



INSTITUTIONAL RACISM IN THE DISCRETIONARY LEGALIZATION OF MARIJUANA

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Abstract

The purpose of this study is to enhance the understanding of institutional racism in the regulation of marijuana, identifying the role of state-level regulation as a more subtle form that facilitates the case-level discriminatory policing and adjudication already identified in the literature. Discretionary legalization of marijuana allows racist electorates and legislators to continue established practices of discretionary arrest and conviction for marijuana of discriminated racial groups, leaving white residents free from police scrutiny and enforcement. The study analyzes population data to identify patterns of legalization, racial composition and policing methods among the 50 United States. The results showed evidence of systemic institutional racism in the state-level discretionary legalization of marijuana, causing Black Americans to be increasingly more likely than White Americans to live where marijuana is illegal. States that maintain prohibition also tend to have traditionally higher racial disparities in marijuana arrest rates. The results strongly suggest that a federated system of marijuana regulation will be inherently racist, and that laws for enforcing drug usage must be universally applied to all states. The authors recommend policies providing constitutionally protected rights for adults to consume substances found to have acceptable potential consequences for abuse and health problems, of which research has shown marijuana to have.

Keywords

Institutional Racism, Discretionary arrest, Marijuana legalization

Introduction

Failure by many states to legalize marijuana, given legalization's high popularity in surveys, discredited potential harm and adoption by numerous states, even conservative states like Missouri and Montana, suggests that a prejudice-driven strategy to continue using discretionary policing and prosecution to oppress minorities exists (Ledford, 2018; Owusu-Bempah & Luscombe, 2021; Sanchez et al., 2020). Until statewide legalization of marijuana occurred, drug prohibition policies among states were relatively homogenous, with only minor differences in what drugs are prohibited and penalties for usage, precluding de jure policies from contributing to institutional racism. However, state-level legalization of marijuana, whether it involves medicinal use, recreational use, or both, creates significant structural differences between the states, where simply stepping over the state line can subject a citizen to search, arrest and extended incarceration. Critical Race theorists point out how minority males are disproportionately persecuted by the criminal justice system, largely based on the "way we define crime" (Valdez & Kaplan, 2019). Relatively benign behaviors of minority males are "energetically policed," and penalties for substances more commonly used by minorities tend to be more severe (Valdez & Kaplan, 2019). These dynamics fuel a vicious cycle of dehumanization, which alleviates the cognitive dissonance of discriminatory arrest and conviction. Higher arrest and conviction rates then reinforce the assumption that minorities are more likely to use illegal drugs, which leads to a vicious cycle of further prejudice, discrimination and dehumanization.

Research suggests that the likelihood a citizen is searched, arrested or incarcerated for drug-related crimes is related to their ethnic minority status and that this correlation is largely a function of race-based discretionary arrest by presumably racist law enforcement personnel. Our research identifies state-level marijuana deregulation as a unique form of institutional racism that operates similarly to the way discretionary arrest operates at the individual level, but at the macro level; a concept we describe as "discretionary legalization." Institutional racism

occurs at the micro-level when law enforcement officials exercise discretionary arrest of minorities for suspected possession and trafficking of marijuana, while ignoring or dismissing evidence of possession and trafficking when confronting White suspects. We argue that discretionary statewide regulation of marijuana constitutes institutional racism at the macro-level, in that it allows states with legacies of discretionary arrest of minorities for marijuana violations to continue this powerful tool of oppression, while facilitating freedom to enjoy marijuana recreationally and protection from discretionary arrest among White citizens in the more progressive states or in prohibitive states practicing discretionary arrest. Ironically, although the manifest rationale for legalizing marijuana is to reduce the opportunity for discretionary policing, the latent result of discretionary legalization is that African Americans and other historically oppressed ethnic minority Americans have become increasingly more likely than White Americans to live where marijuana is prohibited.

This study will test the grounded theory that certain states utilize discretionary legalization of marijuana to oppress minorities, specifically African Americans. If this theory is valid, we would first hypothesize that African Americans will be more likely to reside in the states that have not legalized marijuana, making them statistically more likely to be subjected to discretionary arrest, while Whites will tend to be more likely to live where marijuana is legal. Hypothesis 3 infers that if racial oppression is the manifest purpose for keeping marijuana illegal, we should also observe the highest discrepancies between Blacks and Whites for marijuana arrest in the states that have opted not to legalize. Hypothesis 3 will test whether states where marijuana is illegal have higher mean discrepancies between Whites and Blacks in likelihood of arrest for marijuana than states that have legalized. We will also analyze self-report usage data to test whether any discrepancies can be explained by higher usage patterns among Blacks. If higher usage occurs among minorities, it tends to negate theories of discretionary arrest to explain their higher rates of arrest and prosecution.

If Blacks are aware of discretionary enforcement, we would expect those living in regions with the highest proportions of Blacks to be more likely to favor legalization. Hypothesis 4 will test whether Blacks living in regions with the highest proportions of African Americans tend to be more likely to support legalization of marijuana than Blacks living in regions with the lowest proportion of African Americans. Finally, if Blacks tend to understand the oppressive nature of marijuana prohibition, then logically, African Americans who feel oppressed should be more likely to support legalization. Hypothesis 5 tests whether Blacks who feel discriminated against because of their race are more likely to support legalization than Blacks who do not feel discriminated against because of their race.

Literature Review

“Institutional racism is most simply defined as the process through which an institution produces racist outcomes” (Elliott-Cooper, 2023). Racism is framed as a system of structural inequalities, historically rooted in colonial contexts, that continues to manifest in contemporary society (Rosa & Díaz, 2020).

“The US started out as a settler-colonial slave colony, so the racial hierarchies of colonialism and the power used to enforce those hierarchies are relevant to US institutions” (Elliott-Cooper, 2023). The McPherson Report frames institutional racism as resulting from personal racism manifesting itself through racist individual behaviors and attitudes in the application of institutional laws and policies, not the laws and policies themselves (Elliott-Cooper, 2023). Institutional racism has always been a useful mechanism for exploiting minorities, with the police force providing the muscle for enforcing structural inequality and protecting White capital (Elliott-Cooper, 2023). It took a murder and overwhelming activism to finally get the British government to accept that institutional racism was a problem within the police forces and make attempts to address the problem. The resultant McPherson Report, however, failed to cite the historical colonialist culture and capitalism as sources of institutional racism and lacked engagement with politics and state power (Elliott-Cooper, 2023).

Critical Race Theory asserts that White people are socialized to believe that people of color are more likely to use illegal drugs and commit violent crimes. These dynamics “penalize law-abiding people of color and alienate the young” (Delgado & Stefancic, 2023). “Indeed, historical scholarship demonstrates that those consciousness-altering substances associated with racial and ethnic minorities are more likely to be defined as highly dangerous and to be the target of aggressive anti-drug efforts” (Beckett et al., 2005). Racist assumptions of normative crime by officers charged with protecting residents in minority neighborhoods often foster ambivalence toward enforcement, leaving the law-abiding residents subject to routine defacement and destruction of their property and invasion of their privacy (Delgado & Stefancic, 2023).

