

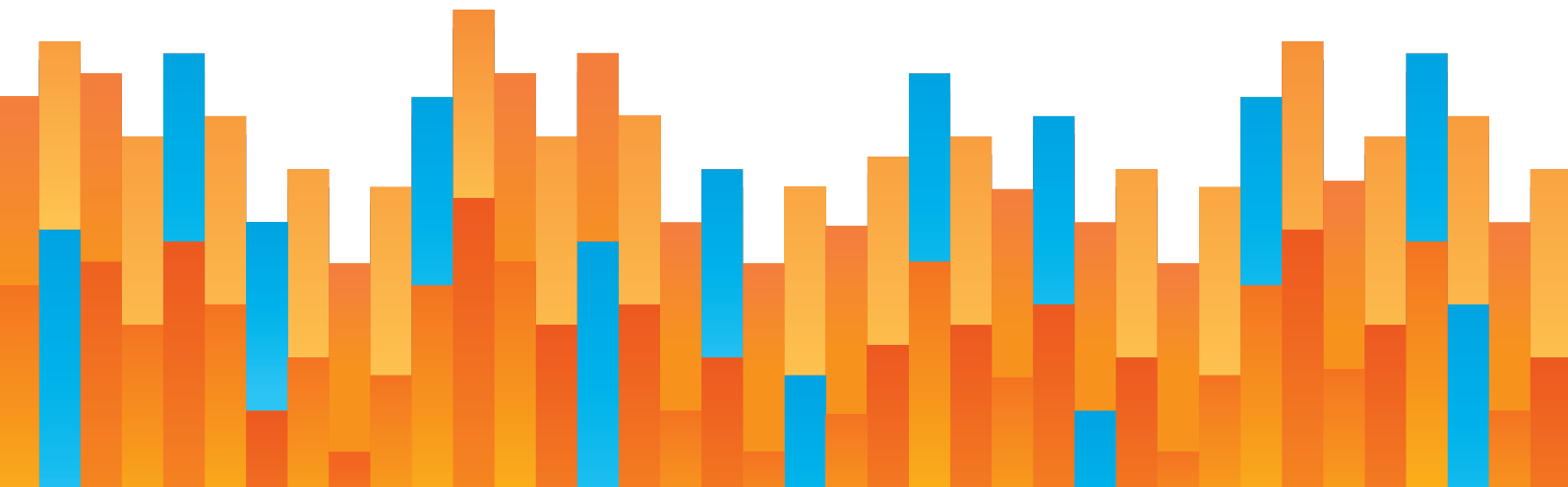


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HOW STATE REFORMS HAVE MELLOWED FEDERAL ENFORCEMENT OF MARIJUANA PROHIBITION

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PART 1

INTRODUCTION

The history of drug prohibitions and enforcement efforts in the United States always reflects a kind of federalism in action. Because the federal government always lacks the resources and often the political will to fully enforce drug prohibitions nationwide, state laws and local practices will inevitably shape and color the full picture of U.S. drug policy and enforcement. When alcohol Prohibition was written into our nation's Constitution, for example, state and local officials embraced an array of different approaches to enforcing temperance, which produced a patchwork of on-the-ground practices across the nation.¹

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In modern times, marijuana prohibitions and reforms present the most salient example of national drug policies reflecting diverse and sometimes clashing federal and state laws and local practices. Though some have explored how federal marijuana prohibition has shaped

¹ Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State*. (WW Norton & Company, 2015). Robert Post, “Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era.” 48 *Wm. & Mary L. Rev.* 1 (2006).

state reform efforts and local enforcement realities,² few have focused attention on the most tangible and arguably most consequential aspect of federal enforcement, namely federal sentences imposed for marijuana activity. Even while formal federal marijuana law has persisted unchanged amid state-level reforms, federal marijuana enforcement on the ground has changed dramatically. Drawing on data from the U.S. Sentencing Commission (USSC), this brief notes new federal enforcement patterns that have emerged in recent years.³

