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The New Gospel of Wealth: On Social Impact Bonds and the Privatization of Public Good

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ARTICLE

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ABSTRACT

Since Andrew Carnegie penned his famous *Gospel of Wealth* in 1889, corporate philanthropists have championed considerable public good around the world, investing in a wide range of social programs addressing a diversity of public issues, from poverty to healthcare to criminal justice. Nevertheless, the problem of "the Rich and the Poor," as termed by Andrew Carnegie in his famous essay, remains unsolved. Socially conscious investors have recently called for America to reimagine a new "gospel of wealth", one that not only grapples with the *what* of social injustice, but also explores the *how* and the *why* of systemic social and economic inequality. An emerging social finance tool, the social impact bond ("SIB"), has been praised as a promising platform that can help solve many of our social challenges by targeting impact investments toward traditionally underfunded social welfare programs.

This Article sets forth a critical examination of the new SIB

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model, highlighting some of the opportunities for the social finance tool to promote social impact, while also revealing several of its challenges that may hinder its broader adoption in communities across America. In the process, this Article exposes key flaws inherent in the design of the SIB model, including its neoliberal emphasis on market-based economic development strategies and its disregard for the primary role of government in the protection and advancement of the public good. It concludes by calling for a more progressive economic development framework to guide the implementation of the SIB model, one that can help development practitioners, philanthropists, and impact investors wrestle with the deficiencies of our global capitalist economic system and overcome the entrenched systemic barriers to economic justice in America.

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"I never asked for nothin I don't demand of myself / Honesty, loyalty, friends and then wealth." – Jay-Z, Justify My Thug[1]

"Our self-awareness—our humility—shouldn't be limited to examining the problems. It should include the structures of solutions, like giving itself . . . It is, after all, an offspring of the free market; it is enabled by returns on capital." – Darren Walker[2]

I. INTRODUCTION

In 1889, Andrew Carnegie, the Scottish-born industrialist and titan of America's Gilded Age,[3] published *The Gospel of Wealth*, articulating a moral philosophy that has become a touchstone of America's rich philanthropic tradition.[4] Carnegie's collection of essays explained his belief in the enduring value of a Darwinian capitalist economic system, notwithstanding that system's production of great inequality, as well as his perspective on "the duty of the man of Wealth."[5] According to Carnegie, the ideals of individualism and human drive should be honored by society, principally because the accumulation of capital by the few is essential for "the progress of the race" and "the refinement of civilization," while also necessary to help our great nation avoid the "universal squalor" that would attend more equitable distributions of income.[6] Recognizing the inherent tensions in our capitalist economic system, creating a world of "Rich and Poor," Carnegie called for the wealthy to live "unostentatious" lives, and become "trustees" for the poor, by giving away the majority of their wealth after providing "moderately for the legitimate wants" of those dependent upon them.[7]

Andrew Carnegie did in fact give away almost 90% of his wealth during his lifetime, donating over $350 million (nearly $4.8 billion in 2017 dollars) toward charitable causes and establishing thousands of libraries around the world, including some famous

1. JAY-Z, *Justify My Thug*, *on* THE BLACK ALBUM (Roc-A-Fella Records 2003).
2. Darren Walker, *Why Giving Back Isn't Enough*, N.Y. TIMES, Dec. 17, 2015, at A39.
3. *See Andrew Carnegie Biography*, BIOGRAPHY.COM (Nov. 22, 2016), http://www.biography.com/people/andrew-carnegie-9238756 [https://perma.cc/H8YX-MQDG] [hereinafter *Andrew Carnegie Biography*].
4. *See generally* ANDREW CARNEGIE, "THE GOSPEL OF WEALTH" ESSAYS AND OTHER WRITINGS viii–ix (David Nasaw ed., 2006).
5. *See generally id.* at 2–3, 10.
6. *See id.* at 1, 8.
7. *See id.* at 10–12.

educational and cultural institutions that are well known today.[8] Contemporary philanthropists like Warren Buffet, Bill Gates, and more recently Jeff Bezos, have followed in Andrew Carnegie's footsteps. Indeed, in 2010, Bill and Melinda Gates and Warren Buffet founded the Giving Pledge, calling on the world's wealthiest individuals to give away the majority of their wealth.[9] Additionally, Jeff Bezos recently pledged to donate $33 million toward an educational scholarship program for immigrants brought to the U.S. illegally as children.[10]

Nevertheless, while corporate philanthropy has dispensed a tremendous amount of good around the world, targeting a wide range of social issues from poverty to healthcare to criminal justice, the problem of "the Rich and the Poor" has not been solved, as Andrew Carnegie predicted it would be.[11] Instead, our development efforts have fallen short. Despite navigating through the horrors of Jim Crow and state-sponsored racial segregation,[12] we still wrestle with racial injustice in the form of mass incarceration and racially biased over-policing of minority communities.[13] Despite donating millions toward education,

8. Andrew Carnegie built Carnegie Hall and founded the Carnegie Endowment for International Peace, the Carnegie Foundation for the Advancement of Teaching, and Carnegie Mellon University, among other educational and cultural institutions. Chloe Sorvino, *The Gilded Age Family That Gave It All Away: The Carnegies*, FORBES (July 8, 2014), https://www.forbes.com/sites/chloesorvino/2014/07/08/whats-become-of-them-the-carnegie-family/#2b230f37b550 [https://perma.cc/BFP4-C8H9]; *see Andrew Carnegie Biography*, *supra* note 3; Evan Andrews, *Andrew Carnegie's Surprise Legacy*, HISTORY (Feb. 23, 2017), https://www.history.com/news/andrew-carnegies-surprising-legacy [https://perma.cc/T8TR-6BJB].

9. Thus far, at least 183 individuals and families have signed onto the Giving Pledge, including Tesla's Elon Musk and Facebook's Mark Zuckerberg. *History of the Pledge*, GIVING PLEDGE, https://givingpledge.org/About.aspx [https://perma.cc/S646-CQY9] (last visited July 2, 2018); *id.* at *Pledge Signatories*.

10. Michael Stratford and Steven Overly, *Amazon's Bezos to give $33M for 1,000 Dreamer scholarships*, POLITICO (Jan. 12, 2018), https://www.politico.com/story/2018/01/12/bezos-dreamers-scholarships-337924 [https://perma.cc/R5ZU-8XJD].

11. *See* CARNEGIE, *supra* note 4, at 12 ("Thus is the problem of Rich and Poor to be solved. The laws of accumulation will be left free; the laws of distribution free. Individualism will continue, but the millionaire will be but a trustee of the poor; intrusted for a season with a great part of the increased wealth of the community, but administering it for the community far better than it could or would have done for itself.").

12. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 17, 19, 101 (2018) (discussing, among other topics, the effect of public housing on de jure segregation, racially motivated zoning laws, and racially motivated taxation policies).

13. *See* Etienne C. Toussaint, *Incarceration to Incorporation: Economic Empowerment for Returning Citizens Through Social Impact Bonds*, 25 J. AFFORDABLE HOUSING & COMMUN. DEV. L. 61, 62 n.3 (2016) (discussing the history of the Black Lives Matter movement, which "seek[s] to affirm the lives of Black men and women who, on a daily basis, experience the negative impacts of institutionalized white supremacy and

millions of children in marginalized communities are still being left behind.[14] Despite making significant investments toward the global health crisis, adequate healthcare remains an uncertainty for many American families.[15] Despite launching a War on Poverty and a Poor People's Campaign, unemployment remains high, and the wealth gap is increasing at an alarming rate.[16] At some point, we must ask ourselves whether Andrew Carnegie's *Gospel of Wealth* has failed to save us from the sins of capitalism and instead has strengthened our lust for using market-based "Band-Aids" to address the systemic and institutional cancer of poverty in America.

Ford Foundation President Darren Walker has recently called for America to reimagine a new gospel of wealth, one that recognizes that we live in a more enlightened and egalitarian world than that of Andrew Carnegie.[17] In the spirit of Dr. Martin Luther King, Jr.,[18] Darren Walker argues that we can no longer

structural racism in America" and "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* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 33–34, 95–97 (Angela J. Davis, ed., 2017) (discussing, among other topics, racial inequality in the justice system and racial profiling).

14. *See Giving Statistics*, CHARITY NAVIGATOR https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=42 [https://perma.cc/ZS7D-BVM2] (last visited Aug. 25, 2018) [hereinafter *Giving Statistics*] (showing that in 2017, American education charities received $58.9 billion (up 6.2% from 2016 and 14% of all domestic donation)); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., 2017-051, STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2017 90–93 (2017) (showing that blacks lagged behind other racial groups in college enrollment following high school graduation and in overall college enrollment).

15. *See Giving Statistics*, *supra* note 14 (showing that in 2017, American healthcare charities received $38.27 billion (up 15.5% from 2016 and 9% of all domestic donation)); *see generally* DAYNA BOWEN MATTHEW, JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE 57 (2015) (describing the racial gap in healthcare).

16. The racial wealth gap in America continues to grow exponentially, leaving many low-income communities of color both frustrated and demoralized. *See* Dedrick Asante-Muhammad et al., *The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing Out America's Middle Class*, INST. FOR POL'Y STUDIES 5 (2017), https://prosperitynow.org/files/PDFs/10-2017_Road_to_Zero_Wealth_Slides.pdf [https://perma.cc/946S-P27S] ("If the racial wealth divide is left unaddressed and is not exacerbated further over the next eight years, median Black household wealth is on a path to hit zero by 2053—about 10 years after it is projected that racial minorities will comprise the majority of the nation's population. Median Latino household wealth is projected to hit zero twenty years later, or by 2073. In sharp contrast, median White household wealth would climb to $137,000 by 2053 and $147,000 by 2073."); *see generally* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 165, 249–51 (2017).

17. *See* Walker, *supra* note 2.

