialization); however, the 2015 guidelines also incorporated the contemporarily-added focus on repairing the infringed rights of those affected by the crime. The new framework was introduced to allow for customization within the given principles, encouraging prosecutors to propose sanctions that are proportional to the criminal offense but that take into consideration the circumstances of the act itself and the individual(s) involved. The application of the new guidelines is intended as a two-step process: first, the starting point of deciding which sanctions seem most applicable in comparison to other cases with similar facts; then the customization portion that reflects on any aggravating factors or penalty-reducing circumstances. For example, a burglary under the guidelines framework is eligible for imprisonment (maximum nine years) or a fine (maximum €82,000). But a prosecutor may decide to pursue a shorter term of imprisonment because the thief has dependent children at home and was determined to be acting out of financial strife more than malice. Though the specifics of the framework will be discussed in more detail later in this paper, a basic understanding of the legal context and motivations behind the change are key to establishing the motivation behind this study.

Chapter II: Literature Review

Sentencing Research

Despite the pervasive importance of prosecutorial and judiciary decision-making in nations across the world, the United States has historically been the epicenter of research into

criminal sentencing. Though the United States has provided a useful blueprint for innovative, comprehensive research into sentencing (and specifically, disparities in sentencing), in the past decade a growing number of academics outside the United States have advocated for the importance of a more global understanding of criminal justice system-related research. In this tradition, research in the Netherlands into criminal justice decision-making has been largely concentrated in the years after 2000. The three main demographic factors studied in relation to sentencing across the world are gender, race/ethnicity, and age². Ethnicity has recently become viewed as an indirect origin of sentencing disparity, due to the number of other personal characteristics that often correlate with ethnic differences and are used as formal justification for disparate sentencing outcomes. However, most international research on race and ethnicity in sentencing indicates that “members of *some* disadvantaged minority groups in every Western country are disproportionately likely to be arrested, convicted, and imprisoned for violent, property, and drug crimes”³. In the American context, the minority groups that are focused on tend to be Black and Latinx individuals, compared against a white standard. However, in the Netherlands, studies have focused on a different set of discernible ethnic clusters, largely Moroccans, Turks, Surinamese, and other non-white immigrant groups.

Recent years of Dutch sentencing research has documented clear disadvantages throughout the criminal legal system for minority individuals, from interactions with police to sentencing outcomes. Cases involving a defendant with a migration background are more likely to be sent to court, and subsequently more likely to be given an incarceration sentence; defendants of Moroccan ethnicity are 60 percent more likely to be incarcerated than Dutch

² Hilde Tonja Wermink, "Expanding the Scope of Sentencing Research: The Influence of Socio Demographic Offender Characteristics on Juvenile and Adult Prosecution and Sentencing Decisions in the Netherlands" in *On the Determinants and Consequences of Sentencing*, Leiden, NTH: Leiden University (2014): 26.

³ Michael Tonry, "Ethnicity, Crime, and Immigration" in *Crime and Justice* 21 (1997): 1. Emphasis in original.

offenders⁴. Non-Dutch offenders are also more likely to receive longer terms of imprisonment than Dutch offenders, consistent with theoretical arguments that “foreign offenders are more likely to be perceived as more dangerous or crime prone than native offenders”⁵. Even before the prosecution phase, minority ethnic groups consistently have more official contacts with police than the native Dutch, despite cross-sectional and longitudinal surveys demonstrating that Dutch respondents self-report committing more crime⁶. All of this research has been completed solely in the Netherlands, but the trend of socially disadvantaged ethnic groups receiving harsher sentences and more scrutiny within the criminal legal system is a phenomenon that has been documented across the globe for generations.

Sentencing research in the Netherlands has also consistently recorded female defendants being punished less harshly than males. Individuals within the Dutch criminal legal system are not given the option of formally identifying as non-binary, so there is no data that includes a gender other than men or women. There aren’t very many female-identifying folks involved in the Dutch system, but those who do appear are consistently viewed as less blameworthy and less of a risk of future violence than their male counterparts. Their cases are less likely to go to court (by about 20 percent), less likely to result in incarceration (by about 27 percent), and likely to result in a shorter length of incarceration (by about 17 percent)—trends that persist because of several reasons, including “chivalry or paternalism, gender-specific concerns over the social costs of imprisonment, women’s informal social controls and the disproportionate involvement in crime of male offenders”⁷. Two cases of the same crime, one committed by a man and one by

⁴ Hilde Wermink, Brian D. Johnson, Jan W. De Keijser, Anja J. E. Dirkzwager, Joni Reef, and Paul Nieuwbeerta, "The Influence of Detailed Offender Characteristics on Consecutive Criminal Processing Decisions in the Netherlands" in *Crime & Delinquency* 63, no. 10 (2016): 12.

⁵ Wermink (2014): 47.

⁶ James D. Unnever, "Ethnicity and Crime in the Netherlands." in *International Criminal Justice Review*, (2018): 1-18.

⁷ Wermink et al. (2016): 6.

a woman, are likely to end in different sentences for the two individuals, even when controlling for non-gender-related differences. This trend is also not dissimilar to sex-based discrimination in the justice system of other comparable nations and has persisted across decades of research.

Dutch Racial Culture

As an enduring European power, the Netherlands' all-too-recent history with slavery and colonization has greatly impacted the nation's contemporary societal formation. Many of the country's non-white citizens are either immigrants (or the recent descendants of immigrants) whose migration to the country is explained by colonization, or labor migrants from the late 20th century. The Netherlands remains a majority-white nation, with about 80 percent of its population identifying as white (around 76 percent of Dutch ethnicity)⁸. The nation boasts a relatively wealthy population, though the majority of this wealth was produced at the expense of a racialized, colonial Other. These Othered groups have, over time, become more common within the Dutch residential context, especially given the increase in "guest workers" who are mostly Moroccan (though, in recent years also come from Southern or Eastern Europe). These workers come into the Netherlands with economic disadvantage and are furthered stigmatized as a result of their skin tone and/or religion, whether that be Islam, Catholicism, or Orthodox Christianity.

The economic and social power imbalance of this arrangement has resulted in a prevalence of structural racism that often goes unacknowledged by mainstream white Dutch society. As Gloria Wekker describes in *White Innocence*, the dominant white Dutch self-representation is governed by the belief that the Dutch are "a small, but just, ethical nation;

⁸ "StatLine - Population Dynamics; Month and Year," opendata.cbs.nl, accessed April 15, 2019.

color-blind, thus free of racism”⁹. However, this self-idealization serves primarily as a perpetuator of willful ignorance around the racism that governs Dutch society. This concept of white innocence comes from a position of privilege and entitlement that intentionally relegates the (immigrant) Other into a position of problematizing non-issues into unnecessary debates. The common denial of racism, including blaming racialized Others for perpetuating the idea that racism exists, occupies much of the white mainstream Dutch culture. The most obvious example of this cognitive dissonance comes in the form of the Black Pete (*Zwarte Piet*) tradition, where blackface and slave imagery are defended by many as simply a children’s holiday tradition¹⁰. A continuous refusal to label racist actions and/or intent as racism has been clearly documented across the Dutch historical context. Halleh Ghorashi has written on the nearly ubiquitous resistance to using the term “racism” to describe outright discrimination in Holland, demonstrating the ways in which a normalization of anti-Muslim and anti-immigrant sentiments has created space for the permission of explicitly racist language that is not considered “actually racist” such as consistent references to Islam as a “backward culture”¹¹. The quotidian usage of this language intentionally permits it to pass under the cultural radar.

