
ARTICLE

REPARATIVE ENTREPRENEURSHIP

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Cannabis social equity programs are sub-policies within a larger state marijuana regulatory scheme that are geared towards prioritizing War on Drugs survivors when allocating market space and cannabis sales revenue. Of the over 20 states that have legalized recreational marijuana, many include some version of a cannabis social equity program. The idea of repairing past harm through cannabis entrepreneurship gives a sense of “reparations-ish” policymaking. Through a case study of both the intent and implementation of New York’s Social and Economic Equity (SEE) Plan, this Article examines whether the ideological crux of these programs, the belief that entrepreneurship leads to positive economic outcomes for individuals and communities, can fix decades of discriminatory drug policy rooted in systemic racism. Ultimately, the Article argues that these cannabis social equity programs are more likely to sustain barriers to entry, especially for Black entrepreneurs, whether legal, systemic or political. In this moment of reckoning for the War on Drugs, policies must course-correct and experiment with a new concept of

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“reparative entrepreneurship.” If the reparations framework advanced in this Article were used, the remedies would be more effective in utilizing entrepreneurship to address the harm of the War on Drugs.

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I. INTRODUCTION

The War on Drugs refers to a shift in federal drug policy initiated by President Richard Nixon in the early 1970s. During this time, Black and brown individuals were the targets of over-policing, stringent drug laws, and mandatory minimum sentences for the possession, sale and distribution of drugs. This legislative and prosecutorial “perfect storm” led to unprecedented and disproportionate levels of incarceration for Black people in the U.S. The War on Drugs left individuals and entire communities disenfranchised and economically stunted.

In recognition of the lingering social and economic harm of the War on Drugs, drug advocates have pressured states to

legislate a new era of equitable drug policies that recompense War on Drugs survivors. The first national test case is marijuana legalization. Although marijuana arrests made up a substantial percentage of criminal offenses during the peak of the War on Drugs, the legalization of marijuana and burgeoning cannabis industry presents an opportunity for states to acknowledge and repair the harm of the War on Drugs through cannabis social equity measures.

For example, in 2021, the Marihuana Regulation and Taxation Act (MRTA)¹ of New York State legalized recreational cannabis.² ³New York joined fourteen other states in legalizing a substance that over 12% of Americans used according to that year's Gallup Poll – a number that was nearly double of what was reported in 2013.⁴ The structure of MRTA was similar to many other legislative efforts across the country, which primarily established a governing regulatory body, and taxation scheme, and revised penal codes relating to marijuana possession and sale. However, MRTA was

¹ Marihuana Regulation and Taxation Act, 2021 N.Y. Sess. Laws 92 (McKinney).

² The NIH National Center for Complementary and Integrative Health defines cannabis as all products derived from the plant *Cannabis sativa* and defines marijuana as “parts of or products from the plant *Cannabis sativa* that contain substantial amounts of tetrahydrocannabinol (THC).” Cannabinoids are a group of substances found in the cannabis plant and the main cannabinoids are THC and cannabidiol (CBD). Nat'l Center for Complementary and Integrative Health, *Cannabis (Marijuana) and Cannabinoids: What You Need To Know*, NAT'L INST. OF HEALTH (Nov. 14, 2023), <https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know> [https://perma.cc/7A5U-D39H].

³ This Article will use the term cannabis to refer to all products derived from the plant *Cannabis sativa*, the legalized or decriminalized substance that derives from hemp (e.g., cannabis businesses, cannabis social equity programs). The article will also use the term “marijuana” to refer to the same substance in the context of pre-legalization (e.g., “marijuana convictions”). The two terms are used concurrently to signal the legal status of the substance that is being discussed and to signal the political shift from using marijuana to cannabis.

⁴ See *What Percentage of Americans Smoke Marijuana?*, GALLUP (Feb. 5, 2024), <https://news.gallup.com/poll/284135/percentage-americans-smoke-marijuana.aspx> [https://perma.cc/32QH-7EFA].

distinct in two ways: it acknowledged the harm from the War on Drugs in the legislative intent of the law⁵ and it also mandated a social and economic equity plan (“SEE”) to give individuals who were formerly convicted of marijuana crimes priority access to the industry through cannabis industry entrepreneurship opportunities.

SEE is ideologically, though not explicitly, connected to the broader movement for Black American reparations across the United States. SEE functions as reparative legislation meant to provide recompense for survivors of the War on Drugs, who are overwhelmingly Black New Yorkers.⁶ For reparations activists, the War on Drugs is part of a long throughline from slavery to the present day. The over-policing and harsh drug sentencing guidelines that were iconic of the War on Drugs have led to incarceration rates for Black men that are similar to the number of Blacks that were in bondage during slavery.⁷

⁵ The legislative findings of MRTA directly acknowledge the disproportionate harm of the legalization marijuana laws on the Black and Latinx community and attributed those laws to mass incarceration, complex generational trauma, and disruption of enjoyment of basic rights in American society such as housing. Marihuana Regulation and Taxation Act, 2021 N.Y. Sess. Laws 92 § 2 (McKinney) (“The legislature finds that existing marihuana laws have not been beneficial to the welfare of the general public. Existing laws have been ineffective in reducing or curbing marihuana use and have instead resulted in devastating collateral consequences including mass incarceration and other complex generational trauma, that inhibit an otherwise law-abiding citizen's ability to access housing, employment opportunities, and other vital services. Existing laws have also created an illicit market which represents a threat to public health and reduces the ability of the legislature to deter the accessing of marihuana by minors. Existing marihuana laws have disproportionately impacted African-American and Latinx communities.”).

⁶ N.Y.C. Dep’t of Health & Mental Hygiene, Cannabis Use in New York City, 117 Epi Data Brief 1, 7 (2019); see also ACLU, Extreme Racial Disparities Persists in Marijuana Arrests (2020), <https://graphics.aclu.org/marijuana-arrest-report/> [<https://perma.cc/MYU8-JCRF>].

⁷ See *Michelle Alexander: More Black Men Are In Prison Today Than Were Enslaved In 1850*, HUFFPOST (Oct. 12, 2011), https://www.huffpost.com/entry/michelle-alexander-more-black-men-in-prison-slaves-1850_n_1007368 [<https://perma.cc/FZG9-MF7Q>].

The new cannabis market creates an opportunity for War on Drugs survivors to enjoy the economic upside of what is predicted to be a highly profitable industry, and survivors ought to be included. New York legislators were aware of the historical dynamics of systemic racism in the War on Drugs and the themes of acknowledgement, repair, restitution, and compensation are utilized in public facing materials.

Thanks to a concerted effort among War on Drugs survivors,⁸ medical marijuana business owners, lawmakers, the agriculture lobby, and drug policy activists, over 40% of tax revenue from cannabis sales legalized by the New York law was promised to be reinvested into communities most ravaged by the War on Drugs, and a goal was set that 50%⁹ of cannabis licenses are to go specifically to social equity applicants. These benchmarks can be considered a victory by those advocates.

Yet, the realization of the social and economic equity plan has not completely lived up to the optimism surrounding the plan's roll-out. New York has taken a self-described "slow-and-steady" approach to the regulated cannabis industry.¹⁰

⁸ There are many other illicit drugs that have been over criminalized causing disproportionate incarceration rates for Black and Latinx individuals. This Article's discussion is limited to cannabis because it is currently the only formerly illicit drug for which prohibition has ended. This choice does not mean to signify agreement with the theory of psychedelic exceptionalism—the notion that certain drugs such as cannabis are more deserving of drug reform than others. See, e.g., Sean Lawlor, *Psychedelic Exceptionalism and Reframing Drug Narratives: An Interview with Dr. Carl Hart*, PSYCHEDELICS TODAY (last visited Feb. 13, 2024), <https://psychedelictoday.com/2020/02/18/psychedelic-exceptionalism-and-reframing-drug-narratives-an-interview-with-dr-carl-hart/> [https://perma.cc/2L8V-K8QY].

⁹ Off. of Cannabis Mgmt., *Social and Economic Equity*, N.Y. STATE, (last visited Feb. 13, 2024), <https://cannabis.ny.gov/social-and-economic-equity> [https://perma.cc/HGG7-3JYX].

¹⁰ Janve Sobers, *New York Cannabis Updates: Steady as She Goes*, CANNA LAW BLOG (July 18, 2022), <https://today.westlaw.com/Link/Document/Blob/Ib1e8394908ed11ed9f24ec7b211d8087.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=e5becf55-cf58-458e-be67->

However, by the close of 2023, only 20%¹¹ of recreational dispensaries were Black-owned.¹² Moreover, there have been additional implementation issues with the social equity plan such as legal challenges, bureaucratic roadblocks, and an underfunded and mismanaged Cannabis Reinvestment Fund, which is the main source of financial support for social equity business owners. This reality mimics what has occurred in many other states with social equity initiatives. The very individuals who were promised redemption and opportunity in the cannabis “wild west” as a recompense for their engagement with the War on Drugs report disappointment with the new cannabis industry. One dispensary owner admitted that he was making more money in the illegal market.¹³

The irony of this predicament, to be criminalized and prosecuted for selling marijuana, then to be championed and endowed with the tools to sell cannabis, is a case study in using market solutions to repair state harm. SEE has more substance than other entrepreneurship policies designed to help socially disadvantaged entrepreneurs. However, the implementation issues point to an underlying deficiency in the law: the absence of a true reparations framework. The United Nations Principles on Reparations declared that victims of

6407966ce164&ppcid=24736ad243c4481088a3bee6e540606e&contextData=(sc.Category)&firstPage=true [https://perma.cc/LBX8-64LT].

¹¹ This proportion outpaces the national cannabis market in which less than 5% of businesses are Black-owned. See BRUCE BARCOTT ET AL., JOBS REPORT 2021: LEGAL CANNABIS NOW SUPPORTS 321,000 FULL-TIME AMERICAN JOBS, 13 (Leafly, 2021), <https://leafly-cms-production.imgix.net/wp-content/uploads/2021/02/13180206/Leafly-JobsReport-2021-v14.pdf> [https://perma.cc/V7HN-MZ6J].

¹² Press Release, N.Y. State Off. of the Governor, Governor Hochul Announces New Adult-Use Cannabis Dispensaries Opening Before End of Year (Dec. 14, 2023), <https://www.governor.ny.gov/news/governor-hochul-announces-new-adult-use-cannabis-dispensaries-opening-end-year>.

¹³ Michael Corkery, *Oakland Cannabis Sellers, Once Full of Hope, Face a Harsh Reality*, N.Y. TIMES (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/business/cannabis-dispensaries-oakland.html?smid=nytcore-ios-share&referringSource=articleShare&tgrp=cpy&pvid=43F96BD2-62FC-4142-B8BC-D3B3CD7409F2> [https://perma.cc/PM3U-KJHB].

human rights violations “should be provided with full and effective reparation...which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”¹⁴ When SEE is examined under the UN reparations framework, which is also utilized by reparations advocates, its limitations are clearer. Without a true reparative focus, future attempts at equitable entrepreneurship policy will not meet the unique needs of Black business owners.

This Article examines New York’s Social and Economic Equity Program as a reparations measure for Black¹⁵ survivors of the War on Drugs. Of particular interest is legislators’ decision to utilize state-sponsored entrepreneurship as a transactional exchange for over five decades of state-sponsored persecution. Entrepreneurship cannot be extricated from systemic racism, and traditional entrepreneurship policy measures meant to provide equity to Black entrepreneurs will not succeed unless the harm of years of economic subjugation is acknowledged and repaired through reparations-based entrepreneurship policy. This Article argues that the neoliberal reforms of existing entrepreneurship policy and community reinvestment fall short of the reparative measures that would begin to make War on Drugs survivors whole.

This Article adds to newly emerging scholarship on cannabis policy and cannabis social equity programs from a transactional law and small business entrepreneurship perspective. This Article also furthers the body of critical race theory scholarship that differentiates the experiences of Black

¹⁴ G.A. Res. 60/147, at 7 (Dec. 16, 2005). The United States involvement in the trans-Atlantic slave trade and the United States’ continued and sustained discrimination against Black people has not been included in international crimes against humanity. In fact, the US opted out of being included in the international tribunal that would adjudicate international crimes against humanity. As a result, there have been isolated attempts to bring light to the instances of state harm endured by Black people in the US; *see also* Patricia M. Muhammad Esq., *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT’L L. REV. 883, 884 (2003).

entrepreneurs. Access to entrepreneurship is a basic tenant of restorative economic justice for groups that have been formerly denied entry into the market. Finally, this Article contributes the novel concept of “reparative entrepreneurship” as a policy consideration to improve economic outcomes for Black and socially disadvantaged entrepreneurs.

Part II of the Article positions MRTA and SEE as reparative legislation by reviewing the law and accompanying public facing materials in light of the current reparations climate in the US. Part III of the Article presents a standard for successful cannabis social equity plans and highlights how SEE’s implementation falls short of several markers for success. Part IV asserts that SEE’s reparative impact is undercut by its neoliberal policy design and instead analyzes SEE under a reparations framework which more closely mirrors its intent. Part IV also explores how to best implement entrepreneurship as a reparative tool for Black people in the U.S. Part IV also presents the idea of reparative entrepreneurship policy and its applicability to Black War on Drugs survivors and other socially disadvantaged groups.

II. CANNABIS SOCIAL EQUITY PROGRAMS AND THE WAR ON DRUGS

A. *A Reparations Moment*

MRTA’s Social and Economic Equity (SEE) plan is ideologically connected to the broader movement for Black American reparations across the United States. Although MRTA is not explicitly branded as “reparations,” it functions as reparative legislation meant to provide recompense for survivors of the War on Drugs, who are overwhelmingly Black.¹⁶ MRTA primarily uses entrepreneurship as the

¹⁶ See Esta Bigler, *MRTA Policy Recommendations*, Cornell ILR Lab. and Emp. L. Program (last visited Dec. 30, 2024), <https://www.ilr.cornell.edu/labor-and-employment-law-program/cannabis-and-workplace/mrta-policy-recommendations> [https://perma.cc/RZ94-RSMG].

medium for repair, both by providing business ownership opportunities to War on Drugs survivors and by utilizing the revenues from the sale of cannabis to fund reparative efforts for individuals and communities disproportionately impacted by the War on Drugs. Entrepreneurial opportunities and investment deserve a central place in War on Drugs reparations agendas for two reasons: (1) the War on Drugs led to economic suppression in Black communities¹⁷ and (2) entrepreneurship confers ongoing symbolic value to Black Americans.¹⁸

Reparations is broadly defined as “the act of making amends, offering expiation, or giving satisfaction for a wrong or injury.”¹⁹ However, the post-racial reckoning²⁰ understanding of reparations found across newspaper

¹⁷ See generally Deborah Small, *The War on Drugs is a War on Racial Justice*, 68 SOC. RSCH. 896 (2001).