Díaz argues that institutional racism isn't solely a product of individual prejudice. It is also rooted in the structural dynamics of institutions, which can act as agents of oppression. Guerra's experience illustrates how race and class intersect in ways that led to his devaluation, and ultimately, his death. The societal response to his death reflected a broader pattern of dismissing the humanity of marginalized individuals, reinforcing the idea that certain lives are considered less valuable (Rosa & Díaz, 2020).

Tanovich (2006) argues that the prejudice-based targeting of Black populations in the drug war is a direct cause of high crime and low unemployment rates within Black enclaves, producing “structural violence” (Khenti,

2014). Researchers have ignored “slow violence,” which is “the structural violence of deprivation that serves to establish economic inequalities and maintain relations of racial domination and subordination” (Owusu-Bempah, 2017). The “symbolic legacy (slavery and Jim Crow) continues to influence how Blacks are viewed and treated by individuals and institutions alike.” This “has left many Blacks politically, socially, and economically marginalized from mainstream American society, which is manifested, in part, through increased participation in crime” (Owusu-Bempah, 2017).

Cultural racism shapes societal beliefs and norms, leading to discriminatory practices. Laws around cannabis have been criticized for disproportionately targeting African American men, reinforcing harmful stereotypes that associate them with violence and promiscuity (Solomon, 2020; Dogan et al., 2021). The War on Drugs, which began about 1970, was heavily directed toward enforcement and punishment, with declining expenditures for treatment and prevention. This War on Drugs greatly expanded both the public funding for drug policing and the prison population sentenced for drug offenses (Koch et al., 2016). Lynch, using Haney López’s (2000) conceptualization of institutional racism, argues that the War on Drugs is a manifestation of institutional racism, in that the War on Drug’s policies and tactics are affected by widely shared negative stereotypes of African Americans as drug offenders (Mitchell & Caudy, 2015). “Critics (often Democrats) argue that drug-testing welfare applicants is an unjust and unconstitutional stigmatization of needy individuals who are no more likely than other citizens to use drugs (National Conference of State Legislatures, 2015a; Sparks, 2003)” (Ledford, 2018). “Thus, the War on Drugs has had an unambiguously larger impact on African Americans and Hispanics than on their White counterparts.” Obama made some structural changes during his second term, which had some success in reducing disparity, but not eliminating it. Trump reversed the trend of reform, opting for a return to punitive approach and leaving the War on Drugs “largely in effect” (Koch et al., 2016).

Owusu-Bempah (2017) “draws upon intersectionality to present an historical analysis of the policing of African Americans. His article argues that the concept of dehumanization helps explain the structural inequalities that produce crime within African American communities and the presence of racism within law enforcement agencies.” Dehumanization is common in war, genocide and ethnic conflict, being necessary to justify the inhumane treatment needed to reach the desired outcome. It is also used to justify slavery, which was especially crucial in the US, given its manifest principles of freedom and equality all “human” men (Owusu-Bempah, 2017).

Marijuana prohibition is the result of the intersection of historical use of marijuana in Mexico, immigration of Mexicans to the US, racism and the Pharma-Medical Industrial Complex. A complementary force was the institutional inertia of drug enforcement agencies attempting to increase the demand for their services. Mexican culture is stigmatized by stereotypes through the mass media. The current projection is a “stereotype of the Mexican American as a highly criminalized gang member and consumer of drugs” (Valdez & Kaplan, 2019). Prohibiting the sale or possession of marijuana was generally a regional phenomenon present in states with large Mexican immigrant populations (Helmer 1975; Musto 1972)” (Valdez & Kaplan, 2019).

Bureaucratic inertia within federal and local enforcement agencies explains the need to “socially construct a drug problem as a justification for their own existence and funding” (Valdez & Kaplan, 2019). Anslinger (head of federal drug enforcement) “used marijuana-related police arrest documents to deceptively depict marijuana users as Latino and African American men who were violent armed robbers, murderers, and rapists (Chasin 2016)” (Valdez & Kaplan, 2019).

Poor fiscal health or precarious economic conditions in a state may create a demand for policy change as a way to improve a state’s fiscal health, of which marijuana use may be a target. Research by Berry and Berry (1990) showed that states are more likely to adopt policies like state lotteries if neighboring states have already done so. Glick and Friedland (2014) similarly found that states are most strongly influenced by the policy changes of their neighbors (Bradford & Bradford, 2017). A similar effect may be occurring with marijuana legalization, as money spent purchasing marijuana, as well as the workers and entrepreneurs producing and selling it, move from the prohibition states to the legalized states.

The earliest American drug laws were not to suppress or oppress racial minorities, but to prevent White kids from falling into the dangers of drug use and addiction. These fears were used, in addition to claims of the harm racial minorities on drugs would bring, by later anti-drug crusaders like Harry Anslinger. Although Anslinger privately expressed racist attitudes regarding drug use, he wanted to avoid being accused of racism and felt that people were more alarmed by the alleged effect on White youth than racial minorities or the crimes they might commit under the influence (Fisher, 2021).

There is a tendency for partisans to adopt the position of their party on legalization, which tends to hinder policy change, especially under intense partisanship. Generally, Democrats tend to support legalization, while Republicans tend to oppose it. “Inconsistencies between federal and state policies were attributed to partisanship, political opportunism, and regional variations in advocacy and research focus (Denham, 2019).

“Two reports from Colorado (Gettman, 2015; Reed, 2018) found large decreases in marijuana arrests after legalization of adult possession and the opening of the marijuana retail market, but the overall disparities for African Americans persisted” (Firth et al., 2019). “Marijuana arrest rates for African Americans 21 years and older

dropped after legalization of possession, and the absolute disparities decreased. However, the relative disparities grew from a rate 2.5 times higher than Whites to 5 times higher after the retail market opened (Firth et al., 2019).

The lack of evidence of differential drug use strongly suggests that the “biased drug enforcement theory” better explains the discrepancies in arrest and conviction between Blacks and Whites (Koch et al., 2016). Blumstein (1993) noted that higher police presence in predominantly Black neighborhoods contributes to increased arrest rates. These neighborhoods often have higher crime rates, which result in more frequent interactions with law enforcement personnel (Nguyen & Reuter, 2012). “Thus, to effectively study and assess racial profiling outcomes, it seems necessary to understand the processes that lead to the conditions that produce the racial conflict in the first place. (Paulhamus et al.)” (Owusu-Bempah, 2017).

Race has long been recognized as playing a critical role in policing decisions (D’Allesio & Stolzenberg, 2003; Donohue & Levitt, 2001; Hill & Crawford, 1990) (Nguyen & Reuter, 2012). Many of the aggressive policies and tactics utilized in the War on Drugs, such as “street sweeps” and consent searches, affect African Americans disproportionately, while relatively rarely affecting Whites (Mitchell & Caudy, 2015). “Police are the first point of contact for those entering the criminal justice system, and the high level of discretion officers have over whether or not to enforce minor drug possession offences amplifies the potential for race-based decision-making” (Owusu-Bempah & Luscombe, 2021).