18. In 1968, shortly before his assassination, Dr. Martin Luther King, Jr. launched the Poor People's Movement as a hallmark of the Southern Christian Leadership

simply grapple with the *what* of social injustice; we must also unearth and dissect the *how* and the *why* of systemic social and economic inequality.[19] Philanthropists and socially conscious investors have recently praised an emerging social finance innovation as perhaps a step in the right direction toward this new gospel of wealth. Specifically, a growing community of socially conscious private investors, aptly called impact investors,[20] has started to invest in a new social finance tool called the social impact bond ("SIB"). The SIB, a type of "pay-for-success" contract, works by establishing mission-driven partnerships between the public sector, the philanthropic sector, and the private sector.[21] Private investors commit to making strategic investments toward social welfare programs with predetermined timelines and established performance benchmarks.[22] An intermediary organization coordinates the operation of the SIB and plays a central role in selecting service providers who facilitate SIB programs.[23] At the completion of a SIB program, if the service providers have successfully met the established performance benchmarks as assessed by an independent evaluator, the government stakeholder repays the impact investors their original investment along with a return on their investment based upon governmental cost savings.[24] Uniquely, if the SIB program is deemed unsuccessful after its metric-based evaluation has been completed, some impact investors are not repaid. Instead, based upon the terms of the SIB contract, impact investors assume the financial risks of the SIB investment and take a monetary loss.[25]

Conference's economic justice strategy, demanding an economic "Bill of Rights," among other demands. *See* GERALD D. MCKNIGHT, THE LAST CRUSADE: MARTIN LUTHER KING, JR., THE FBI, AND THE POOR PEOPLE'S CAMPAIGN 20 (1998).

19. *See* Walker, *supra* note 2.

20. *See* Chelsea McGrath, *The Government's Role in Unleashing Impact Investing's Full Potential*, 44 PEPP. L. REV. 799, 803 (2017) ("Impact investing refers to 'investments made into companies, organizations, and funds with the intention to generate social and economic impact alongside a financial return.'"); *see also* Susan R. Jones, *Is Social Innovation Financing Through Social Impact Bonds the Last Hope for Community Economic Development Programs During the Trump Administration?*, 26 J. AFFORDABLE HOUSING & COMMUN. DEV. L. 351, 357 (2017) ("Impact investors are diverse, ranging from pension funds, financial advisors, family foundations, and institutions to government investors and nonprofit organizations.").

21. *See* Emily Gustafsson-Wright et al., *The Potential and Limitations of Impact Bonds: Lessons from the First Five Years of Experience Worldwide*, BROOKINGS 1, 4, 6–7 (July 2015), https://www.brookings.edu/wp-content/uploads/2016/07/Impact-Bondsweb.pdf [https://perma.cc/URW7-5QU3].

22. *See* McGrath, *supra* note 20, at 809–10.

23. *See* Gustafsson-Wright et al., *supra* note 21, at 6–7.

24. *See id.*

25. *See id.* at 15.

There is much to applaud regarding the new SIB model. By aligning private sector capital from the impact-investing community with underfunded social welfare programs, SIBs offer the prospect of both financial and social returns for private investors, while also helping to address the critical social welfare issues of our time.[26] And, despite much debate over the benefits and drawbacks of the SIB model, the financial tool is increasingly being used by governments across the globe to address an eclectic array of social challenges, including prisoner recidivism, adoption and long-term foster care placement, services for struggling families to avoid foster care, homelessness, and services for disadvantaged and at-risk youth.[27] The SIB model has already been used to successfully fund interventions that either go beyond core governmental services or combine existing governmental services in unique ways.[28]

Further, the SIB model addresses a longstanding challenge

26. Impact investments are commonly defined as "investments intended to create positive impact beyond financial return." NICK O'DONOHOE ET AL., J.P. MORGAN GLOB. RESEARCH & THE ROCKEFELLER FOUND., IMPACT INVESTMENTS: AN EMERGING ASSET CLASS 14 (2010), https://www.jpmorganchase.com/corporate/socialfinance/document/impact_investments_nov2010.pdf [https://perma.cc/5U28-WQCU]. However, unlike traditional impact investments that ask investors to trade lower social returns for higher financial gain, the SIB directly correlates financial and social returns, with the amount of financial return dependent upon the amount of social good created by the SIB program. 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, 461–462 (2013).

27. *See* McGrath, *supra* note 20, at 855 ("There is SIB activity in Australia, Belgium, Canada, France, Germany, India, Ireland, Israel, Korea, the Netherlands, New Zealand, Peru, Poland, Portugal, Switzerland, the United Kingdom, and the United States."); Jennifer Giovannitti & Joshua Ogburn, *Growing the Pipeline of Pay-for-Success Projects*, COMMUNITY PRAC. PAPERS, Feb. 2018, at 1, https://www.richmondfed.org/-/media/richmondfedorg/publications/community_development/practice_papers/2018/practice_papers_2018-2.pdf [https://perma.cc/ZM7D-ACAV] (noting that "there are 20 PFS projects in the United States ([over] 100 across the globe) that are considered launched, meaning the feasibility and structuring processes are complete, and investors have agreed to the formal structure and terms. These projects cross a range of issue areas, including early childhood, workforce development, recidivism, homelessness and many others"). Additionally, the SIB model has branched into the international development and humanitarian aid market as well through the "development impact bond" and the "humanitarian impact bond". *See generally* CTR. FOR GLOB. DEV. & SOC. FIN., INVESTING IN SOCIAL OUTCOMES: DEVELOPMENT IMPACT BONDS (Oct. 2013), https://www.cgdev.org/topics/development-impact-bonds [https://perma.cc/R4QQ-PRHG]; *see also The World's First "Humanitarian Impact Bond" Launched to Transform Financing of Aid in Conflict-Hit Countries*, INT'L COMM'N OF THE RED CROSS (Sept. 6, 2017), https://www.icrc.org/en/document/worlds-first-humanitarian-impact-bond-launched-transform-financing-aid-conflict-hit [https://perma.cc/6S4B-VML7].

28. *See* Gustafsson-Wright et al., *supra* note 21, at 13–14 ("For example, pre-primary education, mentoring for youth, and family therapy are all high-impact, cross sector interventions that fall outside core government services and where service provision by nongovernmental organizations is common, if not the norm.").

for development practitioners—identifying how to translate impact investments in *social* infrastructure[29] into tangible financial vehicles that can monetize their latent economic value. This challenge has persisted, principally because governments often lack the public resources or political will to "invest in the future," notwithstanding proven research indicating that preventative, forward-looking social welfare programs often reduce public expenditures in the long run.[30] Additionally, public policy interventions for our nation's most vulnerable citizens—such as the formerly incarcerated, the homeless, or the unemployed—are often politically unpopular. Research demonstrates that political leaders are often unwilling to support innovative public policy programs that will be implemented or completed only after they leave office, especially when faced with the harsh realities of austere fiscal budgets and wide-ranging, time-sensitive community needs.[31] As a result, the emergence of an economic development platform that facilitates preventative, forward-looking social welfare programs that stand to bolster social infrastructure is undoubtedly a step in the right direction. This Article highlights several benefits of the SIB model and

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29. Unlike the physical infrastructure projects that are often the focus of conventional economic development programs, social infrastructure projects seek to empower low-income families and marginalized individuals with the tools necessary to better their lives in the communities where they live by making investments into their health, education, and employment prospects. *See* GEORGIA LEVENSON KEOHANE, CAPITAL AND THE COMMON GOOD: HOW INNOVATIVE FINANCE IS TACKLING THE WORLD'S MOST URGENT PROBLEMS 148–49, 162 (2016).

30. Government spending is often targeted toward "crisis-driven services" that stand to yield results within one fiscal year. *See* Rebecca Leventhal, *Effecting Progress: Using Social Impact Bonds to Finance Social Services*, 9 N.Y.U. J.L. & BUS. 511, 523–24 (2013); *see also* Toussaint, *supra* note 13, at 78 ("[G]overnment-sponsored social service programs are historically remedial in nature, targeting social problems as they arise or after they have materialized in communities."). However, spending on preventative programs can yield long-term positive impacts. For example, vaccinations have long been proven a far more cost-effective public health intervention than treating diseases after an outbreak or pandemic. *See* KEOHANE, *supra* note 29, at 162. Additionally, investments in high-quality early childhood education, particularly for low-income children in vulnerable communities, have been shown to not only improve life prospects but also reduce government funding allocated toward remediation services. *Id.* at 163; *see also* Benjamin R. Cox, *Financing Homelessness Prevention Programs with Social Impact Bonds*, 31 REV. BANKING & FIN. L. 959, 968 (2012) (explaining that "[t]he SIB structure redirects money from safety-net programs to more effective early-intervention programs").

31. *See* PETER UTTING, SOCIAL AND SOLIDARITY ECONOMY: BEYOND THE FRINGE?, 6 (Zed Books 2015) ("Ongoing constraints associated with market forces, neoliberal ideology and conditionality have restricted social spending by governments, thereby opening up the space for non-state actors to engage in social service provisioning and 'proximity services.'"). *See also* Leventhal, *supra* note 30, at 523–24; Jonathan Boston, *How to Overcome Political Myopia*, STATECRAFTING (Oct. 11, 2016), https://statecrafting.net/how-to-overcome-political-myopia-73b5567c7179 [https://perma.cc/2WST-3BXE].

stands alongside economic development practitioners, public policy experts, and legal scholars who emphasize its potential for meaningful long-term social impact.[32]

Nevertheless, while the SIB model seems to integrate some of the best features of traditional "place-based"[33] and "people-based"[34] approaches to economic development, as this Article reveals, critical challenges have plagued the development of the SIB model and may hinder its broader adoption by communities across America. Specifically, the SIB is built upon a familiar market-based model of economic development that frequently deprioritizes the role of community stakeholders, hinders democratic engagement, and ultimately stymies long-term social and economic justice. Further, key flaws inherent in the design of the SIB model, including its neoliberal emphasis on market-based economic development strategies and its disregard for the primary role of government in the protection and advancement of the public good, point toward the need for a more progressive economic development framework that can overcome some of the

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32. *See* Jones, *supra* note 20, at 353; *see also* Burand, *supra* note 26, at 450; Shaifali Baliga, *Shaping the Success of Social Impact Bonds in the United States: Lessons Learned from the Privatization of U.S. Prisons*, 63 DUKE L.J. 437, 442–45 (2013); Kevin W. Humphries, *Not Your Older Brother's Bonds: The Use and Regulation of Social-Impact Bonds in the United States*, 76 L. & CONTEMP.PROBS., 433, 435–38 (2014); Pandey et al., *Use of Social Impact Bonds to Address Social Problems: Understanding Contractual Risks and Transaction Costs*, 28 NONPROFIT MGMT. & LEADERSHIP 511, 512–16, 524–26 (2018), https://www.researchgate.net/publication/323387675_Use_of_Social_Impact_Bonds_to_Address_Social_Problems_Understanding_Contractual_Risks_and_Transaction_Costs [https://perma.cc/CJ2J-XQJG].