Mainstream Dutch society’s vocal denial of discrimination does nothing to actually negate its existence. In Ghorashi’s argument, discriminatory sentiment against the Other often correlates with the perception of non-white, non-European migrants as a threat to Dutch society. Research from a variety of scholars has documented the practical implications of this perceived threat in a Dutch context, including Tonry (1997), Coen et. al (2016), and Wermink et. al (2016).

⁹ Gloria Wekker, *White Innocence: Paradoxes of Colonialism and Race* (Durham, NC: Duke University Press, 2016).

¹⁰Rebecca Hayes, Katharina J. Joosen, and CalvinJohn Smiley, “Black Petes & Black Crooks? Racial Stereotyping and Offending in the Netherlands” in *Contemporary Justice Review* 21 (2018): 16–32.

¹¹ Halleh Ghorashi, “Racism and ‘the Ungrateful Other’ in the Netherlands” in *Thamrys/Intersecting* 27 (2014): 101-16.

The current most stigmatized migrant group in the Netherlands is Moroccans, who are “portrayed in the media as crime prone, are overrepresented in crime and prison statistics, and tend to be associated with more negative attitudes in the sociological literature on ethnic rankings”¹². Bonnet and Caillault even document open racism from police officers against those who are presumed to be Moroccan (whether or not the individuals are actually Moroccan or of Moroccan descent); “most respondents make a clear association between (presumed) Moroccans and crime, and our respondents sometimes referred to Moroccans as “*kut Marokkanen*” (fucking Moroccans) or “*kanker Marokkanen*” (this cancer that are Moroccans)”¹³. When the police clearly think so negatively of a certain group, the expectation that criminality is an inherent trait becomes far too easy to reify. According to the same Dutch police officers, “it is widely known, and non-controversial to say it, that Moroccans commit more crime”¹⁴. This prejudice against ethnic minorities in the Netherlands, especially Moroccans, continues to be pervasive and is connected to rising anti-Muslim sentiment in the nation.

Negative attitudes towards Muslim individuals in the Netherlands is not a new phenomenon, though the rise of the political right—especially the *Partij voor de Vrijheid* (PVV)—has given a renewed normalization to anti-Muslim rhetoric. The PVV has only continued to gain political influence after its initial victories in the 2009 elections for European parliament, embodying the right-wing populist trend that has gained traction across the world. The PVV is mostly known for its anti-Islam views, in addition to broader xenophobic positions framed around protecting the so-called native Dutch culture. In the Dutch context, “Muslim” is

¹² Wermink et al. (2016): 24.

¹³ Francois Bonnet and Clotilde Caillault, “The Invader, the Enemy within and They-Who-Must-Not-Be-Named: How Police Talk about Minorities in Italy, the Netherlands and France” in *Ethnic and Racial Studies* 38, no. 7 (2015): 1190.

¹⁴ Bonnet and Caillault (2015): 1193.

often used synonymously with “immigrant,” triggering a series of related assumptions that aren’t completely tied (though also not entirely distinct from) actual religiosity. A recent study regarding attitudes towards Muslims in the Netherlands found that the “Muslim Other” poses a prevalent symbolic threat—embodied by perceived group differences in values, customs, etc.—to the so-called proper Dutch culture. This symbolic threat translates into negative stereotypes and empirically distinguishable emotions of disgust, anger, and pity. All three emotions are associated with prejudice; disgust is also closely tied to social distancing, anger with political intolerance, and pity with social distancing in a white-savior manner. The PVV has succeeded in maneuvering each of those emotions into political impacts that both reflect and magnify anti-Muslim sentiment across the country.

The practical impact of racial and cultural Othering accentuates the interpersonal implications of structural xenophobia and institutional racism. Hilde Wermink and her colleagues at Leiden University have been pioneering research into sentencing disparities among ethnic groups in the Netherlands as well as general disparities in policing of minorities. Their research focuses on men involved in the criminal justice system, which reflects a larger international trend of emphasizing the experiences of masculinized individuals as more relevant to criminal justice study. However, this consistent focus on men may be more justifiable in the context of the Netherlands, given the overall low crime rate and nearly non-existent female prison population. Though Wermink et al. find that ethnicity does not factor into pretrial release decisions in a statistically significant way, it does manifest in final sentencing decision differences. Specifically, “Moroccans received longer unsuspended sentences, had a higher chance to receive a prison sentence that exceeded the duration of pretrial detention, and received

more additional incarceration time than Dutch offenders”¹⁵. This trend persists for second-generation Moroccan immigrants, which documents the continuation of perceived and symbolic threat posed by the children of immigrants.

Allochtoon vs. Autochtoon

Any discussion of Othering in the Netherlands would be remiss to leave out the terms *allochtoon* and *autochtoon*, labels with which all Dutch persons are familiar. The terms were first coined by sociologist Hilde Verwey-Jonker in 1971, but they have steadily seeped into the Dutch social consciousness ever since. The labels are drawn from geology, as they describe rocks that are non-native to an area in opposition to those that appear within it naturally. In geological settings, the *allochtoon* label entails fundamental impurities—a dirtiness that easily translates to the perceived contamination risk that non-white bodies carry against the perceived-*autochtoon* Dutch. Though Verwey-Jonker may not have intended for the terms to be used as justification for disparate treatment under the law and the ensuing detrimental social outcomes such distinctions ensure, the terms have been weaponized against both migrants and Dutch nationals who “look” like migrants. The Central Bureau of Statistics has historically defined the term *allochtoon* as describing individuals born abroad or with one or more parents born abroad, while *autochtoon* is reserved for family lineages born only in the Netherlands. In more general social usage, *allochtoon* is a synonym for immigrant, wielded against both those who are actually migrants as well as their descendants, but generally only against immigrant groups who are non-white. In 2016, the Central Bureau of Statistics (CBS) and the Scientific Council for Government Policy (WRR) banned the use of *allochtoon* and *autochtoon* in official documents.

¹⁵ Wermink et al., (2016): 24.

However, the distinctions between those with an “immigrant background” and those with a “native Dutch background” continue throughout their data. The ban was viewed as a symbolic move, rather than an actual signal of cultural change, and has largely been ignored by the public. The government’s ban on these terms serves as a symbol for the Dutch attitude towards racism and xenophobia—not speaking explicitly about those concepts as a way to pretend they don’t exist. The popular understanding and usage of the terms has continued.

Crimmigration

In addition to rhetorical demonization, migrants in the Netherlands face a racialized super-surveillance that renders them more susceptible to perceptions of shortcomings than their Dutch peers. People of color, when occupying a physical space that has always been controlled by whiteness, often face an Otherization that deems any demonstration of capability as exceptional and any imperfections as emblematic of the Othered group as a whole. In *Space Invaders*, Nirmal Puwar describes the ways in which bodies deemed out of place are “constantly under a spotlight, as they are seen to represent a potential hazard”¹⁶. This emphasizes racialized and gendered optics in a way that not only notices slight mistakes, but often exaggerates and weaponizes them. Though Puwar’s work focuses on super-surveillance in employment settings, there is a long-documented history of increased surveillance from a governmental and policing perspective. In the Dutch context, worries about immigration have become increasingly interwoven with a rising concern about crime and safety, resulting in policies that merge criminal justice and immigration. The concept of “crimmigration” describes this merging, defined as “the intertwining of crime control and migration control” that includes the “social context of

¹⁶ Nirmal Puwar, "(In)Visible Universal Bodies." *Space Invaders: Race, Gender and Bodies Out of Place*, New York: Berg Publishers (2004): 61.

crimmigration such as the public and political discourse on issues relating to crime and migration”¹⁷. The manifestation of crimmigration in the Netherlands has included an increase in “undesirable aliens’ resolutions” in addition to expanding grounds for deportation and administrative detention based on an immigrant’s criminal background¹⁸. Though much of crimmigration study has been focused on the U.S. context, exploring this trend in the Netherlands demonstrates how crimmigration is not only about legislation, but also blurring the lines between immigration and criminal justice in a way that exemplifies the Netherlands’ rejection of migrants as inherently threatening to the Dutch way of life.

