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Incarceration to Incorporation: Economic Empowerment for Returning Citizens through Social Impact Bonds

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Etienne C. Toussaint

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Black rage is founded on blatant denial
Squeezed economics, subsistence survival,
Deafening silence and social control.
Black rage is founded on wounds in the soul!

—Lauryn Hill, *Black Rage (Sketch)* (2014)¹

1. David Drake, *Lauryn Hill “Black Rage (Sketch)”*, PITCHFORK (Aug. 24, 2014), <http://pitchfork.com/reviews/tracks/17064-lauryn-hill-black-rage-sketch/>. Throughout this essay, I utilize the terms “Black” and “African American” interchangeably to refer to Americans of African descent. Building upon a rich body of legal scholarship that touches on issues of race and racism, I capitalize “Black” throughout this essay because “Blacks, like Asians, Latinos and other ‘minorities,’ constitute a specific cultural group, and as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

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I. Introduction

On a crisp New Year's Eve in December 2015, fiery words sprung from the lips of hundreds of frustrated protestors gathered near the Gallery Place-Chinatown Metro station in downtown Washington, D.C. "This is more important than partying," one woman shouted.² Others quickly followed with their own passionate declarations as Black Lives Matter activists and a diverse body of outraged community members, young and old, marched in unison down the street. Their collective cries of disapproval called attention to the growing number of police misconduct cases and the rising tension between law enforcement agents and communities of color that have taken American cities by storm.³ Picket signs and bullhorns filled the nighttime sky as the protestors expressed their disdain

2. *Black Lives Matter Protesters March Through DC*, NBC WASH. (Dec. 31, 2015), <http://www.nbcwashington.com/news/local/Protesters-Plan-DC-Rally-Over-Police-Misconduct-Cases-363906071.html>.

3. In the summer of 2013, after the acquittal of George Zimmerman in the shooting and murder of African-American male, Trayvon Martin, a new Black liberation movement was birthed with the use of the social media hashtag #BlackLivesMatter by Alicia Garza, Patrisse Cullors, and Opal Tometi. By August 2014, Black Lives Matter (BLM) had evolved into a vibrant activist movement, gaining international acclaim after organizing massive street demonstrations following the deaths of Michael Brown in Ferguson, Missouri, and Eric Garner in New York City. BLM members seek to affirm the lives of Black men and women who, on a daily basis, experience the negative impacts of institutionalized white supremacy and structural racism in America. The movement has primarily focused on decrying the extrajudicial killings of Black people by law enforcement officers and racial injustices perpetuated by the criminal justice system (e.g., racial profiling, police brutality, mass incarceration, etc.). See generally Khury Petersen-Smith, *Black Lives Matter: A New Movement Takes Shape*, 96 INT'L SOCIALIST REV. 2015, <http://isreview.org/issue/96/black-lives-matter> (describing the history of Black Lives Matter and providing useful context for the future of the activist movement).

Since the movement's formation, BLM activists have organized over one thousand demonstrations against the deaths of numerous Black people killed by police officers, such as Tamir Rice in Cleveland; Walter Scott in North Charleston, South Carolina; Sandra Bland in Waller County, Texas; and Freddie Gray in Baltimore. The movement has sparked conversation about the tense relationship between law enforcement and communities of color across America. See, e.g., Conor Friedersdorf, *The Brutality of Police Culture in Baltimore*, ATLANTIC (Apr. 22, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-brutality-of-police-culture-in-baltimore/391158/> (noting that "as in Ferguson, where residents suffered through years of misconduct so egregious that most Americans could scarcely conceive of what was going on, the people of Baltimore are policed by an entity that perpetrates stunning abuses"); Maria Alvarez, *Invoking King's Memory, de Blasio, Sharpton Try to Mend Fences with NYPD*, NEWSDAY (Jan. 19, 2015), <http://www.newsday.com/news/new-york/invoking-king-s-memory-de-blasio-sharpton-try-to-mend-fences-with-nypd-1.9823321> (noting "Mayor Bill de Blasio and the Rev. Al Sharpton . . . promised their commitment to social justice

over America's criminal justice system. Other community members watched silently from afar, confused at the anger and frustration raining down on their city. Perhaps our country's failure to indict the police officers involved in the shooting of twelve-year old Tamir Rice who waived a toy gun in the wrong park in Cleveland or those officers involved in the unexplained death of 28-year old Sandra Bland after a routine traffic stop in Waller County, Texas, may explain why some Washingtonians resolved that the year 2015 was not one to be celebrated with colorful streamers, pointed party hats, or bubbly champagne.⁴

As an increasing number of citizens in urban and rural communities across America take to the streets in protest to demand justice for victims of police brutality,⁵ lawmakers are calling for much-needed reform to our country's criminal justice system.⁶ And, while the media primarily highlight the troubled lives of the Black bodies that have flooded our streets with the painful stories of their untimely death,⁷ the zealous protesters who waded through the aftermath following every instance of "law

while respecting the NYPD as they vowed to mend fences between police and the community.")

4. See Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html>; see also Dana Ford & Ed Payne, *Grand jury decides against indictments in Sandra Bland's death*, CNN (Dec. 23, 2015), <http://www.cnn.com/2015/12/21/us/sandra-bland-no-indictments/>.

5. For example, see, e.g., Benji Hart, *Baltimore's violent protesters are right: Smashing police cars is a legitimate political strategy*, SALON (Apr. 28, 2015), http://www.salon.com/2015/04/28/baltimores_violent_protesters_are_right_smashing_police_cars_is_a_legitimate_political_strategy/; Sara Burnette, *Black Lives Matter Protests Meet Black Friday Shoppers*, CHRISTIAN SCI. MONITOR (Nov. 28, 2015), <http://www.csmonitor.com/USA/Society/2015/1128/Black-Lives-Matter-protests-meet-Black-Friday-shoppers>; CNN Wire, *Black Lives Matter Protests Stop Traffic in L.A., Chicago, San Francisco and Minneapolis*, KTLA 5 MORNING NEWS (Dec. 24, 2015), <http://ktla.com/2015/12/24/black-lives-matter-protests-stop-traffic-in-l-a-chicago-san-francisco-and-minneapolis/>.

6. As recently as February 2016. See, e.g., Jordain Carney & Lydia Wheeler, *Senators locked in negotiations over criminal justice reform*, THE HILL (Feb. 9, 2016), <http://thehill.com/regulation/legislation/268840-senators-locked-in-negotiations-overcriminal-justice-reform> (noting "[l]awmakers are said to be considering cutting a section from the [criminal justice reform] bill that would have reduced mandatory minimum sentences for armed career criminals from 15 to 10 years, with that standard applied retroactively to people already in prison").

7. For an example of how the media portrayed the death of Michael Brown, see, e.g., *Tracking the Events in the Wake of Michael Brown's Shooting*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/interactive/2014/11/09/us/10ferguson-michael-brown-shooting-grand-jury-darren-wilson.html#/#time354_10512 (noting "[s]ome witnesses later said that Mr. Brown appeared to be surrendering with his hands in the air as he was hit with the fatal gunshots. Others say that Mr. Brown was

enforcement gone wrong” are fueled by concerns that sink far deeper than the loss of unrealized potential. Communities are not only advocating for the mending of fractured relationships between citizens and local police officers,⁸ but also for the healing of a broken carceral system that too often hinders economic justice. Not only does America’s criminal justice system overwhelmingly target young Black men in low-income communities as the primary perpetrators of criminal activity, but it also routinely relegates them to second-class citizenship upon their release from prison.⁹

Formerly incarcerated individuals in America—appropriately called “returning citizens” but more frequently labeled “ex-felons”—are shackled with the stigma of their prison record long after serving time behind bars,¹⁰ a stigma that impairs their civil rights¹¹ and limits their prospects for economic prosperity in the job market. Many social justice advocates recognize that mass incarceration has done more harm than good in addressing drug abuse and crime in communities of color where the cycle of poverty churns unrelentingly.¹² Further, they argue that lasting social

moving toward the officer when he was killed. What is not in dispute is that Mr. Brown was unarmed. His body would lie in the street for four hours.”).