33. Under this strategy, laws and public policies were crafted to improve the places where marginalized neighborhoods existed, typically providing private investors with economic incentives to build affordable housing for low-income residents and bring commercial opportunities to distressed neighborhoods. For a brief discussion of the history of community economic development programs in America, see generally Roger A. Clay, Jr. and Susan R. Jones, *A Brief History of Community Economic Development*, 18 J. AFFORDABLE HOUSING & COMMUN. DEV. L. 257, 259–65 (2009). However, legal scholars have noted that place-based economic development programs have often led to less than favorable outcomes for minority communities. *See, e.g.*, Audrey G. McFarlane, *Race, Space and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 332 (1999) (explaining that although "urban renewal certainly allowed cities to transform their economies in the light of the disappearance of manufacturing jobs, a great many of the newly created jobs benefitted primarily suburban commuters." Additionally, "urban renewal often eliminated poor and working-class neighborhoods and replaced them with high rise, luxury structures for the more affluent while concentrating public housing sites within black neighborhoods").

34. Observing that place-based programs were often economically inefficient and failed to promote racial integration, some economic development advocates have promoted a "people-based" approach to poverty that focused on helping marginalized families move themselves into low-poverty, "high opportunity" suburbs. *See generally* Greg J. Duncan & Anita Zuberi, *Mobility Lessons from Gautreaux and Moving to Opportunity*, 1 NW. J.L. & SOC. POL'Y 110, 113–19 (2006).

deficiencies of our global capitalist economic system. Such a reimagined economic development framework can help guide the SIB toward achieving lasting social justice.

Part II of this Article begins with a brief overview of the emerging SIB model, discussing the fundamentals of the financial tool and exploring its purpose amidst a dominant pro-business dogma of free-market fundamentalism[35] and a hidebound neoliberal political ideology[36] that have come to define American political and economic life. This part then transitions into a brief political history of the SIB in the U.S., capturing how the persistence, diligence, and innovation of the Obama administration have paved the way for recent SIB legislation under President Donald Trump.

Part III of this Article discusses how the SIB model has been utilized in the criminal justice sector through a discussion of two of the earliest SIB programs: (A) the Peterborough Prison SIB in the United Kingdom; and (B) the Rikers Island Prison SIB in the United States. Part III then explores some of the potential opportunities offered by the SIB model, including: (A) the expansion of investment capital for social innovation; (B) the transfer of investment risk from the public sector to the private sector; and (C) the prioritization of evidence-based preventative social welfare programs.

Part IV follows by touching on some of the challenges facing the future of SIBs, including: (A) the transaction complexity of SIB deals, which may hinder their feasibility for under-resourced governments; (B) the execution risks that arise during the implementation of complex SIB deals, which vary based upon the resources of each community and the stakeholders involved; and (C) the political risks associated with SIBs, which can hinder long-term government support and private sector buy-in.

In conclusion, this Article calls for scholars to envision a more progressive economic development framework in the

35. *See* CORNELL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 4–5 (2004) (explaining that free-market fundamentalism renders "money-driven, poll-obsessed elected officials deferential to corporate goals of profit often at the cost of the common good" while placing "a premium on the activities of buying and selling, consuming and taking, promoting and advertising, and devalu[ing] community, compassionate charity, and improvement of the general quality of life").

36. *See* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) (explaining that under neoliberal orthodoxy, "[s]tate interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signal (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit").

implementation of the SIB model, one that incorporates a greater emphasis on economic justice and democratic engagement. Much like earlier "place-based" and "people-based" economic development strategies,[37] the new SIB model focuses on providing much-needed social benefits to marginalized communities yet fails to wrestle with much deeper barriers to economic empowerment grounded in historic racial segregation, ongoing racial injustice, and America's unrelenting commitment to a hegemonic, global capitalist system. A more progressive "justice-based" economic development framework guiding SIB implementation would seek to address the fatal flaw of many traditional philanthropic and economic development innovations—they are fundamentally designed to economically benefit the wealthy through marginal improvements in the lives of the poor and do little to change to the status quo of wealth inequality in America.[38] This Article affirmatively rejects the assertion of Andrew Carnegie that a capitalist system that breeds inequality is "beyond our power to alter, and therefore to be accepted and made the best of."[39] Instead, as Ford Foundation President Darren Walker remarks in his reimagined "gospel of wealth" for the 21st century, "we are obligated to strengthen and improve the system of which we are part."[40]

II. THE EMERGENCE OF SOCIAL IMPACT BONDS

Economic development practitioners and socially conscious investors seeking to address urban poverty and other social ills have traditionally relied upon public-private partnerships to develop infrastructure projects in marginalized communities. Many of these projects are still in existence today and in many

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37. *See supra* notes 33–34 and accompanying text.

38. *See* Scott L. Cummings, *Between Markets and Politics: A Response to Porter's Competitive Advantage Thesis*, 82 OR. L. REV. 901, 913 (2003) ("The issue identified by scholars has been that oftentimes subsidies are used to attract development that not only does little for low-income communities, but has dubious overall effects on city-wide prosperity."); *see also* McFarlane, *supra* note 33, at 333 ("Poor inner-city neighborhoods have not benefitted from the economic development going on around them because economic development promotes capital accumulation and mobility that intentionally bypasses poor neighborhoods."); Balgia, *supra* note 32, at 460–61.

39. *See* CARNEGIE, *supra* note 4, at 1–2.

40. Darren Walker, *Toward a New Gospel of Wealth*, EQUALS CHANGE BLOG (Oct. 1, 2015), https://www.fordfoundation.org/ideas/equals-change-blog/posts/toward-a-new-gospel-of-wealth/ [https://perma.cc/T5WA-6Z5H].

ways, have come to define the landscape of urban development policy.[41] However, many of these same advocates have recently begun using similar public-private partnership models to finance new *social* infrastructure projects, tackling a wide range of urban development challenges, from the reduction of recidivism to the development of social welfare services for the homeless and disadvantaged youth. The impact investing community has taken a leadership role in bringing together the public, private, and philanthropic sectors to leverage private investment capital in support of these public-private partnerships. Recent attention has focused on an emerging market-based economic development model, the social impact bond ("SIB").[42] The SIB, a type of "pay-for-success" contract for social welfare programs funded by impact investors,[43] has been declared a promising economic development strategy that can drive much-needed investment capital toward some of the most debilitating and entrenched social welfare problems facing America today.[44]

Under the SIB model, government stakeholders, private foundations, nonprofit organizations, and private investors form contractual partnerships to finance and facilitate social welfare programs in marginalized communities with underserved

41. *See* Burand, *supra* note 26, at 449 ("Governments have long used public/private partnerships to crowd private sector resources—both financial resources and know-how—into building large-scale infrastructure projects.").

42. *See* Emily Gustafsson-Wright & Izzy Boggild-Jones, *Paying for Social Outcomes: A Review of the Global Impact Bond Market in 2017*, BROOKINGS: BLOG (Jan. 17, 2018), https://www.brookings.edu/blog/education-plus-development/2018/01/17/paying-for-social-outcomes-a-review-of-the-global-impact-bond-market-in-2017/ [https://perma.cc/SWL4-E9YH] ("2017 was an exciting year for social and development impact bonds around the globe, with 32 new contracts signed. This brings the total up to 108 contracted impact bonds globally, along with many more in design.").

43. Interestingly, the SIB is not actually a "bond" but a financial tool far similar to bridge financing. *See* Steven Godeke & Lyel Resner, *Building A Healthy and Sustainable Social Impact Bond: The Investor Landscape*, GODEKE CONSULTING 5 (Nov. 2012), http://connecticutcenter.org/site/wp-content/uploads/2013/08/The-Investor-Landscape.pdf [https://perma.cc/7KZV-86RD] (arguing that the term "social impact bond" is a misnomer because SIBs do not share typical bond features such as scheduled principal payments and designated interest rates).

44. *See* JEFFREY LIEBMAN, CTR. FOR AM. PROGRESS, SOCIAL IMPACT BONDS: A PROMISING NEW FINANCING MODEL TO ACCELERATE SOCIAL INNOVATION AND IMPROVE GOVERNMENT PERFORMANCE 29 (2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/02/pdf/social_impact_bonds.pdf [https://perma.cc/9PTG-LSCT] (concluding that "any new policy tool with the potential to accelerate solutions in even a subset of our nation's most pressing social problems is an important breakthrough—one that deserves careful consideration from the policymaking, philanthropic, and investment communities").

populations. Much like the "place-based" Low Income Housing Tax Credit program initiated by President Ronald Reagan,[45] or the various "place-based" development programs instituted under President Bill Clinton, including the Empowerment Zone Program,[46] the HOPE VI program (and later, the Choice Neighborhoods program),[47] and the New Market Tax Credit Program,[48] the SIB model offers private investors an opportunity to profit from strategic investments into the communities of marginalized, low-income Americans. However, the SIB also adopts the ideology of "people-based" economic development strategies. Much like the Gautreaux Assisted Housing Program, which spanned several decades from the '70s into the '90s, and the HUD Moving to Opportunity for Fair Housing program, which was instituted during President George H. W. Bush's administration,[49]

45. Under the Tax Reform Act of 1986, the federal government created the Low-Income Housing Tax Credit program, which provides tax incentives to encourage private developers to create affordable rental housing for low-income Americans. *See* I.R.C. § 42 (2012); *see also* David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537, 537–39 (1998).