¹⁸ P. Köllinger & M. Minniti, *Not for Lack of Trying: American Entrepreneurship in Black and White*, 27 SMALL BUS. ECON. 59, 73 (2006) (research indicates that Black business owners are “more self-confident in their entrepreneurial skills, exhibit higher alertness to business opportunities, and are less sensitive to fear of failure” in spite of lower rates of self-employment success).

¹⁹ *Reparation*, MERRIAM-WEBSTER(LEGALDEFINITION), (last visited Sept. 19, 2024), <https://www.merriam-webster.com/dictionary/reparations> [https://perma.cc/DH79-LCKK].

²⁰ The racial reckoning refers to the period after the murder of George Floyd in May of 2020. Dissatisfaction among Black Americans in the United States resulted in protests both in person and via social media channels. Although an act of police brutality was the impetus for the racial reckoning, many areas of Black life, including employment discrimination, health inequities, mass incarceration, and economic disenfranchisement, were surfaced in the wake of the murder. During this time, which is informally known as the Racial Reckoning of 2020, there were also increased demands for reparations from Black activists, which is related to a widespread dissatisfaction with the conditions for Black people in America and their connection to chattel slavery. Juliana Menasce Horowitz et al., *Amid National Reckoning, Americans Divided on Whether Increased Focus on Race Will Lead to Major Policy Change*, PEW RESEARCH CENTER (Oct. 6, 2020), <https://www.pewresearch.org/social-trends/2020/10/06/amid-national-reckoning-americans-divided-on-whether-increased-focus-on-race-will-lead-to-major-policy-change/> [https://perma.cc/4ARF-GW27].

headlines²¹ and in the halls of legislative bodies is primarily concerned with how victims of state harm, namely, Black people, can begin to be made whole from the legacy of slavery. Despite widespread opposition on behalf of the American public,²² reparations is not a novel concept to American lawmakers. In various instances, dating back as far as the 1700s, restitution for civil or economic harm has been supported by the U.S. legal system. There are instances of state-led reparations efforts for Black people dating back to the Southern Homestead Act of 1844,²³ but a widespread

²¹ On the day this paragraph was written, for example, the headlines were “Mass. Lawmakers urged to create commission to study reparations for slave descendants,” “Two Detroit reparations task force members step down, citing ‘lack of progress,’” “New York report exposes shocking racial wealth gap as pressure for reparations commission grows.” See Kinga Borondy, *Mass. Lawmakers Urged to Create Commission to Study Reparations for Slave Descendants*, WORCESTER TELEGRAM & GAZETTE (Dec. 8, 2023, 12:08 PM), <https://www.telegram.com/story/news/state/2023/12/06/reparations-needed-to-close-wealth-gap-life-expectancy-gap-between-blackwhite-residents-of-ma/71816998007/> [https://perma.cc/G5CN-4V86]; Hanna Panreck, *Two Detroit Reparations Task Force Members Step Down, Citing Lack of Progress*, FOX NEWS (Dec. 5, 2023, 2:30 PM), <https://www.foxnews.com/media/two-detroit-reparations-task-force-members-step-down-citing-lack-progress> [https://perma.cc/4W33-PFZG]; Kaitlyn Kennedy, *New York Report Exposes Shocking Racial Wealth Gap as Pressure for Reparations Commission Grows*, TAG 24 (Dec. 7, 2023, 10:19 PM), <https://www.tag24.com/politics/reparations/new-york-report-exposes-shocking-racial-wealth-gap-as-pressure-for-reparations-commission-grows-3034029> [https://perma.cc/HV66-W4QG].

²² Only 30% of Americans think reparations for slavery is justified. Carrie Blazina & Kiana Cox, *Black and White Americans are Far Apart in their Views of Reparations for Slavery*, PEW RESEARCH CENTER (Nov. 28, 2022), <https://www.pewresearch.org/short-reads/2022/11/28/black-and-white-americans-are-far-apart-in-their-views-of-reparations-for-slavery/> [https://perma.cc/Q8JR-WQ8X].

²³ The oldest reported case of reparations was from 1773, in which enslaved people in Massachusetts were granted damages by the court against their slaveholder. Allen J. Davis, *Reparations in the United States: A Historical Timeline of Reparations Payments Made from 1773 through 2023 by the United States, Cities, Religious Institutions, Universities, Corporations, and Communities*, U. MASS. AMHERST (Oct. 1, 2024),

legislative effort on the state or federal level has yet to be realized.

Many modern-day demands for Black American reparations are modeled after the United Nations Principles on Reparations,²⁴ the recourse for victims seeking remedy for violations of international human rights law.²⁵ In the 2005 resolution, the UN Commission on Human Rights declared that victims of human rights violations should “be provided with full and effective reparation...which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”²⁶ These principles became known as the five principles of reparations. Whether Black people in the US are entitled to reparations is a topic that has been explored in various follow-up United Nations reports. In 2016, the UN Working Group of Experts on People of African Descent issued a preliminary report on the state of people of

<https://guides.library.umass.edu/reparations>. In the United States alone, reparations have been issued to a variety of groups (e.g., Indigenous Americans and Japanese Americans) and for an assortment of circumstances (e.g., survivors of the Tuskegee experiments and victims of police violence in Chicago). *Id.*

²⁴ G.A. Res. 60/147 (Dec. 16, 2005). The United States’ involvement in the trans-Atlantic slave trade and the United States continued and sustained discrimination against Black people have not been included in the resolution as international crimes against humanity. In fact, the U.S. opted out of being included. As a result, there have been isolated attempts to bring light to the instances of state harm endured by Black people in the US.

²⁵ *Id.* at 1.

²⁶ *Id.* at 7.

African descent in the United States.²⁷ The War on Drugs²⁸ is listed as one of many areas of concern identified by the group. A 2021 report by the United Nations Commission on Human Rights specifically underscores the application of the UN reparations framework for people of African descent and acknowledges that “no State has comprehensively accounted for the past or for the current impact of systemic racism.”²⁹ In light of this lack of accountability, the report contends that “reparations are essential for transforming relationships of discrimination and inequity and for mutually committing to and investing in a stronger, more resilient future of dignity, equality and non-discrimination for all. Reparatory justice requires a multipronged approach that is grounded in international human rights law.”³⁰

In the U.S., the landscape has become ripe for increased reparative legislation, either for comprehensive reparations efforts or standalone measures for more discreet harms such as the War on Drugs. In 2021, after 32 years, federal

²⁷ Human Rights Council, *Rep. of the Working of Experts on People of African Descent on its Mission to the United States of America*, ¶9, 68, U.N. Doc. A/HRC/33/61/Add.2, (Aug. 18, 2016) (“Despite substantial changes since the end of the enforcement of Jim Crow and the fight for civil rights, ideology ensuring the domination of one group over another, continues to negatively impact the civil, political, economic, social and cultural rights of African Americans today . . . The colonial history, the legacy of enslavement, racial subordination and segregation, racial terrorism, and racial inequality in the US remains a serious challenge as there has been no real commitment to reparations and to truth and reconciliation for people of African descent . . .”).

²⁸ The “War on Drugs” has led to mass incarceration and is compared to enslavement, due to exploitation and dehumanization of African Americans. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 185-187 (The New Press rev. ed. 2012) (2010).

²⁹ High Comm’r For Human Rights, *Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers*, ¶60, U.N. Doc. A/HRC/47/53 (June 1, 2021).

³⁰ *Id.* at ¶64.

legislation H.R.40,³¹ which would establish a commission to study and develop reparation proposals for African Americans, was moved out of the House Judiciary Committee to the House floor. Although the bill stalled, its activity marked a shift in visibility for reparative legislation. States and municipalities have also initiated their own reparations measures. In 2024, New York State joined a handful of other states in establishing commissions to study reparations.³² There have been smaller-scale reparations victories for victims of land-theft in California and victims of housing discrimination in Evanston, IL.³³ The various social equity programs, now in almost every state that has legalized marijuana, indicate a tipping of the scales towards public acceptance of reparative legislation for Black people.

While reparations do have a moral component, they are generally meant to address the Black economic disenfranchisement and the anti-Black government policies that resulted from slavery and subsequent *de jure* discrimination. This is evidenced by the racial wealth gap,³⁴

³¹ H.R. 40, 118th Cong., § 3 (2021).

³² Other states, such as California, Illinois, Minnesota, and Michigan, have created similar reparations commissions or task forces at either the state or local level. Jacquelyne Germaine, *The Fight for Reparations has Stalled in Congress. Here's What They Look Like in State and Local Governments*, CNN (July 13, 2022, 1:29 PM), <https://www.cnn.com/2022/07/13/us/reparations-state-local-commission-reaj/index.html> [<https://perma.cc/H8LP-HGAP>]; see also James Sanders Jr., *New York Takes Historic Step: Reparations Commission Announced*, THE NEW YORK STATE SENATE (Feb. 29, 2024), <https://www.nysenate.gov/newsroom/press-releases/2024/james-sanders-jr/new-york-takes-historic-step-reparations-commission> [<https://perma.cc/E8BF-QYPP>].

³³ See *Moving to Right Historical Wrong, Governor Newsom Signs Legislation to Return Bruce's Beach to Black Descendants*, GOVERNOR GAVIN NEWSOM, <https://www.gov.ca.gov/2021/09/30/moving-to-right-historical-wrong-governor-newsom-signs-legislation-to-return-bruces-beach-to-black-descendants/> [<https://perma.cc/9KM3-RAGL>]; *Evanston Local Reparations*, CITY OF EVANSTON, <https://www.cityofevanston.org/government/city-council/reparations> (on file with the Columbia Business Law Review).

³⁴ For example, the median household net worth of white New Yorkers in 2021 was \$276,900 while the median household net worth of Black New

which is attributed to the compounded effect of slavery and subsequent anti-Black policies. Currently the net worth of Black families is about 10% of the net worth of the median white family in America.³⁵ In *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*, the authors draw the throughline of discriminatory economic policies towards Black Americans, from the lack of the 40-acres and a mule³⁶ immediately after emancipation, to exclusion from the G.I. Bill.³⁷ All of these policies, including the cocktail

Yorkers in 2021 was \$18,870. Brad Lander, *The Racial Wealth Gap in New York*, N.Y.C. COMPTROLLER (Dec. 6, 2023), <https://comptroller.nyc.gov/reports/the-racial-wealth-gap-in-new-york/> [<https://perma.cc/M9RA-Y42L>].

³⁵ Briana Sullivan et al., *Households With a White, Non-Hispanic Householder Were Ten Times Wealthier Than Those With a Black Householder in 2021*, U. S. CENSUS BUREAU (Apr. 23, 2024), <https://www.census.gov/library/stories/2024/04/wealth-by-race.html#:~:text=In%202021%2C%20households%20with%20a%20White%20householder%20made,wealth%20of%20households%20with%20a%20White%20householder%20%28%24250%2C400%29> [<https://perma.cc/2QWA-ZUG4>]. (“In 2021, households with a White householder made up 65.3% of all U.S. households and held 80.0% of all wealth. Those with a Black householder made up 13.6% of all U.S. households but held only 4.7% of all wealth. And their median wealth (\$24,520) was about one-tenth the median wealth of households with a White householder (\$250,400).”).

³⁶ DeNeen L. Brown, 40 Acres and a Mule: How the First Reparations for Slavery Ended in Betrayal, *THE WASHINGTON POST* (Apr. 15, 2021, 7:30 AM), <https://www.washingtonpost.com/history/2021/04/15/40-acres-mule-slavery-reparations/>.

³⁷ See Sarah Turner & John Bound, Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outlines of Black Americans, 63 *J. ECON. HIST.* 145 (2003) (asserting that very few Black returning veterans benefited from the G.I. Bill). This Article does not attempt to list all of the incidents of anti-Black policies since slavery. For further information on these policies, the Author suggests the seminal Darity and Mullins book. See WILLIAM A. DARITY & A. KRISTEN MULLEN, *FROM HERE TO EQUALITY, REPARATIONS FOR BLACK AMERICANS IN THE TWENTIETH CENTURY* (U.N.C. Press, 2nd ed. 2022). For a more condensed survey, see Andrea Ritchie et al., *Reparations Now Toolkit, MOVEMENT 4 BLACK LIVES* (2019), <https://m4bl.org/wp->

of policies that created the War on Drugs, have had a material dimension, that contributed to the persisting racial wealth gap. The only way to close this wealth gap, is to provide reparations.

Entrepreneurship, and its potential to close the wealth gap, is gaining traction in the reparations conversation. Business ownership in the U.S. is a vehicle for innovation and class mobility. Entrepreneurship policy that focuses on the potential of entrepreneurship to help individuals and communities has gained prominence since the late 1990s. The evolution of community economic development, vis-à-vis entrepreneurial investment, has also gained carte blanche acceptability for policymakers. Despite general support on behalf of legislators to invest in Black entrepreneurship initiatives, entrepreneurship alone cannot close the wealth gap.³⁸

The War on Drugs is the most recent in a series of harmful state and private actions that extracted wealth from the Black community. Reparative entrepreneurship policy is necessary for Black entrepreneurs to truly succeed. If New York, and many other states, will use entrepreneurship as the method of repair through cannabis social equity programs, which are arguably a euphemism for War on Drugs reparations, the form matters more than the intent.

B. The Harm of the War of Drugs

Reparations advocates name the federal and state policies which characterize the War on Drugs as a major source of harm for Blacks in America. Additionally, advocates place the

content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf
[<https://perma.cc/R82X-Y6XY>].

³⁸ Chuck Collins et al., *The Racial Wealth Divide: A Primer, in Ten Solutions to Bridge the Racial Wealth Divide* 6, 9 (2019) (citing a study that finds that Blacks' individual behavior alone, i.e. entrepreneurship, cannot close the wealth gap).

War on Drugs in the throughline of Black harm that extends from slavery to mass incarceration.³⁹

The War on Drugs refers to a shift in federal drug policy initiated by President Richard Nixon in the early 1970s, although the legacy of drug regulation and criminalization along racial lines existed for decades prior.⁴⁰ In recent years, the War on Drugs was mitigated by a tempering of drug policies, with many states reversing mandatory sentencing guidelines⁴¹ and the passage of the Fair Sentencing Act in 2010 in which Congress reduced the discrepancy between

³⁹ Law 4 Black Lives (L4BL) utilizes the United Nations reparations framework and applies it to the harm inflicted by American institutions from the time period of the transatlantic slave trade through the War on Drugs. L4BL also identifies major historical incidents that have compounded the harm for Black Americans. In its “list of just some of the harms committed against Black people in the United States for which reparations are owed,” L4BL states that “over 1.5 million arrests were made for drug-related offenses in 2017. Black people are nearly [four] times more likely to be arrested for marijuana use, even though they use drugs at rates equal to white people.” The group also discusses the further harm of these arrests by stating that “incarceration has been shown to result in having your voting rights taken away, housing insecurity, unemployment, increased rates of poverty and family separation as well as long-lasting emotional and psychological impacts.” Andrea Ritchie et al., *supra* note 37, at 12–14.