Legalization had an overall positive social impact, but more so for Whites than Blacks. “The reason that racial disparities increased after marijuana legalization appears to be due to the fact that African Americans were more likely to be arrested for marijuana distribution/selling than Whites” (Firth et al., 2019).

Individual-level factors are related to the personal circumstances and behaviors of those involved in marijuana transactions. According to Caulkins and Pacula (2006), the majority of marijuana transactions occur indoors, and most people acquire it from friends or relatives, which generally presents less risk of arrest (Nguyen & Reuter, 2012). However, Ramchand et al. (2006) found that Blacks are more likely to purchase marijuana outdoors and from strangers, which increases their risk of arrest. Despite this, their findings suggest that, even if purchase patterns were equalized, Blacks would still be arrested for marijuana possession at twice the rate of Whites, implying that purchase patterns account for only a portion of the racial disparity (Nguyen & Reuter, 2012). Latino drug users are also more likely than White drug users to obtain those substances in public spaces that are visible to the police, which contributes to their higher arrest rate (Beckett et al., 2005). “Access to private and more discrete locations may be a luxury enjoyed disproportionately by privileged White drug users” (Owusu-Bempah & Luscombe, 2021). This suggests that some individuals turn to cannabis as a coping mechanism for race-related stressors (Assari et al., 2019; Gerrard et al., 2012; Parker et al., 2017; Nguyen & Reuter, 2012).

Studies also show that males and African Americans are over-represented in the diversionary programs. African- and Latino-Americans were less likely to complete the programs, and the ones that did took longer to complete it. There is concern that these programs may be increasing minority men’s exposure to the criminal justice system, primarily via officers using discretionary authority to refer minority suspects to a diversionary program, while issuing only a warning to majority suspects, for the same marginal offenses. Offenders are often required to bear the costs of diversionary programs, including transportation to sessions and online enrollment, meaning it may not be as common an option for low-income defendants, who will be disproportionately minorities (Sanchez et al., 2020).

A self-fulfilling prophecy occurs as disparate arrest and incarceration of minorities creates the impression of disparate usage, thus justifying disparate investigation, arrest and incarceration, which then more often wrongfully exposes minorities to the dangers, social disruption and disintegration and negative socialization of incarceration (Koch et al., 2016).

There are also concerns that Blacks are being discriminated against regarding opportunities to exploit the profitable legal marijuana industry (Firth et al., 2019). Those with criminal records are not eligible. Participation in the legal marijuana trade, unlike in the illegal trade, takes significant startup capital to which Whites are more likely to have access (Owusu-Bempah, 2021). Collateral consequences of drug convictions further entrenched this cycle, stripping individuals of voting rights, jury service, and access to government benefits like education loans. This disenfranchisement effectively marginalized urban African American communities, preventing them from rebuilding their lives and maintaining a perpetual underclass status within American society throughout the War on Drugs (Gauthier, 2023).

Many still blame the higher propensity to crime on inherent racial characteristics. Over-policing only exacerbates the problem, resulting in a higher proportion of Black offenders being prosecuted, which then reinforces the assumption of inherent causation (Owusu-Bempah, 2017). “The indignity of street searches or raids, the fear of violence and the frustration of neglect all mark the power policing has over the lives of everyone, but particularly the Black working class” (Elliott-Cooper, 2023). In addition to decriminalization, the expungement of previous convictions, increased employment and economic opportunities and investing in the communities that are more harmed by prohibition are necessary elements of any effort to mitigate or eliminate the disparity of sanctions that have historically occurred during prohibition. This means that, in addition to the potential harms of living where marijuana is illegal, Blacks are less likely to enjoy the benefits of the efforts to compensate users for past

harms done by prohibition (Owusu-Bempah, 2021). “This commentary calls for an immediate dissolution of policies regulating the War on Drugs as the first step in remedying the injustices experienced by Black Canadians” (Khenti, 2014).

The rationale offered for legalization revolves around ending the decades of minority oppression that had been well-documented in the research findings, but also an argument that prohibition was wasting valuable resources and needlessly causing people of all races social harm, either by imposing criminal sanctions that would harm the defendant’s future prospects for education and employment or their personal health through ingestion of contaminated product (Firth et al., 2019). Reducing racial disparities in arrest rates was one of the manifest purposes of legalization, with activists being well-aware of the numerous social repercussions of arrest and conviction (Adinoff & Reiman, 2019; Ledford, 2018). As the 21st century approached, public sentiment turned against the War on Drugs, with many Americans recognizing its failures. A shift towards treatment and rehabilitation began, with various states implementing alternative policies. However, despite some reforms, communities still faced long-lasting damage from past policies, resulting in persistent systemic inequalities. Overall, the War on Drugs exacerbated socio-economic challenges for African Americans, creating a lasting underclass and reinforcing racial disparities in the criminal justice system (Gauthier, 2023; Meize et al., 2024). After legalization in Colorado, White arrests dropped 51%, compared to only 33% for Latinx and 25% for Blacks (Owusu-Bempah & Luscombe, 2021).

Given that the policy of prohibition has remained unchanged since the early 1900s and that the only softening of the penalties occurred when Whites began to suffer them, it seems reasonable to suspect that the enforcement of marijuana prohibition today has inherited past racial animus in an unconscious way. Unconscious bias training often reinforces this ignorance by framing racial discrimination as an inevitable human trait rather than a systemic issue, thus absolving institutions and individuals of responsibility. This approach leads to a defensive response known as “White fragility,” where even minimal racial stress triggers protective behaviors that maintain the racial status quo and ignore the realities of racism (Tate & Page, 2020). The concept of “Whiteness,” as described by Yancy (2015), refers to a social and psychological reality for White individuals that is perceived as natural, yet is fundamentally oppressive. This understanding of racism extends beyond overtly racist beliefs to encompass systemic and institutional factors that perpetuate racial inequalities. Whiteness operates through an “epistemology of ignorance,” wherein racism is either denied or trivialized, allowing for a continued normalization of White supremacy (Tate & Page, 2020). The discussion on unconscious bias in equality, diversity, and inclusion (EDI) training critiques the way this concept is framed. The prefix “un-” in “unconscious” implies a denial of racism, suggesting that such biases are an absence of awareness rather than an active perpetuation of systemic issues. This type of framing risks normalizing unconscious bias as an inevitable aspect of human behavior, thereby downplaying the reality of racism and allowing White supremacy to persist (Tate & Page, 2020).

Critical of the orientation of the “bourgeois committee” charged with addressing racist policing, the Black Unity and Freedom Party (BUFP) “argued that a police racism, which was rooted in British colonialism, would continue unabated if the liberal reforms for diversity drives, police complaints tribunals, cultural training and control of ‘certain publications’ were implemented.” They maintain that integrating minority police officers into the force will not correct the problem and has been tried with little results. The minority officers simply enculturate to the institutional norms (Elliott-Cooper, 2023). Strategies to end racial profiling and mandatory minimum sentencing, as well as alternatives to incarceration for drug offenses and job and housing opportunities for released inmates, are needed to address institutional racism in the criminal justice system (Koch et al., 2016). Some jurors and judges practice nullification as a means to “combat the disproportionate incarceration of young Black men.” But nullification is relatively rare and would intuitively be more common in states with low proportions of Black residents (Delgado & Stefancic, 2023).