46. In 1993, Congress created the Empowerment Zone and Enterprise Cities Demonstration Program, which was designed to create jobs and stimulate business investments in economically distressed urban communities through a combination of grant and tax credits. *See* McFarlane, *supra* note 33, at 296–97. The zones were designed to be areas of democratic governance and participatory community decision-making. *See id.* at 297.

47. Under the HOPE VI program (enacted in 1992 under Section 24 of the Housing Act of 1937, ch. 896, § 24, 50 Stat. 888, 899, *amended by* Quality Housing and Work Responsibility Act of 1998 § 535, 42 U.S.C. § 1437v (2010)) and later the Choice Neighborhoods grant program, the federal government provided public subsidies to private developers to redevelop struggling public housing developments into new high-quality mixed-income developments. *Cf.* U.S. DEP'T OF HOUS. & URB. DEV., *Hope VI Program Authority and Funding History* (Mar. 2007), https://www.hud.gov/sites/documents//DOC_9838.PDF [https://perma.cc/NLP9-TSLQ].

48. Established as part of the Community Renewal Tax Relief Act of 2000, the New Markets Tax Credit Program sought to incentivize commercial and mixed-use real estate investments in distressed, low-income communities through a federal tax credit. Administered by the U.S. Treasury Department's Community Development Financial Institution (CDFI) Fund and allocated by local Community Development Entities (CDEs) across America, the NMTC awarded $1 billion in allocation to CDEs during the first year of the program, enabling investors to reduce their federal tax liability by $390 million (39% of the amount invested into CDEs) over a seven-year period. *See* Janet Thompson Jackson, *Can Free Enterprise Cure Urban Ills?: Lost Opportunities for Business Development in Urban, Low-Income Communities Through the New Markets Tax Credit Program*, 37 U. MEM. L. REV. 659, 692–99 (2007) (discussing the origins of the New Markets Tax Credit Program).

49. *See generally* Greg J. Duncan & Anita Zuberi, *Mobility Lessons from Gautreaux and Moving to Opportunity*, 1 NW. J. L. & SOC. POL'Y 110, 110–22 (2006) (providing an "update on Gautreaux lessons" and comparing "its sister program, Moving on Opportunity").

the SIB model delivers critical resources into the hands of marginalized individuals who need help in their quest toward achieving the American Dream.

Thus, the SIB model seems to strike a middle ground in the historic Community Economic Development ("CED") debate,[50] prioritizing both the private investor and the low-income recipient of invested funds.[51] However, under the SIB model, private investors not only directly fund economic development through their support of social welfare programs administered by service providers, they also bear the financial risks of those impact investments. Indeed, SIB investors are only rewarded with a return on their capital investment if the social welfare programs sponsored by the SIB have been deemed successful.[52] This is noteworthy because the philanthropic community often lacks the necessary investment capital to scale proven social programs or to fill the governmental funding gap during times of fiscal austerity or budgetary constraints.[53] Moreover, when philanthropists fail to provide multi-year funding support, nonprofit service providers often struggle to sustain their social impact efforts.[54] As a result, the SIB has garnered much attention and has been heralded for its multi-stakeholder approach that can help overcome government funding constraints and political divides. While the SIB model is still in its infancy, there has been growing interest across the globe in its potential to address diverse social and economic challenges in education, employment, criminal justice, and social welfare.[55]

50. *See generally* Nestor M. Davidson, *Essay: Reconciling People and Place in Housing and Community Development Policy*, 16 GEO. J. POVERTY L. & POL'Y 1, 5–6 (2009) (discussing the dichotomy between people-based and place-based policies in community development policy).

51. This dichotomy is evident in the historic dialogue between Booker T. Washington and W.E.B. DuBois during the early 1900s over the best strategy to attain economic and political empowerment for formerly enslaved Africans living in emancipated communities across America. *See* Scott Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 410 (2002); *see* Lateef Mtima, *African-American Economic Empowerment Strategies for the New Millennium—Revisiting the Washington-DuBois Dialectic*, 42 HOW. L.J. 391, 401–02 (1999).

52. *See* Jones, *supra* note 20, at 358.

53. *See* Toussaint, *supra* note 13, at 72.

54. *See* Leventhal, *supra* note 30, at 527; *see also* Cox, *supra* note 30, at 970 (noting that "[m]ulti-year contracts allow service providers to do more service providing and less time consuming fundraising").

55. *See supra* note 27 and accompanying text.

Despite its growing popularity, there has been debate regarding the fundamental purpose of the SIB. This, in turn, has influenced the nature of the social welfare programs that have been funded by SIBs. Some impact investors and SIB advocates primarily view the SIB as a platform to fill the funding gap for *existing* social welfare programs.[56] These proven social programs are viewed as safe investments for private investors, much like traditional place-based economic development programs, principally because they are more likely to provide expected returns when they are either scaled or replicated in new communities. Conversely, some investors and advocates have argued that the SIB model should be used to finance *innovative* social programs that would otherwise struggle to obtain funding.[57] While innovative social programs are often riskier for investors because they are based upon unproven methodologies or new theories of poverty alleviation, they often stand to yield transformational, long-term impacts for the communities they serve if they are successful. Many of these innovative programs, taking a page from the people-based approach to economic development, focus specifically on addressing the unique needs of the people living in distressed communities.[58]

Notwithstanding the diversity of perspectives on the purpose of the SIB, the current implementation of this new economic development tool largely reflects a neoliberal political ideology that promotes a market-based approach to economic development, one grounded in a pervasive dogma of free-market fundamentalism.[59] Consequently, while SIB advocates have focused on identifying ways to minimize the financial, political, and execution risks for private investors in an effort to encourage expansion of the social finance tool, they have paid far less attention to how the SIB model can be used to facilitate economic justice, economically empower marginalized communities, and address our country's growing wealth gap.

As described below, the earliest SIBs have been used to

56. *See* Toussaint, *supra* note 13, at 73.

57. *See id.* at 74.

58. This is not to suggest that there cannot be innovative social welfare programs funded by SIBs that focus on empowering communities or addressing community-level issues.

59. *See* WEST, *supra* note 35, at 4–5.

address the issue of prisoner recidivism by providing formerly incarcerated individuals—referred to as "returning citizens" in the criminal justice literature[60]—with educational resources and job counseling to help them successfully reintegrate into society and find gainful employment. Much like the Moving to Opportunity for Fair Housing "people-based" economic development program, the resources offered by these criminal justice SIBs can be viewed as "vouchers" in the hands of returning citizens as they seek a better life outside of prison. However, the market-based design of many SIB programs may obscure opportunities to capitalize on existing community-based assets. Further, they may undermine a critical need to economically empower existing community members in marginalized neighborhoods during the development process.

A. An Overview of Social Impact Bonds

The social impact bond, combining elements of results-based or performance-based financing and public-private partnerships, is a contractual partnership between public and private stakeholders that seeks to direct investment capital toward preventative, forward-looking social welfare programs. In the United States, this represents an opportunity to direct a small percentage of the $43 trillion of assets under management by the private financial sector toward funding social service providers who are implementing social welfare programs in marginalized, underserved communities.[61] By 2016, four years after the first SIB was launched in the United States, U.S. SIBs were supported by $91.9 million in private investments.[62] If private resources continue to be channeled into the impact investing space, there is a potential for up to $1 trillion of commercial capital over the next ten years to be applied toward the development of SIBs.[63]

The traditional SIB model involves six key constituents: (1)

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60. *See* Susan R. Jones, *Representing Returning Citizen Entrepreneurs in the Nation's Capital*, 25 J. AFFORDABLE HOUSING & COMMUN. DEV. L. 45, 46 (2016) (explaining that "[t]his terminology, designed to be non-stigmatizing in the aftermath of punishments and debts paid to society, recognizes the need for returning citizens to reintegrate into their communities, get on with their lives, and become productive members of society").

61. *See* Leventhal, *supra* note 30, at 529.

62. Emily Liner, *Social Impact Bonds: A New Model for Investing in Social Services*, THIRD WAY (Sep. 8, 2016), http://www.thirdway.org/report/social-impact-bonds-a-new-model-for-investing-in-social-services [https://perma.cc/UXB8-7T6P].

63. *See* Jones, *supra* note 20, at 378.

an underserved population; (2) a government entity; (3) impact investors; (4) social service providers; (5) an intermediary organization; and (6) a program evaluator.[64] First, the SIB model requires a marginalized or underserved community that stands to benefit from preventative, forward-looking social services addressing a specific social welfare problem.[65] The community constituents served by SIB programs are typically underserved or marginalized individuals who may or may not receive remedial services from public resources. Second, the SIB model includes a government contracting authority that serves as the outcome payer who commits to paying impact investors a return on their investment based upon the program's successful achievement of predefined performance metrics.[66] Third, the SIB model includes a pool of impact investors—including financial institutions, private investors, private foundations, and mission-driven philanthropists—who are not only interested in earning a financial return on their investments but are also dedicated to funding social programs that service needy populations and provide a social benefit to society.[67] Impact investments provide the necessary capital to finance SIB programs, as well as cover fees associated with managing SIB projects and evaluating their performance after completion. Importantly, impact investors assume the financial risks of SIB investments as they are only repaid if the social programs have successfully met predefined performance metrics after being assessed by an independent program evaluator.[68]

Fourth, the SIB model includes social service providers, frequently nonprofit organizations who are equipped to directly serve the target population and deliver an evidence-based, preventative social program that addresses an important social

64. *See* Laura Callanan et al., *From Potential to Action: Bringing Social Impact Bonds to the US*, MCKINSEY & COMPANY 1, 7 (2012), https://www.mckinsey.com/~/media/McKinsey/Industries/Social%20Sector/Our%20Insights/From%20potential%20to%20action%20Bringing%20social%20impact%20bonds%20to%20the%20US/From%20potential%20to%20action%20Bringing%20social%20impact%20bonds%20to%20the%20US.ashx [https://perma.cc/2JB7-BQVL].