⁴⁰ Some historians begin the discussion of the War on Drugs with the bans on opium and morphine which took place in the early 20th century. See DAVID T. COURTWRIGHT, *A Century of American Narcotic Policy*, in TREATING DRUG PROBLEMS: VOLUME 2: COMMISSIONED PAPERS ON HISTORICAL, INSTITUTIONAL, AND ECONOMIC CONTEXTS OF DRUG TREATMENT, NATIONAL LIBRARY OF MEDICINE 1, 7 (Gerstein & Harwood eds., 1992).

⁴¹ Mandatory sentencing guidelines stand out as an especially harmful policy contributing to longer sentences for drug convictions. Prior to mandatory sentencing guidelines, someone convicted of a drug crime could expect to spend 5 years in prison. After mandatory sentencing guidelines were in place, the average time spent in prison was 15 years. See generally U.S. SENT’G COMM’N, MANDATORY MINIMUM SENTENCING FOR DRUG OFFENSES IN THE FEDERAL SYSTEM (2017), <https://www.ussc.gov/research/research-reports/mandatory-minimum-penalties-drug-offenses-federal-system> [https://perma.cc/C6CW-QMCW].

crack and powder cocaine offenses.⁴² However, drug policy advocates would argue that the War on Drugs is ongoing, even in spite of efforts to legalize marijuana.⁴³

The War on Drugs is characterized by the regulatory criminalization of drugs on a federal level and increased federal investment into their prohibition. On a policy level, President Nixon endorsed the creation of a more robust federal drug control regime, such as the passage of the Controlled Substances Act⁴⁴ (the “CSA”) and the creation of the Drug Enforcement Administration⁴⁵ (the “DEA”). These developments begun the task of building out a regulatory scheme for all drugs, including the prohibition of certain drugs which were thought to be the most dangerous with a high risk of addiction and little evidence of medical benefits.

The anti-drug sentiment of the time, which permeated everything from cartoons to commercials,⁴⁶ was symptomatic of the top-down conservative influence originating with President Nixon and lasting through President Clinton. Nixon utilized combat imagery and declared drug abuse as “America’s public enemy number one.”⁴⁷ As part of his offensive, Nixon utilized racial stereotypes about drug use and devoted more federal resources to institutionalizing agencies

⁴² The Fair Sentencing Act of 2010 amended the Controlled Substances Act by reducing the disparity between crack and powder cocaine sentencing and by eliminating a mandatory minimum sentence for simple possession. Fair Sentencing Act of 2010, Pub.L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended at 21 U.S.C. § 801).

⁴³ Based on data collected by the Community and Transactional Lawyering Clinic at Rutgers Law School (on file with the *Columbia Business Law Review*).

⁴⁴ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242.

⁴⁵ Reorganization Plan No. 2 of 1973, 38 F.R. 15932, 87 STAT. 1091.

⁴⁶ This Is Your Brain on Drugs was a large-scale U.S. anti-narcotics campaign by Partnership for a Drug-Free America (PDFA) launched in 1987, that used three televised public service announcements (PSAs) and a related poster campaign. Partnership for a Drug-Free America, *This Is Your Brain on Drugs*, YOUTUBE (Sept. 6, 2008), <https://www.youtube.com/watch?v=3FtNm9CgA6U>.

⁴⁷ President Richard Nixon, Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971).

whose sole purpose was to prohibit illegal substances.⁴⁸ On the state and municipal level, the War on Drugs led to over-policing of drug use and sale in poverty stricken Black and brown neighborhoods. During the War on Drugs, Black people were 3.6 times more likely to be arrested for marijuana-related crimes.⁴⁹ Over 80% of people sentenced for federal marijuana charges were Black and Latinx.⁵⁰

The CSA created a five-tiered system, ranging from a Schedule I Drug (most dangerous) to a Schedule V Drug (least dangerous).⁵¹ At first, the CSA temporarily placed marijuana in the Schedule I category, pending further review because of conflicting testimony. Because the risks and benefits of marijuana were not fully analyzed at the time, the National Commission on Marihuana and Drug Abuse was convened, consisting of nine presidential appointees and four congressional appointees. Despite President Nixon's open condemnation of marijuana and disregard for the findings of the committee, the committee still voted that marijuana should not remain a Schedule I Drug in what would be known as the Shafer Commission Report.⁵² White House Chief of Staff Haldeman concluded later in his diary that "[Nixon] emphasized that you have to face the fact that the whole [drug] problem is really the [B]lacks. The key is to devise a

⁴⁸ ANNE L. FOSTER, *War On Drugs Declared*, in *THE LONG WAR ON DRUGS* 109, 109 (2023).

⁴⁹ Press Release, ACLU, New ACLU Report: Despite Marijuana Legalization Black People Still Almost Four Times More Likely to Get Arrested (Apr. 20, 2020), <https://www.aclu.org/press-releases/new-aclu-report-despite-marijuana-legalization-black-people-still-almost-four-times#:~:text=NEW%20YORK%20%E2%80%93%20The%20American%20Civil,despite%20comparable%20marijuana%20usage%20rates> [https://perma.cc/B9BZ-Y6XB].

⁵⁰ *Legalizing and Regulating Marijuana The Right Way*, DRUG POLY ALL., <https://drugpolicy.org/issue/legalizing-and-regulating-marijuana-the-right-way/> (last visited Feb. 13, 2024).

⁵¹ 21 U.S.C. § 812 (1970); Foster, *supra* note 48, at 111–12.

⁵² NAT'L COMM'N ON MARIHUANA & DRUG ABUSE, *MARIHUANA: A SIGNAL OF MISUNDERSTANDING; FIRST REPORT* 150 (U.S. Govt. Print. Off., 1972).

system that recognizes this while not appearing to.”⁵³ The Nixon Administration rejected the Shafer Commission Report⁵⁴ and insisted that marijuana remain a Schedule I Drug under the CSA.

The history of marijuana prohibition is inextricable from the history of anti-Black racism in America. The attempts to associate marijuana with certain societal ills, and consequently, people, dates back to the early 20th century.⁵⁵ Eight decades of marijuana prohibition have disproportionately burdened people of color who are more than four times as likely to be arrested as white people, with targeted policing, arrests, and criminal records.⁵⁶

Drug policy advocates are still awaiting the “end” of the War on Drugs, but there has been a shift in policies from being tough on crime to a harm reduction model, precipitated by the work of drug activists⁵⁷ and the politicization of the opioid epidemic which largely affected white Americans. In fact, much of the preparatory work in lobbying for the inclusion of a social equity plan within MRTA was the framing of the War

⁵³ David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 16 (2020).

⁵⁴ The Shafer Commission Report “rejected both the Criminality Theory and the Gateway Drug Theory and recommended decriminalizing marijuana. The National Institute of Mental Health issued a report that reached the same conclusions.” David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 17 (2020).

⁵⁵ See, e.g., *Leary v. United States*, 395 U.S. 6, 37 (1969); Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).

⁵⁶ “A 2021 study of New York Police Department arrests across all five boroughs revealed that people of color made up 94% of marijuana-related arrests.” Janessa Bailey, *Seeds of Change: Strategies to Create an Equitable Cannabis Industry*, LEAFLY, at 24 (2021), <https://leafly-cms-production.imgix.net/wp-content/uploads/2021/06/25091621/Leafly-2021-white-paper-Seeds-Of-Change-by-Janessa-Bailey-1.pdf> [<https://perma.cc/CY2F-25SQ>].

⁵⁷ *Building Alternatives to Criminalization*, DRUG POL’Y ALL., (last visited Feb. 13, 2024) <https://drugpolicy.org/campaigns/> [<https://perma.cc/CA56-ACN7>].

on Drugs as a reparative issue that disproportionately affected Black and Latinx New Yorkers.⁵⁸

The lasting effects of the War on Drugs are both social and economic. Individuals with marijuana convictions have lost years of their lives behind bars. Families of these individuals have had to do without their support. Those locked away for marijuana convictions could be “attending school, working fair-wage jobs, and contributing to local communities.”⁵⁹ Economically, criminal records prevent convicted people from certain types of employment, housing, and government benefits. In fact, a marijuana conviction is associated with a 30% drop in lifetime wages,⁶⁰ and job applicants are 50% less likely to receive a callback interview.⁶¹

The National Inventory of Collateral Consequences of Conviction (NICCC) is a report prepared by the Council of State Governments. Collateral consequences are “legal disabilities imposed by law as a result of a criminal conviction regardless of whether a convicted individual serves any time incarcerated.”⁶² These consequences create social and economic barriers for individuals reentering society by denying or restricting benefits otherwise available to all Americans.”⁶³ Collateral consequences disproportionately affect minority and economically disadvantaged populations. In a 2008 report by the Center of Economic Policy Research, the

⁵⁸ Press Release, Drug Pol. All., From Prohibition to Progress: What New York Needs to Know About Marijuana Legalization in Eight States and D.C. (Jan. 22, 2018), <https://drugpolicy.org/news/prohibition-progress-what-new-york-needs-know-about-marijuana-legalization/> [<https://perma.cc/YY9G-CBHW>].

⁵⁹ Bailey, *supra* note 56, at 24.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² AMERICAN BAR ASSOCIATION, *Collateral Consequences of Criminal Convictions Judicial Bench Book*, Nat'l Criminal Justice Reference Serv., Doc. No. 251583 (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf> [<https://perma.cc/Y7A5-ADLA>].

⁶³ *Id.*

GDP loss due to employment barriers of people with criminal records was \$65 billion annually.⁶⁴

C. MRTA and SEE: New York's Reparative Response to the War on Drugs

New York State has asserted a desire to lead the nation with regards to racial equity policymaking.⁶⁵ In 2022, Governor Hochul announced an Equity Agenda, a plan to address justice issues faced by women, racial minorities and members of the LGBTQIA+ community. The governor designed the agenda to “protec[t] the health, safety, economic opportunities, and fundamental dignity of every New Yorker.”⁶⁶ MRTA and SEE are listed within the context of this agenda as the announcement reads “a \$4.2 billion industry must create opportunities for all New Yorkers, particularly those from historically marginalized communities. In support of that goal, Governor Hochul will create a \$200 million public-private fund to support social equity applicants as they plan for and build out their businesses.”⁶⁷

⁶⁴ JOHN SCHMITT & KRIS WARNER, EX-OFFENDERS AND THE LABOR MARKET 1 (2010), <https://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

⁶⁵ In December of 2023, Gov. Kathy Hochul signed a bill that would establish a commission to “examin[e] the [i]nstitution of [s]lavery, [s]ubsequent [r]acial and [e]conomic [d]iscrimination [a]gainst [p]eople of African [d]escent, and the [i]mpact on [l]iving [p]eople of African [d]escent.” In the announcement of the bill, the tagline on the podium read “New York Leads Equity and Racial Justice.” Press Release, N.Y. State Off. of the Governor, Governor Hochul Continues New York’s Leadership on Racial Equity, Signs Legislation Establishing Commission to Study Reparations and Racial Justice (Dec. 19, 2023), <https://www.governor.ny.gov/news/governor-hochul-continues-new-yorks-leadership-racial-equity-signs-legislation-establishing> [https://perma.cc/TK4C-73HF].

⁶⁶ Press Release, N.Y. State Off. of the Governor, Governor Hochul Announces Equity Agenda (Jan. 5, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-equity-agenda> [https://perma.cc/2DPV-394P].

⁶⁷ *Id.*

This release, as well as other public facing materials, show that MRTA is a piece of reparative legislation; it explicitly addresses the inequity of the War on Drugs and attempts to correct the harm done to Black and Latinx New Yorkers. The legislative findings section of the bill reads as an acknowledgement of the devastating effects of the War on Drugs:

[E]xisting marihuana laws have not been beneficial to the welfare of the general public . . . and have instead resulted in devastating collateral consequences, including mass incarceration and other complex general trauma, that inhibit an otherwise law-abiding citizen's ability to access housing, employment opportunities, and other vital services. Existing marihuana laws have disproportionately impacted African-American and Latinx communities.⁶⁸

The portion of the law that is designed to specifically address social equity is the New York's Social and Economic Equity Plan ("NYSEE" or "SEE"). SEE is the vehicle for racial and economic justice⁶⁹ and entrepreneurship is the fuel. In the opening letter for the plan, the Executive Director of the Office of Cannabis Management states that "[the plan] does not run from New York's past relationship with cannabis. It . . . provides the State with achievable steps to repair the harm that has been done."⁷⁰ New York's Social and Economic Equity Plan is said to "herald[] the end of the era of 'Jim Crow policing' against Black and brown communities that have been devastated by decades of disproportionate drug possession arrests and mass incarceration."⁷¹

⁶⁸ S. B. 854-A, art. 1, § 2, Reg. Sess. (N.Y. 2021).

⁶⁹ N. Y. STATE OFF. OF CANNABIS MGMT., NEW YORK SOCIAL AND ECONOMIC EQUITY PLAN 4 (2022), <https://cannabis.ny.gov/system/files/documents/2023/09/nys-see-plan-english.pdf> [<https://perma.cc/2F59-C36Z>].

⁷⁰ *Id.* at 3.

⁷¹ In his introductory letter, Office of Cannabis Management Chief Equity Officer Damian Fagon also notes that the goal of the social equity plan is to reserve market space for Black cannabis entrepreneurs. Fagon goes on to note that "Black cannabis entrepreneurs account for just five percent of industry ownership. In many ways, demographic disparities in

SEE is described as a “living document,”⁷² which means the plan’s administrators reserve the option to change the plan based on public input. The inclusion of this caveat likely came after observing the pitfalls of social equity plans nationwide.⁷³ The authors of the plan describe the goals as follows: (1) the promotion of racial, ethnic and gender diversity when issuing licenses and (2) the promotion of diversity in commerce, ownership and employment, and opportunities for social and economic equity in the regulated cannabis industry.⁷⁴

From the self-described goals of the SEE, particularly within the context of Gov. Hochul’s equity agenda, the central purpose of the plan is to protect market space for diverse license applicants and ensure that there is a place for diverse entrepreneurship – and job creation – within the new cannabis industry. The economic aspect of the plan primarily legislates Black and brown entrepreneurship opportunities, whereby SEE is more than a social equity plan; it is also a piece of entrepreneurship policy.

Policymakers prioritized inclusion when designing SEE. At the outset, community stakeholders were included in the policymaking process through equity community roundtables.⁷⁵ The types of groups included were communities

ownership reflect and reinforce America’s persistent and insidious racial wealth gap – the cumulative result of centuries of institutional and systemic racism.” *Id.* at 4.

⁷² *Id.* at 6.

⁷³ “The earliest jurisdictions to legalize such as Colorado, Washington, Oregon, Alaska, and DC often discussed issues of race in the initiative campaigns. . . . However, the initiatives themselves were severely lacking in proactively addressing issues of justice and equity.” Sabrina Morris et al., *State Cannabis Reform is Putting Social Justice Front and Center*, BROOKINGS INST. (Apr. 16, 2021), <https://www.brookings.edu/articles/state-cannabis-reform-is-putting-social-justice-front-and-center/> [<https://perma.cc/SS49-TN6H>].

