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ARE THE U.K.'S PAYMENT-BY-RESULTS PROGRAMS RIGHT FOR U.S. PRISONS?†

INTRODUCTION

The United States is the most incarcerated country in the world,¹ whose most recent population calculations reached over 1.5 million people behind bars in 2015.² The price of housing for the world's largest prison population to American taxpayers is over \$80 billion per year.³ By comparison, between 2016 and 2017 the United Kingdom only spent £2.9 billion, or \$4.2 billion, housing its average prison population of 84,705.⁴

Not only is the American prison system costly to taxpayers, it is also costly to inmates. In a recent study it was found that 21% of male inmates had been assaulted over a six-month period, either by their fellow inmates or prison staff.⁵ Sexual assault, in addition to other acts of violence, is also prevalent throughout U.S. prisons.⁶ In 2011 alone, there were 8,763 allegations of sexual assault or sexual victimization reported.⁷ Looking to other countries to determine if punishment can be provided in a more cost-efficient way can improve the current state of America's criminal justice system.

To improve prison efficiency and performance, certain pro-incentive prison reform advocates suggest that the criminal justice system should use performance-based contracts to fund prisons based on reaching specific performance measures or outcomes.⁸ Over the last decade, the use of performance-based contracts has quickly spread to various countries across the

† This Comment focuses on prison systems, therefore this Comment will refer to prisoners, inmates and offenders interchangeably.

¹ John Surico, *How America Became the Most Imprisoned Nation in the World*, VICE (Oct. 2015), https://www.vice.com/en_us/article/avy474/america-incarcerated-0000765-v22n10.

² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 250229, PRISONERS IN 2015 (Dec. 2016).

³ Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POLICY INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

⁴ MINISTRY OF JUSTICE, COSTS PER PLACE AND COSTS PER PRISONER BY INDIVIDUAL PRISON, October 26, 2017 (U.K.).

⁵ Nancy Wolff and Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORRECTIONAL HEALTH CARE 58, 58 (Jan. 2, 2009).

⁶ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 243904, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2009–11 (Jan. 2014).

⁷ *Id.*

⁸ See Alexander Volokh, *Prison Accountability and Performance Measures*, 63 EMORY L.J. 339 (2013).

globe.⁹ Currently, “there are more than 70 projects in 18 countries, with 16 projects in the U.S.,” all featuring slightly different approaches to a performance-based contract.¹⁰ The use of performance-based contracts in prisons originated in the United Kingdom.¹¹ Over the last decade, the United Kingdom has successfully used a “payment-by-results” (PbR) program for paying private prison contractors based on their ability to lower reconviction rates (also referred to as recidivism rates) by certain percentage points in two of its private prisons.¹² Though payment-based contracts are being used across the world, the United Kingdom’s use of PbR will be the focus of this Comment.

This Comment argues that the U.K.’s pilot private prison PbR programs, in which they compensate prison contractors based on reductions in reconviction rates, are appropriate for use in the U.S.’s federal and state prisons—both public and private. To make this argument, this Comment will examine the effects of the U.K.’s PbR programs in its prisons, health, and employment sectors; explore the potential advantages and disadvantages of a PbR program; and directly apply the U.K.’s PbR prison pilot programs to the federal and state governments in the United States. To conclude, this Comment will argue that the two U.K. private prison PbR pilot programs currently used by the United Kingdom can serve as models for jurisdictions in the United States when designing their own PbR programs, but that the United States cannot directly apply these models to all state and federal prisons due to the need for PbR programs to be designed specifically for the exact prison it is going to be implemented in.

Though this Comment will argue that the United Kingdom’s PbR programs should not be used directly in the United States, designing and proscribing a particular PbR model is outside the scope of this Comment due to the specificity required for designing PbR programs. Instead, this Comment will explain certain factors that jurisdictions in the United States should consider when determining whether to implement PbR programs.

Part I of this Comment will provide background information on incarceration and recidivism in both the United States and United Kingdom, and background information on the U.K.’s use of PbR programs throughout its

⁹ See *id.*; *Oklahoma approves first-ever Pay for Success contract addressing female incarceration*, THE NORMAN TRANSCRIPT (Apr. 12, 2017), http://www.normantranscript.com/news/oklahoma-approves-first-ever-pay-for-success-contract-addressing-female/article_3005ca3e-1ef6-11e7-94b0-4f6fcb6a5f7b.html.

¹⁰ THE NORMAN TRANSCRIPT, *supra* note 9.

¹¹ *Id.* at 2.

¹² MINISTRY OF JUSTICE, STATISTICAL NOTICE, INTERIM RE-CONVICTION FIGURES FOR THE PETERBOROUGH AND DONCASTER PAYMENT BY RESULTS PILOTS, 1, 2013 (U.K.) [hereinafter STATISTICAL NOTICE].

government. Additionally, Part I will describe the U.K.'s PbR prison pilot programs at Peterborough, Doncaster, and Leeds, and will touch on the growth of PbR programs across the world. Subsequently, Part II will analyze the advantages and disadvantages of PbR programs based on the research and results from Peterborough and Doncaster. Part III will discuss the applicability of the U.K.'s PbR prison pilots in U.S. federal and state prisons. To conclude, Parts IV and V will address some potential criticisms of this proposition and draw together some concluding thoughts.

I. INTRODUCTION TO PAYMENT-BY-RESULTS

A. *Incarceration and Recidivism in the United States and United Kingdom*

1. *The United States*

As previously mentioned, the United States houses the largest incarcerated population in the world.¹³ At the end of 2015, the United States had an estimated 1,520,800 prisoners under the jurisdiction of state and federal correctional authorities.¹⁴ Roughly 90% of these inmates are held in state prisons.¹⁵ The U.S. prison population at the end of 2015 marked the lowest population since 2005 and represented a 2% decrease in the prison population from 2014.¹⁶ Even with this decrease in prisoners, the U.S. prison population still greatly outnumbered any other country's prison population. This high prison population leads to high costs of running and maintaining correctional facilities.¹⁷ The Bureau of Justice Statistics (BJS) reported that in 2012 total expenditures of corrections at all levels of the government totaled \$80.7 billion.¹⁸

Arguably, this high cost could be justified if the criminal justice system successfully prepared inmates for life after release, but recidivism rates¹⁹ among previously incarcerated individuals in the U.S. are high.²⁰ After following

¹³ Surico, *supra* note 1.

¹⁴ BUREAU OF JUSTICE STATISTICS, *supra* note 2.

¹⁵ Austill Stuart, *New Zealand's Recidivism-Focused Private Prison Contracts a Model for States*, OUT OF CONTROL POLICY BLOG (Sept. 21, 2017), <http://reason.org/blog/show/new-zealand-recidivism-prison>.

¹⁶ BUREAU OF JUSTICE STATISTICS, *supra* note 2.

¹⁷ Wagner & Rabuy, *supra* note 3.

¹⁸ *Id.*

¹⁹ Recidivism is defined as the "tendency to relapse into a previous condition or mode of behavior." *Recidivism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/recidivism>.