65. *See id.* at 15.

66. *See id.*

67. *See id.* at 14–15.

68. *See id.* at 15–16.

welfare issue linked to governmental cost savings.[69] Fifth, the SIB model includes an intermediary organization that collects the impact investments from private investors, manages the structuring of the SIB deal between the various stakeholders, facilitates the distribution of investment capital to social service providers, coordinates the flow of funds among the SIB stakeholders during the implementation of the program, and assists with the monitoring and general oversight of the SIB's performance throughout its lifecycle.[70] Thus, the intermediary plays a critical and central role in the lifecycle of every SIB. Sixth, the SIB model includes a program evaluator who assesses the success of the social program in meeting predefined performance metrics. Many SIB models include two distinct evaluator roles: (1) an independent program evaluator who is responsible for assessing whether the social service provider has met the predefined performance metrics; and (2) an evaluation advisor who helps establish and define assessment metrics and provides ongoing monitoring of the progress of SIB programs during the lifecycle of their implementation.[71]

Although the development process for a SIB transaction is unique to every deal, the SIB typically goes through four stages of development. First, the stakeholders conduct a feasibility study, which both defines the characteristics of the social problem impacting the target population and determines the feasibility of the SIB program based upon predefined assessment criteria. To determine the feasibility of a SIB, stakeholders look for (1) outcome metrics that are both measurable and meaningful predictors of the long-term economic impacts of public expenditures; (2) a reasonable time horizon to achieve the stated outcomes that align with the goals of impact investors;[72] (3) evidence that service providers can achieve the stated outcomes through their social programs; and (4) the appropriate political and legal conditions to facilitate a successful SIB program in a

69. *See* Gustafsson-Wright et al., *supra* note 21, at 24, 29–31, 43–45 ("Service providers are said to be motivated to join a SIB because it provides them with a stable, long-term revenue stream, allowing them to achieve outcomes, and because a SIB might allow them to scale a program.").

70. *See id.* at 8.

71. *See* Callanan et al., *supra* note 64, at 41.

72. *See, e.g.*, Burand, *supra* note 26, at 456 n.21.

particular jurisdiction.[73]

Secondly, the SIB deal is structured by lawyers and impact investment professionals, an arduous process that involves raising investment capital, defining the scope of the social intervention, choosing the outcome metrics that establish the evaluation methodology, selecting social service providers, and drafting and negotiating a large volume of complex contracts defining the relationship among all of the stakeholders.[74] The third stage of development is the implementation stage, which involves the provision of social welfare services by service providers and the performance management of the various stakeholders involved in the SIB deal. Finally, the fourth stage of development involves the evaluation of the social program's outcomes and the repayment of impact investors based on how successfully the program achieved the predefined performance metrics.[75]

At the conclusion of successful SIB programs under the current model's formulation, the benefits are typically three-fold: (1) the government constituent reduces the financial risks borne by taxpayers for the funding of social welfare programs, while simultaneously prioritizing evidence-based, forward-looking preventative social programs that offer long-term benefits to marginalized communities;[76] (2) impact investors secure "double-bottom-line" returns on their SIB investments—the achievement of both social goals and financial return; and (3) social service providers gain access to additional investment capital to both scale and sustain multi-year social welfare programs designed to address some of the most debilitating social challenges of our time.[77]

There are two general formulations of the SIB model: (1) the individual transaction model, which structures the SIB deal around a single outcome payment contract; and (2) the fund model, which structures the SIB deal to facilitate multiple outcome payment contracts through a pool of funds designed to address a single social welfare problem.[78] The United Kingdom is a

73. *See* Gustafsson-Wright et al., *supra* note 21, at 4.

74. In some cases, social services providers are procured early in the SIB development process. *See id* at 7.

75. *Id.*

76. *See id.* at 25.

77. *See* Gordon Berlin, *Learning from Experience: A Guide to Social Impact Bond Investing*, MDRC 2 (Mar. 2016), http://www.mdrc.org/sites/default/files/Learning_from_Experience_SIB.pdf [https://perma.cc/2CVB-CZKY].

78. *See* Gustafsson-Wright, *supra* note 21, at 9.

recognized leader in establishing and promoting the SIB model, in part due to its development of several SIB funds that have established a series of SIB transactions addressing employment and social welfare issues.[79] Within the United States, although both the individual transaction and fund models have been explored since the launch of the first SIB in New York City in 2012, there has been greater support for the individual transaction approach.[80] While the fund model has been promoted by the U.S. federal government and various state and local governments as a promising strategy for expansion of SIB programs,[81] it has also faced some political opposition.

B. *A Brief Political History of SIBs in America*

Beginning in 2011 under the administration of President Barack Obama, the U.S. federal government began taking legislative steps to promote the development of SIBs and create the necessary infrastructure for new laws and public policies designed to support SIB programs. In February 2011, President Obama included up to $100 million in his proposed fiscal year 2012 budget to support pilot "pay-for-success" programs targeting issues like recidivism, workforce training, and homelessness.[82] In President Obama's budgetary proposal for fiscal year 2013, a similar request to support pay-for-success initiatives was included with the slightly increased amount of $109 million.[83] Unfortunately, a divided Congress did not approve either of these requests, stalling government action on the development of a robust SIB ecosystem within the U.S.[84]

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79. *See generally Guidance: Social Impact Bonds*, GOV.UK (Nov. 16, 2012), https://www.gov.uk/guidance/social-impact-bonds [https://perma.cc/G54R-RCMN]; *see* Gustafsson-Wright et al., *supra* note 21, at 11, 57.

80. *See* Liner, *supra* note 62; PETER RAMDSDEN, OECD, SOCIAL IMPACT BONDS: STATE OF PLAY & LESSONS LEARNT 6 (OECD 2016), https://www.oecd.org/cfe/leed/SIBs-State-Play-Lessons-Final.pdf [https://perma.cc/WXE5-BTUN].

81. Some states have taken steps to promote the SIB fund model. For example, in Massachusetts, the state government established a Social Innovation Financing Trust Fund to support SIB outcome payments in two separate initiatives. However, the model established in Massachusetts differs from the fund model that is popular in the U.K. because it does not use the rate card process. *See* MASS. GEN. LAWS ANN. ch. 10, § 35VV (Supp. 2013); *see* Burand, *supra* note 26, at 476–78.

82. Sonal Shah & Kristina Costa, *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/ [https://perma.cc/AL4Y-QZPR].

83. *Id.*

84. *See id.*

In its 2014 fiscal year budgetary proposal, President Obama's administration again advocated for the development of SIBs, requesting nearly $500 million in appropriations to support pay-for-success programs. This request included a similar proposal as the previous two years and an additional budget request of $300 million to create the Pay-For-Success Incentive Fund at the U.S. Department of the Treasury.[85] The Pay-For-Success Incentive Fund was part of the Social Impact Bond Act (H.R. 4885), which was introduced in June 2014 during the 113th Congress by U.S. Representatives Todd Young (R-Ind.) and John Delaney (D-Md.) with support from additional co-sponsors.[86] The new fund was modeled after the United Kingdom's Social Outcome Fund, which was designed by the U.K. government to "catalyze and test innovative approaches to tackling complex issues using outcomes based commissioning."[87] In July 2014, a companion bill, the Pay for Performance Act (S. 2691), was introduced in the Senate by Senators Michael Bennett (D-Colo.) and Orrin Hatch (R-Utah).[88] This bipartisan support reflected a consensus on the value of bringing private-sector resources to bear toward proven, evidence-based public service programs.

In 2015, bipartisan pay-for-success funding bills designed to expand federal support for state and local SIBs were reintroduced in Congress. Specifically, in March 2015, U.S. Representatives Todd Young (R-Ind.) and John Delaney (D-Md.) introduced the Social Impact Partnerships Act (H.R. 1336), and in April 2015, Senators Michael Bennett (D-Colo.) and Orrin Hatch (R-Utah) introduced the Social Impact Partnership Act (S.1089).[89]

In March 2016, President Obama signed into law the bipartisan Evidence-Based Policymaking Commission Act of 2016 (P.L. 114-140), jointly sponsored by Speaker Paul Ryan (R-Wis.) and Senator Patty Murray (D-Wash.).[90] The commission was tasked with developing recommendations for incorporating

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85. *See id.*

86. *See id.*; H.R. 4885, 113th Cong. (2014).

87. *See* Shah & Costa, *supra* note 82; for more information, see *Commissioning Better Outcomes and the Social Outcomes Fund*, BIG LOTTERY FUND, https://www.biglotteryfund.org.uk/global-content/programmes/england/commissioning-better-outcomes-and-social-outcomes-fund [https://perma.cc/MF69-MKLG] (last visited July 18, 2018).

88. S. 2691, 113th Cong. (2014).

89. H.R. 1336, 114th Cong. (2015); S. 1089, 114th Cong. (2015).

90. Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 144-140, 130 Stat. 317; *H.R. 1831 (114th): Evidence-Based Policymaking Commission Act of 2016*, GOVTRACK, https://www.govtrack.us/congress/bills/114/hr1831[https://perma.cc/5PL9-R7C3] (last visited July 18, 2018).

evidence-based policymaking into the design of federal programs.[91] The commission released a final report, "The Promise of Evidence-Based Policymaking," in September 2017 with recommendations on "(1) how the Federal government can provide the infrastructure for secure access to data, (2) the mechanisms to improve privacy protections and transparency about the uses of data for evidence building, and (3) the institutional capacity to support evidence building."[92]

In January 2017, during the 115th Congress and under the administration of President Donald Trump, building upon the momentum established during the Obama administration, Representatives Pat Tiberi (R-Ohio) and John Delaney (D-Md.) introduced the Social Impact Partnership to Pay for Results Act (H.R. 576) with bipartisan support.[93] In April 2017, Senators Todd Young (R-Ind.) and Michael Bennet (D-Colo.) introduced another version of the bill, the Social Impact Partnerships to Pay for Results Act (S. 963).[94] In June 2017, Representative Adrian Smith (R-Nebr.) introduced the Increasing Opportunity through Evidence-Based Home Visiting Act (H.R. 2824) to reauthorize the Maternal, Infant, and Early Childhood Home Visiting Program, which added a pay-for-success component to the funding allocation.[95] In September 2017, a bipartisan group of senators led by Sen. Chuck Grassley (R-Iowa) introduced the Strong Families Act of 2017 (S. 1829), their version of the reauthorization bill.[96] In October 2017, Speaker Paul Ryan (R-Wis.) and Senator Patty Murray (D-Wash.) introduced the Foundations for Evidence-Based Policymaking Act (H.R. 4174 and S. 2046), the first in a series of legislative actions designed to implement the recommendations of the Commission on Evidence-Based Policymaking.[97]

Four years after its initial introduction under the Obama

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91. *See* Evidence-Based Policymaking Commission Act of 2016, 130 Stat. at 318–19; *see* Nicole Truhe, *State of Play: Pay for Success and Evidence-Based Policy*, AM. FORWARD: BLOG (Dec. 2017), http://www.americaforward.org/state-play-pay-success-evidence-based-policy-december-2017/ [https://perma.cc/G4D2-5WKN].