⁷⁴ See N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 6.

⁷⁵ In total there were 18 community roundtables, the majority of which were in person, and over 400 New York residents spoke out on the social and economic impact that disproportionate cannabis prohibition had on them. Specifically highlighted by the Office of Cannabis management, the participants of the roundtable identified “[b]arriers to accessing economic

disproportionately impacted by cannabis prohibition (CDIs)—minority-owned businesses, women-owned businesses, distressed farmers, and service-disabled veterans—groups representative of SEE stakeholders.⁷⁶ The goal of this public input was to centralize the lived experiences of people directly affected, instead of creating a top-down legislative process.

From the start, policymakers intended to address the harm of the War on Drugs and they strived to create policies that avoided the pitfalls of other state's social equity programs. New York policymakers used lessons-learned from other states. The social equity plan states that “the earliest jurisdictions to legalize such as Colorado, Washington, Oregon, Alaska, and DC often discussed issues of race in the initiative campaigns. Explanations, particularly in communities of color, about the effects of the drug war and how removal of criminal penalties would have significant benefits helped build the coalitions that passed those referenda. However, the initiatives themselves were severely lacking in proactively addressing issues of justice and equity.”⁷⁷ In contrast, New York policymakers intended to centralize equity for people of color.⁷⁸

To do this, the Office of Cannabis Management applied what they call an “equity framework”⁷⁹ to the newly regulated

opportunities that their communities have historically encountered.” *Id.* at 21.

⁷⁶ *Id.* at 20.

⁷⁷ Morris et al., *supra* note 73.

⁷⁸ See, e.g., N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69.

⁷⁹ The Cannabis Control Board and Office of Cannabis Management utilizes the following “equity pillars” as foundational to the work of creating policies for the cannabis market: (1) Bringing to life an industry that gives small, independent businesses an opportunity to compete. (2) Building relationships and trust within the communities most impacted through educational and social programming. (3) Investing resources including grants, loans, and technical assistance to equip SEE groups with the support needed to thrive in the New York State cannabis market. (4) Educating communities on their rights in accordance with the Cannabis Law and regulations. Collecting data and evolving programming to adapt to the equity needs of the industry. N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 10.

cannabis industry. It is important to establish what framework or “theory of change” the authors of the legislation and the executive board of the Office of Cannabis Management employ in their promotion of equity. In the plan’s materials, equity is described as “the fair treatment, access to opportunity, and advancement for All”⁸⁰ which will only be achieved through “the elimination of barriers that prevent the full participation of some groups.”⁸¹ More specifically, social equity is achieved by “acknowledg[ing] systemic inequalities affecting certain communities and offer[ing] sociopolitical and economic solutions that provide opportunity and financial empowerment for those subject to unequal conditions.”⁸² The racial wealth gap is mentioned various times in the plan, as symptomatic of the current inequity that extends beyond the cannabis market and is pervasive in any discussion of economic injustice in America.⁸³ Cannabis legalization in New York State is an example of interest convergence.⁸⁴ Ending marijuana prohibition was not always a racial justice issue. The stars aligned among politicians, drug policy activists, the general public and the medical marijuana community resulting in a piece of legislation that seemed to meet everyone’s needs. Lawmakers were influenced by the political impetus to legalize marijuana, as more and more states passed decriminalization measures. Medical marijuana companies were eager to expand into the recreational market and lobbied for ending prohibition.⁸⁵ Grassroots drug policy activist groups such as the Drug Policy

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 4, 10.

⁸⁴ See generally Derrick A. Bell Jr., Comment, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L.REV. 518 (1980).

⁸⁵ See, e.g., Luis Ferre-Sadurni, *New York Reaches a Deal to Legalize Recreational Marijuana*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/nyregion/ny-legalize-marijuana.html> [https://perma.cc/ML2L-7ZFZ].

Alliance (“DPA”)⁸⁶ only strategically inserted race into the legalization conversation to gain widespread support and to position War on Drugs survivors to receive reparations. Early in their legalization work, DPA identified that early drafts of marijuana legalization legislation would create an industry that blocked formerly incarcerated people from obtaining licenses. DPA focused their campaign to end marijuana prohibition around race, particularly for Black and Latinx people. DPA made marijuana prohibition a racial justice issue, which led to a shift in the cannabis legalization campaigns across the country.⁸⁷ Although reparations is not explicitly mentioned in the New York bill, the messaging that the DPA spearheaded to make marijuana legalization a racial justice issue, pinpointing the harm of the War on Drugs, became the framework for change around the country and laid the foundation for the concept of social equity programs.⁸⁸

New York attempted to create equity for Black War on Drugs survivors by making space in the newly emerging cannabis market. The viability of entrepreneurial opportunities, though, is questionable. Now that the cannabis industry is moving out of the shadows there is no doubt that there is money to be made.⁸⁹ However, most of the cannabis

⁸⁶ The Drug Policy Alliance is a New York City-based nonprofit organization that is “working to end the drug war, repair its harms, and build a non-punitive, equitable, and regulated drug market.” DRUG POL’Y ALL., <https://drugpolicy.org/about/> (last visited Oct. 16, 2024) [<https://perma.cc/7HTG-AZ4V>].

⁸⁷ *White Faces, Black Lives: Race and Reparative Justice in the Era of a “Gentler War on Drugs”*, DRUG POL’Y ALL. (Oct. 18, 2016), <https://drugpolicy.org/resource/white-faces-black-lives-race-and-reparative-justice-in-the-era-of-a-gentler-war-on-drugs/> [<https://perma.cc/7HTG-AZ4V>].

⁸⁸ Press Release, Drug Pol. All., VICTORY: DPA Hails Historic Passage of Marijuana Legalization in New York (Mar. 30, 2021), <https://drugpolicy.org/news/victory-dpa-hails-historic-passage-marijuana-legalization-new-york/> [<https://perma.cc/BE77-HXVK>].

⁸⁹ “With respect to the global legal cannabis industry, consumer spending grew forty- six percent in 2019 to a record high of \$14.8 billion, with \$12.4 billion coming from United States legalized sales alone. One cannabis industry market research firm believes United States sales will

industry is still operated outside of state regulatory schemes in the pre-legalization marijuana industry or “legacy market.”⁹⁰

D. Preview of Shortcomings

MRTA and SEE’s early implementation is characterized by very ambitious initial goals followed by a tempering from both internal and external forces. In the wake of SEE’s announcement, the Office of Cannabis Management publicly spread the word through in-person information sessions and online forums about the dawn of a new era for New York. Administrators spoke about turn-key dispensaries, state-provided leases, and access to capital that would explicitly be reserved for social equity applicants.⁹¹ Administrators spoke of the abundant opportunity in the licensing scheme that would prioritize social equity applicants for recreational licenses and subsequent license rollouts, such as “delivery-only” licenses.⁹² Once the license period opened, the reality of state bureaucracy weighed heavily on the initial applicants. Temporary pop-up license clinics hosted by non-profit groups saw throngs of would-be applicants, many of which were turned away because they didn’t satisfy the narrow guidelines that specified both a previous marijuana conviction and years of experience as a small business owner.⁹³ The applicants who

reach \$33.9 billion by 2025.” Ryan B. Stoa, *Emerging Issues in Cannabis Law: 2022 and Beyond*, 46 SETON HALL J. OF LEGIS. AND PUB. POL. 469, 478 (2022).

⁹⁰ “Even in states where legal markets have emerged, they struggle to compete with legacy networks. In California – the state considered by most to be the largest player in the cannabis industry—eighty-to-ninety percent of the cannabis industry is not part of the new, legal market.” *Id.* at 479.

⁹¹ Off. of Manhattan Borough President Mark Levine, Get Lifted: Learning about Opportunities in the Cannabis Industry, YOUTUBE (May 26, 2022), <https://www.youtube.com/watch?v=Lrgm2wvjzsg> [https://perma.cc/HBV4-UQ6E].

⁹² *Id.*

⁹³ Press Release, The Bronx Defenders, The Bronx Cannabis Hub Successfully Helps 30 People Directly Impacted by the War on Drugs Apply for the First Round of Cannabis Dispensary Licenses in New York (Oct. 5,

did meet the initial threshold spent hours (and sometimes days) filling out applications with the help of pro bono business and criminal defense attorneys. Once the first set of licenses was awarded, the harsh reality of program delays, funding discrepancies, ever-changing regulations, and legal challenges that would hold the entire industry in a deadlock led many advocates, trade associations, non-profits, and license recipients to wonder if SEE would actually fulfill the promises broadcasted at the outset.⁹⁴ Most importantly, would those adversely impacted by the War on Drugs be able to use this opportunity for entrepreneurship as a springboard for something greater for themselves and their communities?

III. THE IMPLEMENTATION OF MRTA'S SOCIAL EQUITY AND ECONOMIC PLAN

A. Signposts for Success

Cannabis social equity programs refer to the legislative effort to capture individuals and communities that the War on Drugs has disproportionately impacted. These programs, often incorporated into the greater regulatory structure of the new cannabis industry, are as diverse and distinct as the various states adopting them. Generally, these programs have the following characteristics: (1) they reserve a number of cannabis industry licenses for members of historically disadvantaged groups;⁹⁵ (2) they provide specific

2022), <https://www.bronxdefenders.org/the-bronx-cannabis-hub-successfully-helps-30-people-directly-impacted-by-the-war-on-drugs-apply-for-the-first-round-of-cannabis-dispensary-licenses-in-new-york/> [https://perma.cc/VCA6-KGXE].

⁹⁴ “One wonders why legal market participants are making such little headway into total market share. Possible explanations include excessive taxes, confusing regulatory requirements for consumers, and a lack of trust in, or familiarity with, new cannabis companies. Even so, many cannabis businesses attempting to gain a foothold in legal markets complain of the increasingly byzantine nature of state regulatory frameworks.” *Id.*

⁹⁵ The U.S. Small Business Administration defines Small Disadvantaged Businesses as (1) a minimum of 51% controlled and owned by at least one disadvantaged person, (2) being economically and socially

opportunities to individuals who have or have had marijuana convictions, and in some cases include the immediate family members in that group; (3) they allocate a percentage of the tax revenues from cannabis sales to individuals and communities affected by the War on Drugs; (4) they offer the expungement or sealing of past marijuana convictions; and (5) they promise the release of incarcerated people for prior legal marijuana convictions that now would be legal.⁹⁶

As social equity programs appear within more and more cannabis regulation schemes, questions arise as to what makes these programs successful. Generally, a successful social equity program should meet the needs of social equity applicants by providing a pathway for them to enter the legal cannabis market. As reparative legislation, MRTA and SEE would be successful if they repair the economic damage from the War on Drugs and promote equity in the cannabis market. The administrators of New York's Cannabis Control Board, the board responsible for administering the new cannabis regulations, established their markers for success. The administrators set the aggressive goal of issuing up to 50% of licenses to social equity applicants and vowed to address and mitigate traditional barriers to entry for these groups.⁹⁷

Social equity, though noble, is almost impossible to conceptually pin down.⁹⁸ First, policymakers must consider if

disadvantaged, and (3) meeting the U.S. Small Business Administration's standard for small. *Small Disadvantaged Business*, U.S. SMALL BUS. ADMIN., (last visited Feb. 13, 2024) <https://www.sba.gov/federal-contracting/contracting-assistance-programs/small-disadvantaged-business> [<https://perma.cc/8E6B-TX5K>].

⁹⁶ This Article does not explore another path of cannabis social equity – agriculture. Cannabis agriculture will become increasingly important, particularly as states across the South begin to legalize cannabis. Farmland and agriculture have been another area in which Black Americans have been systematically discriminated against. Symposium, *Equity in Cannabis Agriculture*, 101 B.U.L. REV. 1135, 1137 (2021).

⁹⁷ *What is in the Law*, OFF. OF CANNABIS MGMT., https://cannabis.ny.gov/system/files/documents/2022/02/cannabis-management-fact-sheet-social-equity_0_0.pdf [<https://perma.cc/8XFV-R6Z6>].

⁹⁸ Cannabis social equity tends to be only mentioned whenever the gains of the War on Drugs' survivors are discussed. However, some scholars

social equity for the War on Drugs is backward or forward-facing. Backward-facing policies would right the wrongs of the past by making survivors of the War on Drugs whole. Forward-facing policies would affirmatively include War on Drugs survivors in the new cannabis industry.⁹⁹ Even groups that are socially “aligned,” diverge when it comes to the actual implementation of social equity programs, including down to the location of the social equity dispensaries.¹⁰⁰

Leafly, a cannabis equity non-profit, defines cannabis social equity as a “tool for providing excluded communities the rights and opportunities afforded to them as equal members of society. In cannabis, equity can refer to a share of resources, access to opportunity, or the removal of unfair barriers. State and municipal policy makers have the obligation and opportunity to build social equity into cannabis legalization laws and establish legalization laws and establish a foundation of fairness in an industry previously ridden with notoriously unjust laws and race-based disparities in

believe there are also potential costs to cannabis legalization. These may include the adverse health effects of marijuana when used in large quantities and the potential for the marijuana industry to target vulnerable populations, similar to occurrences in the tobacco industry. Symposium, *Cannabis Legalization and Social equity: Some Opportunities, Puzzles, and Trade-Offs*, 101 B.U. L. REV. 1003, 1008 (2021).

⁹⁹ Still, if the cannabis industry is going to enjoy an equitable future, it must reckon with its inequitable past. Efforts toward this goal tend to fall into two camps: (1) those focused on restorative justice and revitalizing communities hit hardest by prohibitionist policies, and (2) those focused on inclusion and minority participation in a more general sense.” Stoa, *supra* note 89, at 482.

¹⁰⁰ The 125th Street Business Improvement District has launched a Change.org petition to stop state-licensed marijuana dispensary from setting up in the commercial district. They wanted the dispensary to open in the Adam Clayton Powell Office Building Plaza, where state troopers could monitor it. Ashley Southall, *Harlem Businesses Sue to Stop Dispensary Planned for 125th Street*, N.Y. TIMES (Apr.26,2023), <https://www.nytimes.com/2023/04/26/nyregion/ny-harlem-recreational-marijuana-suit.html>.

treatment.”¹⁰¹ Some examples of social equity strategies identified by Leafly are: mandating automatic expungement of cannabis records, establishing equitable cannabis licensing systems, dedicating cannabis tax revenue to healing, not harming, and supporting cannabis career development opportunities.¹⁰² Another group, the Minority Cannabis Business Association¹⁰³ (“MCBA”), establishes four pillars of social equity: (1) equitable industry, (2) equitable communities, (3) equitable justice, and (4) equitable access.¹⁰⁴ These pillars work as a standard of evaluation for social equity programs because they are divorced from political and economic motivations to grow the market.