²⁰ See Stuart, *supra* note 15.

federal offenders for eight years post-release,²¹ a study found that out of “almost one-half of federal offenders released in 2005, 49.3%, were arrested for a new crime or rearrested for a violation of supervision conditions.”²² It is difficult to gather data regarding state recidivism rates due to differences in state law and the longitudinal nature of recidivism studies; however, it has been found that “when excluding California, whose size skews the national picture, recidivism rates between 1994 and 2007 have consistently remained around 40%.”²³ More recently, a 2014 BJS report across thirty states found that “about two-thirds (67.8%) of released prisoners were arrested for a new crime within 3 years, and three-quarters (76.6%) were arrested within 5 years.”²⁴

State and federal government often contract out their incarceration facilities' management to private prison companies.²⁵ Governments seek bids from private prison companies to establish a new private prison; once a private prison company wins, it begins running the daily operations of the facility and assume legal liability while being paid by the government.²⁶ The use and origins of private prisons started in the United States in 1983 with the founding of Corrections Corporation of America.²⁷ In 2015, the number of prisoners in private prisons was just 8% of the total U.S. prison population²⁸—“about 126,000 prisoners were held in privately operated facilities under the jurisdiction of 29 states and the federal Bureau of Prisons.”²⁹ This population represents an 8% decrease in private prison population since its peak in 2012.³⁰

²¹ The United States Sentencing Commission began an eight-year longitudinal study in 2005 which tracked 25,431 federal offenders in the community after being released from prison or on probation. See U.S. SENTENCING COMM'N, *RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW* (Mar. 2016).

²² *Id.*

²³ PEW CTR. ON THE STATES, *STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS* (Apr. 2011). See also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 244205, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005–2010* (Apr. 2014) [hereinafter 30 STATE RECIDIVISM PATTERNS].

²⁴ 30 STATE RECIDIVISM PATTERNS, *supra* note 23.

²⁵ Brett C. Burkhardt, *Private prisons, explained*, THE CONVERSATION (Mar. 20, 2017), <http://theconversation.com/private-prisons-explained-73038>.

²⁶ *Id.*

²⁷ Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES (2016), <http://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline/>.

²⁸ Abigail Geiger, *U.S. private prison population has declined in recent years*, PEW RESEARCH CENTER (Apr. 11, 2017), <http://www.pewresearch.org/fact-tank/2017/04/11/u-s-private-prison-population-has-declined-in-recent-years/>.

²⁹ *Id.*

³⁰ *Id.*

2. *The United Kingdom*

According to the most recent counts, the United Kingdom's total prison population stands at 86,256.³¹ In 2008, the cost of housing an inmate in the United Kingdom is approximately £40,000 (or \$51,012 in 2018 USD) per year.³² The Ministry of Justice (MOJ) publishes proven reoffending statistics every quarter, which represent the amount of people who have been reconvicted for reoffending.³³ According to the most recent statistics, "the overall proven reoffending rate was 24.8%," which is a decrease from the previous quarter.³⁴ The United Kingdom began contracting with private prison companies in the 1990s.³⁵ As of 2012, there were fourteen private prisons in the U.K.,³⁶ which made up 15% of the country's prisons.³⁷

B. The History and Development of Payment-by-Results Programs in the U.K.

Traditionally, social programs focus on the outputs of the program which are "the tangible and intangible products that result from project activities," such as the number of people who are released from prison or who gain employment.³⁸ Whereas PbR programs focus on outcomes that are "the benefits that a project or intervention is designed to deliver," such as reduced recidivism or lower unemployment rates.³⁹ A PbR system "allows the government to pay a service provider on the basis of the outcomes their service achieves rather than the inputs or outputs the provider delivers."⁴⁰ The theory behind PbR is that it will encourage private prison providers "to focus on ends, not means, and is seen as a means of promoting improvements in public services."⁴¹ Advocates of PbR

³¹ MINISTRY OF JUSTICE, POPULATION BULLETIN: WEEKLY 20 OCTOBER 2017 (U.K.).

³² Kevin Marsh, *The real cost of prison*, THE GUARDIAN (July 28, 2008), <https://www.theguardian.com/commentisfree/2008/jul/28/justice.prisonsandprobation>.

³³ See MINISTRY OF JUSTICE, PROVEN REOFFENDING STATISTICS QUARTERLY BULLETIN, OCTOBER 2014 TO SEPTEMBER 2015 (U.K.).

³⁴ Marsh, *supra* note 32.

³⁵ *Private Prisons*, POLITICS.CO.UK (2012), <http://www.politics.co.uk/reference/private-prisons>.

³⁶ *Id.*

³⁷ Sam Dean, *Is this the end of private prisons?*, THE TELEGRAPH (Feb. 18, 2017), <http://www.telegraph.co.uk/business/2017/02/18/end-private-prisons/>.

³⁸ DEP'T OF INT'L DEV., INDICATORS OF INPUTS, ACTIVITIES, OUTPUTS, OUTCOMES AND IMPACTS IN SECURITY AND JUSTICE PROGRAMMING, 6 (Oct. 15, 2013) (U.K.).

³⁹ *Id.*

⁴⁰ Kevin Albertson & Chris Fox, *Payment by Results and Social Impact Bonds in the Criminal Justice System Sector: New Challenges for the Concept of Evidence-based policy?*, CRIMINOLOGY AND CRIMINAL JUSTICE 1 (2011).

⁴¹ Fraser Battye and Mike Daly, *Payment by Results in public service reform: silver bullet, dangerous weapon, neither, both?*, 1 (July 2012), https://www.sheffield.ac.uk/polopoly_fs/1.2471931/file/C1_daly.pdf.

claim it will lead to greater efficiency, more innovation, transfer of risk, and encourage new market entrants⁴²—a claim which will be discussed in more detail in Part II.

The idea of PbR in the United Kingdom was first introduced into the country's National Health Service (NHS) in the early 2000s, when providers were paid for the number and type of patients treated.⁴³ One of the focuses of the program was to “improve fairness and transparency of the payment systems.”⁴⁴ After several years of implementation, researchers at the King's Fund, a health charity, found that PbR in the NHS contributed to “rapid reductions in lengths of stay,” compared to Scotland where PbR was not implemented as a control.⁴⁵ Additionally, the researchers noted that there was little evidence that PbR had a negative impact on quality of the health services and that the ability to earn extra payments was not being used.⁴⁶

In June 2011, the U.K. implemented another PbR program, the Work Programme, which paid contractors and employers based on their ability to hire and maintain employment of those who were previously classified as “long-term unemployed.”⁴⁷ This program began “with the primary aim of helping the long-term unemployed back into work for [sustainable] periods of time.”⁴⁸ People who had been out of the work force between nine and twelve months were referred to the program and assigned to different groups based on personal characteristics.⁴⁹ Later, contractors or employers were paid based on their ability to provide sustained employment for participants of the program.⁵⁰ After three years, the Work Programme was able to refer 1.6 million people, and 687,000 people were able to maintain employment for two years, thereby saving the government £21 million by “extrapolating invalid job outcome payments and reducing payments to prime contractors accordingly.”⁵¹ Though the Work Programme experienced some success, a majority of the participants were

⁴² Albertson & Fox, *supra* note 40, at 4–7.

⁴³ *Id.* at 4.

⁴⁴ *Id.*

⁴⁵ John Appleby, Tony Harrison, Loraine Hawkins & Anna Dixon, *Payment by Results: How can payment systems help deliver better care?*, THE KING'S FUND (2012).

⁴⁶ *Id.*

⁴⁷ *Case Study: The UK's Work Programme for the unemployed*, Centre for Public Impact (Apr. 18, 2016), <https://www.centreforpublicimpact.org/case-study/uk-work-programme/> [hereinafter Centre for Public Impact].

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ NATIONAL AUDIT OFFICE, *THE WORK PROGRAMME, 2014–2015*, HC 266, at 4 (U.K.).

unable to find sustained employment.⁵²

C. The State of Implementation of Prison PbR Programs in the United Kingdom

After seeing the results of PbR in health services, a Green Paper⁵³ was published in 2010 in which the MOJ committed to starting a number of PbR pilot programs in several of their prisons.⁵⁴ After the Green Paper, two pilot programs were started, each of which used different types of PbR programs.⁵⁵ The first pilot program took place at Her Majesty's Prison (HMP) Peterborough and began on September 9, 2010.⁵⁶ The second pilot program was implemented over a year later on October 1, 2011 at HMP Doncaster.⁵⁷ Both pilot programs focused on reducing reoffending rates as their measure of success.⁵⁸ A third pilot program that focused on reducing reconviction rates was also slated to take place at HMP Leeds, one of the country's publicly-run facilities; it was later cancelled due to market failure.⁵⁹ While the two pilot programs that ran used different PbR programs, the MOJ determined their results by using a "12-month re-conviction measure, which counts offenses committed in the 12 months following release from prison, and resulting in conviction at court either in those 12 months or in a further 6-month period (allowing time for cases to progress through the courts)."⁶⁰ A more in-depth analysis of each prison and its PbR pilot program follows.