The overall theme of existing literature into racialized Othering and sentencing disparities in the Dutch context is that individuals perceived as non-Dutch are consistently targeted as social and legal threats. It does not matter if a person is a Dutch citizen—any immigrant background or indication of *allochtoon*-ness (e.g., Muslim identity or darker skin) marks one as not Dutch. In the legal context, these assumptions of Otherness are projected onto racialized bodies as justifications for heightened surveillance and criminal suspicion. It is in this setting that the prosecution guidelines were altered to allow for more individual case customization, which could facilitate either the correction or reiteration of discriminatory assumptions in the legal process.

Chapter III: Theoretical Frameworks

In the last decade, the population of the Netherlands has increased from around 16.5 million to 17.25 million people, rendering it a small country even by European standards¹⁹. Of

¹⁷ Maartke A. H. van der Woude, Joanne P. van der Leun, and Jo-Anne A. Nijland, “The Negotiated Expansion of Immigrant Control: Crimmigration in the Netherlands” in *Law and Soc. Inquiry*, Leiden, NTH: Leiden University Press (2014): 3.

¹⁸ Van Der Woude, et al., (2014): 7.

¹⁹ “StatLine - Population Dynamics; Month and Year,” opendata.cbs.nl, accessed April 15, 2019.

this population, around 10,500 individuals are currently imprisoned²⁰. Given the low rate of imprisonment for which the Netherlands has become internationally renowned, investigating the theoretical legal frameworks that guide this system provides a ripe opportunity for cross-national comparison. This section will include an explanation of the focal concerns theory, which leads the Dutch framework for prosecution and sentencing, as well as the victims' rights position and ZSM-model within the legal system. It concludes with an exploration of conditional citizenship in the setting of Dutch colonialism, which helps explain the power of the Other's constantly monitored existence as a threat.

Focal Concerns Theory

As mentioned above, the Dutch penal code and judiciary have been studied as centered around the focal concerns theory of judicial decision-making. This framework “identifies offender blameworthiness/culpability, dangerousness and community protection, and practical constraints/consequences” in order to decide on a sentencing determination²¹. The position originates from Darrell Steffensmeier, who initially wrote about the focal concerns approach in relation to sentencing in 1980 (then subsequently expanded upon the framework with colleagues in 1993 and 1998). The blameworthiness/culpability element is most important in determining a guilty verdict, though in the Dutch legal system, varying levels of culpability can translate to different levels of punishment. The community protection element focal concern is most often the focus of critique from criminal justice advocates, as racial and/or cultural dissimilarities often translate to aggrandized assessment of future minority dangerousness—regardless of actual recidivism trends. A related challenge of this framework is that it relies upon a judgement

²⁰ “Netherlands | World Prison Brief,” prisonstudies.org, accessed April 20, 2019.

²¹ Wermink (2014): 4.

outside the pure facts of the case; an individual's risk to the community is not solely determined by the action that person took that landed them in court, but also by a number of other factors that would influence future action. The judicial system rarely has complete information regarding a person's life context, so to apply the focal concerns framework is to rely on stereotypes and preliminary judgements about an individual—almost always based on an incomplete picture of that person's life.

The focal concerns approach has become the dominant theoretical framework across the world for explaining sentencing decisions by judges. Though many countries do not employ the Netherlands' system of professional judges without juries, the same three primary concerns apply in most contemporary legal contexts. Research in the United States and other countries has supported the focal concerns perspective as a framework, finding that discriminatory sentencing does correlate with the offender characteristics that the framework predicts as indicators of stereotypical assumptions—especially race, sex, and citizenship²². The continued relevance of the approach, despite modern changes in criminal legal systems since its conception, indicates the staying power of unconscious prejudices that often go unnoticed.

ZSM-Process

The ZSM-method was introduced officially into the Dutch legal framework between 2011-2015, intended to incorporate a problem- and victim-oriented model of prosecution. The implementation of this method has become a key focus for the OM, and ZSM offices have been steadily opened since the OM formally adopted the 2015 guidelines. Though ZSM is typically understood to stand for “*zo spoedig mogelijk*,” a Dutch equivalent of ASAP, there are a number

²² Richard D. Hartley and Cassia C. Spohn, “Conceptualization and Operationalization: Sentencing Data and the Focal Concerns Perspective — a Research Note” in *The Southwest Journal of Criminal Justice* 4 (1), 2007.

of other motivations within the model: astuteness, selectivity, simplicity, collaboration, and community-orientation²³. The method was introduced as a roadmap for solving common cases in a way that does not require going to trial, hoping to settle the cases out of court as soon as possible. The impetus behind this policy switch was that the court system has been consistently overwhelmed and behind schedule. A consistent goal of the Dutch Ministry of Security and Justice has been to reduce case backlog and process new cases at more quickly; the ZSM-process is a large part of the path towards that goal. But less bureaucracy in processing cases is not the only reason for the ZSM-method, as it also provides partner organizations within the criminal legal system more of a formal codependency, increasing collaboration. This collaboration is facilitated by ZSM offices including representatives from all five cooperating organizations, who meet to discuss the context and future of each case as a group. However, the new system is often criticized because of the emphasis put onto the “rapid” portion, as less information is recorded than in traditional case-review methods. This leads to a potential for misinformation and an inherent lack of transparency. As is common with efficiency-minded governmental structures, the ZSM-process also comes with a potentially dangerous lack of accountability.

Colonialism and “Conditional Citizenship”

Dutch participation in the broader European colonial project is a core part of its historical and modern formation, but most *autochtoon* Dutch citizens would not consider it a key factor in the Dutch identity. The Dutch controlled the territory that is now known as Indonesia as well as Suriname and the Caribbean Islands of Aruba, Curaçao, Bonaire, Saba, Sint-Eustacius and Sint-Maarten—so to claim that Dutch colonialism has not been influential in its nation-building is

²³ LL M. F. Roshangar, “Victim Rights and Interests under the ZSM-Process,” Master’s thesis at Tilburg University, July 2015.

simply a willfully ignorant claim. The nation's self-conception is built upon profits from the Dutch colonial project, but there is a widespread cultural dissociation from acknowledging that source. Authors such as Gloria Wekker, Sara Ahmed, and Guno Jones have written extensively on the hierarchy of citizenship that emerged over the years during and after the Dutch colonial project, a hierarchy in which race, class, gender, and sexuality all intersect. This paper will utilize Claire Jean Kim's conception of "conditional" and "unconditional" citizens, which has been adopted into the Dutch context by Guno Jones. Kim defines conditional citizenship as "formal citizenship whose meaning is contingent upon variable forces in a given place and time [...]. Unlike unconditional citizenship typically enjoyed by whites, conditional citizenship is always on the verge of being compromised"²⁴. In the Netherlands, conditional citizens are the *allochtonen*, who despite owning Dutch passports and often only ever living in the Netherlands, are never considered fully Dutch because of their racially Otherized status.

Approaching this research through the lens of unconditional and conditional Dutch citizens allows for a more thorough expansion of the *allochtoon/autochtoon* discussion. By broadening the distinction between *allochtoon* and *autochtoon* into an exploration of the practical implications of automatic citizen rights as compared to gifted citizen privileges, I am able to delve into the complicated intersectionality of Dutch social and political hierarchies. In the Dutch context, minorities are not only discriminated against because of their *allochtoon*-ness, but also because of the myriad other demographic characteristics that are often associated, if not fully correlated with Otherness. Their Otherness is reified by their conditional citizenship status.