Methodology

Data Sources

Data Availability Statement: Links to all data are available via the links below.

Multiple secondary data sources were utilized to achieve the research objectives. The statewide population by race data were taken from the U.S. Census Bureau’s Annual Community Survey (ACS) for the years from 2008 to 2022. www.census.gov Data on the legalization status of marijuana for the 50 U.S. states for the years 2008 to 2022 were sourced from the National Organization for the Reform of Marijuana Laws (NORML). <https://norml.org/laws/legalization>

State-level measures of times Blacks are more likely to be arrested for marijuana-related offenses than Whites in 2018 were obtained from the American Civil Liberties Union website (<https://graphics.aclu.org/marijuana-arrest-report/>).

Survey data on self-reported use of illegal drugs by race, support among African Americans for legalizing marijuana by regional racial composition and support for legalization of marijuana among African Americans by whether feel discriminated against because of race were obtained from the General Social Survey (GSS) for the years 2000 – 2022. (<https://sda.berkeley.edu/sdaweb/analysis/?dataset=gss22rel2>).

Statistics

The percentage of people living in states where marijuana remains illegal was calculated for both Black and White populations. The percentage of the Black population living where marijuana is illegal is calculated by dividing the total Black population within illegal states by the total population of those states, times 100. Similarly, the percentage of the White population living where marijuana is legal was calculated by dividing the total White population within legal states by the total population of those states, times 100.

The ratio of “percent Black to percent White residents living in states where marijuana remains illegal” was calculated by dividing the percentage of the Black population living where marijuana is illegal by the corresponding percentage for the White population living where marijuana is illegal (as calculated above). Similar statistics were computed for the ratio of percentage White to percent Black living in states where marijuana is legal.

Analysis of variance methods were used to compare the distributions of the percent of the population Black, as well as the percent of the population White, for states where marijuana is illegal, legal for medical purposes and legal for recreation.

The mean times more likely that Blacks are arrested for marijuana compared to Whites is calculated for each category of legalization. For each category of legalization, a mean statistic was calculated by summing the times more likely to be arrested for each state in the category and dividing by n. This statistic does not control for state population size, so the statistic will be biased towards the measures of the smaller states.

Survey Variables

Use of Illegal Drugs: 1575. “Now, I’m going to ask you about various events and conditions that happen to people. I’m interested in those that happened to you during the last 12 months, that is since (CURRENT MONTH), 2003. As I ask you about the specific events, please think carefully, so I can record things accurately. a. First, thinking about health related matters, did any of the following happen to you since February/March, 1990? 5. Used illegal drugs (e.g. marijuana, cocaine, pills)” Yes/No/IAP/NA

Race: “What race do you consider yourself?” Black/White/Other

Support for Legalization of Marijuana: “Do you think the use of marijuana should be legal or not?” Legal/Not Legal/IAP/DK/NA

Region of Interview: New Atlantic/Middle Atlantic/E.N. Central/W.N. Central/South Atlantic/E.S. Central/W.S. Central/Mountain/Pacific

Respondent Feels Discriminated Against Because of Race: On the average (negroes/blacks/African Americans) have worse jobs, income, and housing than White people. Do you think these differences are: a. Mainly due to discrimination? Yes/No/Don’t Know/IAP/No Answer

Analysis Procedure

In order to test the hypotheses, several statistical and analytical methods are applied. Concentrating on changes over time as additional states passed legislation to legalize medicinal marijuana, recreational marijuana or both, Hypotheses 1 and 2 are tested using trend analyses and Analysis of Variance (ANOVA). Hypothesis 3 is tested by comparing the mean times more likely Blacks are arrested for marijuana for the states within each legalization category. We also use crosstabulation to test whether higher arrest rates for Blacks can be explained by differential usage. Hypotheses 4 and 5 are tested by cross-tabulation of GSS data to assess whether African Americans residing in states with high proportions of Blacks are more likely to support legalization than African Americans residing in states with low proportions and whether African Americans who feel discriminated against are more likely to favor legalization, respectively.

Results

Hypothesis 1: African Americans will be more likely to live in states where marijuana use is totally prohibited than White Americans.

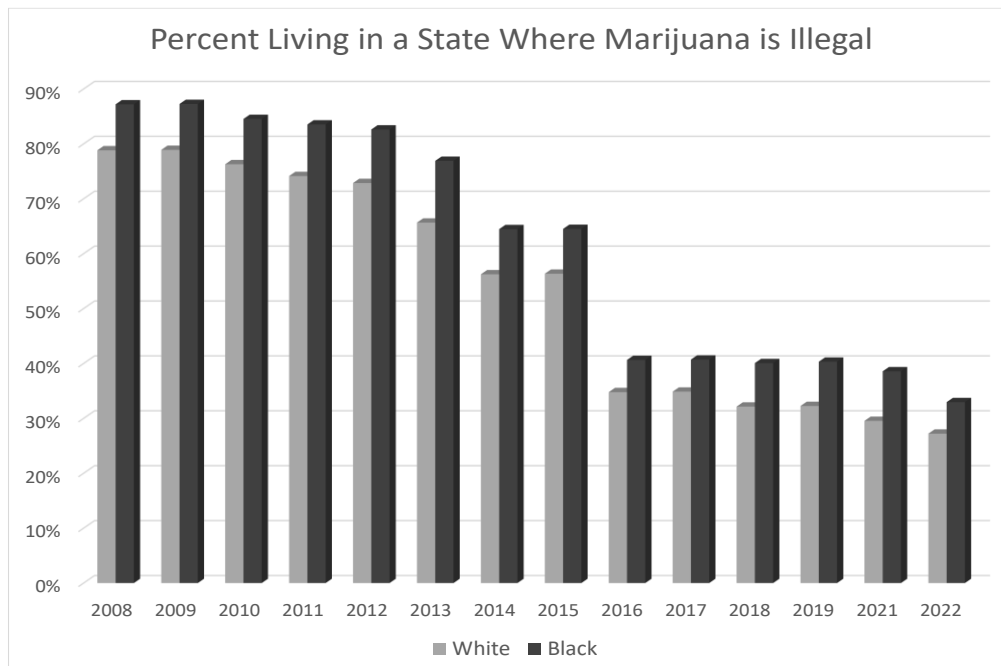


Figure 1 (U.S. Census 2008 - 2022)

Figure 1 shows the percentages of White and Black Americans who live in a state where marijuana is totally illegal, with Blacks being consistently more likely. There was an overall tendency for the percentages of both Black and White Americans to decrease between 2008 and 2022. Several states legalized either medical, recreational or both in 2016, causing a precipitous drop in the proportion of Blacks and Whites living where marijuana is illegal. One exception occurred in 2016 and 2017, when the discrepancy declined. This suggests a tendency for some states with relatively large populations of Blacks to have legalized marijuana during those years, causing the decline in the differences. However, the ratio between the proportion of Whites and Blacks living where marijuana is illegal is a more valid measure of proportional difference. Figure 2 analyzes the trend in the ratio of percent of Black and White Americans living where marijuana is illegal.