1. HMP Peterborough

HMP Peterborough, which began its PbR pilot program in 2010, uses a social impact bond to finance the program.⁶¹ A Social Impact Bond is "a public-

⁵² Centre for Public Impact, *supra* note 47.

⁵³ A Green Paper in the United Kingdom is "a preliminary report of government proposals that is published in order to provoke discussion." *Green Paper*, OXFORDDICTIONARIES.COM, https://en.oxforddictionaries.com/definition/green_paper.

⁵⁴ STATISTICAL NOTICE, *supra* note 13, at 1.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ MINISTRY OF JUSTICE, HMP DONCASTER PAYMENT BY RESULTS PILOT: FINAL PROCESS EVALUATION REPORT, 2015 (U.K.) [hereinafter DONCASTER FINAL EVALUATION REPORT].

⁵⁸ Ministry of Justice, *Payment by results prison pilot continues to show falls in reoffending*, Gov.UK (2014), <https://www.gov.uk/government/news/payment-by-results-prison-pilot-continues-to-show-falls-in-reoffending>.

⁵⁹ Max Chambers, *Expanding Payment-by-Results*, POLICY EXCHANGE (2013).

⁶⁰ STATISTICAL NOTICE, *supra* note 12 at 1.

⁶¹ Jake Anders and Richard Dorsett, *A review of the matching process for the impact analysis of the HMP*

private partnership where one or more investor(s) provide upfront capital for the realization of public projects that generate verifiable social and/or environmental outcomes.”⁶² Typically under a Social Impact Bond, the government contracts out to an intermediary who will raise the capital for the project from investors and find a service provider to deliver the outcomes.⁶³ If the project achieves the desired outcomes, the Government pays the intermediary and the investors.⁶⁴ If the project fails, the investors will lose out on their investment.⁶⁵ The Social Impact Bond at Peterborough was coordinated by Social Finance, a nonprofit organization that raised capital from private investors for the pilot.⁶⁶ The MOJ and the Big Lottery Fund agreed to pay back these investors with interest “ranging from 2.5% to 13%”⁶⁷ if the pilot “reduced reoffending by 7.5% overall.”⁶⁸

In an attempt to reduce reconviction rates, the pilot implemented the One Service program, funded by the Social Impact Bond.⁶⁹ The One Service program provided for “no fixed intervention model or single theory of change,” and therefore allowed for a mix of activities to be individually proscribed to each offender based on their specific needs as determined by caseworkers.⁷⁰ Contact with cohort members of the pilot was made before release and continued for up to twelve months after release.⁷¹ To determine what each offender needed to reduce their risk of reoffending, “a needs assessment was developed with providers and local specialist agencies.”⁷² The One Service program was delivered by “voluntary and community sector providers,” who were compensated for their work.⁷³ Some of the staff members and volunteers who directly dealt with the prisoners in the program were prior offenders, which proved useful in engaging the offenders in the program.⁷⁴ The success of the

Peterborough Social Impact Bond, NAT'L INST. OF ECON. AND SOC. RES. (June, 2017).

⁶² *Social and Development Impact Bonds (Results-Based Financing)*, UNDP, <http://www.undp.org/content/sdfinance/en/home/solutions/social-development-impact-bonds.html>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Anders & Dorsett, *supra* note 61.

⁶⁷ *Social and Development Impact Bonds*, *supra* note 62.

⁶⁸ Anders & Dorsett, *supra* note 61.

⁶⁹ MINISTRY OF JUSTICE, PHASE 2 REPORT FROM THE PAYMENT BY RESULTS SOCIAL IMPACT BOND PILOT AT HMP PETERBOROUGH, 2014, at 1 (U.K.) [hereinafter PETERBOROUGH PHASE 2 REPORT].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 3.

⁷³ *Id.* at 1.

⁷⁴ *Id.* at 4.

One Service program can be linked to its ability to take into account local context when trying to solve a “locally defined problem.”⁷⁵ Additionally, the program served as a gap filler between existing programs and offered hands-on support for offenders.⁷⁶

Throughout the pilot program, the MOJ published both interim and final results.⁷⁷ The final results of the Peterborough pilot looked at the “frequency of re-conviction events, based on offenses committed within 12 months of release from prison and conviction at court within those 12 month or a further 6 month period.”⁷⁸ The interim results were based on periods half the length of those used in the final results.⁷⁹ Peterborough’s success was determined by a comparison of a “control group of comparable offenders from across the country.”⁸⁰ Halfway through the pilot there was a 6% “fall in the frequency of re-conviction events at Peterborough while nationally there [was] a substantial rise.”⁸¹ At the end of the pilot, across the two cohorts that were measured, there was an estimated fall in the frequency of reconviction events of 9%, thereby triggering the outcome payment, allowing the Social Impact Bond investors to receive their money from the government.⁸²

2. *HMP Doncaster*

HMP Doncaster is a private prison which, under the PbR contract, was managed by the private public services company, Serco, alongside two community organizations, Catch 22 and Turning.⁸³ The aim of the pilot was to reduce recidivism.⁸⁴ Under the PbR contract, if Serco reduced the reconviction rate by 5%, it would retain the full contract value. If they reduced the reconviction rate by more than 5%, it would trigger additional outcome payments.⁸⁵

⁷⁵ *Id.*

⁷⁶ *Id.* at 5.

⁷⁷ See STATISTICAL NOTICE, *supra* note 12; DONCASTER FINAL EVALUATION REPORT, *supra* note 58.

⁷⁸ STATISTICAL NOTICE, *supra* note 12, at 2.

⁷⁹ *Id.*

⁸⁰ *Id.* at 3.

⁸¹ *Id.* at 5.

⁸² Anders & Dorsett, *supra* note 61.

⁸³ MINISTRY OF JUSTICE, FINDINGS AND LESSONS LEARNED FROM THE EARLY IMPLEMENTATION OF THE HMP DONCASTER PAYMENT BY RESULTS PILOT 1, 3 (Nov. 2012) (U.K.) [hereinafter FINDINGS FROM DONCASTER PILOT].

⁸⁴ *Id.* at i.

⁸⁵ *Id.* at 4.

To reduce reconviction rates, the key feature of the Doncaster pilot was its use of an Alliance model between the three aforementioned parties.⁸⁶ One of the main changes the managers introduced in Doncaster was the implementation of community resettlement support and case management.⁸⁷ Upon arrival to Doncaster, cohort members were assigned a case manager.⁸⁸ The case manager went through the MegaNexus needs assessment with the prisoner and provided a support plan based on the results.⁸⁹ MegaNexus is an electronic case management system used by Doncaster to track management data.⁹⁰ Rather than deliver services directly, the case manager would simply provide access to interventions and services recommended by the support plan.⁹¹ No new interventions were put into place after the start of the PbR pilot.⁹² Another facet of the pilot program was that Serco would be responsible for accredited programs, while Catch 22 dealt with case management.⁹³

The MOJ also published interim and final results throughout the pilot for Doncaster as it did for the Peterborough pilot.⁹⁴ The final results of the Doncaster pilot were based on “the proportion of offenders who commit one or more offences in the 12 months following release from prison and are convicted at court in those 12 months or in a further 6 months.”⁹⁵ The interim results at Doncaster were also based on periods half the length of those used in the final results.⁹⁶ The success of Doncaster was determined by comparing the results with the baseline reconviction rate that was calculated from the 2009 calendar year.⁹⁷ Halfway through the pilot, the re-conviction frequency at Doncaster fell by 4.9% compared to the baseline year.⁹⁸ At the end of the Doncaster pilot, the reconviction rate fell 3.3% as compared to the baseline year, did not meet the 5% threshold, and therefore did not trigger the outcome payment.⁹⁹

⁸⁶ *Id.* at i.