An additional marker for success is whether the social equity program meets reparative goals, which may extend beyond market considerations. If policymakers operate under the premise that certain groups need reparative entrepreneurial opportunities, the implementation of the

¹⁰¹ Janessa Bailey, *Leafly Seeds of Change: Strategies to create an Equitable Cannabis Industry*, LEAFLY, at 4 (2021), <https://leafly-cms-production.imgix.net/wp-content/uploads/2021/06/25091621/Leafly-2021-white-paper-Seeds-Of-Change-by-Janessa-Bailey-1.pdf> [<https://perma.cc/KU7R-E6W9>].

¹⁰² *Id.* at 5.

¹⁰³ The Minority Cannabis Business Association is the first national trade association dedicated to serving the needs of minority cannabis businesses and their communities. The association seeks to “drive policy, programming, and outreach initiatives to achieve equity for the communities most impacted by cannabis prohibition and the War on Drugs.” MINORITY CANNABIS BUS. ASS’N, MCBA NATIONAL CANNABIS EQUITY REPORT 2 (2022), <https://mjbizdaily.com/wp-content/uploads/2022/02/National-Cannabis-Equity-Report-1.pdf>. [<https://perma.cc/VM6F-5LM5>]

¹⁰⁴ The following is a more detailed explanation of MCBA’s four pillars: “Equitable industry promotes the inclusion and success of minorities in the cannabis industry through equal access to opportunities and resources. Equitable communities empower and support the communities most impacted by the War on Drugs through community reinvestment, corporate responsibility initiatives, and social programming. Equitable Justice reduces arrests and imprisonment for non-violent cannabis offenses and restores basic rights of citizenship to individuals with non-violent cannabis offenses. Equitable access ensures safe legal cannabis products are available to immigrants, veterans, seniors, and disabled persons without risk of loss of benefits or immigration status.” *Id.*

policy must be tailored to correct the harm endured by those groups. Yet, no state has achieved all four pillars of cannabis social equity as established by the MCBA.¹⁰⁵ A few of the many reasons cited for this nationwide failure are the use of non-race criteria in qualifications, lack of access to funding in the startup phase,¹⁰⁶ and the requirement that license awards are contingent on an applicant's ability to secure a lease prior to the issuance of the license. In the next section, MRTA's specific issues in implementation will be analyzed.

B. MRTA's Social Equity Program

New York's Office of Cannabis Management also describes clearing the pathway to licensure as a key component of social equity. The plan notes that "making it easier for businesses owned and operated by underrepresented groups to secure operating licenses is the most direct approach to increasing diversity in the cannabis industry."¹⁰⁷ This is operationalized by conferring benefits to members of underrepresented groups, either through priority or exclusive licensing,¹⁰⁸ reduced or waived application fees,¹⁰⁹ or by giving underrepresented groups an advantage in the actual licensing

¹⁰⁵ *Id.* at 3.

¹⁰⁶ This is because, in most states, the funding promised to social equity license holders will be generated from the tax revenues of cannabis sales. This money generally will not be available until the industry has already been established for some time. *Id.* at 4.

¹⁰⁷ N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 13.

¹⁰⁸ Priority licensing has been implemented in New York. Massachusetts has exclusive licenses *only* for social equity applicants or economic empowerment priority applicants (e.g. marijuana courier licenses and marijuana delivery operators licenses). No other applicants can apply for an initial period of 36 months. There are also expedited applications submitted by minority-owned, women-owned, and veteran-owned businesses. COMMONWEALTH OF MASSACHUSETTS CANNABIS CONTROL COMMISSION, GUIDANCE ON LICENSURE 39–41 (2024), <https://masscannabiscontrol.com/wp-content/uploads/2024/03/Guidance-on-Licensure.pdf> [<https://perma.cc/LRA9-FW6V>].

¹⁰⁹ N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 13.

award determination, whether lottery-based¹¹⁰ or merit-based.^{111 112}

When it comes to entrepreneurship, almost every social equity initiative includes licensing opportunities for for-profit businesses. As discussed in Section II, key marijuana legalization advocates, which consisted of drug policy advocates, specifically requested to be included in the new industry through business licenses. Currently, even with several states prioritizing social equity applicants, the cannabis industry is overwhelmingly white. As of 2020, a survey of individuals with any ownership stake in a cannabis business revealed that 81% of cannabis businesses were white-owned; Black owners only made up 4.3% of the cannabis market.¹¹³

The MRTA was lauded as the most progressive social equity program at the time of passage. When viewed in its best light, the MRTA is the codification of activists' demands. The MRTA goes further than prior small business legislation by (i)

¹¹⁰ *Id.* Lottery-based license distribution, such as the scheme in Massachusetts described *supra* in note 99, may give social equity applicants more weight.

¹¹¹ N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 13. Merit-based license distribution, such as the one in New York, means different factors (e.g., relevant business ownership experience, capital reserves, etc.) are assigned scores. In schemes such as this, social equity applicants may also receive points designed to make their applications stronger. *Id.*

¹¹² Equitable state licensing systems may have additional characteristics, including low application and license fees for everyone, equity licenses for people from areas with high rates of poverty, unemployment, and cannabis-related arrests and incarceration, establishing 1:1 license approval ratios, non-equity licenses only when an equal number of equity licenses are issued, no requirement that license applicants lease real estate prior to license approval, no capital-on-hand requirements, no license caps – or licenses commensurate with liquor license caps, exclusive license categories based on residency eligibility standards, non-storefront cannabis retail licenses, licenses for small local microbusinesses, protections for cannabis co-ops, and licensing incentives for local public school graduates. *Id.*

¹¹³ Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. Bus. and Tech. L. 235, 255 (2020).

providing access and priority and blocking predatory third parties, (ii) circumventing wealth-based barriers to entry, (3) providing access to capital, (4) providing a support network and mentorship, and (5) demystifying the path to legitimacy.

While it is easy enough for the legislation to specifically protect underrepresented groups, determining the composition of underrepresented groups is often problematic. States are stuck between the proverbial rock and hard place. If they define their social equity recipients too broadly, this may dilute the benefits being conferred to the individuals adversely affected by the War on Drugs – Black and brown people. If states define their social equity applicants too narrowly, they will be vulnerable to affirmative action suits which claim reverse discrimination.¹¹⁴

Most states, including New York, have taken a moderately inclusive approach by defining their underrepresented groups in a way that is generally supported, both socially and legally, by other state agencies as well as the Small Business Administration, while simultaneously including another category of “people and communities disproportionately affected by the War on Drugs.”¹¹⁵ This is a new group which diverges from the traditional women and minority business enterprises (WMBEs). This group does not necessarily have a federally protected status like the other groups, but most social equity programs have been successful in granting these groups access. This is because the group is sometimes delineated by a geographic area or based on the presence of a

¹¹⁴ See, e.g., *Variscite NY One, Inc. v. New York*, 640 F.Supp.3d 232 (2023); Chris Roberts, *Marijuana MSOs Sue New York Over Adult- Use Retail License Delay*, MJ BIZ DAILY (Feb. 12, 2024), <https://mjbizdaily.com/marijuana- msos-sue-new-york-over-adult-use-retail-license-delay/#:~:text=In%20a%20lawsuit%20filed%20in%20state%20Supreme%20Court,150%20adult-use%20retail%20licenses%20for%20social%20equity%20applicants.>

¹¹⁵ In New York, SEE applicants include individuals who have lived in communities disproportionately impacted by the enforcement of cannabis prohibition (CDI) and other underrepresented groups including minority and women owned businesses, distressed farmers, and service-disabled veteran-owned businesses. N.Y. CANNABIS LAW § 87 (McKinney 2024).

prior marijuana conviction.¹¹⁶ New York uses a point system to award licenses and certain characteristics, such as being a social equity applicant, will grant a higher number of points per applicant, leading to a greater likelihood of receiving the license.¹¹⁷

After the group of social equity applicants is defined, the next safeguard is to create a market architecture that supports social equity businesses.¹¹⁸ In many states, the cannabis industry licenses are vertically integrated, which means one company can own and control the entire supply chain.¹¹⁹ An example of vertical integration would be a cannabis company that grows, processes and sells their product at a retail location. In contrast, horizontal integration happens when a business expands their footprint at the same part of the supply chain,¹²⁰ for example a cannabis retailer opening several retail locations. In New York, policymakers noticed the inherent barriers to entry in vertical markets. In a vertical market structure, to launch a cannabis business, an

¹¹⁶ There is significant opposition to this delineation because of the psychedelic exceptionalism theory. See Sean Lawlor, *Psychedelic Exceptionalism and Reframing Drug Narratives: An Interview with Dr. Carl Hart*, PSYCHEDELICS TODAY (last visited Feb. 13, 2024), <https://psychedelictoday.com/2020/02/18/psychedelic-exceptionalism-and-reframing-drug-narratives-an-interview-with-dr-carl-hart/> [https://perma.cc/S7U3-5GHV].

¹¹⁷ According to the New York legislation, extra priority shall be given to applications that demonstrate that an applicant meets *all* of the following: is a member of a community disproportionately impacted by the enforcement of cannabis prohibition; has an income lower than eighty percent (80%) of the median income of the county in which the applicant resides; and was convicted of a cannabis-related offense prior to the effective date of the MRTA, or had a parent, guardian, child, spouse, or dependent, or was a dependent of an individual who, prior to March 31, 2021, was convicted of a cannabis-related offense.

¹¹⁸ Market architecture is understood as the types of licenses a single entity can obtain within the licensing scheme. N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 15.

¹¹⁹ Adam Hayes, *What is Vertical Integration?*, INVESTOPEDIA (July 25, 2024), <https://www.investopedia.com/terms/v/verticalintegration.asp> [https://perma.cc/KM5X-6MSQ].

¹²⁰ *Id.*

owner would have to have the capital to launch several different businesses; lack of capital is one of the biggest burdens for under-resourced Black and brown business owners, along with obtaining land and commercial space.¹²¹ Instead, New York segments the recreational market so that vertical integration is not possible. This way, no one company can monopolize the industry.

As part of the market architecture, New York also created a special license opportunity, the Conditional Adult Use Recreational License (“CAURD”), specifically for individuals impacted by the War on Drugs.¹²² To be eligible, applicants are required to either have had a cannabis conviction,¹²³ or be the family member of someone with a cannabis conviction, in addition to having previously owned a profitable business.¹²⁴ For this license opportunity, the business entity must also be majority-owned by at least one individual who was impacted by the War on Drugs. In the announcement for this special licensing opportunity, program administrators noted the

¹²¹ N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 15.

¹²² Through the CAURD license, New York’s first legal adult-use cannabis retail dispensaries will be operated by individuals most impacted by the unjust enforcement of the prohibition of cannabis or nonprofit organizations whose services include support for the formerly incarcerated. N. Y. STATE OFF. OF CANNABIS MGMT., *What is CAURD? Am I Eligible?*, (last visited February 20, 2024) <https://cannabis.ny.gov/caurd-faq> [<https://perma.cc/E4TR-H6W7>]. Awarding 50 additional CAURD licenses for justice-involved applicants represents New York State’s commitment to creating an equitable licensed cannabis industry. Nick Reisman, *New York Cannabis Regulators Approve 50 More Licenses*, SPECTRUM NEWS 1 (May 12, 2023, 5:41 AM), <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2023/05/11/new-york-cannabis-regulators-approve-50-more-licenses> [<https://perma.cc/53DT-XJLV>].

¹²³ The Office of Cannabis Management describes these people as “justice-involved individuals.” A justice involved individual is someone who was convicted of a marihuana-related offense in New York State before March 31, 2021, had a parent, legal guardian, child, spouse, or dependent who was convicted of a marihuana-related offense in New York State prior to March 31, 2021, or was the dependent of someone who was convicted of a marihuana-related offense in New York State before March 31, 2021. N.Y. STATE OFF. OF CANNABIS MGMT., *supra* note 122.

¹²⁴ *Id.*

social equity priority in the establishment of this license. The press release stated that “marijuana laws disproportionately impacted Black and brown communities. For the past 30 years, Black and Hispanic individuals in New York have been 15 and 8 times more likely, respectively, to be arrested than their white counterparts for cannabis-related offenses. These arrests perpetuated a cycle of poverty in Black and brown communities. Accordingly, the criteria for obtaining a CAURD license included having been impacted by the enforcement of the prohibition of cannabis.”¹²⁵

In anticipation of access to capital issues that would be faced by most social equity applicants, New York State partnered with the New York State Dormitory Fund and established the New York State Equity Cannabis Investment Fund.¹²⁶ This fund was specifically set up to provide financial support and turn-key locations to social equity applicants.

In addition to financial assistance, the Office of Cannabis Management also discusses support for and incubation of business development, which falls under ancillary services. Highly regulated industries have even higher barriers to entry than other businesses.¹²⁷ When combined with the systemic barriers for Black and brown entrepreneurs generally, business outcomes have the potential to be even more unpromising for social equity business owners. This is why New York supplements their social equity licensing with additional services such as business counseling, mentorship programs, and information sessions, which have been

¹²⁵ OFF. OF CANNABIS MGMT., *NYS Cannabis Control Board Approves Social & Economic Equity Plan to Achieve an Equitable & Inclusive Cannabis Market*, N.Y. STATE, <https://cannabis.ny.gov/system/files/documents/2023/05/nys-ccb-approves-see-plan.pdf> [https://perma.cc/CA67-CUKV].

¹²⁶ N.Y. STATE OFF. OF CANNABIS MGMT., *supra* note 122.

¹²⁷ Adam Hayes, *Barriers to Entry: Understanding What Limits Competition*, INVESTOPEDIA (Sept. 28, 2023) <https://www.investopedia.com/terms/b/barrierstoentry.asp#:~:text=Industries%20heavily%20regulated%20by%20the%20government%20are%20usually,creates%20for%20midable%20barriers%20to%20entry%20for%20varying%20reasons> [https://perma.cc/J8T5-ZAVB].

documented to boost success for Black and brown entrepreneurs.¹²⁸

Yet even with these guardrails in place, social equity applicants are still struggling to start and maintain businesses. The next section will explore the internal and external challenges that have prevented social equity applicants from full participation in New York's cannabis market.

C. Challenges for Social Equity Applicants and License Holders

As of late 2024, there are less than 100 dispensaries open across New York State. In a statement dated November 9th, 2023 from the Bronx Defenders, the host organization of The Cannabis Hub,¹²⁹ Deputy Executive Director Wesley Caines discussed the highs and the lows of advocating for social equity applicants or those “most impacted by the war on drugs.”

“Through it all, the hundreds of New Yorkers who applied for and won CAURD licenses continued to place their faith in the state's efforts. Talk to these New Yorkers, as we do every day, and you will see the toll this has taken. These are New Yorkers who were arrested and imprisoned by the state. They endured sometimes unimaginable suffering and pain because of it. If anyone should have turned their back on the state, it was them. But their stories are filled with the unshakable

¹²⁸ N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 26, 29.