²⁴ C.J. Kim, "The Usual Suspects: Asian American as Conditional Citizens" in *The State of Asian America: Trajectory of Civic and Political Engagement. A Public Policy Report*. Los Angeles, CA: LEAP Asian Pacific American Public Policy Institute (2008): 159.

The constant risk of losing one's citizen privileges, combined with cultural perception as a threat, renders ethnic minorities stuck with little way out of their assumed dangerousness.

Chapter IV: Methodology

Language of Sources

This research required sources both in Dutch and English, many of which did not come with official translations. I translated all Dutch publications into English, with the help of Google Translate, a series of dictionaries, and kind strangers in cafes. Any point in this paper where I reference the importance of a specific phrase or shift in language has been vetted by at least one native Dutch speaker. Otherwise, my translations are rough and meant to allow me to garner an understanding of the numbers that the texts describe. The most important sources that I translated for this work are the 2015 prosecution guidelines, the 2019 guidelines update, and information from the *Rechtspraak*. However, all of the outside scholarship I am drawing from is published in English, and all of the interviews were conducted in English as well. I also attended a series of Amsterdam court hearings, all of which were conducted in Dutch. I took notes on the hearings as they were happening, but because no recording or phones are allowed inside the courtroom, I was unable to translate much of the conversation during the proceedings.

Accessing Data

I submitted a number of requests with the OM, *Rechtspraak*, and other government agencies for data regarding prosecutions and sentencing since 2015—all of which were denied. The intention for these requests had been to perform a quantitative analysis on individual's outcomes within the criminal legal system before and after the guidelines change, to examine the

impact (if any) the shift in framework had on those experiences. However, without access to data on individual cases, I relied upon publicly available aggregate numbers and legal documents describing the prosecution shift. This work-around is not a full solution, but rather a necessity given the limitations imposed by the bureaucratic hurdles that so often accompany criminal legal research. The aggregate numbers are mostly downloaded from the WODC and CBS websites, though some were sent directly from employees at the *Rechtspraak* and OM as consolation data after the denied requests.

Interviews

Similar to my requests for quantitative data, many of my requests to interview relevant experts were turned down. The OM declined to permit any of its prosecutors to be interviewed, and the judiciary information center declined to forward my request to judges. I reached out to a number of professors, researchers, law students, post-incarceration service providers, and other related professionals, most of whom declined to be interviewed or did not feel they could speak to the shift in prosecutorial framework. The interviews I did conduct were done in person, in English, and at the place of work of each interviewee. I recorded each interview, then transcribed the recordings. Any quotes included in this paper have been edited for clarity, but no content has been altered. The full transcripts and final paper were provided to interviewees, if requested.

Courtroom Observation

When sitting in on Dutch courtroom activities, I reported to the Amsterdam courthouse (*Rechtbank Amsterdam*), located in the Zuid neighborhood. I sat in the gallery of single-judge

sessions, intending to gain a better understanding of the final stages of the justice system in the Netherlands. I avoided panel-judge cases because of the delayed verdict. I always sat in the back row, on the right-hand side of the courtroom, so as to sit with the best vantage point to observe both the judge and the prosecutor during the court session. In court, the OM-delegate is referred to as the “*Officier van Justitie*” and sits in view of the defendant, slightly to the left of the judge(s). The officer’s table is always slightly separated from the judges’ table, a symbolic indication of the separation between the judiciary and executive branch. Notably, the prosecutor is not seated at the same level of the defendant and their lawyer, but rather raised slightly on the bench-level and seated facing the defendant. The prosecutor also stays seated in between cases, representing the OM through an entire session rather than individual cases.

My purpose in sitting in on court cases, despite not understanding much of the conversation during proceedings, was to observe in a practical sense the disparities that I am studying. Though my conclusions from the hearings are at best anecdotal, they provide an observed reality that supplements the interviews and data analysis I rely upon for the firmer conclusions.

Chapter V: Results and Analysis

This project began with an exploration of the intent behind the switch to prosecutorial guidelines, in order to compare this to its actual impact. In reading through the documentation of the 2015 guidelines, two key goals became clear: making the entire criminal legal process more efficient and facilitating more customization by prosecutors than the points system permitted. This section will examine the law itself, as well as the publicized data around criminal legal system involvement since the implementation of the new guidelines to examine their

effectiveness in accomplishing these goals. Conclusions about the change's impact will also be supplemented with interview data and personal observations from court hearings. Overall, this research has determined that despite the stated intentions of the guidelines shift, sentencing disparities and overall disparate treatment based on demographic characteristics persist in the Netherlands' criminal legal system. This treatment is influenced by and serves as a reification of the societal racism and xenophobia that permeates modern Dutch culture.

The twofold intention of the prosecution guidelines is summarized in the executive summary portion of the guidelines. The ZSM-process is clearly adopted as the route of implementation for the efficiency goal, formalizing the merging of the relatively new (but already established) ZSM offices with the OM mission. But the personalization aspect of the new prosecution framework is less obviously defined. The guidelines describe the intention of a criminal prosecution policy that combines "clear and recognizable starting points for each criminal offense (the framework)," with unambiguous "room for the public prosecutor to apply custom work"²⁵. This emphasis on personalizing each case to its individual suspect fits with the overall tailored sense of the Netherlands' criminal legal system, facilitated by its small prison population and low reported crime rate.

The ZSM method has been positively received by the legal community, but its implementation has not necessarily been correlated with practical positive change. As Dr. Hilde Wermink, professor of criminology at Leiden University, reflected on the ZSM-method's realization, "from a theoretical point of view you could argue that if it's really so quick, then it could be that with a time limit and an information limit, stereotypes could play more of a role [in

²⁵Ministerie van Binnenlandse Zaken en Koninkrijksrelaties. n.d. "Aanwijzing kader voor strafvordering en OM-aftoeningen." Beleidsregel. *Overheid*. Accessed April 13, 2019. Translated by author.

sentencing]”²⁶. This conclusion, though not intended as an empirical statement of fact, is supported by other data. In an interim review of the ZSM-method conducted by Utrecht University in 2015 (while the policy was being implemented through the new prosecution guidelines), respondents in focus groups who work with the ZSM-method were enthusiastic about the potential of the model, but consistently pessimistic about its enactment. This negative outlook is particularly evident in positions on the provision and sharing of information across organizational partners (the OM, police, probation organizations, Victim Support, and Council for Child Protection), where the amount of cases and intended speed of processing cases regularly prevent effective coordination and consideration of all relevant information²⁷. Speed, especially in the first years of implementation, acts the dominant focus of the ZSM-method and as such has been consistently questioned by those tasked with executing it in practice.

Aligning with the ZSM-method is the parallel efficiency goal of the new prosecution model. The number of registered crimes has been in consistent decline, but the clearing percentage of those crimes has continued to fluctuate around 25 percent both before and after the guideline implementation. The low percentage is not unusual, as cases may take more than one year to filter through the legal system. But changes to the percentage still matter, as the timing for processing cases has not been altered. As such, the efficiency of the new system is a nuanced discussion. The clearance rate actually declined in the years after implementation, from 27.3 percent to 25.4 percent²⁸. Because the OM is not the only body responsible for clearing reported crimes, it would be an incomplete story to only rely on this decline to determine that the ZSM-

²⁶ Hilde Wermink (Professor of Criminology at Leiden University), interviewed by Alia Nahra at Leiden University, The Netherlands, April 23, 2019.

²⁷ Simon Thomas, P.T.C. van Kampen, L. van Lent, M.J. Schiffelers, P.M. Langbroek, J.G. van Erp, “Snel, Betekenisvol en Zorgvuldig,” in *Montaigne Centrum*. Utrecht, NTH: Utrecht University (2016): 1-8.