⁸⁷ *Id.* at ii.

⁸⁸ *Id.* at 12.

⁸⁹ *Id.* at 15.

⁹⁰ *Id.*

⁹¹ *Id.* at 18–19.

⁹² *Id.* at 19.

⁹³ *Id.* at ii.

⁹⁴ See STATISTICAL NOTICE, *supra* note 12.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 2.

⁹⁸ *Id.* at 6.

⁹⁹ MINISTRY OF JUSTICE, HMP DONCASTER: PAYMENT BY RESULTS PILOT, FINAL RE-CONVICTION RESULTS FOR COHORT 1, 2 (July 2015) (U.K.) [hereinafter DONCASTER COHORT 2 FINAL RESULTS].

3. *HMP Leeds*

HMP Leeds was slated to be the first ever public prison to be funded using a PbR program.¹⁰⁰ In 2012, the MOJ began the procurement process and later closed the competition because only one of six potential providers decided to pursue the prison contract.¹⁰¹ The Leeds model was supposed to involve a “public/private partnership, where a new joint venture would be set up and services jointly run, with risk transferred to the private sector.”¹⁰² Though the Leeds pilot program did not come to fruition due to market failure,¹⁰³ its proposal stands for the proposition that PbR programs can and should be considered for use in both public and private institutions.

Overall, the two completed prison PbR pilot programs at Peterborough and Doncaster have shown some successes. Though both Peterborough and Doncaster were able to reduce reconviction rates, Doncaster was unable to meet the desired threshold to trigger the final outcome payment.¹⁰⁴ Additionally, despite both pilots having used the same performance measure of reducing reconviction rates, comparing the two pilots is difficult as they both employed different models and used different methods within the prisons themselves to achieve their goals.

In 2015, the National Audit Office (NAO) released a report discussing the government's use of PbR throughout its various departments.¹⁰⁵ Based on the United Kingdom's use of PbR, the NAO found that PbR contracts are “a technically challenging form of contracting and [have] attendant costs and risks that the government has often underestimated.”¹⁰⁶ One such cost is that the commissioner must expend time and resources to monitor and manage the contractor to ensure they are achieving their outcomes.¹⁰⁷ Additionally, if the contractor is failing to meet their outcomes the commissioner may have to step in and assist.¹⁰⁸ Due to this, the NAO suggested that when the government is

¹⁰⁰ Joe Inwood, *State-run Leeds Prison to be paid on results*, BBC (Oct. 27, 2011), <http://www.bbc.com/news/uk-england-leeds-15479570>.

¹⁰¹ NAT'L AUDIT OFFICE, *OUTCOME-BASED PAYMENT SCHEMES: GOVERNMENT'S USE OF PAYMENT BY RESULTS*, 2015–16 HC 86, at 27 (U.K.) [hereinafter *GOVERNMENT'S USE OF PAYMENT BY RESULTS*].

¹⁰² Chambers, *supra* note 59.

¹⁰³ *Id.* at 14–15.

¹⁰⁴ DONCASTER COHORT 2 FINAL RESULTS, *supra* note 99.

¹⁰⁵ *GOVERNMENT'S USE OF PAYMENT BY RESULTS*, *supra* note 101.

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.* at 8.

¹⁰⁸ *Id.*

determining whether to choose PbR in the future, the “commissioners should justify their selection of PbR over alternative delivery mechanisms” because of the costs and the fact that “PbR is not suited to all public services.”¹⁰⁹ NAO suggested that governments need to “actively monitor and manage provider performance,” which the U.K. has failed to do.¹¹⁰ The government has also failed to collect data about the effects of PbR across the various departments in which programs had been implemented.¹¹¹

D. The Growth of Payment-by-Results and Similar Programs in Prisons Across the World

In the last decade, there has been an increase in the use and implementation of PbR programs in prisons around the world.¹¹² Many of these projects are still in the beginning phases, and therefore published results are not available for analysis in this Comment. Though the following PbR programs take place outside of the U.K., these projects are worth mentioning because they demonstrate the idea that PbR design is dependent on context and local needs and that PbR is worth exploring in the United States.

New Zealand’s government began experimenting with PbR in 2015 when it allowed a consortium led by Serco to build and operate the Auckland South Correctional Facility (Wiri).¹¹³ The consortium has been tasked with lowering recidivism rates by 10% with a special focus on reducing recidivism among indigenous inmates.¹¹⁴ In addition to receiving payments if the consortium lowers recidivism rates, they will also receive incentive payments if their facility out-performs state facilities.¹¹⁵ On the other hand, if there is a security incident, or a serious breach occurs, the consortium’s payments are reduced, or they may be responsible for paying a penalty.¹¹⁶ The New Zealand government preferred this model because it encouraged the manager of the prison to create change that could lead to better outcomes both inside and outside of the prison.¹¹⁷ A noteworthy aspect of this project is that the consortium was able to build and

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.* at 8.

¹¹¹ *Id.* at 32.

¹¹² See Stuart, *supra* note 15.

¹¹³ *Id.*; Rikha Sharma Rani, *New Zealand Tries a Different Kind of Private Prison*, CITY LAB (Aug. 31, 2017), <https://www.citylab.com/equity/2017/08/new-zealand-tries-a-different-kind-of-private-prison/538506/>.

¹¹⁴ Rani, *supra* note 113.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

design Wiri in a way that allowed them to increase incentives for inmates to behave, and thereby reduced recidivism rates.¹¹⁸ Initial results from Wiri should be soon forthcoming and are worth analyzing in the contemplation and design of a PbR program in the United States.

In December 2016, the Australian government opened a new women's prison called Melaleuca,¹¹⁹ which is run by Sodexo.¹²⁰ In Melaleuca, Sodexo will be employing support programs to help prevent inmates from reoffending once released.¹²¹ For compensation, Sodexo will receive a payment of \$11,000 (15,000 Australian dollars) "for every convict who does not return within two years" from the Australian government.¹²²

The use of PbR has also made its way to the United States where there are sixteen PbR, or pay for success (PFS)¹²³, programs currently running.¹²⁴ In Oklahoma, a PbR system was put into effect in early 2017 at women's facilities in which the government contracted with the nonprofit organization Women in Recovery (WIR) to run a diversion/reentry program.¹²⁵ Oklahoma contracted with WIR with the purpose of WIR delivering these intensive reentry programs in public women's facilities in Tulsa.¹²⁶ The nonprofit will receive payments for each successful graduate of the program.¹²⁷ WIR predicts it will be able to admit "125 women into the program annually for up to five years."¹²⁸

Another effort was made in 2013 in Pennsylvania where the state was able to renegotiate "all contracts governing its 38 community correction centers" to

¹¹⁸ *Id.*

¹¹⁹ Hanna Kozłowska, *In Australia, a private prison company gets a bonus for every freed inmate who does not come back*, QUARTZ (Dec. 3, 2016), <https://qz.com/849774/in-australia-sodexo-owned-private-prison-company-melaleuca-will-get-cash-for-every-freed-inmate-who-does-not-come-back/>.

¹²⁰ Sodexo was founded in 1966 in France and is a worldwide provider of "Quality of Life services." Sodexo provides services across a wide variety of industries including education, corrections and healthcare. Sodexo, About Us, <http://www.sodexousa.com/home/about-us.html>.