92. COMM'N ON EVIDENCE-BASED POLICYMAKING, THE PROMISE OF EVIDENCE-BASED POLICYMAKING (2017), https://www.govexec.com/media/gbc/docs/pdfs_edit/090617cc1.pdf [https://perma.cc/T9AA-NDFK].

93. *See* Truhe, *supra* note 91; H.R. 576, 115th Cong. (2017).

94. *See* Truhe, *supra* note 91; S. 963, 115th Cong. (2017).

95. *See* Nicole Truhe, *State of Play: Pay for Success and Evidence-Based Policy, February 2018*, AM. FORWARD: BLOG (Mar. 1, 2018), http://www.americaforward.org/state-play-pay-success-evidence-based-policy-february-2018/ [https://perma.cc/6XTT-RVVL]; H.R. 2824, 115th Cong. (2017).

96. *See* Truhe, *supra* note 91.

97. *See id.*; H.R. 4174, 115th Cong. (2017); S. 2046, 115th Cong. (2017).

administration, the Social Impact Partnerships to Pay for Results Act was finally included as Section 50801 of the Bipartisan Budget Act of 2018 and was signed into law by President Trump on February 9, 2018.[98] One of the first statutory deadlines is associated with naming members to the Commission on Social Impact Partnerships.[99] Additionally, the reauthorization of the Maternal, Infant, and Early Childhood Home Visiting Program, including its pay-for-success provision, was included as Section 50601 of the Bipartisan Budget Act of 2018.[100] The Trump administration's most recent fiscal year 2019 budget proposal includes a chapter entitled "Building and Using Evidence to Improve Government Effectiveness," which includes various ideas and themes from the Commission on Evidence-Based Policymaking's final report.[101]

In addition to requesting funding through the appropriations process, the federal government under the Obama administration took substantive steps to encourage innovation in the financing and implementation of social welfare programs. In 2009, the Obama administration created the Office of Social Innovation and Civic Participation "to advance opportunity, equality, and justice by creating a more outcomes-driven government and social sector."[102] In April of that same year, President Obama signed into law the Edward M. Kennedy Serve America Act, which established the White House Social Innovation Fund ("SIF") within the Corporation for National and Community Service, a "nearly $1 billion social impact incubator . . . creating more than 450 public-private partnerships that deliver high-impact, community-based solutions that work."[103] The SIF launched its first competition in

98. *See* Truhe, *supra* note 95; H.R. 1892, 115th Cong. (2017).

99. *See State of Play: Pay for Success and Evidence-Based Policy,* AM. FORWARD: BLOG (May 2018), http://www.americaforward.org/state-of-play-pay-for-success-and-evidence-based-policy-may-2018/ [https://perma.cc/S8WK-C8UZ] [hereinafter *State of Play: Pay for Success and Evidence-Based Policy*].

100. *See* Truhe, *supra* note 95; H.R. 1892, 115th Cong. (2017).

101. *See* Truhe, *supra* note 95.

102. *Office of Social Innovation and Civic Participation*, WHITE HOUSE, https://obamawhitehouse.archives.gov/administration/eop/sicp [https://perma.cc/5QB8-5JAU] (last visited Sept. 6, 2018).

103. *See Federal Agency Announces $13 Million in Funding to Support Pay for Success Projects*, CORPORATION FOR NAT'L & COMTY SERV. (Nov. 3, 2016), https://www.nationalservice.gov/newsroom/press-releases/2016/federal-agency-announces-13-million-funding-support-pay-success [https://perma.cc/9KHV-J9YT]; Christi Goldfuss & David Wilkinson, *Pay for Success: New Resources for Better Conservation Outcomes*, WHITE HOUSE (Dec. 17, 2015), https://obamawhitehouse.archives.gov/blog/2015/12/17/pay-success [https://perma.cc/34Q2CPF3]; *Social Innovation Fund*, WHITE HOUSE,https://obamawhitehouse.archives.gov/administration/eop/sicp/initiatives/social-innovation-fund [https://perma.cc/43PC-NME5] (last visited July 21, 2018) [hereinafter *Social Innovation Fund*].

April of 2010, awarding 11 intermediary grantees that funded more than 150 sub-grantees serving low-income communities.[104] In 2014, the White House SIF awarded grants to eight organizations to promote the development of SIBs in the U.S., including the Harvard Kennedy School's Social Impact Bond Technical Assistance Lab.[105]

President Obama's 2016 fiscal budget included $70 million dollars allocated toward the SIF and proposed that 20% be made available for pay-for-success projects.[106] In April 2016, the Corporation for National and Community Service announced 25 SIB pay-for-success competition sub-awards.[107] There have also been a few recent initiatives funded by SIF. Through a three-year, $2.4 million SIF grant issued in 2016, Third Sector Capital Partners, Inc. and Actionable Intelligence for Social Policy (AISP) at the University of Pennsylvania are providing several governments with technical assistance to develop evidence-based social programs.[108] Additionally, Social Finance announced the second round of the Outcomes Rate Card Development Competition, and JPAL North America announced the third round of the J-PAL State and Local Innovation Initiative, both designed to incentivize governments to create new pay-for-success-programs.[109]

Other governmental agencies have also begun to incorporate the SIB framework into their grant programs, including the Department of Justice, the Department of Labor, the Office of Management and Budget, the Department of Housing and Urban Development, and the Department of Education.[110] Alongside the

104. *Social Innovation Fund*, *supra* note 103.

105. *See* Gustafsson-Wright et al., *supra* note 21, at 34.

106. *See* CORP. FOR NAT'L & COMMUNITY SERV., CONGRESSIONAL BUDGET JUSTIFICATION: FISCAL YEAR 2016 6, 45, 94–95 (Appendix 1) (2016), https://www.nationalservice.gov/sites/default/files/page/cncs_2016_CBJ_Final.pdf [https://perma.cc/PE4B-X2EF].

107. *See* Truhe, *supra* note 91.

108. *See* Emily Wood, *Third Sector and AISP Partner with Five Governments to Improve Outcomes for Vulnerable Families and Children*, THIRD SECTOR CAP. PARTNERS (Sept. 27, 2017), https://www.thirdsectorcap.org/news/third-sector-and-aisp-partner-with-five-governments-to-improve-outcomes-for-vulnerable-families-and-children/ [https://perma.cc/X78U-NNF8].

109. *See* Truhe, *supra* note 91.

110. The U.S. Department of Justice offered "priority consideration" for Second Chance Act grant applicants in fiscal year 2012 that incorporated pay-for-success program models in their application. *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PAY FOR SUCCESS AND THE DEPARTMENT OF JUSTICE'S SECOND CHANCE ACT PROGRAMS NONPROFIT FINANCE FUND AND DOJ WEBINAR RECORDING, FREQUENTLY ASKED QUESTIONS (FAQS) 1 (2012), https://www.bja.gov/Funding/12PayforSuccessFAQ.pdf [https://perma.cc/S8GR-GLLR]. In 2013, the U.S. Department of Labor announced a $24

wide-ranging efforts of the federal government to develop a SIB ecosystem in the U.S., various state and local jurisdictions have also explored the SIB as a promising CED tool to address poverty and other social challenges impacting marginalized communities.[111] Nevertheless, despite praiseworthy efforts by the government at both the federal and state levels, the SIB model has not yet been widely endorsed as a tool to empower marginalized communities, nor as a dominant strategy to address systemic social and economic inequality.

C. *The Purpose of Social Impact Bonds*

There are competing ideas about the fundamental purpose of the social impact bond. Scholars have divided SIB programs into three general categories: (1) *untested*, *innovative* social welfare programs; (2) *existing* social welfare programs with *mixed results* about their effectiveness when implemented on a limited, large scale; and (3) *existing* social welfare programs with *very strong evidence* of success and the likelihood of greater social impact

million Workforce Innovation Fund to fund pilot pay-for-success programs that provide employment services to returning citizens. *See News Release: US Labor Department Awards Nearly $24 Million in Pay for Success Grants*, U.S. DEP'T OF LABOR (Sept. 23, 2013), https://www.dol.gov/newsroom/releases/eta/eta20131936 [https://perma.cc/89YV-NYBV]. Also, in 2013, the U.S. Department of Housing and Urban Development announced that it would provide up to $5 billion in grant dollars to assist with redevelopment efforts in the areas impacted by Hurricane Sandy and encouraged the five impacted states to incorporate pay-for-success strategies where applicable. *See* Jonathan Greenblatt, *Building a Smarter, More Efficient Government through "Pay for Success"*, WHITE HOUSE (Nov. 20, 2013), https://www.whitehouse.gov/blog/2013/11/20/building-smarter-more-efficient-government-through-pay-success [https://perma.cc/TLW6-CYTA]. In October 2017, the Department of Education released a Pay for Success Feasibility Toolkit. *See* U.S. DEP'T OF EDUC., PAY FOR SUCCESS FEASIBILITY TOOLKIT: CONSIDERATIONS FOR STATE AND LOCAL LEADERS (2017), https://www2.ed.gov/about/inits/ed/pay-for-success/pay-for-success-toolkit.pdf [https://perma.cc/4MWT-BJYQ].