The impact of marijuana prohibitions and the scope of enforcement are often documented through nationwide arrest data, in part because the numbers are enormous and in part because there is little other reliable national information on marijuana enforcement. Yearly marijuana arrest data, as collected by the Federal Bureau of Investigation (FBI), are dynamic: as arrests for all drug offenses increased during the War on Drugs acceleration in the 1980s, the total number of possession and sale of marijuana arrests actually dipped due to a more aggressive focus on cocaine and heroin.⁴ Yet, as state marijuana reforms picked up steam, so too did total marijuana federal and state arrests—peaking at over 850,000 arrests in 2007⁵ and averaging over 750,000 arrests annually for more than a dozen years.⁶ Starting in 2014, FBI data showed declines in total marijuana arrests and they reached a (pre-pandemic) low of under 550,000 arrests in 2019,⁷ and then hit another new low of just over 350,000 in 2020.⁸ Disconcertingly, as the American Civil Liberties Union has documented, one pernicious consistency in marijuana arrest data has been racial

² For example, Jonathan H. Adler, *Marijuana Federalism: Uncle Sam and Mary Jane* (Brookings Institution Press, 2020); Robert A. Mikos, “The Evolving Federal Response to State Marijuana Reforms,” *26 Widener L. Rev.* 1 (2020); Erwin Chemerinsky, Jolene Forman, Allen Hopper, and Sam Kamin, “Cooperative federalism and marijuana regulation,” *62 UCLA L. Rev.* 74 (2015): 74.

³ A longer version of this article can be found at Douglas A. Berman and Alex Fraga, “How State Reforms Have Mellowed Federal Enforcement of Marijuana Prohibition,” *Fordham Urban Law Journal*, v.49, 2022, 675, <https://ir.lawnet.fordham.edu/ulj/vol49/iss3/7>

⁴ Bureau of Justice Statistics, *Drugs and Crime Facts, Number of Arrests, By Drug Type, 1982-2007*, at <https://www.bjs.gov/content/dcf/tables/drugtype.cfm>

⁵ *Ibid*; Ryan S. King and Marc Mauer, “The War on Marijuana: The Transformation of the War on Drugs in the 1990s”, at 1-4 (2005).

⁶ American Civil Liberties Union (ACLU), *The War on Marijuana in Black and White*, (American Civil Liberties Union, 2013).

⁷ Kyle Jaeger, “Marijuana Arrests Decline Nationally for First Time in Four Years, FBI Data Shows,” *Marijuana Moment*, October 1, 2020.

⁸ Kyle Jaeger, “Marijuana Arrests Dropped Sharply in 2020 As Both COVID and Legalization Spread, FBI Data Shows,” *Marijuana Moment*, September 27, 2021.

disparities, with Blacks many more times likely than Whites to be arrested for marijuana possession.⁹



Disconcertingly, as the American Civil Liberties Union has documented, one pernicious consistency in marijuana arrest data has been racial disparities, with Blacks many more times likely than Whites to be arrested for marijuana possession.



While national arrest patterns tell one story, sentences imposed for marijuana convictions reflect the most significant consequence of marijuana prohibition's enforcement. Disappointingly, there seemingly has been no systematic collection or analysis of marijuana sentencing outcomes nationwide since the work done by Ryan King and Marc Mauer through the year 2000.¹⁰ Indeed, even with growing attention on marijuana reform, there are no recent data on how many persons nationwide are incarcerated for marijuana offenses nor any detailed accountings of the types of offenders still incarcerated for marijuana activities in the states.¹¹ However, data assembled by the USSC allow a close look at how federal marijuana enforcement has cashed out since the start of state-level marijuana reforms in the form of yearly sentencing outcomes.

⁹ ACLU, *The War on Marijuana*; Emily Greytak, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, (American Civil Liberties Union, 2020).

¹⁰ Ryan S. King and Marc Mauer, "The War on Marijuana: The Transformation of the War on Drugs in the 1990s," (*Harm Reduction Journal*, v.3, No.6, 2005) (providing a leading, and perhaps the only, detailed report with analysis of marijuana criminal case processing outcomes from leading policy analysts).

¹¹ Zoe Sigman, "The Women Fighting for Cannabis Justice and Data Transparency in the U.S. Prison System," *Vogue*, April 20, 2021 (discussing the "massive gap in data" that precludes knowing "how many people are serving time for cannabis").