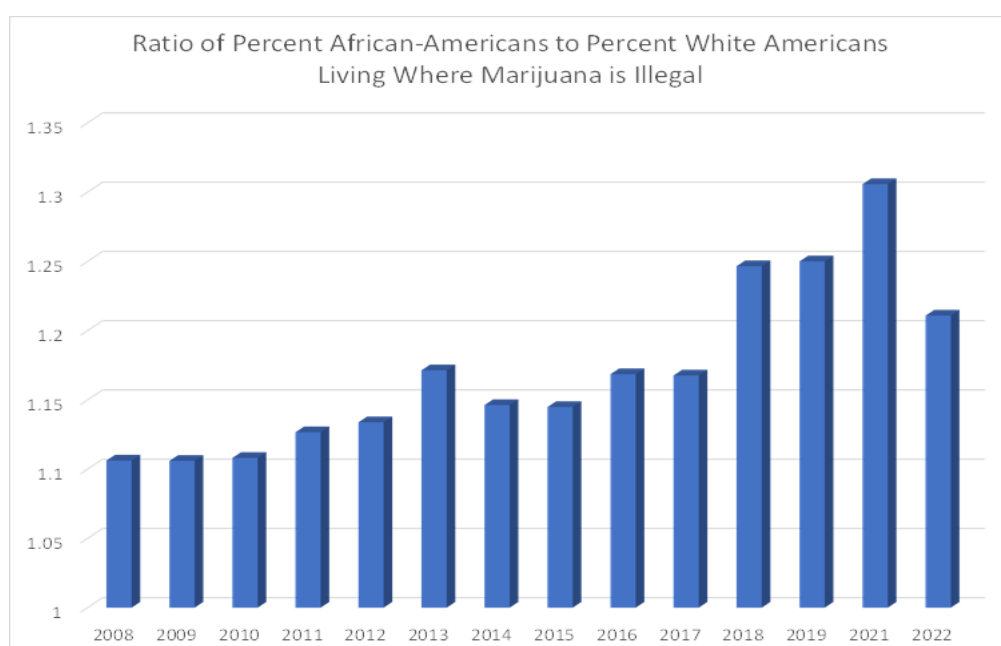


Figure 2 (U.S. Census 2008 - 2022)

Figure 2 shows a generally increasing ratio of percent of Blacks to percent of Whites living where marijuana is illegal between 2008 and 2021, with a significant drop in 2022. The overall decline in the number of states where marijuana is illegal, together with the subsequent differences in the percentages remaining stable, caused a significant increase in the ratio of these percentages. This means Blacks have been more and more likely to live where marijuana is illegal, as the more progressive and largely White states legalize marijuana. Interestingly, a drop in 2022 suggests that several states with higher proportions of Blacks legalized marijuana that year. Similarly large increases in 2018 and 2021 suggest that several states with a high proportion of White residents legalized marijuana during those years.

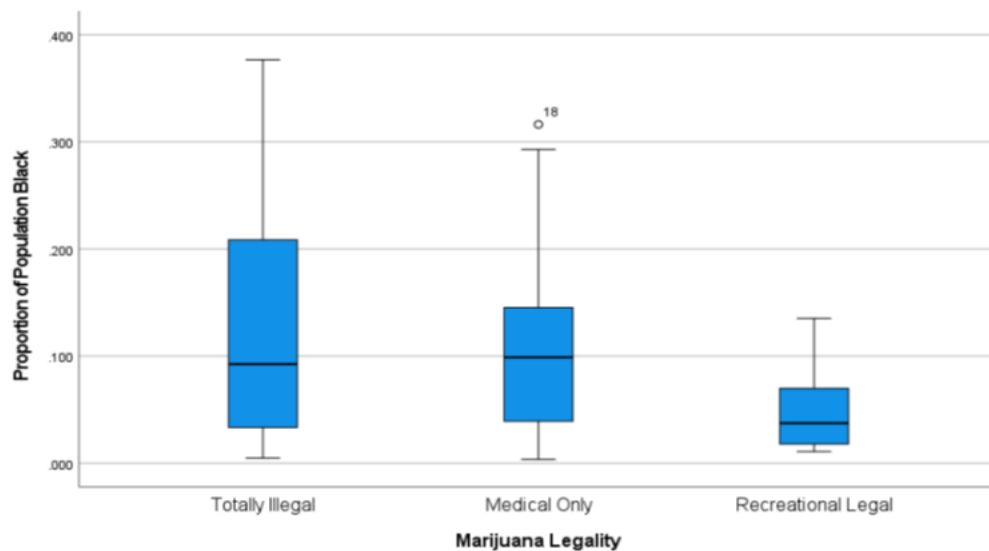


Figure 3 (U.S. Census 2022)

Figure 3 shows the analysis of variance for the percent of Blacks in the state within the three legalization categories. The upper quartile for the totally illegal states has the highest proportion of African Americans. These include Mississippi (37%), Georgia (31%), Alabama (26%), South Carolina (26%), and North Carolina (21%). None of the states that have fully legalized marijuana have high proportions of African Americans. The relative similarities of the Totally Illegal and Medical Only distributions support the literature explaining the legalization of medicinal marijuana as an effort to normalize recreational use or to allow affluent Whites to obtain prescriptions from doctors sympathetic to their patients' desires for recreational use. The data analysis shows strong support for Hypothesis 1.

Hypothesis 2: White Americans will be more likely to live in states where recreational marijuana use is legal than African Americans.

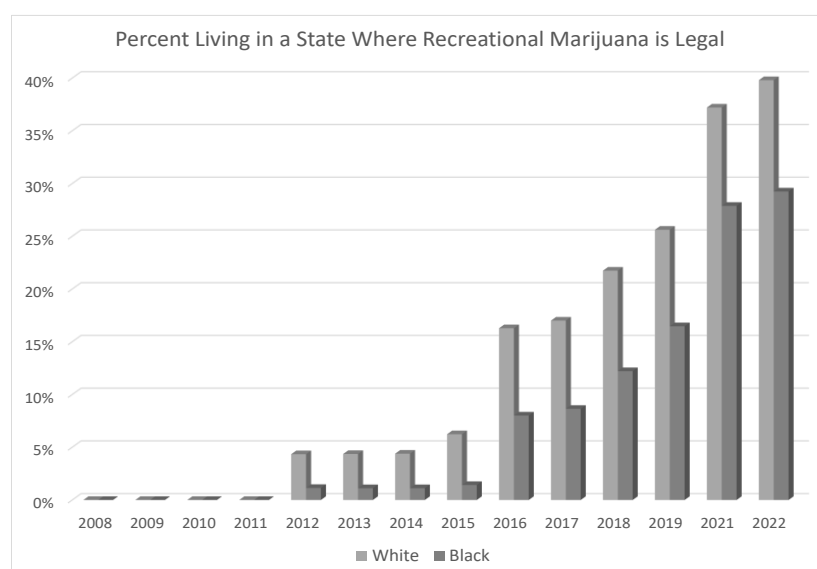


Figure 4 (U.S. Census 2008 - 2022)