8. See, e.g., William Powell, *The Roots of Violence in Ferguson*, ATLANTIC (Aug. 16, 2014), <http://www.theatlantic.com/national/archive/2014/08/racial-tension-in-ferguson-isnt-over/378625/> (noting that when residents gathered with other protesters for a peace march days after the shooting of Michael Brown by a police officer, “[m]any in the crowd wore goggles or painters’ masks, concerned about another round of tear gas”).

9. See George Will, *America’s Broken Criminal-Justice System Is in Desperate Need of Reform*, NAT’L REV. (Oct. 24, 2015), <http://www.nationalreview.com/article/426017/americas-broken-criminal-justice-system-desperate-need-reform-george-will> (describing an article by Alex Kozinski that cites “disturbing indications that a non-trivial number of prosecutors—and sometimes entire prosecutorial offices—engage in misconduct.”).

10. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (explaining that mass incarceration has become “a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow” for African Americans).

11. See generally Etienne C. Toussaint, *The Silenced Minority: On Selma, Voting Rights, and the Clinton You Never Heard About*, EMPOWER MAG. (Mar. 9, 2016), <http://www.empowermagazine.com/silenced-minority-selma-voting-rights-clinton-never-heard/>.

12. See, e.g., MARY PATILLO, IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (2004) (noting “[a]lthough young minority men with little schooling had relatively high rates of incarceration, before the 1980s the penal system was not a dominant presence in disadvantaged neighborhoods. Criminal behavior, as officially recognized by the police, was much more unusual than poverty. The utter marginality of prisons and other carceral institutions shaped criminological and penological understanding of punishment.”); see also Ta-Nehisi Coates, *The*

change and long-term income equality cannot be achieved without advancing economic justice.¹³ The U.S. government has heeded their call by shrinking overcrowded prisons and reducing excessively long prison sentences.¹⁴ Nevertheless, concerns about recidivism persist, and the cycle of poverty among the formerly incarcerated continues. Indeed, more than one-third of federal inmates return to prison within five years of their release, often after struggling to secure employment due to the stigma of their criminal record and the lack of employment opportunities in their home communities.¹⁵ Although the facts speak for themselves, scholars agree that the politics of race that drive criminal justice reform are inextricably linked to the movement for economic justice that steer historically marginalized communities deeper and deeper into inequality.¹⁶

The George Washington Law School Small Business and Community Economic Development Clinic (SBCED Clinic), under the leadership of Professor Susan R. Jones, has played a leading role in advancing economic empowerment for returning citizens in Washington, D.C. In addition to

Black Family in the Age of Mass Incarceration, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> (revealing, in stark terms, “Our carceral state banishes American citizens to a gray wasteland far beyond the promises and protections the government grants its other citizens. Banishment continues long after one’s actual time behind bars has ended, making housing and employment hard to secure.”).

13. Laurie Hauber, *Promoting Economic Justice Through Transactional Community-Centered Lawyering*, 27 ST. LOUIS U. PUB. L. REV. 3, 1 (2007).

14. Notably, on October 30, 2015, following a recent decision by the U.S. Sentencing Commission to reduce federal guideline sentences for many nonviolent drug offenses, the U.S. Justice Department began the process of releasing approximately 6,000 federal prisoners. For more information, see Sari Horwitz, *Justice Department Set to Free 6,000 Prisoners, Largest One-Time Release*, WASH. POST (Oct. 6, 2015), https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html.

15. Matthew R. Durose, Alexia D. Cooper & Howard N. Snyder, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, BUREAU OF JUST. STAT. SPECIAL REP. (Apr. 2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

16. See Susan R. Jones, *Dr. Martin Luther King, Jr.’s Legacy: An Economic Justice Imperative*, 19 WASH. U. J. L. & POL’Y 39, 44 (2005) (“It is my position that economic justice must be advanced independently and as a critical part of social justice, racial justice and human rights.”); Gary Chartier, *Civil Rights and Economic Democracy*, 40 WASHBURN L.J. 267 (2000) (“At root, civil rights struggles have consistently touched on questions, not only social and cultural, but also economic, questions about the organization and distribution of economic power and material good.”); see also Hauber, *supra* note 13, at 1–9; Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. ON POVERTY L. & POL’Y 389 (2004).

providing pro bono legal services to returning citizen entrepreneurs, the SBCED Clinic has been engaged in an action research project during the past several years that actively supports entrepreneurship for returning citizens.¹⁷ Most recently, the clinic faculty and student attorneys conducted policy research on legislation in the District of Columbia that promotes economic justice for returning citizens, the product of which resulted in public testimony before the Washington D.C., Council in January 2016.¹⁸ During the spring 2016 academic semester, the clinic faculty and student attorneys explored various social finance innovations that could support proposed legislative economic empowerment initiatives for returning citizens. This essay highlights the potential for an emerging social finance tool—the social impact bond—to help finance newly proposed legislation in Washington, D.C., targeting returning citizens.

Part I of this article discusses the D.C. Incarceration to Incorporation Entrepreneurship Program Act of 2015, an innovative bill that seeks to economically empower the District's most vulnerable citizens. Part II briefly traces the history of the social impact bond in the United States and positions the financial tool within an evolving history of community economic development that currently emphasizes market-based initiatives. Part III offers a critique of the social impact bond as a vehicle to fund criminal justice reforms, identifying benefits of the financial tool while discussing key challenges that may hinder its future success. The

17. The George Washington Law School SBCED Clinic "Action Research Project for Returning Citizens" has gone through several stages of development during the past few years, including: (1) the creation of a workforce development report investigating issues for marginalized population in D.C.; (2) faculty participation in an Entrepreneurship and Reentry Forum with the U.S. Probation Office under the D.C. Workforce Development Program in October 2013; (3) direct requests for legal assistance from returning citizens; (4) creation of a white paper proposing a virtual law pro bono initiative at a city-wide George Washington University sponsored workforce development workshop; (5) faculty participation in a "Rebuilding Reentry Hackathon" in October 2015; (6) hosting of a "Returning Citizens and Entrepreneurship Convening" at George Washington Law School in November 2015; (7) clinic participation in the "D.C. Reentry Task Force" and faculty public testimony on the District of Columbia Incarceration to Incorporation Entrepreneurship Program Act of 2015 in January 2016; (8) creation of a draft "Returning Citizen's Legal and Business Entrepreneurship Toolkit" during the spring and summer of 2016; and (9) intentional reflection and storytelling. For more information, see Susan R. Jones, *Representing Returning Citizen Entrepreneurs*, 25-1 J. AFFORDABLE HOUS. & CMTY. DEV. L. **page no.** (2016).

18. Professor Susan R. Jones and Visiting Professor and Friedman Fellow Etienne C. Toussaint testified on January 28, 2016, before the D.C. Council on B21-0463 - District of Columbia Incarceration to Incorporation Entrepreneurship Program Act of 2015. See Public Hearing on B21-0463, Committee on Business, Consumer, and Regulatory Affairs, Council of the District of Columbia (Jan. 28, 2016), <http://lims.dccouncil.us/Download/34815/B21-0463-HearingRecord1.pdf>.

essay concludes by urging social justice advocates to consider the social impact bond, while also noting the importance of incorporating strategies and strategic partnerships that will ultimately empower communities at the grassroots level.