PART 2

THE DECLINE IN FEDERAL MARIJUANA SENTENCES

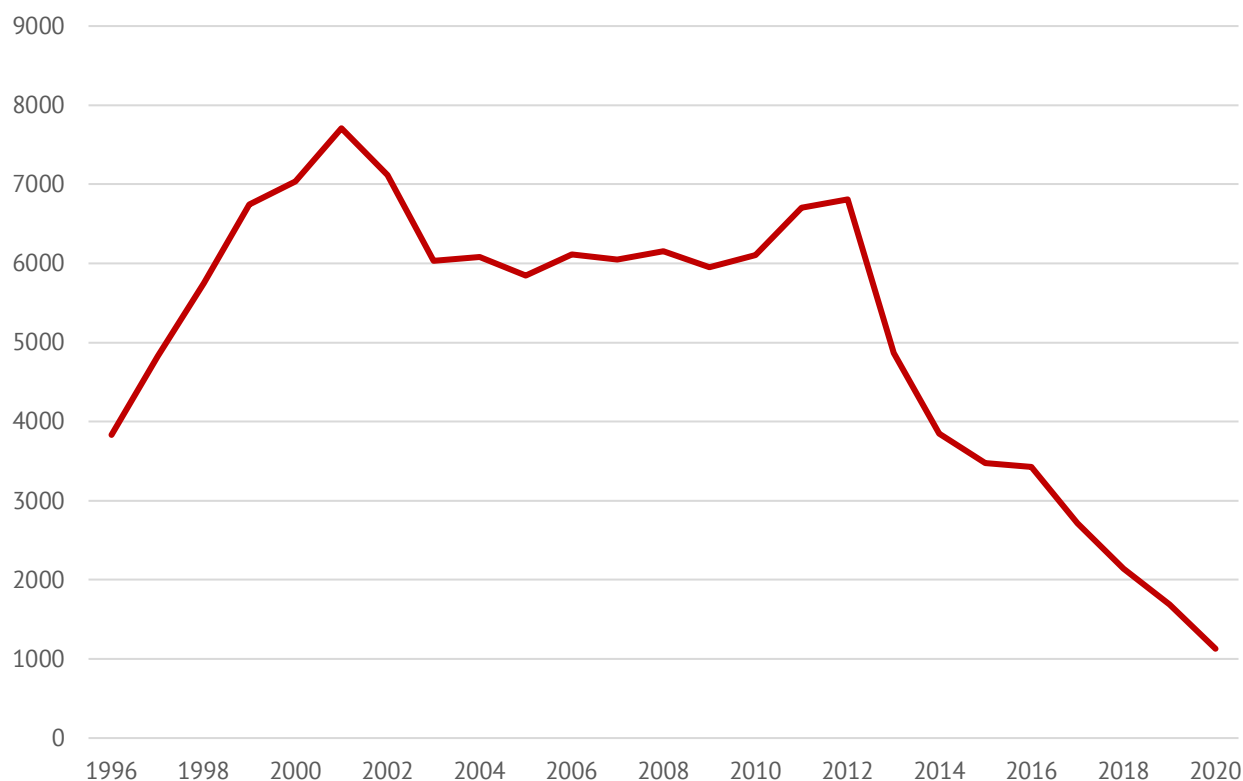
The number of marijuana sentences imposed in federal courts actually climbed significantly for five consecutive years starting in 1996, after the first states legalized medical marijuana.¹² By 2002, the number of federal marijuana sentences each year leveled out but remained consistently high for more than a decade—from 2002 to 2012—when an ever-growing number of states were adopting medical marijuana reforms.

However, over the last decade, coinciding with the emergence of state adult-use marijuana reforms, there has been a considerable and steady drop in the number of sentenced federal marijuana defendants, and marijuana cases have composed an ever-smaller percentage of federal drug cases being sentenced in federal courts. In USSC FY2020, 1,129 people were sentenced for trafficking marijuana in federal courts, down 83% from USSC FY2012.¹³ In 2012, a full 27.7% of all drug trafficking cases sentenced in federal court involved marijuana as the primary drug type; by 2020, only 7% of all drug trafficking cases sentenced in federal court involved marijuana as the primary drug type.¹⁴

¹² Drawn from U.S. Sentencing Commission, Monitoring of Federal Criminal Sentences.

¹³ U.S. Sentencing Commission data covers a fiscal year that runs from October 1 through September 30 so that fiscal year 2020 covers data collected from October 1, 2019, through September 30, 2020.

¹⁴ The data reported in this section are drawn from various reports and data files coming from the U.S. Sentencing Commission, and available online at https://www.usc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Marijuana_Trafficking.pdf,

FIGURE 1: FEDERAL MARIJUANA TRAFFICKING SENTENCES IMPOSED

Source: Authors calculations from U.S. Sentencing Commission, *Monitoring of Federal Criminal Sentences*.