¹²¹ Kozłowska, *supra* note 119.

¹²² *Id.*

¹²³ This Comment will refer to the U.K.'s Payment-by-Results programs and the United States' Pay for success programs collectively as "PbR."

¹²⁴ See THE NORMAN TRANSCRIPT, *supra* note 9.

¹²⁵ Randy Ellis, *Oklahoma creates first pay for success program for female offenders*, THE OKLAHOMAN (Apr. 11, 2017), <http://newsok.com/article/5545168>.

¹²⁶ Press Release, Women in Recovery, Oklahoma Approves First-Ever Pay for Success Contract Addressing Female Incarceration (Apr. 11, 2017) (on file with author).

¹²⁷ Ellis, *supra* note 125.

¹²⁸ THE NORMAN TRANSCRIPT, *supra* note 9.

tie performance and payment to recidivism rates.¹²⁹ In the second year of the program, the forty-two community correction centers, or halfway houses, were able to reduce recidivism rates by 11.3%, marking two years of decreases by preparing residents to re-enter society after being released from prison.¹³⁰

II. THE ADVANTAGES AND DISADVANTAGES OF A PAYMENT-BY-RESULTS PROGRAM

A. *Advantages*

There are many potential advantages of employing a PbR program, some of which include: efficiency and resource distribution, experimentation, and market participation.¹³¹

Scholars argue that PbR leads to greater efficiency by correcting “misaligned incentives.”¹³² The “principal mechanism underpinning PbR” is changing incentives by addressing the “principal-agent problem by aligning interests and incentives around the achievement of an outcome that both parties regard as desirable.”¹³³ In the case of prisons, this could include: reducing recidivism,¹³⁴ overcrowding,¹³⁵ assaults,¹³⁶ escapes,¹³⁷ and improving health care.¹³⁸ In a normal service provider situation, the provider often does not take part in the benefit of that activity, but PbR allows for service providers to benefit from their actions by receiving a payment.¹³⁹ Incentives will also be realigned due to the entrance of new market participants.¹⁴⁰ As described below, service providers will have a greater incentive to perform and focus on outcomes to stay in business.¹⁴¹ PbR programs also allow resources to be disbursed where they will have the most benefit.¹⁴² For example, rather than putting resources towards

¹²⁹ Stuart, *supra* note 15.

¹³⁰ Leonard Gilroy, *Pay for Success Contracting Reducing Recidivism in Pennsylvania*, REASON FOUND. (Aug. 31, 2015), <http://reason.org/news/show/pennsylvania-contract-recidivism>.

¹³¹ Albertson & Fox, *supra* note 40, at 4–7.

¹³² *Id.* at 5.

¹³³ Battye & Daly, *supra* note 41, at 4.

¹³⁴ *Id.* at 3.

¹³⁵ MTC Inst., *Measuring Success: Improving the Effectiveness of Correctional Facilities 5* (2006).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Volokh, *supra* note 8, at 343.

¹³⁹ Albertson & Fox, *supra* note 40, at 5.

¹⁴⁰ *Id.*

¹⁴¹ Battye & Daly, *supra* note 41, at 2.

¹⁴² Albertson & Fox, *supra* note 40, at 13–15.

more security guards, money could be put towards preventative measures, job training, or counseling services in order to improve outcomes.¹⁴³

Another advantage of a PbR program is that it can lead to experimentation. By focusing on outcomes rather than inputs and outputs, PbR programs allow providers to find innovative solutions to reach their goals or performance measures.¹⁴⁴ PbR does this by telling providers what needs to be done, rather than how they need to do it, thereby giving the provider an opportunity to experiment to achieve their goals.¹⁴⁵ This advantage was demonstrated in the Peterborough pilot where the contract did not specify what needed to be done to improve outcomes.¹⁴⁶ This resulted in the successful One Service program that was crafted based on local knowledge and context.¹⁴⁷ Also, the government transfers the risk of experimenting to reach the performance measurements away from themselves and onto the providers by partaking in contracts.¹⁴⁸

Another purported advantage of a PbR program is that experimentation in service delivery will lead to the entry of new market participants and diverse service providers.¹⁴⁹ Implementing a PbR program could allow for private and nonprofit organizations to come in and break up the public sector monopoly on a given service.¹⁵⁰ Having multiple service providers could increase competition in the sector, and create competitive pressure among the market participants to perform and find effective means of achieving outcomes.¹⁵¹ Providers who do not perform will be replaced by those who are able to deliver favorable outcomes.¹⁵² This advantage of a PbR program is minimal because new market entry is already possible under the traditional privatization model.¹⁵³ Additionally, scholars argue that a PbR program could deter new market entry of small or nonprofit providers because they may be more sensitive to the risks associated with a PbR contract.¹⁵⁴ Though small corporations and nonprofits may not be parties to a PbR contract due to financial constraints, the major

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 7–9.

¹⁴⁵ GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101, at 5.

¹⁴⁶ PETERBOROUGH PHASE 2 REPORT, *supra* note 69, at 1.

¹⁴⁷ *Id.*

¹⁴⁸ Albertson & Fox, *supra* note 40, at 5.

¹⁴⁹ Battye & Daly, *supra* note 41, at 4.

¹⁵⁰ *Id.* at 2.

¹⁵¹ *Id.*; Albertson & Fox, *supra* note 40, at 5.

¹⁵² Battye & Daly, *supra* note 41 at 2.

¹⁵³ Volokh, *supra* note 8, at 362-63.

¹⁵⁴ *Id.* at 400.

corporations could still tap nonprofits for help with delivering services to help achieve their outcomes.¹⁵⁵

Additional advantages of PbR programs include cost-effectiveness,¹⁵⁶ risk transfer from commissioner to service provider,¹⁵⁷ user responsiveness,¹⁵⁸ and accountability.¹⁵⁹

B. Disadvantages

Inherent in a PbR program are several disadvantages which involve the designing and implementation of the program itself and the effects on provider behavior.¹⁶⁰

One of the largest disadvantages to a PbR program is the difficulty of defining outcomes, or targets, that are measurably close to the desired end result.¹⁶¹ Outcomes should be clear, measurable, and aligned with the government's policy objectives to ensure that the government can track performance, and that the provider is meeting their objectives.¹⁶² To set performance goals, the commissioner or government must determine the baseline, or non-intervention rate, in the sector based on quantitative data on that specific outcome.¹⁶³ Setting performance goals may be challenging depending on the sector, but once the baseline is calculated, the commissioner or government should set performance goals above the non-intervention rate.¹⁶⁴ When dealing with the criminal justice system, it may be difficult to value

¹⁵⁵ GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101, at 12.

¹⁵⁶ A PbR program is cost-effective because it only pays providers for the outcomes they achieve, rather than paying a blanket fee. A PbR ensures money is being used on successful programs. GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101, at 19.

¹⁵⁷ Another advantage of a PbR program is that it allows governments and commissioners to transfer the risk of experimentation onto the service providers. The transfer of risk must be balanced though. The transfer should be enough to allow for the government to benefit, while also not too high to prevent service providers from entering the market. *See Battye & Daly, supra* note 41, at 4.

¹⁵⁸ A PbR program is more response to user needs because service providers are allowed to experiment with ways to deliver services in order to produce favorable outcomes for themselves and the offenders. *See id.*; GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101, at 19.

¹⁵⁹ PbR programs improve accountability because the contracts hold providers accountable for achieving specific outcomes. GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101, at 19

¹⁶⁰ *Id.*

¹⁶¹ Albertson & Fox, *supra* note 40, at 9.

¹⁶² GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101, at 18.

¹⁶³ *Id.* at 9.