II. The D.C. Incarceration to Incorporation Entrepreneurship Program Act of 2015

In the nation's capital, an estimated 60,000 people, approximately ten percent of the city's current population, have a criminal record.¹⁹ Additionally, more than 8,000 people return to the city each year from prisons across the country.²⁰ These returning citizens, predominantly young Black men between the ages of 21 and 30, face tremendous challenges as they transition into their old neighborhoods and seek access to employment opportunities.²¹ In an October 2014 report by the District of Columbia Department of Corrections, 37 percent of these young men self-reported their education level as "none."²² The Council for Court Excellence found that 77 percent of Washington, D.C., offenders who return home from prison received no employment assistance while incarcerated, and only one-third of those surveyed stated that assistance was available to them after their release.²³ Additionally, approximately 80 percent of those surveyed said that they were asked "all the time" about their criminal records when

19. Brian Englehardt, *The Effect of Employment Frictions on Crime: Theory and Estimation*, 28:3 J. OF LAB. ECON. 677–718 (2010).

20. See Richard Freeman, *Can We Close the Revolving Door?: Recidivism vs. Employment of Ex-Offenders in the U.S.* (N.Y. Univ. Law Sch. Urban Inst. Reentry Roundtable May 19–20, 2003), http://www.urban.org/uploadedpdf/410857_freeman.pdf.

21. See Justin Wolfers, David Leonhardt & Kevin Quealy, *1.5 Million Missing Black Men*, N.Y. TIMES (Apr. 20, 2015), http://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html?_r=5&abt=0002&abg=0 (revealing "African American men have long been more likely to be locked up and more likely to die young, but the scale of the combined toll is nonetheless jarring. It is a measure of the deep disparities that continue to afflict black men—disparities being debated after a recent spate of killings by the police—and the gender gap is itself a further cause of social ills, leaving many communities without enough men to be fathers and husbands.").

22. See Clinton Yates, *"Returning Citizens" Are Still One of D.C.'s Most Marginalized and Motivated Groups*, WASH. POST (Jan. 16, 2015), <https://www.washingtonpost.com/news/local/wp/2015/01/16/returning-citizens-are-still-one-of-d-c-s-most-marginalized-and-motivated-groups/> (explaining that the young Black men being interviewed reported not having a GED or a high school diploma).

23. DC Prisoner Reentry Initiative, *Unlocking Employment Opportunity for Previously Incarcerated Persons in the District of Columbia* (Council for Court Excellence 2011).

looking for a job.²⁴ Although the D.C. Mayor's Office on Returning Citizen Affairs (MORCA) has launched various initiatives for returning citizens targeting these challenges,²⁵ MORCA operates with a limited budget and has received criticism for failing to achieve its laudable goals.²⁶

These challenges are not new. At the national, state and local levels, our government has historically employed a variety of community economic development (CED) policy measures to combat the concentrated poverty that plagues low-income communities of color and frustrates the economic prospects of individuals with criminal records. Yet, as the racial wealth gap in America widens,²⁷ and as our country's incarceration rate remains among the highest in the world, both non-profit initiatives and government-sponsored social service programs continue to offer insufficient

24. *Id.*

25. The D.C. Mayor's Office on Returning Citizen Affairs, developed under former Mayor Vincent Gray to "provide zealous advocacy, high-quality services and products, up-to-date, useful information for the empowerment of previously incarcerated persons," has launched various initiatives to address the challenges facing returning citizens in the district. On September 14, 2015, current D.C. Mayor Muriel Bowser announced two new training and professional development programs for D.C. returning citizens: (1) the DC Jail Work Readiness Program, a partnership between the Department of Corrections (DOC) and the Department of Employment Services that will provide male inmates at the D.C. Central Detention Facility with six weeks of pre-release workforce training and development; and (2) an initiative between Events DC and the Congress Heights Community Training & Development Corporation that will provide female returning citizens with a fourteen-week program teaching professional skills, such as etiquette, conflict management, and digital literacy. *See generally Mayor Bowser Announces New Programs to Support the District's Returning Citizens*, Executive Office of the Mayor (Sept. 14, 2015), <http://mayor.dc.gov/release/mayor-bowser-announces-new-programs-support-districts-returning-citizens> ("A major component of Mayor Bowser's Safer, Stronger plan is recommitting ourselves to building pathways to the middle class. The Mayor is championing a mix of legislation and programs that will provide returning citizens with work readiness skills and experience.").

26. *See, e.g.,* Jeffrey Anderson, *IG Report: Returning Citizens Office Lacks 'Fundamental' Ability to Help Ex-Offenders*, WASH. CITY PAPER (Sept. 30, 2015), <http://www.washingtoncitypaper.com/blogs/citydesk/2015/09/30/ig-report-returning-citizens-office-lacks-fundamental-ability-to-help-ex-offenders/> (noting "OIG inspectors found that, while MORCA staff worked diligently to directly serve returning citizens, it lacked fundamental organizational mechanisms and resources to inform them about available resources and collaborate with other entities on critical job readiness, life skills, and family reunification services").

27. *See* Tanzina Vega, *Minorities Fall Further Behind Whites in Wealth During Economic Recovery*, N.Y. TIMES (Dec. 12, 2014), http://www.nytimes.com/2014/12/13/us/pew-research-finds-growing-net-worth-gap.html?_r=0 (citing a report by the Pew Research Center, noting that "the median net worth of white households in 2013 was \$141,900, about 13 times that of black households at \$11,000").

solutions to tackle these societal challenges.²⁸ Further, state and local governments across the country have struggled to finance existing social service programs, much less bring successful models to scale and finance new innovations.²⁹

Among a growing number of other jurisdictions across the country, Washington, D.C., has begun to explore new public policy solutions that can address the shortcomings in America's criminal justice system while helping returning citizens seeking access to economic opportunities when they return home. Specifically, a new initiative promoting entrepreneurship for returning citizens provides a platform for returning citizens to achieve economic justice and reveals the potential for decreasing recidivism.³⁰ Convincing stakeholders in both the public and private sector of the viability of this model, as well as identifying how it can address entrenched issues of racial and economic justice, will be an important step in economically empowering these citizens.

On January 28, 2016, the District of Columbia Council Committee on Business, Consumer, and Regulatory Affairs responded to the demands of frustrated Washingtonians³¹ by holding hearings on B21-463, the District of Columbia Incarceration to Incorporation Entrepreneurship Program Act

28. See Stephanis Bibas, *The Truth About Mass Incarceration*, NAT'L REV. (Sept. 21, 2015), <http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform> (noting "[m]ost prisoners are eventually released, and we do almost nothing to help them reenter society, simply providing a bus ticket and perhaps \$20").

29. See, e.g., Julie Bosman, *One State's Struggle to Make Ends Meet: Why Illinois Is Without a Budget*, N.Y. TIMES (Oct. 26, 2015), <http://www.nytimes.com/2015/10/27/us/illinois-budget-stalemate-rauner-and-democrats-divided.html> (describing Illinois' budget challenges, noting "[s]ocial service organizations that have contracts with the state, and the low-income populations they serve, may be suffering the most. Some nonprofits have not received money from the state since July 1 and say they have been forced to deplete their cash reserves and scale back services. Mark Mathews, the executive director of the Child Abuse Council in Moline, which provides counseling and visits homes of troubled families, said he had eliminated two staff positions and reduced one program's caseload by 40 percent.").