²⁸ “Rechtspraak in Cijfers,” *wodc.nl*, accessed April 15, 2019.

method is not as efficient as it claims to be. Due to budget cuts, the OM is tasked with clearing cases more quickly with less staff and fewer resources. The ZSM-method's goal of efficiency, given the context of financial pressure, seems both well-intentioned and bureaucratically/fiscally motivated.

Concurrently, incarceration is becoming less and less popular as a solution to criminal activity in the Netherlands. The number of persons prosecuted in the Dutch justice system has declined steadily from 2013-2016 (the years before and after the guidelines change), from 206,328 to 186,386²⁹. This decline is in line with the decline in reported crimes and does not speak to much on its own. But when comparing this figure to the number of persons brought before the criminal court, it becomes evident that the prosecution service is handling fewer cases on its own (not sending to court) than before the guidelines change (Figures 1 and 2). 2014, right before the prosecution guidelines, saw 109,056 persons brought before the criminal court. But after the change, the number dropped to 105,481. This indicates that while about half of prosecuted cases went before criminal court in 2014, closer to 60 percent went before a judge after the guidelines were implemented. The increased ability of prosecutorial discretion seems to have facilitated, if not caused, a more judicially-minded approach to prosecution. Given that judges are the only parties able to impose a prison sentence, the increased reliance on court may have worsened sentencing disparities among Dutch and non-Dutch defendants being incarcerated.

Evaluating the success of the guidelines shift in creating a more personalized and fair criminal legal system becomes clearer when investigating the sentencing outcomes of racialized Others in the country. The CBS provides data regarding prosecution totals by "migration

²⁹ "Criminal Justice System Process: Netherlands Statistics and Data," dataunodc.org, accessed April 14, 2019.

background,” which divides defendants into Dutch and non-Dutch according to the same divisions that *allochtoon* and *autochtoon* supplied. Notably, it is not just immigrants who are considered “non-Dutch” in this description, but also anyone for whom one or both parents were born abroad. While the total number of decisions by the OM has declined in recent years, the number of decisions involving a non-Dutch defendant has remained stagnant (Figure 3).

Whereas a number of demographic and social factors influence criminal involvement, they are consistently correlated in the Dutch context with ethnicity—and these other factors are less often acknowledged in social discussions of crime than the ethnic labels³⁰. This indicates that the disproportionate involvement in the criminal legal system of those with an immigrant background is a valid indicator of discrimination that persists even after the guidelines change.

The increase in the percentage of cases brought to court seems to have benefitted Dutch defendants more than non-Dutch ones. Specifically, individuals with a non-Western migration background (those who are the target of crimmigration and Otherizing rhetoric) have been called before a criminal court at a slightly higher rate than before the guidelines shift, and remain an almost equal proportion of overall cases to Dutch defendants—despite embodying a significantly lower percentage of the population. Figure 4 compares court summons of Dutch and non-Dutch defendants before and after the guidelines implementation, demonstrating how disproportionately involved non-Western immigrants and their descendants are in the Dutch justice system. Overall, there has been a slight increase in the percentage of cases that are settled by prison sanction, indicating that more non-white defendants are being sent to prison than would have been before the guidelines change³¹. This is clear in that the overall number of court

³⁰ Marian Fitzgerald, “‘Race’, ethnicity, and crime” in *Criminology*, edited by Chris Hale, Keith Hayward, Azrini Wahidin, and Emma Wincup, 3rd edition. Oxford, ENG: Oxford University Press (2013): 327-347.

³¹ “Misdriften; opgelegde straffen en maatregelen 1994-2016,” opendata.cbs.nl, accessed April 15, 2019.

summons for non-Western individuals has stayed the same between 2013-2016, but the overall number of prosecutions (as well as court summons for Dutch individuals) has declined.

Therefore, non-Western immigrants embody a higher percentage of cases going to court after the guidelines implementation and as such likely explain the increase in prison sentences.

Though the prosecutorial guidelines framework intends to create a more efficient, tailored, and consistent criminal legal system, the switch has not actually lessened the disparities faced by minorities. Slightly more cases are being brought to court than in the past, where judges and prosecutors are expected to predict the dangerousness and culpability of defendants using past experience and social expectations. Especially given that ethnic minorities comprise a disproportionate percentage of individuals brought before the court, “court actors may rely not only on legal case characteristics but also on stereotypes linked to offender background characteristics such as ethnicity”³². These stereotypes are not currently being addressed within the Dutch legal system, as the perception of the professional judiciary and prosecution service is that the system has been structured to consider each case individually. The guidelines structure serves as further emphasis on this personalization and ensuing perception of equity, which is not actually reflected in the experiences of minorities in the criminal legal system.

The Dutch legal system post-prosecution guidelines also maintains its gendered assumptions. Women continue to be treated less harshly under the new framework. Because women are less likely to be perceived as capable of committing a crime, they are also less likely to become suspects or be arrested. Women do commit less crime than men, but they are also less likely to be caught because they are so often overlooked³³. The overall percentage of people

³² Wermink et al., (2016): 9.

³³ Azrini Wahidin, “Gender and Crime” in *Criminology*, edited by Chris Hale, Keith Hayward, Azrini Wahidin, and Emma Wincup, 3rd edition. Oxford, ENG: Oxford University Press (2013): 308-326.

prosecuted that are women has remained around 11 percent for the past five years, with the percentage of those women being sentenced to a fine, prison stay, or community service all also remaining around the same³⁴. This persists despite the fact that the Netherlands has reached gender parity among both prosecutors and judges in recent years (with many areas even employing more women than men), indicating that the patriarchal assumptions of the legal system are entrenched into the structures themselves rather than simply being the work of male court actors projecting onto feminine defendants³⁵. On the other hand, gendered social projections pull immigrant men even further into the negative outcomes of their criminal legal system involvement. Men with a migration background comprised 49 percent of registered male suspects in 2016, an obviously disproportionate number considering the overwhelming majority of native Dutch men in the country³⁶. This is a slight increase from the 46 percent in 2014, before the guidelines were implemented, though the overall number of registered suspects has declined steadily. Both trends denote how entrenched social presumptions around gender are within the Dutch legal system, regardless of equitable intentions.

Chapter VI: Discussion and Conclusion

This paper has demonstrated the continuity of the Dutch legal system's disparate treatment of certain demographic groups after the 2015 introduction of prosecutorial guidelines. Despite the more personalized approach outlined in the switch to prosecutorial guidelines, the societal persecution of minority individuals in the Netherlands continues to permeate its legal system. I am not aiming to accuse individual judges, prosecutors, or other court actors of

³⁴ "Criminal Justice System Process: Netherlands Statistics and Data," dataunodc.org, accessed April 14, 2019.

³⁵ "De Rechtspraak - Jaarverslag." *de Rechtspraak*. Accessed April 22, 2019.

³⁶ "Verdachten; delictgroep, geslacht, leeftijd en migratieachtergrond," opendata.cbs.nl, accessed April 12, 2019.

intending to discriminate against individuals in their charge because of their demographic characteristics, though there is evidence to suggest that that is the case for some. I am arguing, however, that the Dutch criminal legal system is not impervious to the nation's broader struggles with racism, xenophobia, and white exceptionalism. Though the legal system is often viewed as an independent, rational arbiter of justice, this research and the decades of scholarly analysis before it have demonstrated that this perception does not fit reality. Interviewees often reiterated that they believed there to be no disparities in the Dutch criminal legal system, around ethnicity or any other demographic factor. Individual well-intentioned people may not be setting out to pursue Dutch-appearing individuals less aggressively, or punish those with a migration history more severely, or send fewer woman-identifying defendants to jail, but these are the well-documented outcomes of this system. The prosecution guidelines posed an ample opportunity to reverse this trend, given the stated goal of personalization and the ZSM-framework's holistic approach, but instead the years after the guidelines switch have either perpetuated or intensified disparate experiences in the criminal legal system.