¹⁶⁴ *Id.*

outcomes, such as lowered crime rates or reconviction rates.¹⁶⁵ However, controlling for baselines may not be crucial “for a compensation scheme to provide the proper incentives for improvement” if PbR contracts are allocated by auction because it would result in the same price to the contractor and government.¹⁶⁶

Further, the implementation of PbR programs results in higher transaction costs.¹⁶⁷ Due to the fact-specific nature of designing PbR programs, designing an appropriate program for every prison where the government may want to implement a program would be expensive and somewhat tedious.¹⁶⁸ Also, PbR programs result in increased costs when considering factors such as monitoring and paying providers and setting up and commissioning a PbR contract.¹⁶⁹

Measuring the impact itself may also prove challenging.¹⁷⁰ Monitoring the provider's performance requires the development and maintenance of a system to track the progress of the program both inside and outside of the prison.¹⁷¹ The PbR programs at Doncaster and Peterborough “were hampered because [the] MOJ had not established effective data sharing between its prison and probation systems and the police national computer when piloting began.”¹⁷² Additionally, regarding reconviction data, impact and data can be affected by outside factors, “such as police clear-up rates and the time taken to finalize cases.”¹⁷³

Another disadvantage of implementing a PbR program is that it could result in “undesirable strategic behavior” by the provider.¹⁷⁴ By focusing on outcomes, PbR programs could create incentives for providers to cherry-pick, or “target people most likely to achieve a result, rather than those most in need.”¹⁷⁵ Cherry-picking can be avoided by not allowing contractors to have a choice in what inmates they are given.¹⁷⁶ In the Social Impact Bond pilot at Peterborough, the MOJ determined that there was no evidence of cherry-picking within its One

¹⁶⁵ Albertson & Fox, *supra* note 40, at 9.

¹⁶⁶ Volokh, *supra* note 8, at 378–82.

¹⁶⁷ Battye & Daly, *supra* note 41, at 7.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Albertson & Fox, *supra* note 40, at 11–12.

¹⁷¹ GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101, at 6.

¹⁷² *Id.*

¹⁷³ Carol Hedderman, *Payment by Results: Hopes, Fears and Evidence*, 11(2–3) BRIT. J. COMMUNITY JUST. 43 (2013).

¹⁷⁴ Volokh, *supra* note 8, at 346.

¹⁷⁵ Battye & Daly, *supra* note 41, at 7.

¹⁷⁶ Volokh, *supra* note 8, at 346.

Service program to help those who have a better chance of achieving better outcomes.¹⁷⁷ Additionally, concerns over undesirable strategic behavior are not serious enough to stop experimenting with PbR.¹⁷⁸

The use of targets or performance measures could also lead to myopia, in which providers focus on “short-term gain to yield quick returns, leaving long-term issues to build up.”¹⁷⁹ By allowing providers to be a part of the contracting process and crafting the performance measures, they could easily manipulate the goals or choose easily achievable goals.¹⁸⁰ In choosing the performance measures, they may focus on “measurable dimensions” rather than unmeasurable ones.¹⁸¹ A simple solution to this problem would be not to allow contractors to be part of setting the goals, and instead leave it to the “relevant contracting authority.”¹⁸² Setting targets which result in payment of the contract, or incentive payments, could also result in convergence where providers work towards “a standard level of performance rather than excellence.”¹⁸³ Some scholars even argue that using a PbR program may encourage falsifying records to ensure targets are met.¹⁸⁴ This strategic behavior may be linked, as previously mentioned, to the fact that PbR programs transfer the risk of experimentation to the providers who may feel pressure to act strategically to avoid major losses.¹⁸⁵

III. DISCUSSION ON PAYMENT-BY-RESULTS IMPLEMENTATION IN THE U.S.

The U.K.’s PbR prison pilot programs provide two models to consider when determining what is appropriate for implementation in the United States. In making such a determination, it is important to look at: the evidence from both pilot programs; their applicability to the United States on the federal level; their applicability to the United States on the state level; and current U.S. private prison contracts.

¹⁷⁷ PETERBOROUGH PHASE 2 REPORT, *supra* note 69, at 4.

¹⁷⁸ Volokh, *supra* note 8, at 346.

¹⁷⁹ Hedderman, *supra* note 173.

¹⁸⁰ Volokh, *supra* note 8, at 403.

¹⁸¹ Sasha Volokh, *Why not measure prison performance?*, WASH. POST, (Feb. 24, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/24/why-not-measure-prison-performance/>.

¹⁸² Volokh, *supra* note 8, at 405.

¹⁸³ Hedderman, *supra* note 173.

¹⁸⁴ Volokh, *supra* note 8, at 412.

¹⁸⁵ Volokh, *supra* note 181.

A. *Evidence from Peterborough and Doncaster*

The two PbR pilot programs in the United Kingdom began after 2010.¹⁸⁶ Due to its recent implementation and the government's inability to run a pilot program at the Leeds public prison, the United Kingdom's use of PbR in private and public prisons has not been fully tested.¹⁸⁷ This recent implementation, and use of different models in the prisons, have not provided the United States with one reliable model that can be transplanted into the U.S. prison system.

Both of the pilot programs at Peterborough and Doncaster showed some success in reducing the reconviction rate for cohort members.¹⁸⁸ At the end of the Peterborough pilot, there was a 9% decrease in reconviction rates, which triggered the income payment.¹⁸⁹ At Doncaster, the pilot was able to reduce reconviction rates by 3.3% which ultimately did not trigger the outcome payment.¹⁹⁰ These statistics may not be accurate, as evidenced by the finding of the NAO in its 2015 report that the MOJ had not been collecting evidence and data of its PbR programs.¹⁹¹ Though only one program triggered the outcome payment, they were both able to reduce reconviction rates, which was the ultimate goal of the pilots.¹⁹² Since both pilots documented a reduction in reconviction rates due to the incentives given to the service providers, both pilots can serve as models for the United States to use when implementing their own PbR programs. The United States should continue to monitor studies coming from these two pilot programs as well as those mentioned in other parts of the world.

B. *The U.K.'s Payment-by-Results Programs Applicability to the U.S. State and Federal Governments*

As found by the NAO, PbR programs are difficult and costly to design.¹⁹³ Additionally, PbR programs are not a one-size-fits-all approach, and each program has to be carefully crafted to fit its context.¹⁹⁴ There are a number of factors to consider when determining whether a PbR model should be used in

¹⁸⁶ STATISTICAL NOTICE, *supra* note 12, at 1.

¹⁸⁷ Hedderman, *supra* note 173.

¹⁸⁸ GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101.

¹⁸⁹ Anders & Dorsett, *supra* note 61.

¹⁹⁰ DONCASTER COHORT 2 FINAL RESULTS, *supra* note 99.

¹⁹¹ GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101, at 32.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See Battye & Daly, *supra* note 41.

the United States, some of which include: scale of change, defining outcomes, measuring impact, and fiscal benefits.¹⁹⁵ Designing a program that meets the context's needs is imperative to determine whether a PbR program is right for the United States.¹⁹⁶ Variables for developing a proper program include: "(1) the level at which results are specified, (2) the extent to which payment is based solely on outcomes, or whether a blend of outputs and outcomes are used, (3) the significance of PbR within the contract, and (4) at what level PbR is structured to alter incentives at the level of a system."¹⁹⁷ To determine if either of the U.K. pilot programs are applicable to U.S. state and federal prisons, this Comment will directly apply them to the U.S. context in which there are 102 federal prisons and 1,719 state prisons.¹⁹⁸

The Peterborough pilot used an Social Impact Bond to fund its One Service program, which brought together community members to help define and solve the community problem of reoffending.¹⁹⁹ To implement the One Service program, Social Finance paid the aforementioned community service providers to help offenders before and after release in an attempt to reduce their chance of reoffending.²⁰⁰ Implementing such a program at the federal level in the United States would be challenging, more so than at the state level, but is feasible. First, due to the philanthropic culture of the United States there would be a myriad of opportunities for funding an Social Impact Bond.²⁰¹ There have been several PbR programs across the United States involving various social issues that have been able to find impact-seeking capital from investors to fund their various programs.²⁰² For example, the first Social Impact Bond in the United States at New York Rikers Island jail was funded by an investment from Bloomberg Philanthropies and Goldman Sachs, which was protected by a philanthropy.²⁰³ In 2017, Americans donated approximately \$410.02 billion to charities.²⁰⁴

¹⁹⁵ Albertson & Fox, *supra* note 40, at 7–13. *See also* Battye & Daly, *supra* note 41.