30. See *infra* Part I. Research demonstrates that employment opportunities with higher wages can reduced the likelihood of re-offense among returning citizens and ultimately lower the rate of incarceration. See Michelle N. Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply:" The Case for Reforming Criminal Background Checks for Employment*, NAT'L EMP. LAW PROJ. (Mar. 2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

Additionally, studies have revealed that reducing the unemployment period among returning citizens by as little as three months can decrease recidivism by five percent. See JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (Urb. Inst. Press 2005).

31. For a discussion of the issues inspiring this frustration, see *supra* notes 2-5.

of 2015 (Incarceration to Incorporation Bill), an innovative bill that seeks to economically empower the District's most vulnerable citizens.³² Through the creation of a business development program administered by the D.C. Department of Employee Services (DOES) and the D.C. Department of Small and Local Business Development (DSLBD) that targets formerly incarcerated D.C. residents, this legislation promises to help "educate, train, and assist returning citizens, in becoming self-sufficient entrepreneurs and civically engaged residents."³³

The Incarceration to Incorporation Bill requires DOES and DSLBD to establish the Incarceration to Incorporation Entrepreneurship Program (IIEP), which:

(1) invests in for-profit and non-profit businesses owned, operated, or managed by returning citizens; (2) provides a fast-track GED program; (3) provides classes to improve math, reading, and writing abilities; (4) provides business training including accounting, finance, administration, business planning, budgeting, marketing; (5) provides business-themed educational workshops and seminars; (6) provides scholarships and/or grants for returning citizens to enroll in business classes at the University of the District of Columbia ("UDC") and the University of the District of Columbia Community College ("UDCCC"); and (7) establish an IIEP Fund.³⁴

The IIEP Fund will be administered by the Office of the Deputy Mayor for Greater Economic Opportunity.³⁵ Additionally, the Incarceration to Incorporation Bill calls for the IIEP Fund to maintain a balance of \$10 million, to be generated from D.C. government appropriations, public and private donations, and sponsored funds.³⁶ Given funding challenges to

32. Introduced by Councilmember Vincent Orange on November 3, 2015, and co-sponsored by Councilmember Yvette Alexander, the bill presents an opportunity for returning citizens in Washington, D.C., to learn about and utilize entrepreneurship as an economic empowerment tool, critically important in an economic climate marked by persistent employment challenges for Washingtonians with criminal records. After a public hearing on January 28, 2016, the bill underwent a committee mark-up on June 23, 2016, and received a unanimous affirmative vote from the Committee on Business, Consumer, and Regulatory Affairs after a final reading on July 12, 2016. B21-0463 was transmitted to the mayor of the District of Columbia on August 4, 2016, for a response due on August 18, 2016. For more information, see B21-0463, District of Columbia Incarceration to Incorporation Entrepreneurship Program Act of 2015, Committee on Business, Consumer, and Regulatory Affairs, Council of the District of Columbia (Nov. 3, 2015), <http://lims.dccouncil.us/Legislation/B21-0463>.

33. *Id.* at 1.

34. *Id.*

35. Interestingly, and perhaps in response to harsh criticism of the D.C. Office on Returning Citizens Affairs, the Incarceration to Incorporation Bill did not include a management role for the district's primary governmental reentry organization. See *id.*

36. *Id.* at 2.

meet the existing social service needs for marginalized communities in Washington, D.C.,³⁷ policy makers recognize that this program will require innovative financing mechanisms.³⁸ Such funding streams would benefit from the growing pool of investment capital available in the private sector, particularly from the impact investing community. Impact investments prioritize social and environmental investments that are “intended to create positive impact beyond financial return.”³⁹

The Incarceration to Incorporation Bill offers a unique platform for Washington, D.C., to both invest in the lives of returning citizens struggling to find employment and empower communities seething with frustration over unequal economic opportunities. As civil rights activist and philosophy professor Dr. Cornel West has eloquently pointed out, marginalized communities across America “have a righteous indignation at injustice”⁴⁰ that has become emblematic of this millennial generation⁴¹

37. See Wes Rivers & Claire Zippel, *While DC Continues to Recover from Recession, Communities of Color Continue to Face Challenges*, DC FISCAL POL’Y INST. (Sept. 18, 2015), <http://www.dcfpi.org/while-dc-continues-to-recover-from-recession-communities-of-color-continue-to-face-challenges> (explaining that 26 percent of Black people in Washington, D.C., lived below the poverty line in 2014).

38. The Incarceration to Incorporation Bill anticipates a diversity of funding streams, including appropriated funds, donations from the public, donations from private entities, and funds provided through a sponsorship agreement. See B21-0463, *supra* note 32, at 2.

39. See J.P. Morgan Global Research & The Rockefeller Found., *Impact Investments: An Emerging Asset Class* 14 (Nov. 29, 2010), <https://theiin.org/assets/documents/Impact%20Investments%20an%20Emerging%20Asset%20Class2.pdf>. A 2015 survey of 158 investors revealed that the global impact investing market committed more than \$15 billion to impact investments in 2015 and planned to increase capital committed by 16% in 2016. See Abhilash Mudaliar et al., *2016 Annual Impact Investor Survey*, J.P. Morgan & the Global Impact Investing Network (May 2016). While the market shows continued growth, it represents a small portion of total assets under management worldwide, which is expected to exceed \$100 trillion by 2020. See Michael Liersch, *Millennials and Money*, Private Banking & Inv. Grp., Bank of America Merrill Lynch (2013).

40. Cornel West, “*Living and Loving Out Loud*” Interview, NPR TALK OF THE NATION, Oct. 29, 2009, transcript available at <http://www.npr.org/templates/story/story.php?storyId=114287606> (stating “I still have a righteous indignation at injustice, no matter what form it takes. It could be homophobia, it could be white supremacy, male supremacy, imperial arrogance, class subordination or whatever.”)

41. See D. Watkins, *In Baltimore, We’re All Freddie Gray*, N.Y. TIMES (Apr. 28, 2015), http://www.nytimes.com/2015/04/29/opinion/in-baltimore-were-all-freddie-gray.html?_r=0 (declaring “[b]ut it’s not only about Freddie Gray. Like him, I grew up in Baltimore, and I and everyone I know have similar stories, even if they happened to end a little differently. To us, the Baltimore Police Department is a group of terrorists, funded by our tax dollars, who beat on

and reminiscent of a not too distant civil rights movement.⁴² However, opinions remain divided on how best to provide beneficial social services for needy citizens while promoting economic growth and development in evolving communities. How does a local government sustainably fund a program like the IIEP? Perspectives are mixed, in part due to differing opinions on who is to blame for poverty. While some scholars believe that low-income communities of color are responsible for their inability to break the cycle of poverty in their neighborhoods, others point to a history of institutionalized racism that has stifled opportunity for marginalized peoples.⁴³ These ideologies have shaped the landscape of CED initiatives, policies, and tools used by the public and philanthropic sectors to spark social transformation. However, foundations and philanthropists have historically lacked the necessary capital to scale proven programs and provide non-profit service providers with much-needed multiyear support to create lasting change.⁴⁴ Funding innovative social service programs that address the range of challenges plaguing our communities requires creative solutions that can overcome government funding constraints.

people in our community daily, almost never having to explain or pay for their actions.”).

42. See ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 195 (1984) (“Nineteen sixty was the year when thousands of Southern black students at black colleges joined forces with “old movement warriors” and tremendously increased the power of the developing civil rights movement.”).