Despite this outcome, there is little awareness of the prosecutorial changes even years after they have taken effect. Searching for material about the impact of the change, both in Dutch and in English, resulted in little information aside from a single, short, and mostly speculative blog post by a law professor³⁷. When interviewing participants and reaching out to perspective interviewees, I was continuously struck by how few people knew there had been a change at all, or who offered no interest in understanding why the change was made or what effect it had even if they did know it existed. Part of this mentality seems to fit with my understanding of the Dutch adage "that's just how we do it here," which has been repeated to me

³⁷ Sigrid van Wingerden and Jakub Drápal, "Dutch prosecutorial sentencing guidelines: an inspiration for other countries?" in *Criminal Law and Criminology*. Leidenlawblog.nl, accessed April 10, 2019.

endlessly over the past few months. The guidelines are there, it doesn't matter why because they are already in effect and it doesn't matter what impact they have because they aren't going away. The problem with this mentality is partially that the guidelines themselves are clearly editable—the points system was replaced only 14 years after its implementation—so it is worth understanding why they exist the way that they do and whether or not they can be improved. But even more importantly, the mindsets of ignorance or blind acceptance fail to acknowledge the extent to which these guidelines shape individual lives. The perception that the changes do not matter is simply untrue, yet it endures.

Another common refrain I heard throughout this research was that the native Dutch simply don't commit crimes. Again, this is untrue. But it clearly leads to the view of crime as an immigrant problem, one that is brought into the country rather than produced within it. This mindset allows for the social demonization and rhetorical Otherization that have been so clearly documented by academics, but it also permits the legal system to maintain a stellar reputation among most white Dutch people, despite its obvious failures for the non-white Dutch population. Sitting in on court sessions, about three quarters of the defendants I saw were non-white. Only two were women. And for most of them, I was the only outside observer in the entire courthouse. Though I did not speak to people outside the criminal legal system for this research, I have no doubt that they would reaffirm the conclusion that I have drawn—that most people don't care about these changes or their impact because they don't see the system as needing to change.

Without access to individual case histories from the OM, I was unable to document decisively the relationship between individual crimes and the demographic characteristics that influence punishment. But I feel confident concluding that socioeconomic characteristics, which

in the Netherlands in particular are often correlated with ethnic categories, are used by actors within the legal system to explain away the racial stereotypes that motivate criminal legal system interactions. This motivation need not be intentional to be impactful; it even becomes more meaningful when unconscious because unconscious biases are more impervious to change. When judges decide on the individual cases argued before them, they may not be aiming to punish the minority individuals more harshly, but that is what happens all too often in the courthouse. Prosecutors may not intend to nominate more immigrants for maximum sentences than they do native-born Dutch people, but the new guidelines facilitate this abuse of discretion nonetheless. Police officers may truly believe that they are policing all neighborhoods fairly, but the fact remains that minority communities are more heavily scrutinized and feel overtly targeted. Research like this project should enable a more nuanced national conversation around prejudice and discrimination within the criminal legal system but will only succeed in doing so if people decide to pay attention.

This study is also only the beginning of the work that needs to be done in order to manifest social and legal change for the people of the Netherlands. Subsequent research should explore the perceptions of individuals within the criminal legal system (those who have been incarcerated, are incarcerated, or whose cases have been settled in another manner). It should investigate the impacts of criminal legal system involvement on future life outcomes, especially whether or not those impacts are different for individuals of different demographic backgrounds. There must be more focus on prosecutorial discretion, to examine how prosecutors make decisions in every step of the criminal process and not just the final charge. This scrutiny should also be applied to the ZSM-method, in order to document how effective and efficient the model actually is—and whether these goals are measured according to those employed within the

system or those experiencing it in their own cases. Simply put, the Netherlands is falling behind in its lack of self-examination of its criminal legal system. Despite the country's continuous denial of legal and social injustice, the criminal system is in need of a more just model to be truly successful. More research would enable this model to be crafted in an empirically justifiable way, and therefore should be a top priority for academics and prosecutors alike.

Bibliography

- Bonnet, Francois, and Clotilde Caillault. 2015. "The Invader, the Enemy within and They-Who-Must-Not-Be-Named: How Police Talk about Minorities in Italy, the Netherlands and France." *Ethnic and Racial Studies* 38 (7): 1185–1201.
- Boone, Miranda, and Philip Langbroek. 2019. "Problem-Solving Initiatives in Administrative and Criminal Law in the Netherlands." *Utrecht Law Review* 14 (3): 64–76.
- "Criminal Justice System Process: Netherlands Statistics and Data." dataunodc.org. Accessed April 14, 2019.
- "De Rechtspraak - Jaarverslag." *de Rechtspraak*. n.d. Accessed April 22, 2019.
- Eijk, Gwen van. 2017. "Socioeconomic Marginality in Sentencing: The Built-in Bias in Risk Assessment Tools and the Reproduction of Social Inequality." *Punishment & Society* 19 (4): 463–81.
- Fitzgerald, Marian. "'Race', ethnicity, and crime." In *Criminology*, edited by Chris Hale, Keith Hayward, Azrini Wahidin, and Emma Wincup, 327-347. 3rd edition. Oxford: Oxford University Press, 2013.
- Ghorashi, Halleh. "Racism and 'the Ungrateful Other' in the Netherlands." *Themrys/Intersecting* 27 (2014): 101-16.
- Hartley, Richard D., and Cassia C. Spohn. 2007. "Conceptualization and Operationalization: Sentencing Data and the Focal Concerns Perspective — a Research Note." *The Southwest Journal of Criminal Justice* 4 (1): 58-78.
- Hayes, Rebecca, Katharina J. Joosen, and CalvinJohn Smiley. 2018. "Black Petes & Black Crooks? Racial Stereotyping and Offending in the Netherlands." *Contemporary Justice Review* 21 (1): 16–32.

- Jones, Guno. 2016. "What Is New about Dutch Populism? Dutch Colonialism, Hierarchical Citizenship and Contemporary Populist Debates and Policies in the Netherlands." *Journal of Intercultural Studies* 37 (6): 605–20.
- Kim, C.J., 2008. "The Usual Suspects: Asian American as Conditional Citizens." P.M. Ong, ed. *The State of Asian America: Trajectory of Civic and Political Engagement. A Public Policy Report*. Los Angeles, CA: LEAP Asian Pacific American Public Policy Institute, 137–163.
- Koninkrijksrelaties, Ministerie van Binnenlandse Zaken en. n.d. "Aanwijzing kader voor strafvordering en OM-afdoeningen." Beleidsregel. *Overheid*. Accessed April 13, 2019.
- "Netherlands | World Prison Brief." *PrisonStudies.org* n.d. Accessed April 20, 2019.
- "Rechtspraak in Cijfers." *wodc.nl*. Accessed April 15, 2019.
- Roshangar, LL M.F. "Victim Rights and Interests under the ZSM-Process," Master's thesis at Tilburg University, July 2015. Print.
- Statistiek, Centraal Bureau voor de. n.d. "Criminaliteit en rechtshandhaving 2013." Webpage. *Centraal Bureau voor de Statistiek*. Accessed April 15, 2019.
- Statistiek, Centraal Bureau voor de. n.d. "Criminaliteit en rechtshandhaving 2016." Webpage. *Centraal Bureau voor de Statistiek*. Accessed April 15, 2019.
- Tak, P. J. P. *The Dutch Criminal Justice System*. Nijmegen, The Netherlands: Wolf Legal Publishers, 2008.
- Tonry, Michael. "Ethnicity, Crime, and Immigration." *Crime and Justice* 21 (1997): 1-29.
- Unnever, James D. "Ethnicity and Crime in the Netherlands." *International Criminal Justice Review*, April 23, 2018, 1-18.
- "Van Der Steur: New Code Is Given Form" n.d. *Government.NL* Accessed April 22, 2019.