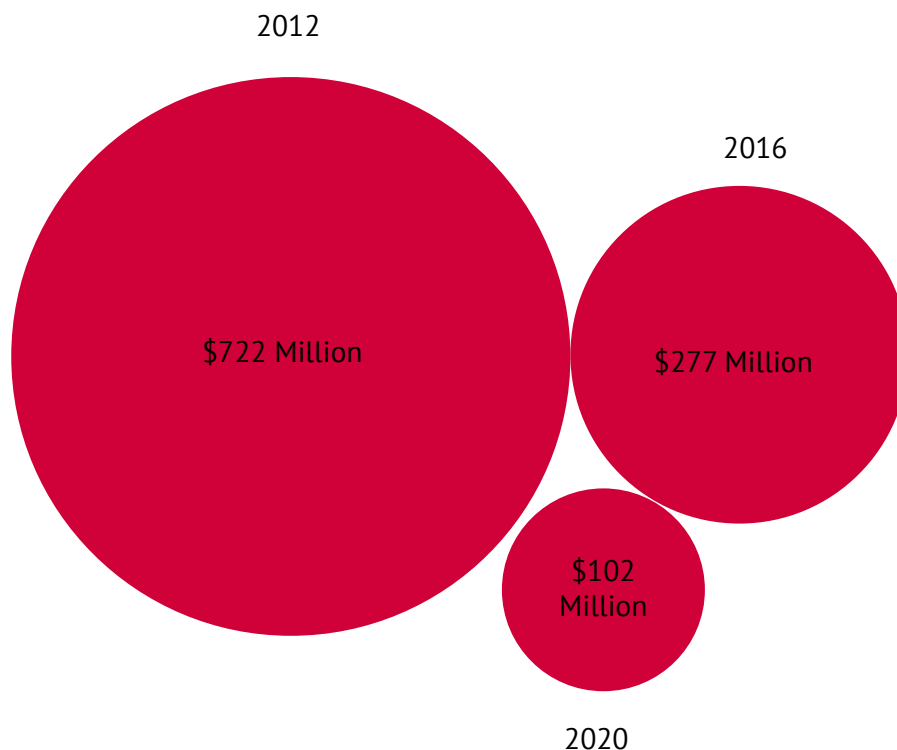
Data recently released by the USSC show comparable trends in 2021 relative to 2020. Specifically, 1,005 people were sentenced for marijuana trafficking in 2021 compared to 1,129 in 2020. Likewise, marijuana trafficking cases made up 7% of all federal drug trafficking cases in 2021. While the total number of marijuana cases being sentenced in federal court has declined, so too has the average prison sentence length and the number of life or de facto life sentences. In fiscal year 2012, offenders were sentenced to a median sentence length of 34 months—two years and 10 months—in prison. By 2020, the median sentence length had dropped to 29 months—two years and five months. Also, from 2012 to 2016, an average of four life or de facto life sentences were imposed each year on marijuana offenders, but since 2017 only two total such sentences have been imposed—with none imposed in the last four years.¹⁵

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Marijuana_FY16.pdf,
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Marijuana_FY20.pdf.

¹⁵ Drawn from U.S. Sentencing Commission, *Monitoring of Federal Criminal Sentences*.

Declining federal marijuana sentences means less expected federal spending committed to incarcerating those convicted of marijuana trafficking. In fiscal year 2012, at an average annual cost of \$37,449 per inmate each year, an estimated \$722,000,000 was committed to the federal imprisonment of those sentenced for marijuana trafficking (Figure 2).¹⁶ Expected incarceration expenditures for marijuana trafficking have declined considerably with the dramatic recent decrease in the number of sentences imposed, but that should not occlude the fact that significant costs persist for continued federal marijuana imprisonment in our era of widespread state marijuana reforms. Approximately \$102,000,000 was committed to the federal imprisonment of people convicted of marijuana trafficking in fiscal year 2020.

FIGURE 2: APPROXIMATE INCARCERATION EXPENSES COMMITTED TO MARIJUANA SENTENCES



Source: Authors calculations from Bureau of Prisons data.