43. Compare Wesley Lowery, *Paul Ryan, Poverty, Dog Whistles, and Electoral Politics*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/03/18/paul-ryan-poverty-dog-whistles-and-racism/> (quoting Congressman Paul Ryan (R-WI), “We have got this tailspin of culture, in our inner cities in particular, of men not working and just generations of men not even thinking about working or learning the value and the culture of work, and so there is a real culture problem here that has to be dealt with.”) with Ta-Nehisi Coates, *The Secret Lives of Inner-City Black Males*, ATLANTIC (Mar. 18, 2014), <http://www.theatlantic.com/politics/archive/2014/03/the-secret-lives-of-inner-city-black-males/284454/> (declaring “Certainly there are cultural differences as you scale the income ladder. Living in abundance, not fearing for your children’s safety, and having decent food around will have its effect. But is the culture of West Baltimore actually less virtuous than the culture of Wall Street? I’ve seen no such evidence. Yet that is the implicit message accepted by Paul Ryan, and the message is bipartisan.”).

44. See Emily Gustafsson-Wright et al., *The Potential and Limitations of Impact Bonds: Lessons from the First Five Years of Experience Worldwide* at 1 (Brookings Inst. 2015), <http://www.brookings.edu/~media/Research/Files/Reports/2015/07/social-impact-bonds-potential-limitations/Impact-Bondswb.pdf?la=en> (noting, for example, “Low levels of education and the prevalence of malaria result from the inability of governments to equitably deliver high-quality services in the education and health sectors. This inability May arise from lack of resources, ineffective use of such resources, or both.”).

This, coupled with a now dominant CED ideology that favors market-based strategies over grassroots political activism,⁴⁵ has resulted in a focus on innovations that expand opportunities for the private sector to invest in low-income communities to drive community development.

Recent efforts by foundations, corporations, and governments across the globe highlight the ability to leverage private investment capital to finance social service programs through “pay-for-success” contracts. Specifically, a type of pay-for-success contract called the “social impact bond” has been heralded as a new financial vehicle that can help local governments attract capital from the private sector to finance important social service programs.⁴⁶ In the United States, President Barack Obama’s administration has demonstrated a tangible interest in the social impact bond,⁴⁷ and various states have also begun to consider its potential for financing their social service programs, particularly in the criminal justice arena. As Washington, D.C., explores the implementation of the Incarceration to Incorporation Bill, a deeper analysis of the social impact bond model and its potential for funding criminal justice programs should be considered.

III. Can Social Impact Bonds Finance Criminal Justice Reform?

Social impact bonds (SIBs) add to a rich history of market-based CED strategies in the United States that seek to address social inequities by creating new channels for the private sector to make strategic investments into marginalized communities.⁴⁸ Unlike traditional bonds or debt instruments,

45. See *infra*, note 48.

46. See V. Kasturi Rangan & Lisa A. Chase, *The Payoff of Pay-for-Success*, STANFORD SOC. INNOVATION REV. (Fall 2015), http://ssir.org/up_for_debate/article/the_payoff_of_pay_for_success (explaining that social impact bonds have been “widely touted as a clever way to fill the funding gap plaguing social programs by attracting a tranche of the trillions of dollars in private return-seeking capital”).

47. In February 2011, President Barack Obama’s proposed fiscal year 2012 budget included up to \$100 million to support pilot pay-for-success programs targeting issues like recidivism, workforce training, and homelessness. In fiscal year 2013, a similar request was made for the slightly increased amount of \$109 million. Although neither of the budget proposals were supported in Congress, in the 2014 fiscal year budget proposal, the Obama administration requested nearly \$500 million to support these programs, which included a proposed \$300 million fund designed to encourage state and local governments to develop Social Impact Bonds and to be administered by the Treasury Department. See Sonal Shah & Kristina Costa, *Social Impact Bonds: White House Budget Drives Pay for Success and Social Impact Bonds Forward*, CTR. FOR AM. PROGRESS (Apr. 23, 2013), <https://www.americanprogress.org/issues/economy/news/2013/04/23/61163/white-house-budget-drives-pay-for-success-and-social-impact-bonds-forward/>.

48. During the 1990s, CED evolved into a market-based poverty alleviation strategy that stood in opposition to the welfare policies and entitlement programs born out of the civil rights movement. As consensus formed around the idea that increasing for-profit opportunities in geographically isolated low-income neighborhoods

SIBs work by creating public/private partnerships between state or local governments, private foundations, non-profit organizations, and private investors.⁴⁹ These entities collaborate to inject private-sector capital into traditionally public-sector activities. Non-profit service providers are funded through privately invested funds, and private investors are repaid with government cost savings after evidence-based outcome metrics have been achieved by the SIB program.⁵⁰ If the outcome metrics outlined in the social impact bond are not met, the government typically does not have to pay for the services delivered.⁵¹ This financing model is a powerful tool for state and local governments to reduce long-term costs while prioritizing the outcomes of their social programs,⁵² as well as an opportunity for philanthropies and private investors to help increase the pool of funding available for innovative social service programs that target challenging issues like recidivism and unemployment.

The first SIB in the United States was launched by New York City in 2012 to help reduce juvenile recidivism at the Rikers Island Correctional Facility (Rikers Island SIB).⁵³ In the Rikers Island SIB, Goldman Sachs

could produce social transformation and economic empowerment, government policy followed. At the national level, initiatives such as the Empowerment Zones Program and New Markets Tax Credit sought to stimulate investment in low-income neighborhoods and promote economic development. The privatization of social welfare policy led to increased support for CED financing strategies, such as real estate investment trusts, microfinance, and community development trusts, that channeled private sector capital into low-income neighborhoods. For a discussion of the history and impact of market-based CED in the United States, see Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STANFORD L. REV. 3, 399–493 (2001).

49. See Gustafsson-Wright, *supra* note 44, at 4.

50. *Id.*

51. *Id.* at 6.

52. SIBs differ from traditional performance-based government contracting, where payments are typically triggered by performance “outputs” like the number of individuals reached through a social service program, rather than performance “outcomes,” which focus more on tangible changes in the lives of the target population. See Deborah Burand, *Globalizing Social Finance: How Social Impact Bonds and Social Impact Performance Guarantees can Scale Development*, 9 N. Y. U. J. L. & BUS. 447, 464 (2013).

53. See Eduardo Porter, *Wall St. Money Meets Social Policy at Rikers Island*, N.Y. TIMES (July 28, 2015), http://www.nytimes.com/2015/07/29/business/economy/wall-st-money-meets-social-policy-at-rikers-island.html?_r=0; see also Kristina Costa, *Social Impact Bonds: New York City and Massachusetts to Launch the First Social Impact Bond Programs in the United States*, CTR. FOR AM. PROGRESS (Nov. 5, 2012), <https://www.americanprogress.org/issues/economy/news/2012/11/05/43834/new-york-city-and-massachusetts-to-launch-the-first-social-impact-bond-programs-in-the-united-states/> (explaining “In New York City, juvenile offenders between the ages of 16 and 18 serve their sentences in the adult corrections system. Recidivism is very high among these youth—nearly 50 percent of young offenders

invested \$9.6 million to support a social service program for approximately 3,000 adolescent males to receive cognitive behavioral therapy before and during their transition out of prison.⁵⁴ In 2013, New York State created a SIB valued at \$13.5 million that aimed to reduce adult recidivism by providing job training for recently incarcerated adults through a non-profit called the Center for Employment Opportunities (CEO SIB).⁵⁵ The CEO SIB in New York, which targeted 2,000 recently incarcerated adults, was funded through an investment from Bank of America-Merrill Lynch.⁵⁶ An increasing number of other jurisdictions across America have also begun exploring social impact bonds as a funding tool for CED, particularly in the criminal justice arena where the reduction of prison beds can lead to verifiable cost savings to the government. For example, in 2014, the State of Massachusetts contracted with non-profit service provider Roca and announced a \$21.3 million, seven-year social impact bond aimed at reducing the recidivism rate within the state by 40 percent by working with 929 young adult males.⁵⁷

SIBs are a new innovation and have faced criticism.⁵⁸ The financing model was only recently pioneered in the United Kingdom in September

return to Rikers Island within a year of their release. Currently, adolescents incarcerated on Rikers do not receive consistent services to prevent re-offending”).