“Verdachten; delictgroep, geslacht, leeftijd en migratieachtergrond.” opendata.cbs.nl. Accessed April 12, 2019.

Wahidin, Azrini. “‘Race’, ethnicity, and crime.” In *Criminology*, edited by Chris Hale, Keith Hayward, Azrini Wahidin, and Emma Wincup, 308-326. 3rd edition. Oxford: Oxford University Press, 2013.

Wekker, Gloria. *White Innocence: Paradoxes of Colonialism and Race*. Durham, NC: Duke University Press, 2016.

Wermink, Hilde Tonja. "Expanding the Scope of Sentencing Research: The Influence of Socio Demographic Offender Characteristics on Juvenile and Adult Prosecution and Sentencing Decisions in the Netherlands." *On the Determinants and Consequences of Sentencing*, 25-50. Leiden, NTH: Leiden University, 2014.

Wermink, Hilde Tonja (Professor of Criminology at Leiden University), interviewed by Alia Nahra at Leiden University, The Netherlands, April 23, 2019.

Wermink, Hilde, Brian D. Johnson, Jan W. De Keijser, Anja J. E. Dirkzwager, Joni Reef, and Paul Nieuwebeerta. "The Influence of Detailed Offender Characteristics on Consecutive Criminal Processing Decisions in the Netherlands." *Crime & Delinquency* 63, no. 10 (2016): 1279-313. Accessed March 13, 2019.

Wingerden, Singrid van, and Drápal, Jakub. 2018. “Dutch prosecutorial sentencing guidelines: an inspiration for other countries?” in *Criminal Law and Criminology*. Leidenlawblog.nl. Accessed April 10, 2019.

Wingerden, Sigrid van, Johan van Wilsem, and Brian D. Johnson. 2016. “Offender’s Personal Circumstances and Punishment: Toward a More Refined Model for the Explanation of Sentencing Disparities.” *Justice Quarterly* 33 (1): 100–133.

Wirtz, Coen, Joop van der Pligt, and Bertjan Doosje. 2016. "Negative Attitudes toward Muslims in The Netherlands: The Role of Symbolic Threat, Stereotypes, and Moral Emotions." *Peace and Conflict: Journal of Peace Psychology* 22 (1): 75–83.