111. Washington D.C. and 29 states have explored pay-for-success programs. *See Pay for Success Activity Map*, NONPROFIT FIN. FUND, http://www.payforsuccess.org/activity [https://perma.cc/LX2Y-YK7U] (last visited July 22, 2018). Currently, over 20 pay-for-success projects have been launched in the United States, with the most recent projects in Alameda County, Cal., Los Angeles County, Cal., Ventura County, Cal., and King County, Wash. *See* Truhe, *supra* note 91; *see Chicago Child-Parent Center Pay for Success Initiative*, NONPROFIT FIN. FUND , http://www.payforsuccess.org/project/chicago-child-parent-center-pay-success-initiative [https://perma.cc/6MMF-MZ5G] (last updated Oct. 17, 2017); *see Utah High Quality Preschool Program*, NONPROFIT FIN. FUND, http://www.payforsuccess.org/project/utah-high-quality-preschool-program [https://perma.cc/8YWR-5STE] (last updated July 2, 2018). Additionally, some state legislatures have considered establishing pay-for-success funds to support future pilot projects. *See State of Play: Pay for Success and Evidence-Based Policy*, *supra* note 99. Colorado recently passed legislation to establish a pay-for-success fund to support three pilot projects targeting youth involved in child welfare and criminal justice systems. *Id.*

when operated at a larger scale.[112] The types of social welfare programs that are ultimately funded by SIBs reflect the risk appetite of impact investors as they seek to balance financial risks with opportunities for social reward.[113]

Some impact investors view SIBs primarily as a funding platform for *innovative*, *unproven* social welfare programs that merit testing on a larger scale but are unlikely to be funded by government stakeholders because of their high-risk profile.[114] These SIB investors prioritize risky investments, much like venture philanthropists and private equity investors, principally because such investments offer the prospect of large returns. This perspective is not without its benefits. Meaningful social progress for marginalized populations undoubtedly requires new ideas and unproven, yet promising, development strategies. Further, the private sector is potentially in the best position to bear the financial risk of unproven social programs because of its access to market capital. This investment strategy can also save governments from using limited taxpayer dollars to fund social welfare programs that may prove to be ineffective, while still encouraging the kind of social innovation that yields long-term benefits for society.[115]

However, there are some impact investors and SIB advocates who alternatively view the SIB model as a new tool to help governments meet the funding gap for *existing*, *proven* social welfare programs with strong evidence for success.[116] Under this

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112. *See* Berlin, *supra* note 77, at 9.

113. There has been variety on how SIBs are structured globally that reflects an appetite for financial risk versus a commitment to social rewards. The investment structures of existing SIBs vary in their similarity to debt—meaning, a more conservative investment with fixed repayment timelines and interest rates—versus equity—meaning, a riskier investment structure where repayment and interest rates are impacted by the performance of the fund recipient. While in the United States many SIBs have been structured like debt instruments, in the United Kingdom, many SIB deals are structured like equity investments. As a result, SIBs in the U.S. tend to include a larger upfront capital commitment from investors, whereas in the U.K., capital recycling is more common, meaning that early payments to funders are reinvested into the SIB program to help finance ongoing operating costs. Additionally, SIB deals in the U.S. tend to include subordinate investments, grants, and investment guarantees more frequently than in other countries. *See* Gustafsson-Wright et al., *supra* note 21, at 15–16.

114. *See* Berlin, *supra* note 77, at 8–9.

115. *See* Max Liang et al., *An Overview of Social Impact Bonds*, 13 J. INT'L BUS. & L. 267, 273 (2014).

116. Impact investors exhibit diverse expectations for financial and social return. While some impact investors are staunchly "impact" oriented and willing to sacrifice financial returns to achieve social gain, others believe that their financial returns should not be sacrificed when investing in social programs. *See* YASMIN SALTUK ET AL., J.P. MORGAN GLOB. SOC. FIN., PERSPECTIVES ON PROGRESS: THE IMPACT INVESTOR SURVEY,

conception of SIBs, the model provides investment capital for low-risk, proven social welfare programs that can benefit communities when operated at scale, while also providing expected returns for impact investors.[117] This investment strategy is similar to that adopted by many traditional CED lenders who seek to empower marginalized communities through established, market-driven government programs that offer guaranteed returns or predefined tax benefits to investors.[118]

Although seemingly less risky for impact investors, the strategy of prioritizing *proven* programs has its shortcomings. While it may attract a large volume of investments from the private sector, it can obscure the role of the government as the primary advocate for, and protector of, the public welfare. By privatizing the provision of social welfare services that are typically managed by governmental constituents, the government may unintentionally empower the private sector to dictate the landscape of social welfare issues that receive public funding. As a result, politically unpopular or challenging social welfare services that offer uncertain financial returns for impact investors, or that lack clear solutions that can be easily translated into evidence-based social welfare programs with quantifiable performance metrics, may be overlooked and remain underfunded.[119]

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30 (2013), https://thegiin.org/assets/documents/Perspectives%20on%20Progress2.pdf [https://perma.cc/3D6U-HLSZ] (noting that nearly two-thirds of the 99 impact investors surveyed target market financial returns for their impact investments); *see* Burand, *supra* note 26, at 461–62; *see also* Paula Lantz & Samantha Iovan, *When Does Pay-for-Success Make Sense?*, STAN. SOC. INNOVATION REV. (Dec. 12, 2017), https://ssir.org/articles/entry/when_does_pay_for_success_make_sense# [https://perma.cc/G2KZ-L7L7] ("It is difficult to justify the resources, risks, and opportunity costs of PFS initiatives when an intervention has no evidence base or when existing evidence raises red flags about the impact of a program.").

117. While SIBs were historically conceptualized as a vehicle to finance innovative new approaches to complex social problems, in practice, many of the early SIB deals have focused on supporting programs that offer strong evidence of success. *See* Berlin, *supra* note 77, at 9. Both the Peterborough SIB and the Rikers Island SIB prioritized service providers with a proven track record of success. *See generally* SOC. FIN., THE ONE* SERVICE. ONE YEAR ON 7, 9 (2011), https://www.socialfinance.org.uk/sites/default/files/publications/sf_peterborough_one-_year_on.pdf [https://perma.cc/YZJ8-GX6E] (explaining the One Service program funded by the Peterborough SIB); *see also Adolescent Behavioral Learning Experience (ABLE)*, N.Y.C. DEP'T OF CORR., http://www.nyc.gov/html/ymi/downloads/pdf/able.pdf?epi-content=GENERIC [https://perma.cc/Z6ZN-MKGE] (last visited July 19, 2018) (teaching more about the service program at Rikers Island). Additionally, SIB deals have structured returns for investors that are more similar to those expected from typical bond deals. *See* Berlin, *supra* note 77, at 9. Of course, scaling "proven" service programs can still introduce many risks.

118. For example, program-related investments and community loans under the Community Reinvestment Act. *See* Berlin, *supra* note 77, at 8.

119. *See* Stephen Sinclair et al., *Social Impact Bonds: Shifting the Boundaries of Citizenship*, *in* SOCIAL POLICY REVIEW 26: ANALYSIS AND DEBATE IN SOCIAL POLICY 119,

Replicating *proven* social welfare programs in different communities (or in different populations within an existing community) may provide great value to local or state governments by freeing taxpayer dollars to support more innovative public programs.[120] Indeed, this may account for the growing interest in using the SIB model to help scale proven solutions to social problems.[121] Nevertheless, a critical question emerges: should the private sector be responsible for sustaining *proven* social welfare programs into the foreseeable future, or should the ongoing funding of public welfare programs fall under the job description of government entities funded by taxpayer dollars? If the answer lies in the latter camp, impact investors who seek the safer risk profile of *proven* social welfare programs may in fact hinder the development of innovative, disruptive SIB programs that can challenge the systemic social and economic inequities that plague our country.[122]

D. The Ethics of Social Impact Bonds

As we explore the implications of privatizing the delivery of some public services through the SIB model, a discussion of the role of government in the provision of social welfare services is useful. After the financial crisis of 2008, governments across the globe expressed increased interest in outsourcing the funding and delivery of critical social services.[123] However, support for outsourcing public services to the private sector is mixed. A longstanding challenge facing social justice advocates has been identifying how to finance innovation in public welfare service

125–26 (Kevin Farnsworth et al. eds. 2014) ("Assessing performance in relation to outcomes rather than narrower indicators does not resolve this problem nor address the incentive to game playing—focusing on meeting formal performance targets rather than substantive issues—and shaping services to meet the terms of a contract rather than the needs of clients. SIBs could encourage investors to focus on policy areas that have more readily measurable results . . . and encourage a focus on the 'low hanging fruit.'" (citation omitted)).

120. *See id.* at 123 ("SIBs allow governments 'to privatize the up-front costs of social innovations and the associated risks, thus reducing taxpayer expenditures in the short-term and eliminating the risk of government money being spent on interventions which do not deliver the desired outcomes.'" (citation omitted)).

121. *See* Emily Gustafsson-Wright et al., *supra* note 21, at 24–32.

122. Arguably, the SIB is not designed to be a "safe" investment for impact investors. Both the Peterborough SIB and the Rikers Island SIB offered their investors the least attractive features of both debt and equity investments, notwithstanding efforts to mitigate investment risk through creative contract negotiation. *See* Burand, *supra* note 26, at 459–60.