54. See Shah, *supra* note 47.

55. See Alana Semuels, *A New Investment Opportunity: Helping Ex-Convicts*, ATLANTIC (Dec. 21, 2015), <http://www.theatlantic.com/business/archive/2015/12/reducing-recidivism/421323/> (explaining that the social impact bond investment would fund an expansion of the workplace training provided by the Center for Employment Opportunities for individuals leaving prison).

56. *Id.*

57. See Ben Hecht, *Massachusetts Pay for Success Initiative Advances Government, Private Sector, and Philanthropic Investment in Human Capital*, HUFFINGTON POST (Apr. 13, 2014), http://www.huffingtonpost.com/ben-hecht/massachusetts-pay-for-suc_b_4761124.html (explaining that the investment would “allow Roca, a non-profit that for 25 years has delivered an evidence-based high impact intervention that has reduced incarceration rates among high-risk individuals . . . to tackle the problem of juvenile recidivism, but also to train participants in job readiness, education readiness, and life skills.”).

58. Scholars have argued that SIBs may lead to the privatization of important social objectives that should be managed by the public sector. See Dexter Whitfield, *Alternative to Private Finance of the Welfare State; A Global Analysis of the Social Impact Bond, Pay-for-Success and Development Bond Projects*, Australian Workplace Innovation and Social Research Centre (Univ. of Adelaide 2015) (arguing that SIBS “increase the rate of commodification, marketization and privatization processes”); see also Rick Cohen, *Social Impact Bonds Not Well Received at Senate Budget Hearing*, NONPROFIT Q. (May 7, 2014), <https://nonprofitquarterly.org/2014/05/07/social-impact-bonds-not-well-received-at-senate-budget-hearing/> (quoting Senator Angus King (I-ME) as stating, “I think this is an admission that government can’t do what it’s supposed to do. . . . This just strikes me as . . . it’s a fancy way of contracting

2010 with a social service program focused on reducing recidivism at the Peterborough Prison.⁵⁹ As a result, although the structure has the potential to provide long-term capital investments for social service programs with the capacity to scale, to truly advance innovation, there is a critical need for accelerated learning that quickly translates lessons learned into best practices.⁶⁰ Moreover, not every SIB program will reap financial rewards for private investors, especially those that are being used to fund program ideas that have yet to be proven. Notably, the Rikers Island SIB was recently terminated in July 2015 after failing to meet its recidivism goals, resulting in a \$1.2 million loss in outcome payments for Goldman Sachs.⁶¹ However, because a myriad of factors impact juvenile recidivism, it is unclear whether one can truly measure success over the span of only a few years of program implementation. Perhaps the lesson to be learned from the “failure” of the Rikers Island SIB program is that the best strategy to reduce juvenile recidivism may be one that not only includes one-on-one counseling, but also incorporates robust community-centered CED initiatives that address the economic opportunities available to returning citizens outside prison walls.⁶² Incarcerated men and women may need fewer social service programs premised on a cognitive behavioral therapy

out. And as I say, I don’t believe government contracts very well . . . and the government is always going to be outfoxed on the contracts, in my experience.”).

59. For more information on the history of SIBs, see generally *From Potential to Action: Bringing Social Impact Bonds to the US* (McKinsey & Co. May 2012), http://mckinseysociety.com/downloads/reports/Social-Innovation/McKinsey_Social_Impact_Bonds_Report.pdf; see also Burand, *supra* note 52, at 452–67.

60. See Jeffrey B. Liebman, *Social Impact Bonds: A Promising New Financing Model to Accelerate Social Innovation and Improve Government Performance*, CTR. FOR AM. PROGRESS (Feb. 2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/02/pdf/social_impact_bonds.pdf (arguing “if long-duration contracts or payments that include the future value of learning are not feasible, social impact bonds will likely be limited to interventions that have already demonstrated significant net benefits in rigorous impact studies and proved themselves scalable”).

61. Goldman Sachs suffered only a \$1.2 million loss from its \$9.6 million investment. Its overall loss was reduced because of a partial guarantee provided by Bloomberg Philanthropies. See Burand, *supra* note 52, at 458. For an overview of the Rikers Island SIB evaluation by the Vera Institute of Justice, see *Impact Evaluation of the Adolescent Behavioral Learning Experience (ABLE) Program at Rikers Island*, Vera Institute of Justice (Vera Inst. of Just. July 2015), <http://www.vera.org/sites/default/files/resources/downloads/adolescent-behavioral-learning-experience-evaluation-rikers-island-summary-2.pdf>.

62. Indeed, such a model would be more similar to the approach taken at the criminal justice SIB at the Peterborough Prison in the United Kingdom, which created a voluntary rehabilitation program called “One Service” that provided individualized housing, education, vocational training, and health care services to incarcerated individuals as they transitioned out of prison. See Emma Disley et al., *Lessons Learned from the Planning and Early Implementation of the Social Impact Bond*

model that pathologizes their criminality⁶³ and more comprehensive CED initiatives grounded in an economic justice framework that seeks to enrich their future employment prospects and drive economic mobility.⁶⁴ In fact, scholars have argued that the true driver of recidivism may not be poor decision making by supposedly “irresponsible” citizens in our land of opportunity, but rather limited choices for frustrated individuals living in neighborhoods riddled with concentrated poverty.⁶⁵ This is an important insight for policymakers in Washington, D.C., in their consideration of how to implement the Incarceration to Incorporation Entrepreneurship Program. Returning citizens need greater access to economic empowerment opportunities as much as they need greater access to skill training.

Nevertheless, these early criminal justice initiatives funded through SIBs have proven immensely valuable. SIBs provide state and local governments with important lessons on how to vet social service providers and effectively measure the success of social service programs, while also illuminating best practices for public/private partnerships. Moreover, investment banks like Goldman Sachs have not stopped investing in SIBs.⁶⁶ In fact, Goldman Sachs recently became the first successful SIB investor in the United States by financing a SIB to help pay preschool

at HMP Peterborough (Rand Europe 2011), http://www.rand.org/pubs/technical_reports/TR1166.html.

63. The model used in the Rikers Island SIB employed moral reconnection therapy with the incarcerated youth, a form of cognitive behavioral therapy that focuses on improving social skills, personal responsibility, and decision making. See Shah, *supra* note 47.

64. See Jarrett Murphy, *Did Rikers Policy Experiment Look at the Right Policies?*, CITY LIMITS (July 7, 2015), <http://citylimits.org/2015/07/07/did-rikers-policy-experiment-look-at-the-right-policies/> (questioning “[i]s the main driver of youth recidivism a lack of social skills, a deficiency of personal responsibility or an epidemic of poor decision-making? . . . Is a youth who is homeless really able to make decisions that keep him out of the criminal justice system?”).

65. See Trymaine Lee, *Recidivism Hard to Shake for Ex-Offenders Returning Home to Dim Prospects*, HUFFINGTON POST (June 10, 2012), http://www.huffingtonpost.com/2012/06/09/recidivism-harlem-convicts_n_1578935.html (noting “[i]n the case of East Harlem, also known as El Barrio or Spanish Harlem, analysts blame the area’s high incarceration and recidivism rates on the continuing plague of poverty, a concentration of public housing complexes, major disparities in the quality of education and a long history of gangs and drug culture”).