¹²⁹ The Cannabis Hub is a grassroots initiative to help social equity applicants apply for licenses. During the rollout of the first CAURD licenses, the Cannabis Hub provided legal, business and criminal law experts to assist Applicants. *The Bronx Cannabis Hub Successfully Helps People Directly Impacted by the War on Drugs Apply for the First Round of Cannabis Dispensary Licenses in New York*, THE BRONX DEFENDERS (Oct. 5, 2022), <https://www.bronxdefenders.org/the-bronx-cannabis-hub-successfully-helps-30-people-directly-impacted-by-the-war-on-drugs-apply-for-the-first-round-of-cannabis-dispensary-licenses-in-new-york/> [https://perma.cc/K5ZX-HPUB].

hope that they can show their children and communities that doing the right thing is rewarded.”¹³⁰

Barriers to entry for small businesses are well documented. They can be defined as a set of prerequisites that new businesses need to be successful. They usually fall into two buckets: material barriers, such as access to funding, investors or loans, and social barriers such as business acumen, and a network of entrepreneurs and possible clients.¹³¹ There is also a distinction between high-barrier and low-barrier industries.¹³² Entry into highly regulated industries is even more burdensome. This paints a bleak picture for social equity applicants. Because social equity applicants are individuals who were adversely impacted by the War on Drugs, their position within the economic landscape of the US has already been compromised. As a result, they have a harder time overcoming barriers to entry than a mainstream entrepreneur.

Legal Challenges to CAURD Licenses

As mentioned in the previous section, the CAURD license was reserved for social equity applicants, meaning individuals

¹³⁰ Wesley Caines & Kavita Pawria-Sanchez, *Commentary: New York Can Still Deliver on the Promise of Cannabis Equity*, TIMES UNION (Apr. 4, 2024), <https://www.timesunion.com/opinion/article/new-york-still-deliver-promise-cannabis-equity-19383693.php>.

¹³¹ See generally, Brendan Cosgrove et al., *Access To Capital For Entrepreneurs: Removing Barriers*, EWING MARION KAUFFMAN FOUNDATION (2023), <https://www.kauffman.org/wp-content/uploads/2023/06/Access-to-Capital-for-Entrepreneurs-Report-2-June-2023.pdf#contact-form-89814> [<https://perma.cc/JX7W-YENS>]; Lois M. Shelton & Maria Minniti, *Enhancing Product Market Access: Minority Entrepreneurship, Status Leveraging, and Preferential Procurement Programs*, 50 SMALL BUSINESS ECONOMICS, 481–98 (2018); Timothy Bates et al., *Minority Entrepreneurship in Twenty-First Century America*, 50 SMALL BUSINESS ECONOMICS, 415–27 (2018).

¹³² See generally Magnus Lofstrom et al., *Why are Some People More Likely to Become Small-Businesses Owners than Others: Entrepreneurship Entry and Industry-Specific Barriers*, 29 JOURNAL OF BUSINESS VENTURING, 232–251 (2014).

who were convicted of a marijuana offense and their spouses, children or parents. This license was the first released in what was anticipated to be a series of licenses¹³³ that would make up the cannabis market architecture. The release of this license ensured that social equity applicants would have the priority in the market.¹³⁴

From a legislative perspective, the CUARD license was different. Unlike the other general licenses that were codified in MRTA,¹³⁵ the CUARD license went through a separate process, through a package called the Seeding Opportunity Initiative.¹³⁶ This program set up the regulatory structure for a temporary license¹³⁷ that would create a subset of dispensaries and allow social equity applicants with marijuana convictions to open before the general public had access to dispensary licenses. In effect, those most harmed by the War on Drugs are given a “first-mover advantage” in the new cannabis industry.

The way in which the Seeding Opportunity Initiative was set up from a legislative perspective made it vulnerable to

¹³³ Other licenses are distributor licenses, microbusiness licenses, cultivator licenses, and processor licenses. OFF. OF CANNABIS MGMT., *New York State Adult-Use Application Overview*, N.Y. STATE, <https://cannabis.ny.gov/system/files/documents/2023/12/ocm-augeneral.pdf> [https://perma.cc/CB9L-WWDW].

¹³⁴ N.Y. STATE OFF. OF CANNABIS MGMT., *supra* note 122.

¹³⁵ The CAURD license is never mentioned in MRTA. S. 854A, 2021-2022, Reg. Sess. (N.Y. 2021).

¹³⁶ In the official press release, the Seeding Opportunity Initiative was described as a “farm-to-store” initiative that would jumpstart the cannabis industry in New York. It was projected to “guarantee support for future equity applicants, and secure an early investment into communities most impacted by the disproportionate enforcement of cannabis prohibition.” Press Release, N.Y. State Off. of the Governor, Governor Hochul Announces The Office of Cannabis Management Seeding Opportunity Initiative (Mar. 10, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-office-cannabis-management-seeding-opportunity-initiative> [https://perma.cc/P9W8-ZV5F].

¹³⁷ In addition to setting up the licensing pathway for CUARD licenses, the Seeding Opportunity Initiative also created a license application for hemp farmers to grow adult use cannabis. *Id.*

legal challenges. In some ways CAURD violated MRTA, which did not allow regulators to create new license types. MRTA also prescribed that the license application period shall be opened for all applicants at the same time.¹³⁸ Further, CAURD arguably violates the U.S. Dormant Commerce Clause¹³⁹ because the program includes residency requirements by outlining that convictions must have taken place in New York.

In the first lawsuit, *Variscite v. New York State*,¹⁴⁰ an applicant was denied a CAURD license because the applicant had no significant connection to New York and because his cannabis conviction took place in Michigan. The second lawsuit was on behalf of four service-disabled veterans¹⁴¹ who joined with the Coalition for Access to Regulated & Safe Cannabis, a medical marijuana lobbying group. They sued claiming they were unfairly excluded from applying to CAURD. The trial judge issued another statewide injunction preventing the OCM from approving new CAURD licenses and blocking most licensees who hadn't yet launched their businesses from opening stores,¹⁴² noting that "it is certainly conceivable that a successful challenge to the CAURD program could result in a finding that the licenses are invalid."¹⁴³

¹³⁸ Marihuana Regulation and Taxation Act, S.B. 854-A Art. 2 § 10, Reg. Sess. (N.Y. 2021).

¹³⁹ The Dormant Commerce Clause prohibits states from passing legislation that discriminates against or excessively burdens interstate commerce. *See* U.S. CONST. art. I, § 8; *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁴⁰ The courts held that the plaintiff was correct and issued an injunction of the CUARD program in five of the fourteen regions in which the OCM was licensing CAURD dispensaries. Eventually, the state settled the lawsuit, awarded the plaintiff a license and lifted the injunction. *Variscite NY One, Inc. v. New York*, 640 F. Supp. 3d 232 (N.D.N.Y. 2023).

¹⁴¹ *Fiore v. N.Y. State Cannabis Control Bd.*, No. 34670(U), slip op (N.Y. Sup. Court Aug. 18, 2023).

¹⁴² Zach Hoffman, *NY Judge Scorches Regulators Over CAURD Licenses*, CRB MONITOR, <https://news.crbmonitor.com/2023/08/ny-judge-scorches-regulators-over-caurd-licenses/> (last visited Feb. 20, 2024) [<https://perma.cc/L9SV-LFUS>].

¹⁴³ *Id.*

As the judge predicted, there very well could be future challenges to New York and other states' social equity licensing schemes based on the Dormant Commerce Clause.¹⁴⁴ Because of the reparative nature of MRTA's social equity scheme, licenses were granted based on the proximity to the harm of the War on Drugs.¹⁴⁵ Some states also give local municipalities the option to "opt-in" or "opt-out" of retail marijuana sales. In New York state, for example, 50% of counties and municipalities have opted out, further limiting the places where dispensaries can be opened.¹⁴⁶ In October 2023, the application for adult-use dispensary licenses was opened to the public. The free-market competition will likely dilute the social equity cannabis market. The priority period that would protect justice-involved individuals would no longer exist.

¹⁴⁴ The Dormant Commerce Clause prohibits states from advantaging in-state commerce over out-of-state competition except in two scenarios. One is when Congress has expressly allowed the state to enact laws protecting in-state competition. The other scenario is when there is a legitimate local objective that cannot be served by nondiscriminatory means. Scott F. Roberts & Griffin Kas, *Cannabis Law: The Michigan Cannabis Industry and the Dormant Commerce Clause*, 100 MICH. BAR. J. 20, 22 (2021).

¹⁴⁵ In New York and in other states such as Michigan and Maine, courts have enjoined social equity license holders from opening and operating dispensaries based on a violation of the Dormant Commerce Clause, in spite of the federal prohibition of marijuana through the Controlled Substances Act. 21 U.S.C. § 812 (c) Sched. I(c)(10). In Maine, the court found that the Controlled Substances Act did not "affirmatively grant states the power to burden interstate commerce in a manner which would otherwise not be permissible. *Ne Patients Grp. v. Maine Dep't. of Admin. & Fin. Servs.*, 544 F. Supp. 3d 177, 185 n.11 (D. Me. 2021) (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) and quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945)). In Michigan, the licensing requirements which favored long-time Detroit residence was not reasonably tailored to the goal of promoting "social equity." *Lowe v. City of Detroit*, 544 F. Supp. 3d 804, 815 (E.D. Mich. 2021). Residency requirements may prove to be problematic going forward because there are other ways in which states can establish a disproportionate impact of the War on Drugs. This is where reparative entrepreneurship can be useful.

¹⁴⁶ N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 17.

Access to Resources Roadblocks

In addition to the cannabis social equity program itself, many states also provide supplemental resources to assist social equity applicants. These resources have included license application assistance, information sessions, and business education and mentorship programs.¹⁴⁷ These programs do attempt to fill a necessary gap in business acumen; however, there are still barriers, particularly in the justice-involved community, that prevent full utilization of these resources.¹⁴⁸

Because government actors do not necessarily have the resources to provide the business development and incubation services that would boost success for social equity business owners, they often rely on non-profits and private actors.¹⁴⁹ This is not uncommon of government agencies. The Small Business Association (SBA), state, and municipal bodies responsible for small businesses reserve large portions of their funding for consultants and other private actors who essentially teach their recipients business skills. What is unique about the cannabis industry is the potential for profits may create a predatory dynamic. Private companies¹⁵⁰ who

¹⁴⁷ The Office of Cannabis Management created an initiative called the Cannabis Hub and Incubation Program (CHIP) to further advance “Social and Economic Equity” in New York’s cannabis industry. CHIP has application assistance programs and education and training programs to support adult use cultivators and processors. OFF. OF CANNABIS MGMT., *Social and Economic Equity*, N.Y. STATE, (last visited Feb. 13, 2024), <https://cannabis.ny.gov/social-and-economic-equity> [<https://perma.cc/KYC4-RXCX>].

¹⁴⁸ In Ohio, between the opening of the legal cannabis market in 2018 and 2020, the state’s Cannabis Advisory Committee admitted that the complex regulatory landscape was “hampering” the legal market. There is also the potential for corruption because much of this is handled at the local level. “A significant benefit of operating illegally is the absence of regulatory compliance costs.” Donald K. Kochan, *The Regulatabilization of Cannabis*, 49 FORDHAM URB. L.J. 519, 540 (2022).

¹⁴⁹ N.Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 14.

¹⁵⁰ 25 *Investment Companies in the Cannabis Space*, CANNABIS BUSINESS TIMES, (last visited Sep. 13, 2024),

brand themselves as supporting social equity cannabis entrepreneurship are also taking equity in smaller businesses.¹⁵¹

Access to Capital Roadblocks

The Community Grants Reinvestment Fund, run by private equity firm Chicago Atlantic, manages access to capital for social equity applicants.¹⁵² Chicago Atlantic is the sole lender to the Dormitory Authority of the State of New York's (DASNY) Community Grants Reinvestment Fund. Chicago Atlantic is negotiating loan agreements directly with CAURD licensees, speaking to licensees without the presence of counsel and engaging in high-pressure tactics.¹⁵³

Some CAURD license holders have taken loans between \$1.5 and \$1.7 million with a 13% interest rate to be paid back in 10 years. Matt Robinson, CEO of Essential Flowers Legacy Dispensers in Albany, said a DASNY lease he declined to sign would have cost him \$19,000 per month for a 4,000-square-foot space.¹⁵⁴ In October 2023, the New York State's Senate

<https://www.cannabisbusinesstimes.com/article/25-investment-companies-in-the-cannabis-space/> [https://perma.cc/94MG-DPVS].

¹⁵¹ In some states, such as Oakland, CA, applicants who could show that they would incubate social equity businesses were granted expedited licenses in exchange for providing the social equity business free rent and dedicated space and security. N.Y. OFF. OF CANNABIS MGMT., *supra* note 69, at 14.

¹⁵² OFF. OF CANNABIS MGMT., COMMUNITY GRANTS REINVESTMENT FUND REPORT (2024); Press Release, N.Y. State Off. of the Governor, Governor Hochul Announces \$150 Million Investment in the Cannabis Social Equity Investment Fund (June 30, 2023), <https://www.governor.ny.gov/news/governor-hochul-announces-150-million-investment-cannabis-social-equity-investment-fund> [https://perma.cc/Z79R-YUKZ].

¹⁵³ Rosalind Adams, *How Private Equity Trumped Social Equity in State Cannabis Deal*, THE CITY (Apr. 24, 2024), <https://www.thecity.nyc/2024/04/24/cannabis-fund-social-equity-dispensary/> [https://perma.cc/NY2C-EUF3].

¹⁵⁴ Commercial rental prices in the Capital Region of New York (Albany and surrounding areas) average around \$18/sq foot. NAT'L ASS'N OF REALTORS, NAR COMMERCIAL REAL ESTATE METRO MARKET REPORT: 2021.Q2

Subcommittee on Cannabis initiated a fact-finding hearing on DASNY's operations.¹⁵⁵

Marijuana Illegal at Federal Level

As states continue to legalize marijuana, the federal government holds a stance of absolute prohibition. Marijuana is classified as a Schedule I drug, along with heroin, LSD and ecstasy. As a result of the federal ban on marijuana under the 1970 Control Substances Act,¹⁵⁶ business owners who legally run cannabis businesses are not able to apply for trademarks,¹⁵⁷ file federal bankruptcy, deduct certain business

ALBANY-SCHENECTADY-TROY, NY (2021), <https://www.nar.realtor/sites/default/files/documents/2021-q2-commercial-real-estate-metro-market-reports-ny-albany-schenectady-troy-08-19-2021.pdf> [<https://perma.cc/7JUG-VBVM>].

¹⁵⁵ To Examine Issues in the New York State Market Related to Consumer Accessibility and Retail Sale of Legal Adult-Use Cannabis: Joint Public Hearing Before the N.Y. Senate (Oct. 30, 2023), <https://www.nysenate.gov/calendar/public-hearings/october-30-2023/joint-public-hearing-examine-issues-new-york-state-market> [<https://perma.cc/4QSX-G3Z5>].