Appendix

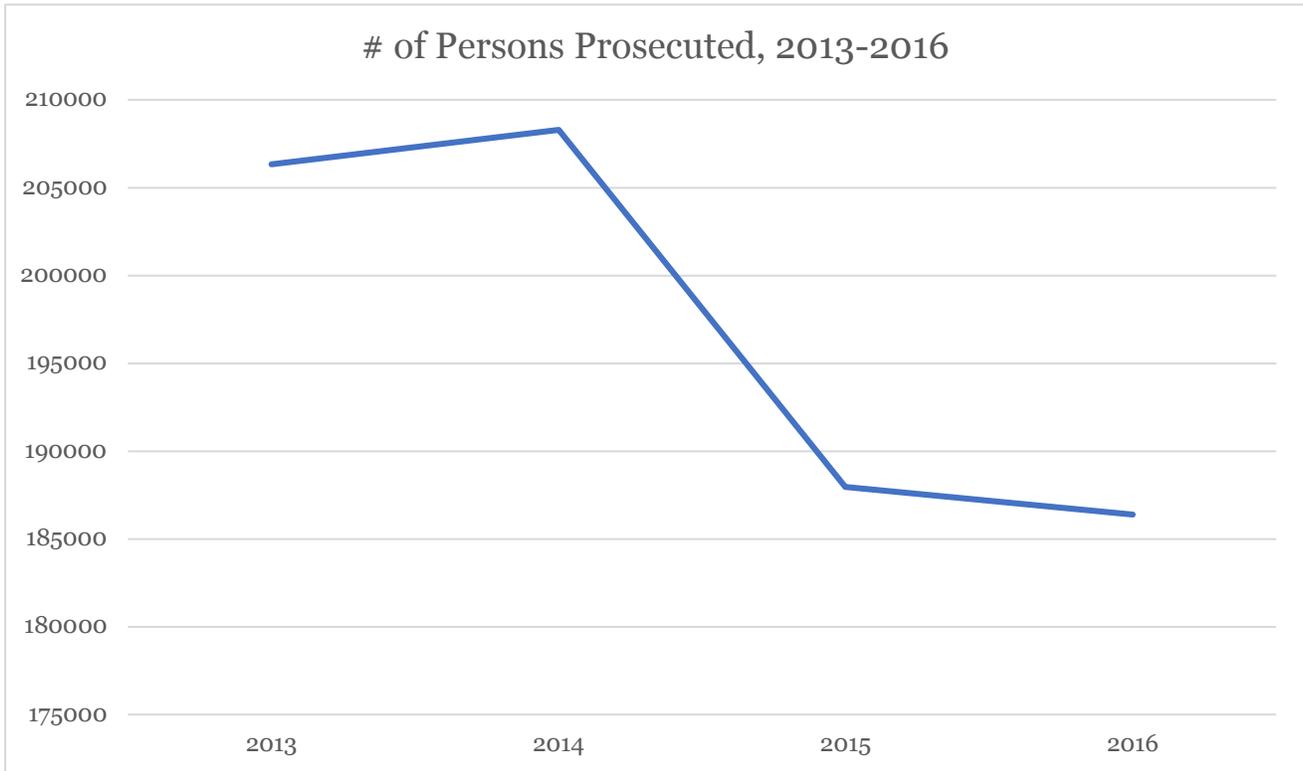


Figure 1

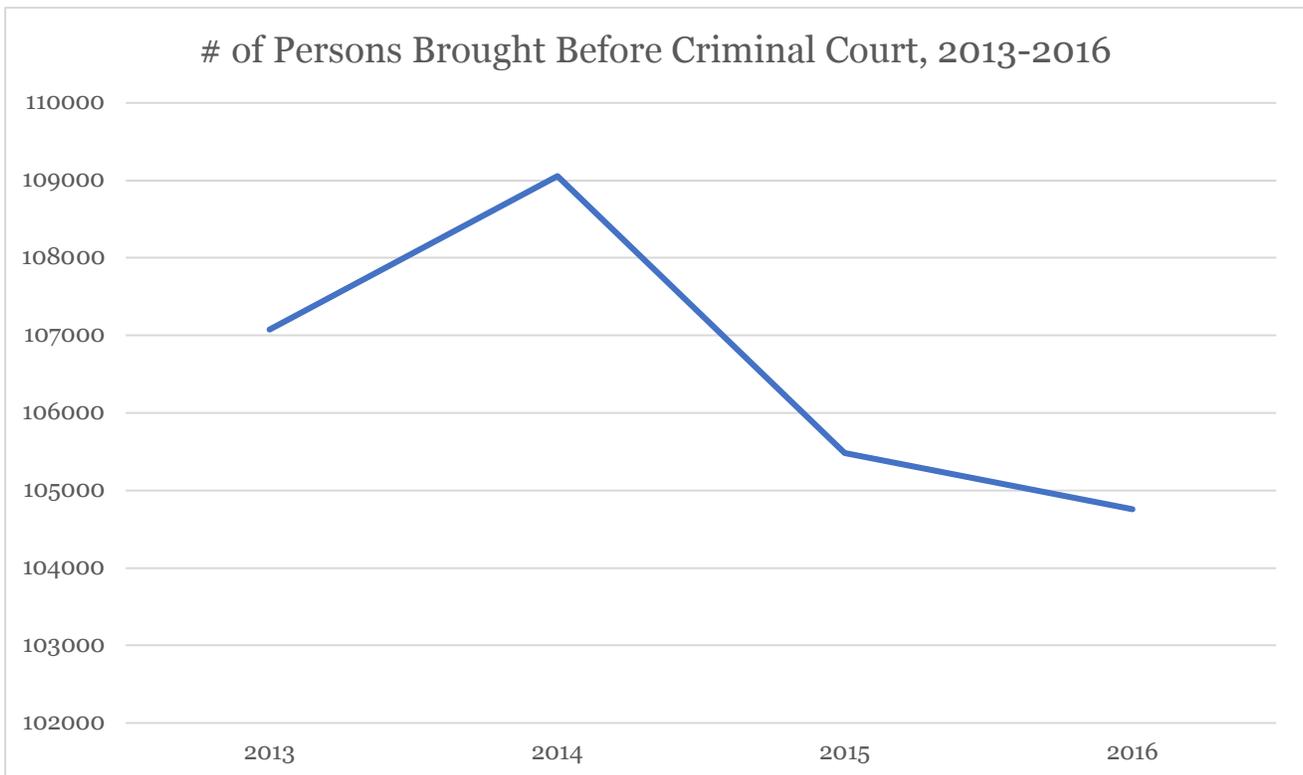


Figure 2

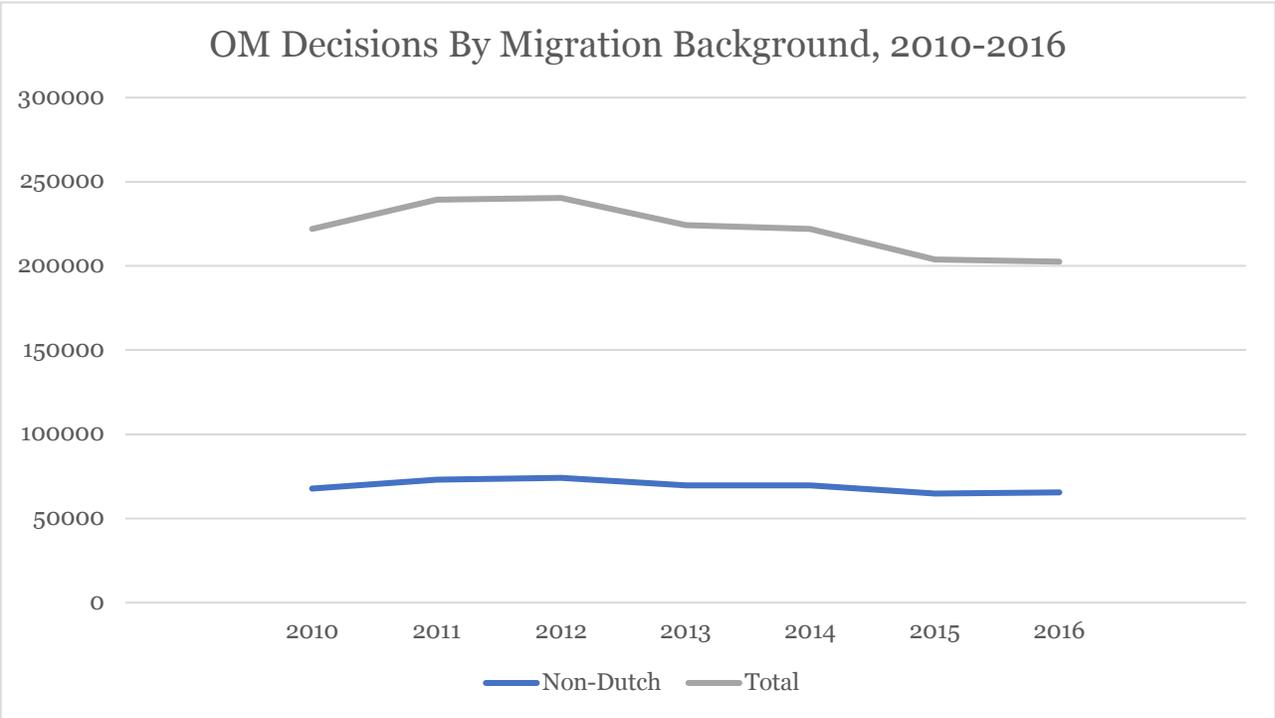


Figure 3

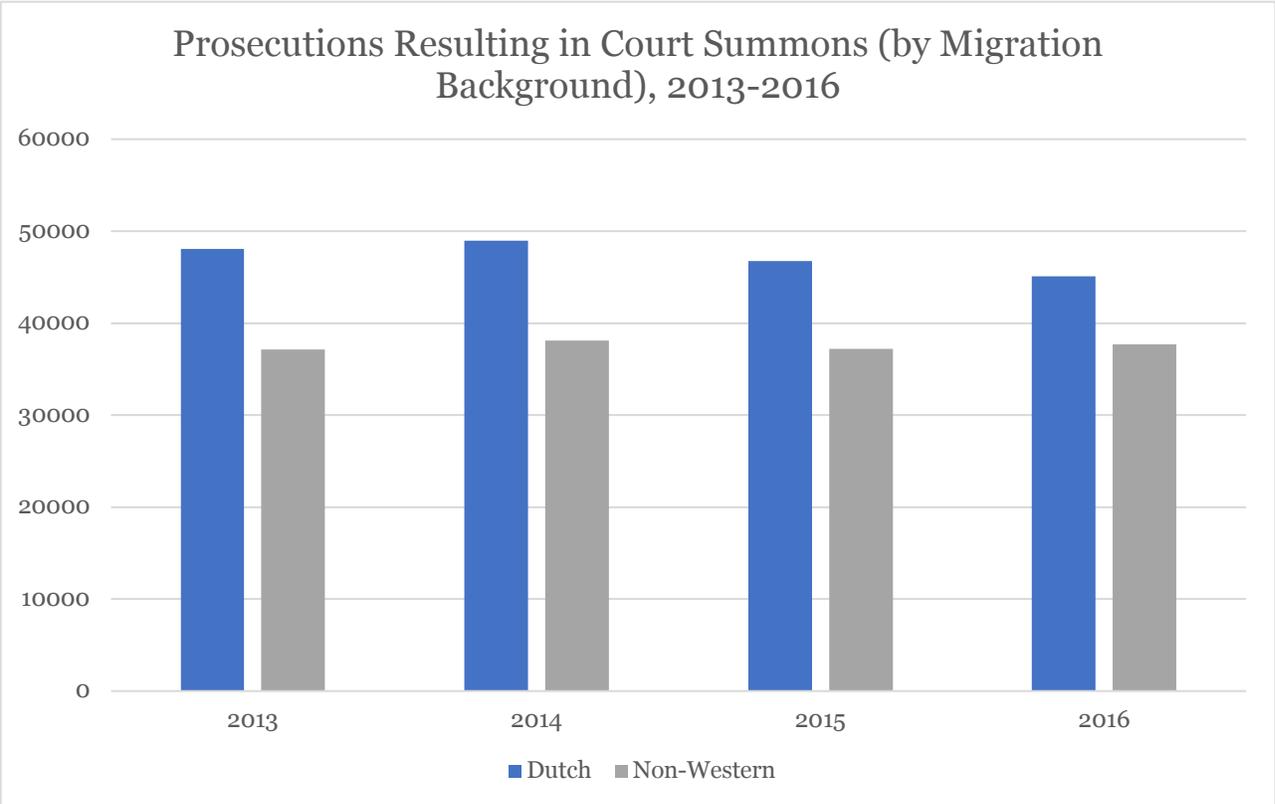


Figure 4