66. Goldman Sachs has expressed a commitment to the SIB model. In August 2012, CEO and Chairman Lloyd Blankfein observed, “We believe this investment paves the way for a new type of instrument that enables the public sector to leverage upfront funding from the private sector.” Press Release, N.Y.C. Office of the Mayor, Mayor Bloomberg, Deputy Mayor Gibbs and Corrections Commissioner Schirio Announce Nation’s First Social Impact Bond Program (Aug. 2, 2012), http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=

costs for special needs students in Utah.⁶⁷ After a year in preschool, the one hundred students participating in the program did not require additional educational assistance, enabling the State of Utah to repay Goldman Sachs with state educational cost savings.

IV. Opportunities for the Future of SIBs in the United States

The benefits of social impact bonds for the future of social service programs have garnered much interest among social justice advocates and impact investors. First, SIBs expand the pool of available capital for social service programs, especially important during an era of government austerity at both the state and local levels.⁶⁸ Not only does this method of financing enable governments to tap into the growing pool of capital in the impact investing community, but it also provides a platform to scale proven evidence-based social service programs and drive innovation.⁶⁹

Second, government-sponsored social service programs are historically remedial in nature, targeting social problems as they arise or after they have materialized in communities. This practice mitigates the impact of political and financial risk.⁷⁰ However, these political strategies often fail to situate the key drivers of crime in low-income communities within the context of our country's history of institutional racism. Rather than address the structural aspects of poverty that often promote criminal behavior, they offer re-development that fails to provide meaningful economic opportunities for longstanding residents.⁷¹ In contrast, SIBs allow state and local governments to prioritize preventive and forward-thinking programs, which benefit the public through future government costs savings while also shifting the financial risks of innovation to the private sector.⁷² Of course, jurisdictions that are

<http://www.nyc.gov/html/om/html/2012b/pr285-12.html&cc=unused1978&rc=1194&ndi=1>.

67. See Nathaniel Popper, *For Goldman, Success in Social Impact Bond That Aids Schoolchildren*, N.Y. TIMES (Oct. 7, 2015), <http://www.nytimes.com/2015/10/08/business/for-goldman-success-in-social-impact-bond-that-aids-schoolchildren.html> ("For people studying social impact investing, the results in Utah are exciting—even more so given the children's success. Among the 110 students who had been expected to need special education had they not attended preschool, only one actually required it this year.").

68. See Peter Gosselin, *Here's How You Add 2.4 Million Jobs to the Economy*, BLOOMBERG (May 28, 2015), <http://www.bloomberg.com/news/articles/2015-05-28/government-austerity-exacts-toll-on-u-s-jobs-wages-and-growth> ("The nation's retreat from tax cuts and spending increases to promote the recovery has been a bipartisan affair. Democratic President Barack Obama and Republican House Speaker John Boehner agreed in 2011 to apply the fiscal brakes by negotiating \$1 trillion in spending cutbacks over 10 years and a process to impose more.").

69. See McKinsey & Co., *supra* note 59; see also Burand, *supra* note 52, at 463.

70. See McKinsey & Co., *supra* note 59; see also Burand, *supra* note 52, at 463.

71. See Hauber, *supra* note 13, at 8.

72. See Gustafsson-Wright, *supra* note 44, at 38.

structuring SIBs must recognize that the problems of social and economic inequality in America do not lie solely within the hands of marginalized individuals struggling to find employment and improve their well-being, but also in the tools that are within their grasp as they wrestle with a criminal and economic justice system that does not always meet their needs.⁷³ As a result, a SIB investing in a social service program targeting recidivism—such as a theoretical SIB in Washington, D.C., funding the IIEP—must be grounded in an equitable CED model that advances economic justice through an authentic engagement with the community.

Third, due to the complexity of the SIB model and the focus on assessing outcome metrics, SIBs promote the efficient allocation of public resources and provoke a shift in government culture with respect to the procurement and provision of critical government social services.⁷⁴ Through public/private partnerships, both state and local governments learn to better quantify the costs of addressing social inequities, and non-profit service providers learn to better quantify the benefits of their social service interventions, all of which drive enhanced performance management for social services.⁷⁵ In addition, successful non-profit service providers that identify workable solutions to critical challenges are rewarded with investments that help them scale.

Despite these benefits, the future implementation of SIBs in the United States face several challenges. First, SIBs are very complex transactions with high transaction costs, requiring significant legal and financial expertise, institutional expertise, and detailed negotiation among key stakeholders. Deal structuring can take hundreds of hours of financial analysis and legal drafting, as well as require extensive due diligence on the appropriate metrics to measure success, the relevant strategies to engage with constituents, and the best tools for impact evaluation.⁷⁶ The conventional SIB ecosystem includes at least seven stakeholders, and each stakeholder brings certain skills to the table and faces unique challenges.⁷⁷ Additionally,

73. See, e.g., Jennifer Forbes, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones and New Markets Tax Credits*, 2006 U. ILL. L. REV. 177 (2006).

74. See John K. Roman et al., *Five Steps to Pay for Success: Implementing Pay for Success Projects in the Juvenile and Criminal Justice Systems* (URB. INST. June 2014), at 14, <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413148-Five-Steps-to-Pay-for-Success-Implementing-Pay-for-Success-Projects-in-the-Juvenile-and-Criminal-Justice-Systems.PDF>.

75. See Gustafsson-Wright, *supra* note 44, at 43.

76. For example, the Peterborough SIB in the United Kingdom required 2.5 person years of resources and more than 300 hours of legal advice (provided pro bono). See Burand, *supra* note 52, at 479, n.73; see also Roman, *supra* note 74, at 14.

77. These stakeholders include constituents, investors, non-profit service providers, the intermediary, the independent assessor, the evaluation advisor, and the government. See McKinsey & Co., *supra* note 59, at 14–15; see also Burand,

the balance of risk and reward is difficult to navigate because local governments may not always be able to pay a financial return that is proportional to the risks taken by impact investors.⁷⁸

Second, although SIBs have received great reception in the United Kingdom, they are not widespread in the United States. It is also unclear whether the impact investing community in the United States will invest in social service programs that truly drive innovation or will simply focus on the “tried and true” service providers that offer a lower risk of failure. As the private sector takes a more active role in selecting social service providers, the high level of sophistication required to negotiate SIB deals may squeeze out smaller, less-resourced non-profits from these funding opportunities. Furthermore, insisting on a model solely premised on government cost savings might unnecessarily rule out innovative programs that are hard to quantify but still yield valuable social benefits.⁷⁹ Many local and state governments will simply not know how to adequately price some SIB programs. If governments are pressured to renegotiate terms in the middle of a SIB implementation because program costs outweigh the benefits, they face the risk of private investors “shutting down” the deal, which ultimately hurts the recipients of these critical social services.

To combat these risks, some private investors have required credit enhancements in the form of partial guarantees from the philanthropic community,⁸⁰ while other SIBs have prioritized “proven” social service programs to reduce the risk of program failure. It remains unclear whether private investors can overcome the appropriations risk from governments that may choose to withdraw from negotiated commitments after changes in administration leadership. Some governments have attempted to use legislation to address this challenge.⁸¹ Still, SIBs in the United States will always maintain a degree of political risk because state and local procurement rules often hinder collaborative negotiation between governments and certain stakeholders, slowing negotiation and limiting the feasibility of closing transactions.⁸²

supra note 52, at 467–80 (explaining the broad range of risks facing the various stakeholders involved in SIB deals).