Figure 4 shows the percentage of White and Black Americans who live in states that have legalized recreational marijuana between 2008 and 2022. The overall percentage increased as more states gradually legalize recreational marijuana over the years. There was no growth until 2012 because no states legalized recreational marijuana before 2012. Between 2012 and 2015, White Americans were much more likely to live in states legalizing recreational marijuana than their Black American counterparts, a development that created a noticeable gap between the two groups that greatly increased in 2016. The significant increase in states legalizing marijuana in 2016 caused the percentage gap to increase dramatically, but inequality can best be assessed by analyzing the ratio of percent White to percent Black living where marijuana is legal, which sets the stage for the next analysis.

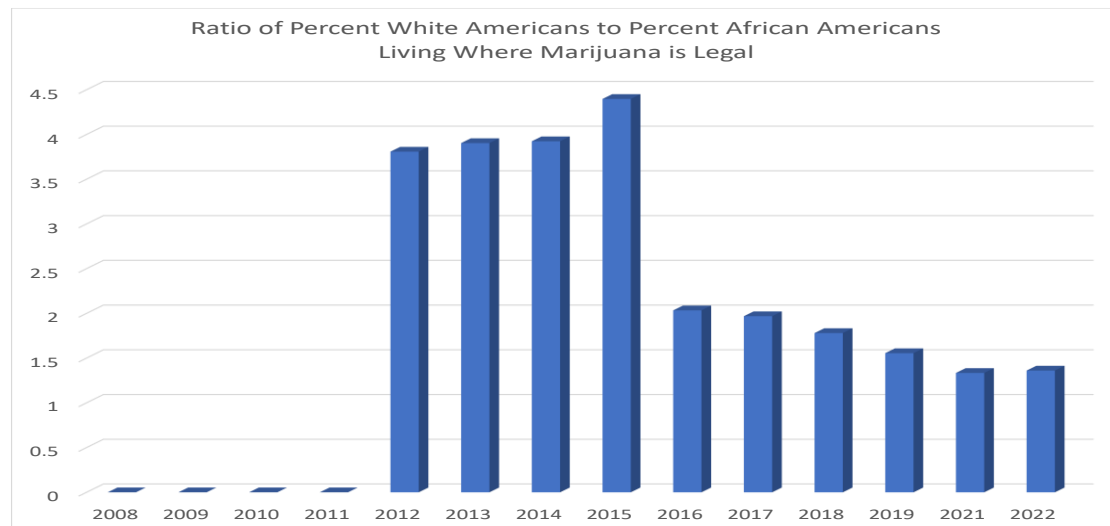


Figure 5 (U.S. Census 2008 - 2022)

Figure 5 illustrates the ratio of the percent of White to the percent of Black Americans who live in states where marijuana is legal. From 2008 until 2012, this ratio was zero, as no states had legalized recreational use until 2012. In 2012, the ratio is relatively high and peaked in 2015, indicating that Whites were much more likely to live where recreational use of marijuana was legal during the first four years of legalization.

In 2016, the ratio dropped drastically, then began a linear decline as more and more states with higher percentages of Blacks began legalizing recreational marijuana. This is a positive trend, suggesting that Blacks in several states were becoming less likely to be subject to discretionary arrest. In 2022, the ratio stabilized, suggesting that most of the states with low proportions of Blacks had legalized marijuana, with the ratio mostly reflecting the states with large Black populations that had maintained prohibition.

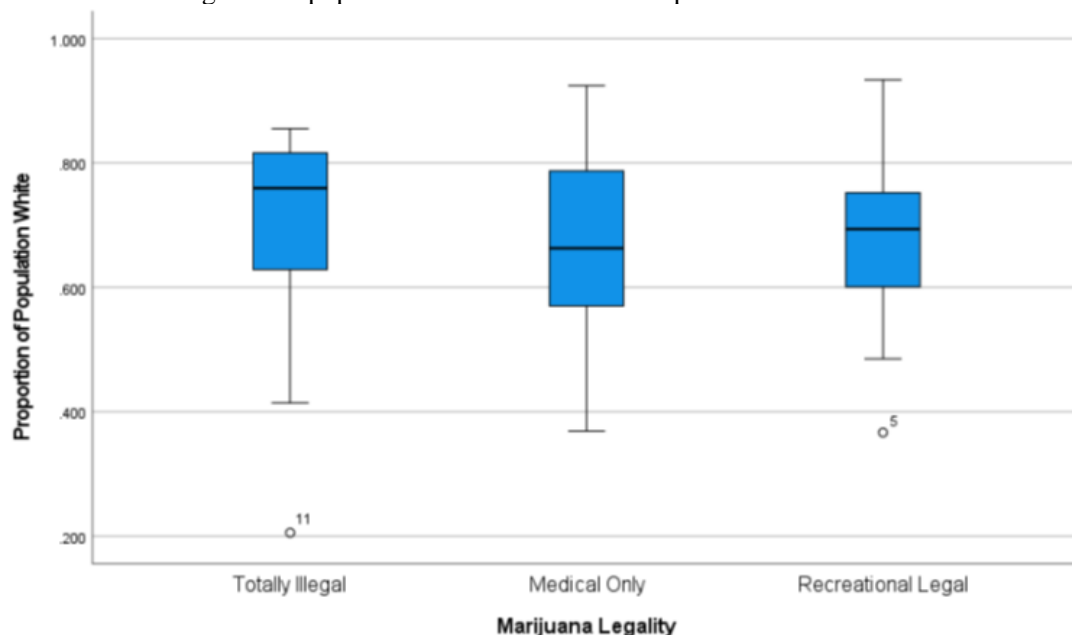


Figure 6 (U.S. Census 2022)

Figure 6 shows the analysis of variance of percent of Whites in the state for the three legalization categories. Here, we see that the lower quartiles for states where marijuana is totally illegal or only allows medical use contain the lowest proportions of Whites. These include Hawaii (19%), California (34%), New Mexico (35%),

Texas (39%), and Nevada (44%). None of the states where marijuana is totally illegal have White populations higher than 85%, whereas 20% of the states where marijuana is legal have White populations greater than 85%. The relative similarities of the Medicinal Only and Recreational Legal distributions support the literature that attributes legalization of medicinal marijuana to an effort to normalize recreational use or to allow affluent Whites to obtain prescriptions from doctors sympathetic to their patients' desires for recreational use. The data analysis shows strong support for Hypothesis 2.

Hypothesis 3. States where marijuana is illegal will have higher discrepancies between White and African Americans in likelihood of arrest for marijuana than states where marijuana is legal.