¹⁹⁶ Battye & Daly, *supra* note 41, at 3.

¹⁹⁷ *Id.*

¹⁹⁸ Press Release, Prison Policy Initiative, Mass Incarceration: The Whole Pie 2017 (Mar. 14, 2017) (on file with author).

¹⁹⁹ PETERBOROUGH PHASE 2 REPORT, *supra* note 69, at 4.

²⁰⁰ *Id.*

²⁰¹ *See generally* Giving USA, Giving USA 2018: Americans Gave \$410.02 Billion to Charity in 2017, Crossing the \$400 Billion Mark for the First Time, <https://givingusa.org/tag/giving-usa-2018/> (June 13, 2018) (describing the major giving trends, including who gave and who received how much, in 2017).

²⁰² V. Kasturi Rangan and Lisa A. Chase, *The Payoff of Pay-for-Success*, STANFORD SOC. INNOVATION REV. (2015), https://ssir.org/up_for_debate/article/the_payoff_of_pay_for_success.

²⁰³ *Id.*

²⁰⁴ Giving USA, *supra* note 201.

Additionally, the United States was found to be the most generous nation in the world when comparing the “rate of charitable donations as a percentage [of] gross domestic product.”²⁰⁵ Secondly, in the United States, service providers at each state and federal prison chosen to run a PbR program would replicate the local focus of the Peterborough pilot by bringing in local actors and organizations to help solve and define the problems in their community.

The Doncaster pilot, on the other hand, used an alliance model to improve case management for cohort members before and after release.²⁰⁶ Throughout the pilot, case managers only facilitated access to interventions, rather than fully supplying interventions to offenders, which did not ensure that offenders would take advantage of them.²⁰⁷ Though case managers did not fully supply interventions to every offender,²⁰⁸ and the program did not trigger the outcome payment, the pilot was still able to lower reconviction rates.²⁰⁹ Learning from the experiences at Doncaster, service providers chosen to run a PbR program in a federal prison could ensure that more resources are allocated to case managers to effectively run the alliance model.

Though the federal government has not yet implemented a PbR program, several states have already begun exploring PbR in their prisons.²¹⁰ Building of the models at Peterborough and Doncaster, in addition to developing their own models, states can contribute to experimentation advantage of PbR programs more readily than the federal government.

Neither the Peterborough nor the Doncaster pilot programs are wholly appropriate for U.S. state or federal prisons due to the context driven nature of designing a PbR program. Nonetheless, both programs can serve as models for the federal government to learn from and improve upon when implementing potential PbR programs in federal prisons. Further, allowing states to take the lead on conducting PbR pilots would allow the federal government to draw from those experiences when designing their own PbR programs. However, that should not prevent the federal government from acting now.

²⁰⁵ Loulla-Mae Eleftheriou-Smith, *America, New Zealand and Canada top the list of world's most generous nations*, INDEPENDENT (Feb. 2, 2016), <http://www.independent.co.uk/news/world/americas/america-new-zealand-and-canada-top-list-of-world-s-most-generous-nations-a6849221.html>.

²⁰⁶ FINDINGS FROM DONCASTER PILOT, *supra* note 83, at i.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ DONCASTER COHORT 2 FINAL RESULTS, *supra* note 99; FINDINGS FROM DONCASTER PILOT, *supra* note 83, at ii (The Doncaster pilot lower reconviction rates but not enough to trigger the outcome payment.).

²¹⁰ THE NORMAN TRANSCRIPT, *supra* note 9.

C. *Current U.S. Private Prison Contracts*

A major legal obstacle to implementing PbR programs in U.S. private prisons is determining whether it is possible to implement a PbR program under current private prison contracts, or if the government would have to wait until renewal negotiations. To determine the answer to this question, the parties to the contract would need to look at the specific contract language regarding amendments, and follow those procedures therein.²¹¹ Traditionally, if the terms of a contract are to be changed, the parties must draft an amendment on which they mutually agree, which then merges and becomes a part of the original contract upon signing.²¹² Though private prison companies can be incentivized to improve through performance measures, making them agree to terms that make it harder for them to earn a profit before the end of their current contract will be a hard obstacle to overcome. It is more likely that the parties will wait until it is time to renew the contract to add a PbR program into the agreement. Amending contracts would not be a hurdle for implementing a PbR program in publicly run facilities, which is another argument for increasing the use of PbR programs in the public sector.

D. *Other Practical Issues*

In addition to the difficulty of amending current private prison contracts, another issue to keep in mind when discussing the implementation of a PbR program in private prisons on the federal level is the recent reversal of private prison policy. In August 2016, the Department of Justice released a memorandum stating that it would reduce the amount of private prison contracts held by the Bureau of Prisons.²¹³ In the memorandum, Deputy Attorney General Sally Yates cited the fact that private prisons do not substantially save on costs and do not provide the same level of services as federally run facilities as reasons for bringing an end to federal private prisons.²¹⁴ This Obama era policy was quickly changed by the Trump Administration in February 2017 when Attorney General Jeff Sessions released a memorandum rescinding the previous administration's "Reducing our Use of Private Prisons" memorandum.²¹⁵ In the

²¹¹ See RAYMOND T. NIMMER AND HOLLY K. TOWLE, *THE LAW OF ELECTRONIC COMMERCIAL TRANSACTIONS* § 8.10 (LexisNexis A.S. Pratt, 2nd ed. 2018).

²¹² See *id.*

²¹³ U.S. DEPT. OF JUSTICE, MEMORANDUM FOR THE ACTING DIRECTOR: REDUCING OUR USE OF PRIVATE PRISONS (Aug. 2016).

²¹⁴ *Id.*

²¹⁵ U.S. DEPT. OF JUSTICE, MEMORANDUM FOR THE ACTING DIRECTOR, FEDERAL BUREAU OF PRISONS:

memorandum, Sessions claims ending the use of private prisons “impaired the Bureau’s ability to meet the future needs of the federal correctional system.”²¹⁶ Since the federal government is once again embracing the use of private prisons and the discussion of PbR in federal private prisons should continue.

In addition to the fluctuating policies at the federal level, there have been some changes in opinion among the states regarding private prisons. In 2017, there was a movement away from private prisons among the states in three major cities, New York City, Philadelphia and Portland, and in universities divesting from private prison companies.²¹⁷ This movement away from private prisons among states does not preclude the implementation of PbR programs. Performance-based compensation in public prisons is also a feasible idea,²¹⁸ as evidenced by the PbR program in Oklahoma²¹⁹ and the cancelled PbR pilot at Leeds.²²⁰ Additionally, there has been a movement in the United States towards merit-based pay and promotions in various areas of the public sector, such as merit-based pay for teachers, which could be translated to prisons.²²¹

Further, throughout the United States, there is the belief that the government, rather than for-profit businesses, should be administering justice.²²² However, there are counterarguments against this point of view that claim there is no inherent, or relevant, difference between private or publicly managed services.²²³ Alexander Volokh argues that the non-empirical arguments against privatization, such as the argument that states should provide certain services, are not relevant to the “employee-contractor distinction.”²²⁴ Volokh further argues that the distinction between employees and contractors is an administrative one, and that “contracting out is merely a retreat of state *employment* in favor of other forms of state contracting.”²²⁵ Also, many believe

RESCISSION OF MEMORANDUM ON USE OF PRIVATE PRISONS (Feb. 2017).