¹⁵⁶ 21 U.S.C. § 812 (c) Sch. I(c)(10).

¹⁵⁷ Although there are a variety of cannabis related compositions, products, machines and processes that can be patented. Tamara Fraizer, *Twelve Cannabis Plant Patents and Counting*, NAT'L L. REV. (Jan. 2, 2021), <https://natlawreview.com/article/twelve-cannabis-plant-patents-and-counting> [<https://perma.cc/A5ZX-Z7UC>]; Trevor K. Copeland, *Design Patents – Fundamental Additions to Cannabis Intellectually Property Portfolios*, NAT'L L. REV. (Feb. 14, 2020), <https://natlawreview.com/article/design-patents-fundamental-additions-to-cannabis-intellectual-property-portfolios> [<https://perma.cc/23BE-WCEV>]; Robert Mikos, *POTUS and Pot: Why the President Could Not Legalize Marijuana Through Executive Action*, 89 U. CIN. L. REV. 668 (2021).

expenses when calculating their federal income tax,¹⁵⁸ or apply for SBA loans.¹⁵⁹

While there is hope that President Biden may sweep in and use an executive order to legalize marijuana, scholars have cautioned against this approach given the potential for an “imperial presidency.” Such executive action may undermine the integrity of the administrative process Congress designed to access the safety and efficacy of new drugs and treatments.¹⁶⁰

However, the Marijuana Opportunity Reinvestment and Expungement Act of 2020, the MORE ACT, has the potential to remove marijuana from the federal list of controlled substances. While this would be a victory in many respects for cannabis entrepreneurs, it could also hurt cannabis entrepreneurs. State lines would be opened for the production, transportation, and sale of cannabis, leading to

¹⁵⁸ Section 280E of the Internal Revenue Code does not allow for cannabis businesses to deduct ordinary business expenses when filing federal income tax. Section 280E was an addition to the tax code that originated during the War on Drugs. Prior to the addition of 280E, the source of the funds that were being deducted were not relevant. *Edmonson v. Commissioner*, 42 T.C.M. (CCH) 1533 (1981). *Edmonson* was decided by the tax court in 1981. A drug dealer was able to deduct rent, telephone calls and a \$50 small scale because they “constitute[d] . . . ordinary and necessary expense[s]” of petitioner’s business, but the source of the income had to be a legal one. This decision created an unfair tax burden on the 36 and counting states which have legalized the sale of cannabis. Because of Section 280E, cannabis owners are now not able to deduct ordinary business expenses, as almost all other businesses do, which results in tax rates from 40-70%, compared to the typical corporate tax rate of around 21%. David Butter, *Modernizing U.S Tax Code Section 280E: How An Outdated “War on Drugs” Tax Law Is Failing the United States Legal Cannabis Industry and What Congress Can Do to Fix It*, 14 FIU L. REV. 739 (2021); De Lon Harris, *Providing Resources to Help Cannabis Business Owners Successfully Navigate Unique Tax Responsibilities*, INTERNAL REVENUE SERV. (Sept. 27, 2021), <https://www.irs.gov/about-irs/providing-resources-to-help-cannabis-business-owners-successfully-navigate-unique-tax-responsibilities> [https://perma.cc/59W5-U8BA].

¹⁵⁹ Robert A. Mikos, *POTUS and Pot: Why the President Could Not Legalize Marijuana Through Executive Action*, 89 U. CIN. L. REV. 668, 671 (2021).

¹⁶⁰ *Id.* at 685.

heightened scrutiny of Dormant Commerce Clause violations that would likely end or reconfigure the structure of many social equity programs.

Another piece of legislation that is currently being considered is the Tenth Amendment Through Entrusting State (STATES) Act. This act amends the Controlled Substances Act so that as long as the cannabis business complies with state law, the CSA provisions no longer apply to that business.¹⁶¹ This will help circumvent any federal restrictions on cannabis.

The most promising of all federal measures is the Marijuana 1-to-3 Act of 2023 which would direct the Drug Enforcement Agency to transfer marijuana from a Schedule I drug to a Schedule III Drug.¹⁶² President Biden has express support for this measure and the Department for Health and Human Services also issued a recommendation to the DEA to reclassify marijuana. While social equity advocates would generally advocate for a full legalization or “declassifying” of marijuana, it is not likely that the federal government will make more than an incremental change.

Predatory Actors

In an industry with high revenue potential such as the cannabis industry, there will be predatory actions on behalf of highly capitalized investors. The dynamics of social equity programs are ripe for exploitation. Because most social equity applicants come from historically disadvantaged, under-resourced backgrounds without strong social networks or personal capital, they are particularly vulnerable. Predatory

¹⁶¹ Butter, *supra* note 158, at 771.

¹⁶² A Schedule I controlled substance is a drug, substance, or chemical that has a high potential for abuse; that has no currently accepted medical use; and that is subject to regulatory controls and administrative, civil, and criminal penalties under the Controlled Substances Act. A Schedule III controlled substance is a drug, substance, or chemical that has less potential for abuse than a Schedule I or II substance, that has a currently accepted medical use, and that has low or moderate risk of dependence if abused. H.R. 610, 118th Cong. § 2 (2023).

investment into social equity businesses has taken various forms around the country, but more often than not includes the partnership of an investor, fund or large business and a social equity applicant. The terms of the partnership agreement often give an advantage to the more resourced party in exchange for their investment.¹⁶³ There has been significant organizing to protect CAURD businesses by spreading information and by forming trade groups.

IV. THE LIMITS OF ENTREPRENEURSHIP AS REPARATIONS

Section II of the Article places MRTA in context of other reparative legislation and argues for analyzing MRTA and SEE under the UN reparations framework. Section III of the Article discusses the implementation issues that have prevented SEE from achieving the goals set at the outset of the plan. In Section IV, the Article will discuss the lessons learned from MRTA by analyzing both the complexity and potential in using entrepreneurship as a form of economic repair in the wake of state harm.

A. MRTA: A Neoliberal Approach to Reparations

“The failure of existing social equity programs can be attributed to a disconnect

¹⁶³ N. Y. STATE OFF. OF CANNABIS MGMT., *supra* note 69, at 16. “Some exploitative efforts have included partnership or management agreements with terms that (1) severely dilute the applicant’s or owner’s ownership stake; (2) reserve management rights and decisions exclusively for the equity partner or management company as opposed to the equity owner; (3) list inequitable profit distribution and exorbitant above-line fees and rents; (4) contain forced sale provisions that trigger the sale of the business to an equity partner for a predetermined amount of money, which is frequently significantly less than the business’s actual value; (5) demand supermajorities for key decisions, thereby stripping the equity owner of management control; (6) divest the social equity individual or individuals of any intellectual property created during the partnership for the management company’s benefit; or (7) mandate that the financial partner holds the lease, allowing the partner to evict the equity owner.”

*between commitment to the goal of equity and
the execution to achieve equity.”*

In legal and sociological scholarship, there is great debate over whether entrepreneurship can be a path to economic stability for Black business owners and the communities in which they live.¹⁶⁴ Scholars have touted entrepreneurship as having the potential to close the wealth gap between certain minorities and their white counterparts.¹⁶⁵ The literature champions entrepreneurship as being able to “lift entrepreneurs and their employees out of poverty and introduce a suitable alternative to government welfare and income-substitute programs.”¹⁶⁶ In reality, socially disadvantaged communities have not seen material improvements in economic outcomes since the rise in the investment of entrepreneurship in the 1960s both as an economic and social policy strategy.

This stagnation persists despite explosive Black entrepreneurship rates over the last decade. By one metric, the numbers of Black entrepreneurs are higher than ever, but these businesses are not poised for growth because of a concept called “barriers to entry.” Barriers to entry, refer to social or market forces that prevent socially disadvantaged business owners from launching, sustaining and scaling their businesses. Some examples of barriers to entry are access to capital, access to mentors and networks, or access to wraparound services like lawyers or accountants. The barriers to entry generally faced by socially disadvantaged businesses have the same origins as systemic racism. The wealth gap also speaks to the gap in resources necessary to

¹⁶⁴ ASSN’ FOR ENTER. OPPORTUNITY, THE TAPESTRY OF BLACK BUSINESS OWNERSHIP IN AMERICA 4–5 (2019), https://aeoworks.org/wp-content/uploads/2019/03/AEO_Black_Owned_Business_Report_02_16_17_FOR_WEB-1.pdf [<https://perma.cc/3N5T-4Z2Y>].

¹⁶⁵ Mirit Eyal-Cohen, The Illusory Promise of Free Enterprise: A Primer to Promoting Racially Diverse Entrepreneurship, 70 EMORY L. J. 1577, 1585 (2021).

¹⁶⁶ *Id.* at 1587.

sustain a business venture.¹⁶⁷ Cannabis entrepreneurship has additional barriers because it is a regulated industry, similar to the alcohol industry, and social equity applicants are more economically marginalized than the average minority entrepreneurs. As more social equity programs were introduced around the country, “it [became] clear that if states create unrealistic regulatory burdens for small businesses that cannot afford teams of lawyers and consultants, those businesses will not be capable of operating in the legal market. To incentivize participation in the cannabis industry; therefore, regulators must create regulatory frameworks that small businesses can navigate.”¹⁶⁸ The “regulatabilization”¹⁶⁹ of cannabis refers to the process of taking a formerly illegal substance and making it legal through a new regulatory framework. The process of going from illegal to highly regulated comes with increased regulatory costs, higher prices for legal cannabis, and higher barriers to entry.¹⁷⁰ This has a ripple effect into many aspects of this new industry, and potentially threatens its success. If the compliance costs are too high, the illegal market will continue concurrently and any efforts to promote social equity will ultimately fail.¹⁷¹ Underestimating the regulatory burden also incentivizes underground cannabis businesses.

¹⁶⁷ Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS L. J. 419, 424 (2018). Pantin attributes the failures of entrepreneurship to the systemic racism vis-a-vis the wealth gap, “which is the result of government-sanctioned exclusionary policies that caused economic disparity for people of color [and] cannot be overcome solely by the promotion of entrepreneurship.”

¹⁶⁸ Ryan B. Stoa, *Emerging Issues in Cannabis Law: 2022 and Beyond*, 46 SETON HALL J. OF LEGIS. AND PUB. POL’YS 469, 479-80 (2022).

¹⁶⁹ “Regulatability focuses on the more complex end result – a product and set of activities formerly unregulated because it was illegal is now subject to the full umbrella of regulations that we apply to all aspects of the legitimate economy.” Donald J. Kochan, *The Legalization of Marijuana in Urban Communities: The Regulatabilization of Cannabis*, 49 FORDHAM URB. L. J. 519, 528 (2022).

¹⁷⁰ *Id.* at 529.

¹⁷¹ *Id.* at 546.

Cannabis social equity programs, employ a neoliberal approach to reparations. Neoliberalism is a term coined in legal scholarship that refers to “the revival of the doctrines of classical economic liberalism, also called laissez-fair, in politics, ideas, and law.”¹⁷² Under neoliberal policy making, free market capitalism serves as a regulator in lieu of government intervention. Proponents of neoliberalism believe that “the market is the most efficient way to allocate resources” and this will promote “economic growth, lower prices and increased efficiency.”¹⁷³ Neoliberalism is central to modern day entrepreneurship policy. Critiques of neoliberal entrepreneurship policies argue that “entrepreneurship’s discourse exempts the state from the responsibility of guaranteeing minimal living conditions for workers, meaning they are responsible for their success or failure, regardless of the importance of social context variables.”¹⁷⁴

Neoliberal entrepreneurship is incompatible with cannabis social equity entrepreneurship for two reasons. First, the onus should not be on War on Drugs survivors to fix their own harm. Second, the justification for social equity and repair should be divorced from the success of the market. In the case of cannabis social equity programs, policymakers cannot balance market demands with democratic demands;¹⁷⁵ they must subvert market demands and prioritize democratic

¹⁷² David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1-23 (2014).

¹⁷³ Claudine Cassar, *The Rise of Neoliberalism – Understanding its History and Impact*, ANTHROPOLOGY REVIEW (Apr. 27, 2023), <https://anthropologyreview.org/anthropology-glossary-of-terms/neoliberalism-history-and-impact/>.

¹⁷⁴ Luana Carmo et al., *Entrepreneurship as a Neoliberal Ideology*, 19 CADERNOS EBAPE.BR 18, 18 (2021). “Entrepreneurship is a means through which governments and large employers may also shift the responsibility for full employment onto the individual, reflecting neoliberal ideology as well.” See also Sibylle Heilbrunn & Rose Lisa Iannone, *Neoliberalist Undercurrents in Entrepreneurship Policy*, 5 JOURNAL OF ENTREPRENEURSHIP AND INNOVATION IN EMERGING ECONOMIES 149, 157 (2019).

¹⁷⁵ David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. AND CONTEMPORARY PROBS. 1, 4 (2014).

demands. As a result, policy makers may have to act in ways that are “anti-capitalist” to mete out justice. In fact, the “capitalist imperative”¹⁷⁶ may be at odds with the reparative goals of the policy.

B. The Symbolism of Black Entrepreneurship

If the implementation of cannabis social equity programs is, in fact, at odds with reparative economic outcomes for Black people, the logical response would be to remove entrepreneurship from social equity programs altogether. Instead, a more responsive solution would be for policymakers to engage in a paradigm shift from a neoliberal framework to one that centers reparative entrepreneurship. To address the special needs of Black entrepreneurs in cannabis businesses and beyond, Black entrepreneurship must be viewed as distinct from mainstream entrepreneurship. Critical Race Theory scholarship attempts to reclaim and redefine perceptions of Black entrepreneurship.¹⁷⁷

¹⁷⁶ “Neoliberalism has had the purpose of promoting capitalist imperatives against countervailing democratic ones.” *Id.* at 6.