¹⁶ Calculated as total prison years multiplied by the Annual Determination of Average Cost of Incarceration Fee (COIF) for FY 2018 COIF, which was \$37,449. Bureau of Prisons, "Annual Determination of Average Cost of Incarceration Fee," (2019), <https://www.federalregister.gov/documents/2019/11/19/2019-24942/annual-determination-of-average-cost-of-incarceration-fee-coif>

The significant decline in the number of marijuana sentences imposed in federal courts over the last decade is likely in large part the direct result of a significant decline in marijuana seized by the Drug Enforcement Administration. Since 2012, both marijuana sentences and DEA marijuana seizures have declined by roughly 85%.¹⁷ The DEA attributes the decline in marijuana seizures to state-level changes in marijuana laws, leading to significantly more domestic marijuana production and less trafficking of marijuana over international borders.¹⁸

¹⁷ Sentences from U.S. Sentencing Commission, Monitoring of Federal Criminal Sentences, seizures from Drug Enforcement Administration, “2015 National Drug Threat Assessment Summary,” Table B11 at 127 (2015), <https://www.dea.gov/sites/default/files/2018-07/2015%20NDTA%20Report.pdf>, with Drug Enforcement Administration, “2020 National Drug Threat Assessment,” Figure 59 at 57 (March 2021), https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf (citing the Domestic Cannabis Eradication/Suppression Program (a DEA program) in coordination with state and local LE agencies).

¹⁸ Drug Enforcement Administration, “2019 National Drug Threat Assessment,” (Dec. 2019) https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf (“According to [Custom and Border Protections] information, marijuana seizures along the [Southwest border] have continued to decline as domestic production increases.”).

PART 3

DEMOGRAPHICS OF A CHANGING FEDERAL ENFORCEMENT LANDSCAPE

The geography of federal marijuana prosecutions has evolved in the last decade. In 2012, only 29% of federal marijuana sentences were imposed in districts not at the U.S.-Mexico border.¹⁹ As of 2020, 47.5% of all federal marijuana sentences are imposed in non-border districts.²⁰ Reports from the DEA indicate that marijuana seizures at the southern U.S. border have dwindled as states have legalized adult use and medicinal use of marijuana, suggesting that reduced trafficking over the southern border accounts for both the reduced number and changing location of federal prosecutions of marijuana offenses.²¹

¹⁹ Drawn from U.S. Sentencing Commission, Monitoring of Federal Criminal Sentences.

²⁰ Ibid.

²¹ Drug Enforcement Administration, “2015 National Drug Threat Assessment Summary,” Table B11 at 127 (2015), <https://www.dea.gov/sites/default/files/2018-07/2015%20NDTA%20Report.pdf>, with Drug Enforcement Administration, “2020 National Drug Threat Assessment,” Figure 59 at 57 (March 2021), https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf (citing the Domestic Cannabis Eradication/Suppression Program (a DEA program) in coordination with state and local LE agencies).

Nonetheless, though shrinking in relative size, more than 1,000 people, and mostly people of color, were sentenced in federal court for marijuana trafficking in fiscal year 2020. Specifically, of the 1,129 federal defendants sentenced for marijuana trafficking in 2020, according to USSC data, 200 were Black and 701 were Hispanic, with a total of over \$100 million committed to the incarceration of defendants for activities not dissimilar from the activity now conducted by licensed, regulated commercial business in states in which marijuana has been legalized for various purposes.²²