²¹⁶ *Id.*

²¹⁷ Lauren-Brooke Eisen, *What is the Best Way to Hold Private Prisons to Account?*, NEWSWEEK (Dec. 13, 2017), <http://www.newsweek.com/what-best-way-hold-private-prisons-account-745861>.

²¹⁸ *See generally* Volokh, *supra* note 8, at 384–85.

²¹⁹ Press Release, Women in Recovery, Oklahoma Approves First-Ever Pay for Success Contract Addressing Female Incarceration (Apr. 11, 2017) (on file with author).

²²⁰ Inwood, *supra* note 100.

²²¹ *See* Jon. D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023, 1048 (2013).

²²² Joseph Margulies, *This is the Real Reason Private Prisons Should Be Outlawed*, TIME, Aug. 24, 2016, <http://time.com/4461791/private-prisons-department-of-justice/>.

²²³ *See* Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012).

²²⁴ *Id.* at 202.

²²⁵ *Id.* at 207–08.

that allowing for-profit businesses to take part in administering justice encourages them to not reduce reconviction rates, but to encourage the growth of mass incarceration to ensure they make a profit.²²⁶ This argument against private prisons depends entirely on how the compensation is structured. If the compensation is structured on the number of beds filled in the prison, then it is arguable that private prison companies would partake in undesirable strategic behavior to obtain high profits. A PbR compensation method on the other hand rewards private prison companies for reducing reconviction rates or achieving various other outcomes. Finally, though many people dislike the thought of contracting out to private prison companies, this argument should not prevent the implementation of PbR programs in public prisons.

IV. POTENTIAL CRITICISMS

There are several potential criticisms that suggest the U.K.'s PbR prison pilot programs should not be implemented at the federal or state levels in the United States.

First, the PbR pilot prison program at Peterborough and Doncaster did not produce enough successful results to suggest either should be implemented in the United States. Out of the two pilot programs in the U.K., only one pilot was successful enough to trigger the outcome payment.²²⁷ Also, even though both prison pilots and the other PbR health and employment programs implemented in the U.K. demonstrated some successes,²²⁸ they are arguably not the right fit for or ready to be implemented in the United States. While only Peterborough triggered the outcome payment, both programs were able to reduce reconviction rates.²²⁹ Though the use of PbR in the area of corrections is new, the successes of PbR programs across the world suggest that incentives are effective when trying to reduce recidivism. Moreover, the U.S. federal and state governments should learn from the successes and failures of the Peterborough and Doncaster models when using them to implement PbR programs in the United States.

Second, the type of outcome measures used in the PbR prison pilot programs are not appropriate for the United States. The U.K. PbR programs used a reduction in reconviction rates as their only outcome measure, when various other measures like violence, health care or overcrowding could have been

²²⁶ Margulies, *supra* note 222.

²²⁷ See Anders & Dorsett, *supra* note 61.

²²⁸ See Centre for Public Impact, *supra* note 47; Appleby, Harrison, Hawkins, & Dixon, *supra* note 45.

²²⁹ GOVERNMENT'S USE OF PAYMENT BY RESULTS, *supra* note 101.

used.²³⁰ Additionally, the PbR contracts used an “intermediate reward scheme,” which combined discrete²³¹ and continuous²³² measures where the payment of the contract did not start until it reached the desired reduction of reconviction rates, and continued for every percentage point the reconviction rate decreased until it hit the cap.²³³ The use of discrete or binary measures can result in providers having little incentive to achieve higher than the set target which can be avoided through the use of continuous measures.²³⁴ While the use of only one somewhat discrete outcome measure in the U.K. PbR pilot programs is problematic, that does not prevent federal or state governments from taking the U.K.’s programs and building upon them by adding in additional outcome measures and compensation schemes.

CONCLUSIONS

A PbR program’s potential for improving outcomes in the criminal justice system is worth exploring in the United States, but it is important that the proscribed model is designed specifically for the U.S. and the specific prison in which it will be implemented. The two U.K. PbR pilot programs at Peterborough and Doncaster resulted in reduced reconviction rates, though only one program triggered the outcome payment.²³⁵ Consequently, these results, and the implementation of PbR programs in the United States and across the world suggest that the PbR programs used at Peterborough and Doncaster should serve as inspirations for the United States in designing their own PbR programs because any reduction in reconviction rates is beneficial.

Though only one outcome measure, recidivism, was used in the U.K. pilot programs, that does not preclude the federal or state governments from introducing additional outcome measures like health care, prison violence, and

²³⁰ See generally MTC INST., *supra* note 135 (This article discusses a number of outcomes other than recidivism that can be measured to pay outcome payments off of.)

²³¹ Discrete or binary outcome measures are those in which payment is dependent upon whether the provider does or does not hit the desired outcome. They are often easier to implement into PbR contracts than continuous measures. See JAMES DICKER, 2020 PUB. SERVS. TRUST AT THE RSA, CASE STUDY 2, PAYMENT-BY-OUTCOME IN OFFENDER MANAGEMENT 16 (2011).

²³² Continuous or distance travelled measures are those in which payment is awarded based on the providers progress in reaching the desired outcome. Continuous measures are less risky for the service provider as compared to the discrete measures. Volokh, *supra* note 8, at 382–83.

²³³ *Id.* at 383.

²³⁴ *Id.* at 382–84.

²³⁵ Anders & Dorsett, *supra* note 61; DONCASTER COHORT 2 FINAL RESULTS, *supra* note 101.

cost savings into the contract.²³⁶ This has already been seen in New Zealand, where New Zealand's government is using the outcome measures of death and prison violence in calculating payments or deductions on the contract.²³⁷ Additionally, federal and state governments in the United States could build on the U.K.'s intermediate reward scheme combining both discrete and continuous measures. This would allow them to move towards an increased use of continuous measures which could allow more risk-adverse smaller corporations and nonprofits to get involved in PbR contracts. It would also incentivize providers to go above and beyond certain targets to achieve higher payments.

With the myriad of PbR programs being implemented in the United States and abroad, the first step the federal government should take is to create a task force within the Department of Justice. This group would be tasked with monitoring the PbR programs currently taking place. Though these programs are relatively new, the U.S. can monitor them for success while crafting their own PbR program. The task force would also be responsible for comparing and contrasting the various models to determine which performance measures would best suit the needs of federal prisons. After choosing the appropriate performance measures and determining which goals they would want the providers to focus on, the task force should choose a federal prison in which to implement their pilot program and analyze what specific programs and resources would most benefit that particular location. Such task force would allow for the federal government to benefit from the experimentation among the states and the world, while also ensuring a federal PbR program is contextually designed. States and the federal government could also work with incentive advocacy groups like Instiglio²³⁸ to design and implement PbR programs in their public and private prisons.

In conclusion, the prison PbR pilot programs at Peterborough and Doncaster can serve as excellent models for the U.S. federal and state governments to use when designing and implementing their own PbR programs, but they cannot be directly transferred to the United States due to the need to design a PbR programs under a U.S.-specific context. The lessons learned from Peterborough, Doncaster, and other PbR programs around the world will allow the United States to develop their own PbR programs to meet their unique needs while alleviating some of the issues that are currently running rampant in the U.S.

²³⁶ See Volokh, *supra* note 181.

²³⁷ Rani, *supra* note 113; Stuart, *supra* note 15.

²³⁸ INSTIGLIO, <http://www.instiglio.org/en/> (last visited Feb. 9, 2018).

criminal justice system, such as overcrowding, recidivism, violence, and high costs.

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