¹⁷⁷ Priya Baskaran & Alicia Plerhoples, *Race and Entrepreneurship: Reclaiming Narratives*, 30 CLINICAL L. REV. 7, 11. (“We create laws and policies based on partial information and lopsided narratives, utterly failing to build nuanced and resilient entrepreneurial ecosystems.”). Statistically, Black businesses are different. According to the 2020 U.S. Census, 13.7% of people in the U.S. are Black, not including people who identify as two or more races. *Quick Facts: United States*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/RHI225223>. But only 9.5% of private or closely-held public U.S. businesses are Black-owned, and together they comprise 1% of the income of white-owned businesses. Rebecca Leppert, *A Look at Black-Owned Businesses in the U.S.*, PEW RSCH. CTR. (Feb. 16, 2024), <https://www.pewresearch.org/short-reads/2024/02/16/a-look-at-black-owned-businesses-in-the-us/> [<https://perma.cc/S5HJ-MVDL>]. Less than 5% of Black-owned businesses are big enough to have any employees, but they make over two-thirds of the total income generated by Black businesses. The gap between the number, size, and income of these businesses points to the main issue with Black businesses: There is plenty of entrepreneurship, but not enough capital. When Black entrepreneurs can start businesses, they often don’t have much

At the root of Black entrepreneurial aspirations is the desire to be made whole. Because Black people could not depend on the government to provide economic equity, considering hundreds of years of slavery, indentured servitude, racial terrorism and disenfranchisement, and the War on Drugs, Black people were forced to utilize the free market to close economic gaps.¹⁷⁸ This history with entrepreneurship, from legitimate to illicit business ventures, is interwoven into Black culture and symbolizes resilience, self-determination and, most significantly, self-repair.¹⁷⁹

Unfortunately, the hope of social mobility through entrepreneurship has always been hampered by racism. When slavery ended and Blacks begged for opportunities to become self-made, public policy failed them.¹⁸⁰ While other groups were given opportunities to strike out, Blacks were shut

investment—only 1% of venture capital, for instance, is invested in businesses with Black founders. Talib Visram, *1% of Venture Capital Goes to Black Founders. California's New Bill Hopes to Shame VCs into Change*, FAST Co. (Oct. 20, 2023), <https://www.fastcompany.com/90969457/1-of-venture-capital-goes-to-black-founders-californias-new-bill-hopes-to-shame-vcs-into-change>. This virtually ensures Black-owned businesses stay small.

¹⁷⁸ Timothy Bates, William D. Bradford & Robert Seamans, *Minority Entrepreneurship in Twenty-First Century America*, 50 SMALL BUS. ECON. 415, 417 (2018) (Black-Americans were forced into self-employment as a result of lack of access to traditional employment).

¹⁷⁹ Despite inherent instability and potential danger in the informal labor market, many Black women were drawn to “intangible benefits” in the informal workforce, especially “occupational autonomy.” Harris argues that control over their working lives “was a part of black women’s perception of and quest for American freedom and citizenship,” and was “a weapon against race, gender, and class discrimination and white employers’ relentless efforts to undermine their work.” In the formal labor market, “[i]t was commonplace for whites to verbally and physically abuse black household workers.” LASHAWN HARRIS, *SEX WORKERS, PSYCHICS, AND NUMBERS RUNNERS: BLACK WOMEN IN NEW YORK CITY’S UNDERGROUND ECONOMY* 37–38 (2016).

¹⁸⁰ See generally Ta-Nehisi Coates, *The Case for Reparations*, *The Atlantic* (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [https://perma.cc/EN6D-QEX6].

out.¹⁸¹ The caste system originating in slavery determined employment options for Black people into the 20th century. Even for college-educated Blacks, most became either teachers or preachers.¹⁸² If Black Americans started businesses, these businesses only served others within the Black community as a result of legal segregation and the subsequent redlining policies that led to *de facto* segregated communities.¹⁸³

During and after slavery, Black people engaged with entrepreneurship resulting in varying outcomes. In some instances, social mobility was obtained, but for many others, entrepreneurship was simply a way to sustain families and communities in the absence of other economic opportunities.¹⁸⁴ This dynamic is referred to as necessity entrepreneurship,¹⁸⁵ and many Black people worked low-wage jobs by day and used the free-market economy to make extra money.¹⁸⁶ Necessity entrepreneurs are defined as people who are “pushed to entrepreneurship [] due to low-income, lack of job opportunities and limited government support.”¹⁸⁷

If one were to track the policies since the establishment of the SBA in 1953, there has been a consistent public policy investment in entrepreneurship.¹⁸⁸ If tallying the resources

¹⁸¹ *Id.*

¹⁸² See Bates, Bradford & Seamans, *supra* note 178, at 417.

¹⁸³ See Bates, Bradford & Seamans, *supra* note 178, at 417.

¹⁸⁴ See generally Antoinette Schoar, *The Divide Between Subsistence and Transformational Entrepreneurship*, 10 INNOVATION POL’Y AND ECON. 57 (2010) (explaining the difference between subsistence and transformational entrepreneurship and the policy responses to both forms of entrepreneurship).

¹⁸⁵ Necessity entrepreneurship refers to entrepreneurship that “does not create economic security but serves as a ‘last resort’ that provides some relief to those in perilous financial conditions.” Priya Baskaran, *Respect the Hustle: Necessity Entrepreneurship, Returning Citizens, and Social Enterprise Strategies*, 78 MD. L. REV. 323, 346 (2019).

¹⁸⁶ Harris, *supra* note 179, at 28 and 30.

¹⁸⁷ Laura Serviere, *Forced to Entrepreneurship: Modeling the Factors Behind Necessity Entrepreneurship*, 22 J. BUS. & ENTREPRENEURSHIP 37, 41 (2010).

¹⁸⁸ Brett Anitra Gilbert, David B. Audretsch & Patricia P. McDougall, *The Emergence of Entrepreneurship Policy*, 22 SMALL BUS. ECON. 313, 313 (2004).

directed by private businesses, large corporations, and nonprofits, the impact is even larger. . Despite the rising numbers of new Black and brown entrepreneurs since the pandemic, there remains a gap in the accessibility of entrepreneurship in these communities. According to the SBA Strategic Plan for fiscal years 2022–2026, Black, Latino, and Indigenous business owners are still underrepresented when numbers are adjusted to their proportion of the U.S. population.¹⁸⁹

If these businesses use the traditional banking route to raise capital, Black business owners are three times less likely to be approved for loans, even when they have similar net worth and credit scores as white business owners.¹⁹⁰ The cost of these discrepancies is huge. Per a McKinsey study, if existing privately-held Black-owned businesses had the same revenue as white-owned firms, an additional \$200 billion would be pumped into the economy.¹⁹¹

The answer is not more traditional investment because public support and financial investment into Black businesses does not necessarily result in better outcomes for Black business owners.¹⁹² These entrepreneurs often cite numerous ways in which traditional entrepreneurship, even with public and private investment, would not be truly accessible to them.¹⁹³ Barriers to entry are often baked into policy design or,

¹⁸⁹ U. S. SMALL BUS. ASS'N, SBA STRATEGIC PLAN 8 (Apr. 7, 2022), <https://www.sba.gov/document/support-sba-strategic-plan> [<https://perma.cc/JT5C-YEQY>].

¹⁹⁰ *Id.*

¹⁹¹ Kimberly Stohr, Opinion, *When Black-Owned Businesses Fail, It Hurts Everybody*, THE BOSTON GLOBE (Apr. 24, 2022), <https://theemancipator.org/2022/04/24/topics/money/when-black-owned-businesses-fail-it-hurts-everybody> [<https://perma.cc/2RM4-DNCH>].

¹⁹² See Köllinger & Minniti, *supra* note 18, at 70 (noting that external, societal factors may be one reason for the success gap between Black and white businesses).

¹⁹³ Michael Bonds, *Looking Beyond the Numbers: The Struggles of Black Businesses to Survive: A Qualitative Approach*, 37 J. BLACK STUD. 581, 592 (2007) (Black business owners in Milwaukee noted that the “established and connected White business community is not supportive of minority businesses” and that business opportunities in Milwaukee are “difficult [to

in the case of cannabis social equity programs—like many other entrepreneurship initiatives—certain realities entrepreneurship such as lack of human capital and inherited wealth, for minorities are overlooked.¹⁹⁴ The law, through policymaking, either maintains or reduces barriers to entry for entrepreneurs. Despite the significant energy spent on reducing barriers to entry by providing capital, education, and networking, a well-designed entrepreneurship policy is the ultimate tool to break barriers to entrepreneurship.¹⁹⁵

As discussed in the previous section, MRTA and SEE are responsive to barriers to entry, perhaps more than any other small business policy to date. Still, the reason MRTA, with all its safeguards, is not working is because MRTA does not address systemic racism—the elephant in the room.

C. Reparative Entrepreneurship

Reparative entrepreneurship policy is distinguished from existing entrepreneurship policy as it adopts a reparations framework that informs policy design. The need for a reparative entrepreneurship policy arises when the state endeavors to create entrepreneurial opportunities for an economically disenfranchised group, such as War on Drug survivors. Below is an analysis of the five principles of reparations as outlined by the United Nations in response to cannabis social equity plans.

obtain] because of lack of contacts and experience and White business opposition.”).

¹⁹⁴ See generally Robert W. Fairlie & Alicia M. Robb, *Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital*, 25 J. LAB. ECON. 289 (2007).

¹⁹⁵ Heather Martin, Maureen Berner & Frayda Bluestein, *Documenting Disparity in Minority Contracting: Legal Requirements and Recommendations for Policy Makers*, 67 PUB. ADMIN. REV. 511, 517 (2007).

Restitution

For War on Drugs survivors, access to entrepreneurship can be understood as a form of restitution. In the UN guidelines, one example of restitution is “restoration of employment.”¹⁹⁶ Once harm is demonstrated, policymakers can ensure this prong is met by providing entrepreneurial activity for all War on Drugs survivors, not just those who previously owned businesses, as is the case in MRTA. Additionally, War on Drugs survivors who have entrepreneurial aspirations in any industry, not just cannabis, should receive assistance.

Compensation

In the UN guidelines, compensation should be provided for any economically assessable damage, including physical or mental harm, imprisonment, lost opportunities, including employment, education and social benefits, and material damages such as loss of earning potential.¹⁹⁷ For social equity applicants, this requirement could be met by a comprehensive analysis of the economic harm of the War on Drugs. At the very least, War on Drugs survivors who desire to start a business enterprise should be able to request start-up grants, tax abatement, and commercial space, for example.

Rehabilitation

The UN guidelines note that legal and social services can be included in addition to medical and psychological care. Regarding cannabis social equity plans, rehabilitation could include business education services, state-sponsored assistance in navigating regulatory schemes, and legal support for social equity entrepreneurs.

¹⁹⁶ G.A. Res. 60/147, ¶ 19 (Dec. 16, 2005).

¹⁹⁷ *Id.* at ¶ 20.

Satisfaction

Cessation of continuing violations is the most applicable example of satisfaction for War on Drugs survivors. Drug policy activists continue to advocate for victims of the War on Drugs who were prosecuted for other substances besides marijuana and point to individuals who are still imprisoned on concurrent charges along with their marijuana charges. Individuals operating legacy businesses are still criminally vulnerable as they are not legally operating cannabis businesses within the regulatory state. Additionally, since cannabis is not legal for minors, they are also still able to face criminal prosecution. Although this doesn't directly affect social equity entrepreneurs, "cherry-picking" certain justice-involved individuals does not speak to full and adequate reparations for the entire harmed group.

Guarantees of non-repetition

Within the UN guidelines, an action that can be taken to guarantee non-repetition is to "review and reform laws" that contribute to additional human rights violations. The wealth extraction from the Black community endemic to the War on Drugs will continue if cannabis social equity policies are designed in a neoliberal fashion. In New York, as in many other states, the cannabis market has the potential to be diluted with wealthy investors and is only as strong as the amount of tax revenues generated by cannabis sales. To truly protect War on Drugs survivors, policymakers can create markets that are exclusive to survivors and give them ultimate discretion in how tax revenues are distributed.

Unlike entrepreneurship policies based on neoliberal ideals, through reparative entrepreneurship, social imperatives should supersede capitalistic outcomes. States considering social equity plans have the responsibility to create entrepreneurship policy that will promote economic

justice for the recipients, even if that is to the detriment of the market participation of other society members.¹⁹⁸

V. CONCLUSION

After dey free us . . . we so glad, we makee de drum and beat it lak in de Affica soil. . . . We glad we free . . . but we cain stay wid de folks what own us no mo'. . . . Where we goin' live, we doan know. . . .

[W]e want buildee de houses for ourselves, but we ain' got no lan'. . . . We meet together and we talk. We say we from cross de water so we go back where we come from. So we say we work in slavery five year and de six months for nothin', now we work for money and gittee in de ship and go back to our country. We think Cap'n Meaher dey ought take us back home. But we think we save money and buy de ticket ourselves. . . .

But it too much money we need. So we think we stay here. . . . [W]e join ourselves together to live. . . .

'Cudjo, you always talkee good, so you go tell de white men [the Africans' former owners] and tellee dem whut de Affican say [i.e., their request for land in exchange for years of free labor].' . . .

I say, now is de time for Cudjo to speakee for his people. . . .

¹⁹⁸ As a response to Apartheid, South Africa used entrepreneurship policy as a means to achieve economic reparations. The government aimed to pursue Black Economic Empowerment (BEE) policies that would increase Black ownership, management, and participation in major South African industries because Apartheid excluded Black people from fully participating in major industries. The government pressured "the status quo white corporate capital to incorporate new black investors and divert institutional and capital government resources to facilitate a new black bourgeoisie." Adam Kassner, *Diggin' Deep into Gold Fields: South Africa's Unrealized Black Economic Empowerment in the Shadows of Executive Discretion*, 48 CORNELL INT'L L.J. 667, 671 (Fall 2015).

I tell him . . . ‘Cap’n Tim, you brought us from our country where we had lan’. You made us slave. Now dey make us free but we ain’ got no country and we ain’ got no lan’! Why doan you give us piece dis land so we kin buildee ourself a home?’

Cap’n jump on his feet and say, ‘Fool do you think I goin’ give you property on top of property? I tookee good keer my slaves and derefo’ I doan owe dem nothin.’ . . .

Cudjo . . . tell dem [the people] whut Cap’n Tim say. Dey say, ‘Well, we buy ourself a piece of lan’.’ . . . We workee hard and save, and eat molasse and bread and buy de land from de Meaher. Dey doan take off one five cent from de price for us. . . .

*We call our village Affican Town.*¹⁹⁹

The above excerpt is the first-hand account of a formerly enslaved African man who was newly freed. In the excerpt, Cudjo recounts the joy of his emancipation and the subsequent despair Blacks in America endured with no economic options. These individuals lacked both land and finances because they worked for free their entire lives. They received no reparations from their former master, nor from the government that sanctioned their enslavement. Yet, they were motivated to create their own economic justice through hard work and saving.

The throughline of slavery to the War on Drugs provides the justification for full and adequate reparations on behalf of War on Drugs survivors. Currently, social equity plans are teetering around the edges of reparations. However, policymakers must rise to the occasion and acknowledge the depth of harm inflicted on War on Drugs survivors. Through the equity agenda, New York and a handful of other states have designed social equity plans that are ideologically

¹⁹⁹ ZORA NEALE HURSTON, BARRACON: THE STORY OF THE LAST “BLACK CARGO” (Deborah G. Plant ed., Amistad 2d ed. 2020) (2018).

aligned with the reparations movement. While the policy design is not “successful” by the measures mentioned above, these plans lay the groundwork for a reparative entrepreneurship policy for War on Drugs survivors and other economically disenfranchised groups who demand market space.

Much like with reparations, there is no agreed-upon way to implement reparative legislation. The lessons learned through experimentation, in different states and in different markets will ultimately lead to more comprehensive policies for social equity applicants.