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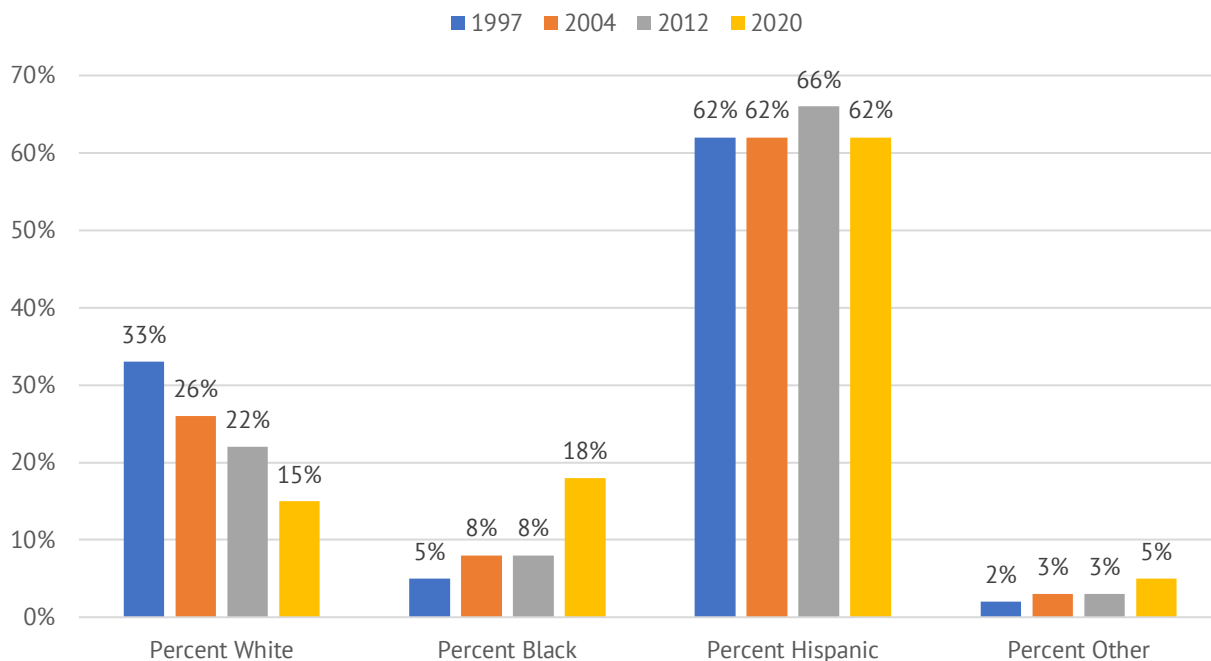
Notably, the racial composition of persons sentenced in federal court for marijuana offenses has evolved as the caseload has shrunk. In 2012, the majority sentenced for marijuana offenses were Hispanic (66.4%), followed by White (22.2%), Black (8.3%), and Other Races (3.1%).²³ In 2020, the majority were still Hispanic (62.1%), followed now by Black (17.7%), White (14.9%), and Other Races (5.1%).²⁴ The proportion of Whites who are federal marijuana defendants has been consistently falling since 1997 (Figure 3), while there has been a considerable relative growth in the percentage of Blacks who are marijuana defendants being sentenced in the federal system during this period.²⁵

²² Number of sentences and demographics of those sentenced drawn from U.S. Sentencing Commission, Monitoring of Federal Criminal Sentences. Cost estimates calculated as total prison years multiplied by the Annual Determination of Average Cost of Incarceration Fee (COIF) for FY 2018 COIF, which was \$37,449. Bureau of Prisons, Annual Determination of Average Cost of Incarceration Fee (2019), <https://www.federalregister.gov/documents/2019/11/19/2019-24942/annual-determination-of-average-cost-of-incarceration-fee-coif>.

²³ Drawn from U.S. Sentencing Commission, Monitoring of Federal Criminal Sentences.

²⁴ Ibid.

²⁵ The United States Sentencing Commission introduced a new variable in the USSC datafiles to capture both race and ethnicity in 1997. Thus, comparisons to 1996 could not be made.

FIGURE 3: RACIAL COMPOSITION OF MARIJUANA TRAFFICKING SENTENCES IMPOSED BY YEAR

Source: Authors calculations from U.S. Sentencing Commission, *Monitoring of Federal Criminal Sentences*.

These data suggest that white people are benefitting relatively more from fewer federal marijuana prosecutions and sentences. The recent doubling in the relative percentage of black offenders subject to federal marijuana sentencing is particularly notable and disconcerting at a time when marijuana reforms are now being more robustly promoted in the name of racial justice. Though a fewer absolute number of black defendants were sentenced in federal court for marijuana offenses in 2020 than in 2012, proportionately more white people benefitted from the reduction in the federal marijuana caseload.²⁶ The racial patterns emerging within recent federal marijuana enforcement seem to exacerbate a racially skewed modern landscape in which some profit from the demand for marijuana without facing federal prosecution while others are prosecuted and imprisoned for similar activity. Notably, 80% of those sentenced for trafficking marijuana in the federal system are Black or Hispanic, while only 10% of marijuana business owners are Black or Hispanic (Figure 4).²⁷ Recently released data by the USSC show that these trends carried into 2021.

²⁶ Drawn from U.S. Sentencing Commission, *Monitoring of Federal Criminal Sentences*.