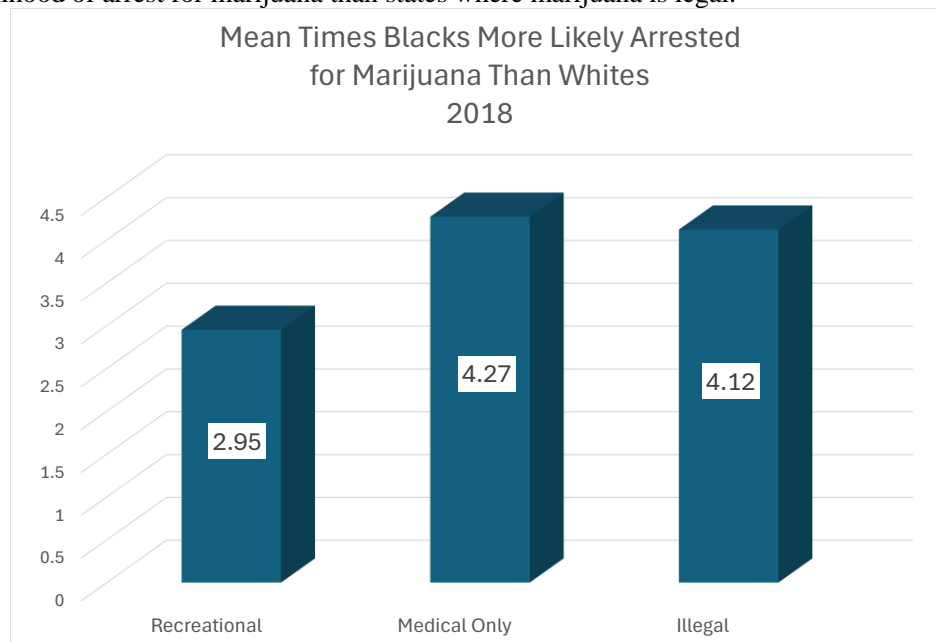


Figure 7 (American Civil Liberties Union, 2018)

The mean statistics for the 2018 statewide measure of times Black residents are more likely to be arrested for marijuana than White residents are shown in Figure 7 for the states where recreational marijuana is legal, where only medical marijuana is legal and where marijuana is illegal. States that had legalized recreational marijuana by 2018 had the lowest mean statistic, while states maintaining prohibition or that had legalized only medical were similarly higher. African Americans living in states where marijuana was illegal in 2018 were 40% more likely to be arrested for marijuana than those living in states that had fully legalized marijuana. The data support Hypothesis 3.

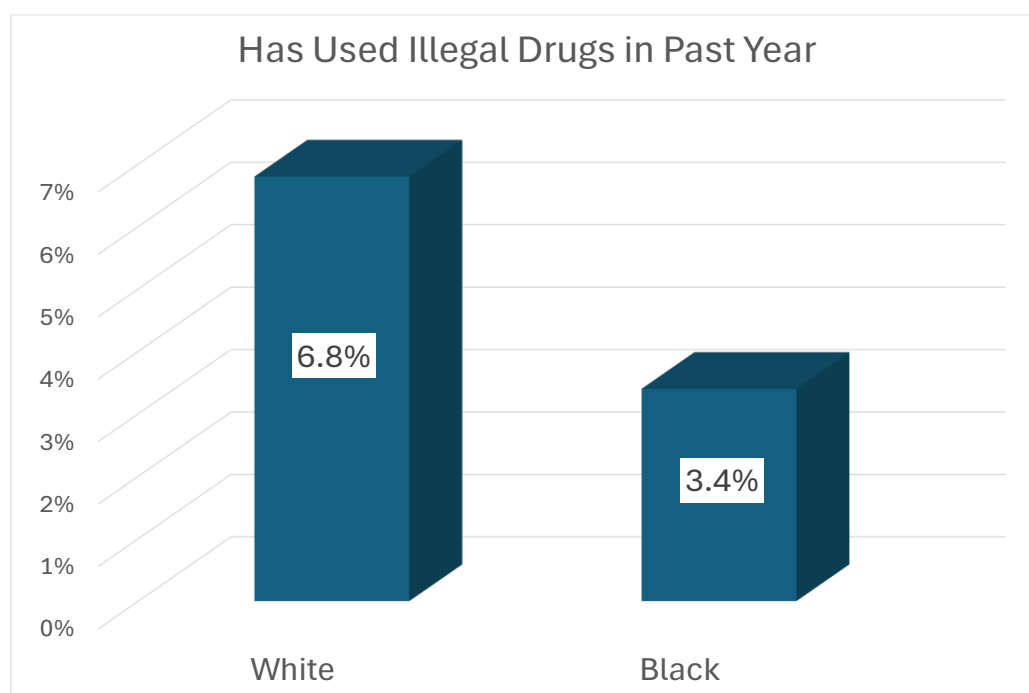


Figure 8 (General Social Survey 2004)

“In the past 12 months, have you used illegal drugs, for example marijuana, cocaine or pills?” Yes/No “What race do you consider yourself? White/Black/Other Sample Size = 1,170

Higher rates of arrest for African Americans could be either a function of disparate usage or disparate enforcement. Figure 8 shows that in 2004, the most recent year measured, Whites were significantly more likely to self-report having used illegal drugs in the past year than Blacks, leaving discretionary arrest as the most likely reason for the 40% discrepancy in arrest rate in 2018.

Hypothesis 4: Regions with the higher proportions of African Americans will tend to be more likely to support legalization of marijuana than regions with the lower proportion of African Americans.

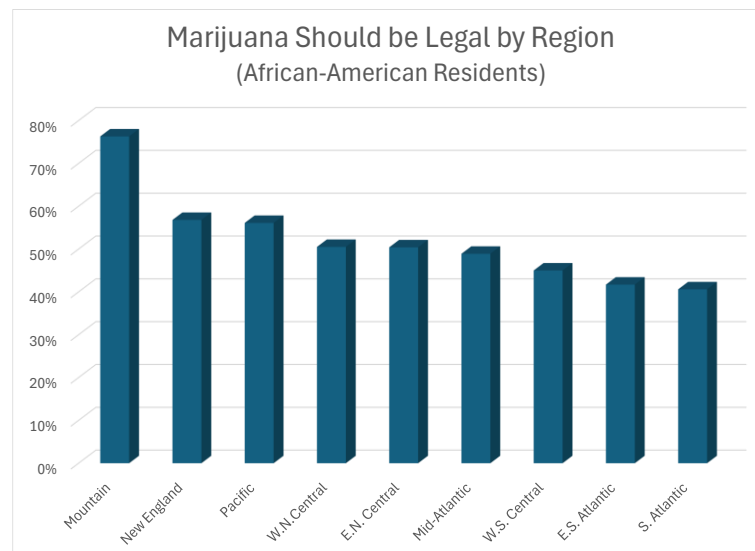


Figure 9 (General Social Survey 2000 – 2022)

“Do you think the use of marijuana should be made legal or not?” Should be legal/Should not be legal/Don’t Know
 “What race do you consider yourself? White/Black/Other Sample Size = 1,597

Figure 9 shows the percent of Blacks that support legalization for the nine GSS regions of the U.S., ordered from lowest to highest proportion of the population being African American. A strong linear relationship exists throughout the distribution of regions. The higher the proportion of Blacks in the region, the less likely Blacks are to support the legalization of marijuana. The Pearson’s r correlation coefficient for percent of region Black and the percent of Blacks supporting legalization is $- .848$, so the data do not support Hypothesis 4. Quite the contrary, it suggests that African Americans are either not aware of the disparate effect of marijuana prohibition or do not believe legalization is the appropriate solution.