78. See Gordon L. Berlin, *Learning from Experience: A Guide to Social Impact Bond Investing* at 8–9, MDRC (Mar. 2016), http://www.mdrc.org/sites/default/files/Learning_from_Experience_SIB.pdf.

79. See McKinsey & Co., *supra* note 59, at 37 (noting “[r]epaying investors from realized cash savings may require aggregating SIB benefits across multiple agencies and programs as well as different levels of government. This could prove challenging.”).

80. See text accompanying *supra* note 59.

81. See Burand, *supra* note 52, at 477 (“In 2012 Massachusetts passed legislation to establish a sinking fund to finance payments owed by the state on certain qualifying pay-for-success contracts.”).

82. See Berlin, *supra* note 78, at 14.

Finally, SIB models must overcome a dominant market-based CED ideology that scholars argue fails to adequately address the root causes of criminal activity and poverty.⁸³ Indeed, the presumption that an infusion of external capital can adequately address community-centered challenges may divert attention from the political dimensions of CED and poverty, while also favoring local incrementalism over broad-based structural reform.⁸⁴ Addressing the systemic drivers of poverty and racial injustice in marginalized communities, which often can trigger criminal behavior, is a critical component of CED. Unfortunately, too many CED strategies fail to empower residents in a meaningful way and provide opportunities for them to directly benefit from redevelopment initiatives in their own neighborhoods. At the conclusion of social service programs, are communities left more politically engaged and prepared to challenge the institutional structures that perpetuate cyclical poverty? And perhaps most important of all, has anyone asked community-based organizations and community-centered coalitions whether they would also like to invest in and profit from the SIBs targeting social challenges in their very own neighborhoods? This will be a critical consideration for the implementation of the IIEP in Washington, D.C. Indeed, a sole focus on SIB models that include only evidence-based metrics for program evaluation and large, institutional impact investors could lead to a reliance on oversimplified program models that obscure the true scope of the costs, benefits, and savings to local communities. SIB programs targeting recidivism must be certain to avoid pathologizing criminality by placing blame solely on the mindset of incarcerated individuals⁸⁵ and instead seek to empower entire communities struggling to overcome poverty.

Looking forward, scholars are beginning to identify alternative SIB models that address the myriad of concerns facing the financial model's success. The successful SIB not only capitalizes on the funding provided by eager impact investors, but also integrates a more equitable CED model that forges new multiracial coalitions, links community-based initiatives to broad-based structural reform, and advances economic justice through community accountability and ownership. Innovations such as the micro-SIB model,⁸⁶ equity crowdfunding platforms, and the impact

83. See generally Cummings, *supra* note 48; see also Hauber, *supra* note 13, at 7–9.

84. See Cummings, *supra* note 48 at 442 (noting that “there has been a powerful tendency to treat the local neighborhood as a discrete economic unit in need of rebuilding”).

85. See Roman, *supra* note 74, at 2 (noting “[as] currently constituted, the juvenile justice and adult criminal justice systems focus on remediation rather than prevention, if they are therapeutically oriented at all”).

86. See Ean Garrett et al., *The Micro Social Impact Bond: A Framework for 21st Century Social Innovation*, INFINITE 8 INST. L3C (Sept. 2015), https://issuu.com/infinite8institute/docs/themicrosibwhitepaper_final_.

bond fund model,⁸⁷ which has been primarily used in the United Kingdom, offer a promising pathway for the future of this financial tool.

Further, pro bono legal service programs like the Small Business & Community Economic Development Clinic at the George Washington Law School can help facilitate the business development goals of returning citizens and the policy goals of social justice advocates. Students at the SBCED Clinic have helped advance small business development by creating small businesses and worker cooperatives, forming non-profit organizations, conducting business negotiations, creating corporate subsidiaries, obtaining federal tax exemptions, registering trademarks, and supporting community organizers and community groups to achieve economic justice through advocacy.⁸⁸ The SBCED Clinic has also empowered returning citizens by advancing important policy measures, from the publication of white papers discussing economic justice initiatives to hosting public forums with key stakeholders to discuss innovations in criminal justice reform.⁸⁹ With respect to the Incarceration to Incorporation Bill, the SBCED Clinic could play a helpful role in negotiating and drafting important legal documents for a social impact bond deal, as well as help facilitate the participation of important community-based entities, such as community development financial institutions and business incubators focused on the returning citizens community. All of these activities help law students develop critical lawyering skills, while also supporting innovations that advance economic justice and embody the core public service mission of clinical legal education.

Returning citizens do not have to do it alone. Developing strategic partnerships between the public and private sector, while also involving the academic community through law school clinics, can facilitate community-driven economic justice initiatives that not only forge and fortify new and existing multiracial coalitions, but also develop a broader network of stakeholders who are invested in advancing economic justice. Ultimately, by working together, we can help level access to economic opportunities and impact the structural determinants of poverty that trigger criminal activity.

V. Conclusion

The Incarceration to Incorporation Entrepreneurship Bill can utilize the social impact bond model, alongside other funding streams, to help finance the IIEP Fund. Recidivism is a social problem that can be objectively measured and will result in identifiable cost savings to the Washington, D.C., government, factors that have proven to be critical to the success

87. See Gustafsson-Wright, *supra* note 44, at 9 (the impact bond fund model facilitates multiple outcome payment contracts around the same social issue).

88. See Jones, *supra* note 16, at 53.

89. See text accompanying *supra* note 17; see also Jones, *supra* note 17.

of social impact bonds.⁹⁰ Moreover, in a world of limited employment prospects for returning citizens, entrepreneurship can be a viable pathway to the middle class, an important theme of D.C. Mayor Muriel Browser's administration.⁹¹ However, Washington, D.C., must be certain that this market-based CED financial tool integrates an economic justice approach to community empowerment. As highlighted in the Rikers Island SIB, a social service program that focuses almost exclusively on the behavior of incarcerated individuals may lead to failure.

For too many Americans, a prison record feels like a revocation of citizenship and all of its associated benefits. But in the words of President Barack Obama, "In America, we believe in redemption . . . We believe that when people make mistakes, they deserve the opportunity to remake their lives."⁹² The Incarceration to Incorporation Entrepreneurship Bill is not simply about individuals who made mistakes and served their time behind bars. This initiative is not simply about mothers and fathers, and sisters and brothers who need our help. This is about residents of Washington D.C., and citizens of these United States. This is about driving innovation and leveraging every available funding platform to eliminate recidivism for good. This is about ending the debate over retribution and shifting our focus towards economic democracy.⁹³ In a country where over 35 percent of the prison population is Black,⁹⁴ it's about time that Washington D.C. stands up, fights back, and proudly declares that Black Lives Matter. Let's do something to empower returning citizens and welcome them home.

90. See Berlin, *supra* note 78.

91. See generally Executive Office of the Mayor, *supra* note 25.

92. Barack Obama, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

93. Economic justice was a critical building block of the vision of democracy our country was founded upon and an important component of the civil rights movement. As Gary Chartier explains, "If democracy means self-government, then our progress toward democracy will be incomplete until all people are able meaningfully to influence the structures and processes that shape their environments and constrain their choices." See Chartier, *supra* note 16, at 274.

94. African Americans comprise approximately 35 percent of jail inmates and 37 percent of prison inmates as of 2014. See Todd D. Minton & Zhen Zeng, *Jail Inmates at Midyear 2014*, U.S. Department of Justice (2014), <http://www.bjs.gov/content/pub/pdf/jim14.pdf>.