²⁷ Sentencing from FY 2020 estimates from the USSC Individual Offenders Fiscal Year 2020 datafile: <https://www.ussc.gov/research/datafiles/commission-datafiles>, ownership from Eli McVey, "Chart:

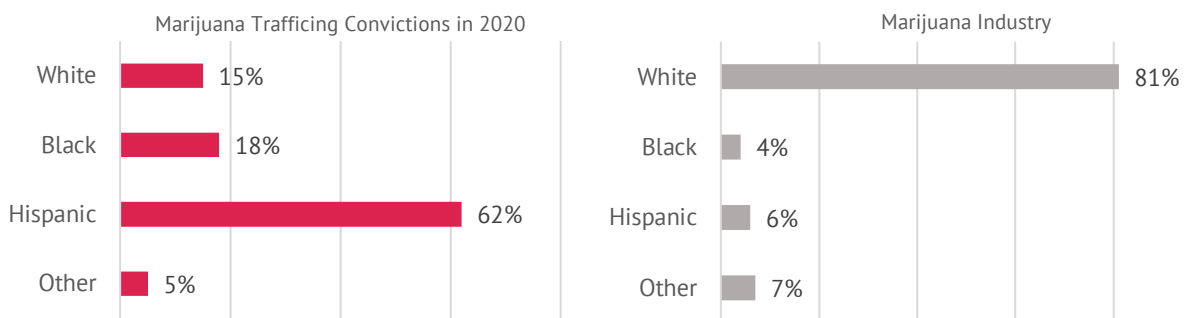
Specifically, of those sentenced for marijuana trafficking, 13% were White, 17% were Black, and 64% were Hispanic.



The racial patterns emerging within recent federal marijuana enforcement seem to exacerbate a racially skewed modern landscape in which some profit from the demand for marijuana without facing federal prosecution while others are prosecuted and imprisoned for similar activity.



FIGURE 4: RACIAL COMPOSITION OF THOSE SENTENCED FOR MARIJUANA AND THE MARIJUANA INDUSTRY



Marijuana industry demographics sourced from *Marijuana Business Daily* August 2017 survey
 Chart originally published in “How State Reforms Have Mellowed Federal Enforcement of Marijuana Prohibition” by Professor Douglas A. Berman and Dr. Alex Fraga. Source: *Fordham Urban Law Journal*.

Percentage of Cannabis Business Owners and Founders By Race,” *MJBiz Daily*, September 13, 2017, <https://mjbizdaily.com/chart-19-cannabis-businesses-owned-founded-racial-minorities/>.

PART 4

CONCLUSION

The modern prosecution and sentencing patterns for federal marijuana offenses provide a fascinating window into what might be called “on the ground” federalism for drug enforcement. New *state* laws legalizing marijuana for various purposes have prompted evolving federal enforcement policies and practices even as blanket *federal* marijuana prohibition has remained the law of the land. When states first enacted medical marijuana reforms beginning in 1996, the number of federal marijuana sentences grew to historic highs. However, after Colorado and Washington legalized recreational marijuana and additional states followed suit, marijuana traffic over the southern border declined and the number of federal marijuana sentences declined dramatically from 2012 to 2020. Furthermore, as marijuana trafficking across the border and federal prosecutions declined, the landscape of federal prosecutions started shifting from rural and urban communities along the Southern border to more cities and towns throughout the United States.

Significantly, while the decline in federal marijuana prosecutions has resulted in fewer prosecutions across all racial groups, the decline has not been experienced evenly across these groups. Federal data show that white people have disproportionately benefitted: the decline in overall prosecutions has resulted in relatively fewer white and more black and Hispanic populations convicted of federal marijuana trafficking. As the marijuana industry flourishes in many states, it is worth noting that, while white people are relatively less likely to be subject to federal marijuana prosecution, they are also relatively more likely to be marijuana business owners.



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Congress is in the midst of a robust debate over various proposals to reform federal marijuana laws, and one focal point concerns whether and how to pursue racial and social equity in statutory reform efforts. These data should provide additional support for the arguments made by certain members of Congress that any federal marijuana reform proposals must seek to advance racial and social justice in light of long-standing racial disparities in marijuana enforcement at all levels. Whatever the fate of federal reform efforts, all supporters of marijuana reform should take note: There are developments to celebrate in the recent pattern of federal marijuana sentences, but also that there is still considerable work to be done.

ABOUT THE AUTHORS

Professor Doug Berman is the Newton D. Baker-Baker & Hostetler Chair in Law and director of the Drug Enforcement and Policy Center at The Ohio State University Moritz College of Law.

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