Hypothesis 5: Blacks who feel they are discriminated against because of their race will be more likely to support legalization than Blacks who do not feel discriminated against because of their race.

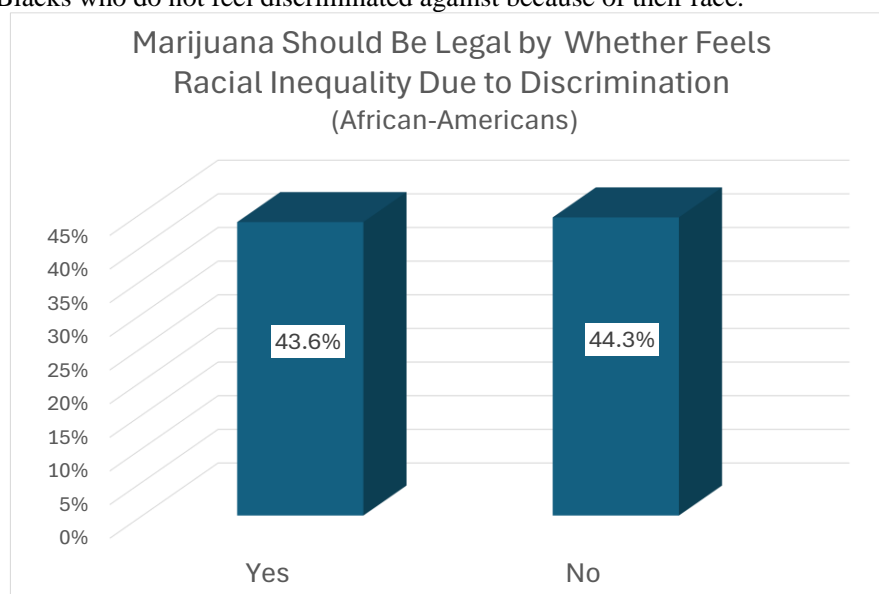


Figure 10 (General Social Survey 2000 – 2022)

On the average African Americans have worse jobs, income and housing than White people. Do you think these differences are mainly due to discrimination? Sample Size = 758

Figure 10 shows that African Americans who tend to believe that inequality between Blacks and Whites is due to discrimination are no more likely to support the legalization of marijuana than those who indicate they do not believe this is true. The data do not support Hypothesis 5, suggesting that even race-conscious African Americans may be unaware of how marijuana prohibition adversely affects them.

Discussion

The analysis has shown significant and consistent disparities in the percentage of Black and White citizens who live where recreational marijuana use is legal and illegal. It also showed that, as more states have legalized marijuana, the ratio of Blacks to Whites living where marijuana is illegal has tended to increase, making Blacks more and more likely to live where marijuana is illegal. We also showed that Blacks were less likely to be arrested in states that have fully legalized marijuana than in states where marijuana is totally illegal or only allows medicinal use. Our control analysis found evidence that usage patterns of illegal drugs are higher for Whites, precluding disproportional usage as a mitigating factor in arrest disparity. The study found strong evidence that Blacks experience unequal treatment in the current system for regulating marijuana.

The more compelling finding is that Blacks apparently are either largely unaware of the negative effects of statewide regulation or do not believe that legalization is the solution. Our hypothesis that African Americans aware of structural discrimination would lead them to be more likely to support legalization was not supported by the data, in that Blacks in states with high proportions of Blacks, as well as Blacks who said they feel discriminated against because of their race, were less likely to support legalization. Additional research is needed to understand these social dynamics.

We found it significant that states legalizing only medical marijuana had similar measures of disproportional arrest as states with total prohibition. This suggests that Whites are more likely to be enjoying recreational use under the guise of medical need, in that legalizing medical marijuana does not seem to affect a reduction in Black arrests as is seen with recreational legalization. Whites may enjoy a structural advantage in having greater access to healthcare professionals open to the therapeutic use of marijuana, at least for their white patients, a practice we might describe as “discretionary diagnosis.”

We are confident with the validity of our data measuring population and marijuana legality status. The survey question measuring usage of marijuana also included cocaine and pills as examples, so this variable may be an overestimation of marijuana use. However, we believe it is a safe assumption that the overestimation was similar for both races, so any overestimations should not affect a comparative analysis.

The finding that Blacks are less likely to favor legalization of marijuana in the face of such overwhelming evidence of discrimination in the enforcement of prohibition suggests that discretionary legalization comprises a more subtle, insidious form of institutional racism, one that cannot be directly observed by the victim as with discretionary arrest and conviction. In addition to making Blacks more aware of the disparate impact of prohibition, our results suggest some policy recommendations.

If we assume that the problem of disproportional arrest and prosecution of Blacks is rooted in the diverse policies of legalization among states, it strongly suggests not only that general drug prohibition should be established at the federal level, but that recreational drugs should be fully legalized to minimize the use of discretionary arrest and conviction via state statutes. Obviously, states’ rights issues would be an obstacle. The social problem of discrimination, however, is not rooted in the regulation of marijuana, but rather in its prohibition. Discretionary arrest and conviction can still occur if recreational marijuana is prohibited at that federal level or state level. So, legality in all jurisdictions, federal, state and local, is needed to eliminate the facilitation of discretionary arrest and discretionary legalization.

The uneasy legal accommodation of medical and recreational marijuana usage in states legalizing such use by federal drug enforcement agencies under the Obama, Trump and Biden administrations strongly suggests that federal bans on marijuana will be lifted at some point in the future. This, however, will not preclude discretionary marijuana arrest for adults living where state laws prohibit marijuana, leaving options for discretionary arrest to continue. Limiting black market commerce and sale to minors will always require limited prohibition. However, minimizing discretionary arrest among states opting to retain prohibition will require constitutional protections, defining the freedom to ingest recreational drugs as essential for the pursuit of happiness and with cases of drug abuse being handled under a medical model rather than a prohibitionist model. Just as the Twenty-First Amendment to the Constitution effectively protected citizens’ rights to “pursue happiness” via the free consumption of alcohol or as proposed amendments might someday protect women’s right to control their own bodies no matter what state they live in, a similar amendment may be needed to protect citizens rights to “pursue happiness” via the consumption of recreational drugs objectively judged to be of reasonable risk to the user and society in order to largely free discriminated minorities from this tool of oppression

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