123. For example, the U.K. Cabinet Office's Green Paper, *Modernising Commission*, reaffirmed the government's commitment to pay-for-success programming. This in turn inspired the creation of the Centre for Social Impact Bonds and the establishment of a £20 million Social Outcomes Fund. *See* Sinclair et al., *supra* note 119, at 119.

delivery, while coming to consensus on the underlying public policy values that guide their development and implementation.[124] On the one hand, there is a prevailing assumption embedded in the SIB model that private sector stakeholders can more effectively coordinate and manage social welfare services than cash-strapped and legislatively constrained governmental actors. On the other hand, this viewpoint undermines the complex nature of public services, which are concerned with more than simply quantitative assessments and instrumental programmatic goals. Indeed, public services also reflect "statements about ideals of citizenship, fraternity and solidarity, which mark the social fabric of a society."[125]

Critical scholars have recently begun to explore how the SIB model raises ethical and moral concerns for democratic governments.[126] Employing a Kantian deontological system of ethics, where actions are viewed as being morally impermissible if they do not treat persons with "respect,"[127] one may question whether it is in fact wrong for someone to profit directly from the human suffering of another individual, particularly in a way that undermines the autonomy of the program participants.[128] SIB

124. *See id.* at 127 ("Social Impact Bonds raise the question of what qualifies as a 'public' or 'private' welfare service, and indeed whether this distinction is anything other than a technicality.").

125. *See id.* at 129.

126. *See generally* Emma Dowling, *In the Wake of Austerity: Social Impact Bonds and the Financialization of the Welfare State in Britain*, 22 NEW POLITICAL ECON. 294, 297–98 (2016), http://dx.doi.org/10.1080/13563467.2017.1232709 [https://perma.cc/B5UP-J7QH]; Emma Dowling & David Harvie, *Harnessing the Social: State, Crisis and (Big) Society*, 48 SOCIOLOGY 869 (2014) (explaining that government social investment market policies aimed at resolving a global crisis in ways that empower local communities actually foster further financialization and a deepening of capitalist disciplinary logics into the social fabric); Sinclair et al., *supra* note 119; Neil McHugh et al., *Social Impact Bonds: A Wolf in Sheep's Clothing?*, 21 J. OF POVERTY & SOC. JUST. 247, 250–51 (2013) (investigating the moral question about what role the market should play in society in relation to social problems); Alex Nicholls & Alex Murdock, *The Nature of Social Innovatio*n, *in* SOCIAL INNOVATION: BLURRING BOUNDARIES TO RECONFIGURE MARKETS 1 (Alex Nicholls & Alex Murdock, eds., 2012) (discussing social innovation broadly conceived in the context of social entrepreneurship and social enterprise in their global context).

127. *See* Julia Morley, *The Ethical Status of Social Impact Bonds* 12–13 (unpublished manuscript), https://static1.squarespace.com/static/56573087e4b0f60cdba13509/t/58eb6db b5016e13683134b58/1491824060500/The-ethics-of-SIBs-submission-April-2017.pdf [https://perma.cc/AWM4-KZTV] ("Whereas the theory of expected utility requires decision-makers to be hyper-rational, we can realistically this assumption in practice to say that agents must have well-informed expectations of the outcomes of their actions. This is consistent with work by moral philosophers and social theorists who have argued that certain kinds of activities, such as healthcare, do not lend themselves to marketisation without the risk of moral problems arising.").

128. Indeed, the earliest SIB investors of the Peterborough SIB and the Rikers Island SIB relied upon the existence of prisoners and the involuntary participation in

advocates have traditionally responded to such concerns by emphasizing the benefits of the SIB model to social welfare delivery, justifying the morally questionable profits earned by its social investors on consequentialist ethical grounds[129]—the means of social welfare delivery are justified by the measurable benefits to individuals and society in terms of social welfare or utility. When viewed through a utility-maximization lens,[130] the profit motive imbedded in the SIB model serves to facilitate efficient resource allocation, meet consumer needs, and compensate private stakeholders for the risks associated with their investments. These utilitarian arguments hinge on the presumption that free markets can spur economic growth, which ultimately leads to a higher level of aggregate utility for all.

Conversely, some moral philosophers have criticized consequentialist theories of ethics, noting that different methods of carrying out an action often determine the nature of the outcome. For example, when private-sector stakeholders carry out public services, the outcomes may be significantly different than when executed by the government, even if aggregate utility appears to have increased. American philosopher Debra Satz provides guidance on identifying the characteristics of ethical or "moral" markets, as well as the signs of unethical or "noxious" markets, by observing their distributional effects.[131] According to Satz, an increase in aggregate utility may nevertheless lead to a morally problematic distribution of welfare when there are asymmetries in information among decision-makers regarding the consequences of the transaction or when there is an imbalance of power between market participants.[132] Market participants should be equipped with information about the likely outcomes of their actions that can empower them to make utility-maximizing decisions.[133] Further, there should be an equality of power among

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rehabilitation programs to make a financial return from their social investments. *Id.*; Abram Olmstead, *Rikers Island Tackles Rearrest Rate with Social Impact Bond—a U.S. First*, FREE ENTERPRISE (Feb. 24, 2014), https://www.freeenterprise.com/rikers-island-tackles-rearrest-rate-countrys-first-social-impact-bond/ [https://perma.cc/MM2K-3MSJ].

129. *See* Morley, *supra* note 127, at 9–10.

130. *See id.* at 10 n.10 ("Those who think that mere aggregation fails to capture every aspect of moral significance often favour some version of *prioritarianism*, the view that the goodness of an outcome depends upon the well-being of all individuals, but where extra weight is given to those who are worse off.").

131. DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS 92–97 (2010).

132. *See id.* at 97–98.

133. However, research demonstrates that decision-makers routinely make choices that are inconsistent with rational choice theory because they are subject to biases, framing effects, subjective preferences and heuristics. Thus, even with adequate information, it is

market participants. Whether or not these market conditions are attainable in the context of social welfare services,[134] especially when those services are financed by SIBs,[135] the discussion suggests that the inherent vulnerability of SIB constituent populations—who are typically uninformed about the financing details of SIB programs and lack power to make any decisions related to their participation[136]—may undermine the moral legitimacy of the SIB marketplace.

By perpetuating the privatization of public services, the current SIB model may in fact erode the ability of governments to uphold the values and ideals of democratic citizenship, including "direct public and democratic accountability for welfare entitlements."[137] Further, by failing to meaningfully consider the implications of the current market-based SIB model for the importance of citizens' rights in public welfare provision, SIB advocates may in fact reinforce a neoliberal, pro-business approach to public service delivery that shifts "the morality of welfare provision" and "changes the status of the service user from a citizen entitled to support into a commodity processed for profit."[138] Consequently, under the current SIB framework, public service becomes "de-moraliz[ed]," and economic development becomes decreasingly about delivering a vision of ethical democratic life grounded in solidarity and more about maximizing private interests to advance collective benefit.[139]

Satz also notes that moral markets have two key outcomes: (1) no harm is done to individuals and (2) no harm is done to society

uncertain whether actors will make utility-maximizing decisions. *See generally* Herbert A. Simon, *Rationality as a Process and as Product of Thought*, *in* DECISION MAKING: DESCRIPTIVE, NORMATIVE AND PRESCRIPTIVE INTERACTIONS 58, 60–61, 66–68 (David E. Bell et al. eds., 1988).

134. *See* Morley, *supra* note 127, at 12–13 ("Whereas the standard theory of expected utility requires decision-makers to be hyper-rational, we can realistically relax this assumption in practice to say that agents must have well-informed expectations of the likely outcomes of their actions. This is consistent with work by moral philosophers and social welfare theorists who have argued that certain kinds of activities, such as healthcare, do not lend themselves to marketisation without the risk of moral problems arising.").

135. *See id.* at 15 (noting that a cost-benefit analysis of the current SIB model may lead advocates to question "whether the spillover of knowledge from the private sector to the social sector, or the transfer of risk from the public sector to the private sector, can be achieved in some other way").

136. *See id.* at 13, 19 ("Markets characterized by 'very weak or highly asymmetric knowledge and agency' of participants are likely to be noxious," and "[a] crucial piece of information that may not be made clear to the individuals who are intervened upon by the SIB is that they are effectively a profit-centre for private investors." (citations omitted)).

137. *See* Sinclair et al., *supra* note 119, at 129.

138. *See id.* at 131.

139. *See id* at 131–32.

overall.[140] Regarding the first outcome, while on its face the SIB seems to offer great benefits to its constituent populations, the embedded profit motive that drives, at least in part, the decision-making of impact investors may in fact reinforce short-term, incremental solutions, while deprioritizing opportunities for more meaningful systems change. Leading philanthropists have already noted the dangers of investing without an intentional focus on systemic change.[141] Furthermore, the pervasive neoliberal, market-based approach to economic development may hinder the adoption of alternative economic frameworks that seek to shift development programs away from capitalism and toward more communitarian economic models that can more effectively advance economic justice.[142] Simply put, private investors may be less inclined to radically shift an economic system that serves as the foundation of their profit model because they would be acting against the best interests of the company[143]—long understood by economists to be the maximization of shareholder wealth.[144]

Regarding Satz's second outcome of moral markets, it is unclear whether the SIB model may harm society overall. The design of the early criminal justice SIBs, for example, implies that the motivation for investing in the rehabilitation of incarcerated individuals need not be the achievement of broad-based democratic engagement or community, social, and economic empowerment, but can simply be the prospect of private profit for

140. *See* SATZ, *supra* note 131, at 94–95.

141. *See* Walker, *supra* note 2 (arguing that "*giving back* is necessary, but not sufficient. We should seek to bring about lasting, systemic change, even if that change might adversely affect us. We must bend each act of generosity toward justice").

142. For example, the "social and solidarity economy" has been declared a promising new approach to economic life that is participatory, inclusive and grounded in a concern for community empowerment. *See* UTTING, *supra* note 31, at 6 ("This umbrella term is increasingly used to refer to forms of economic activity that prioritize social and often environmental objectives, and involve producers, workers, consumers and citizens acting collectively and in solidarity. The broadening field of SSE involves not only traditional 'social economy' or 'third sector' organizations and enterprises such as cooperatives, mutual associations, grant-dependent and service-delivery non-governmental organizations (NGOs), and community and other forms of volunteering and giving, but also myriad types of self-help groups organizing to produce goods and services, fair trade networks and other forms of solidarity purchasing, consumer groups involved in collective provisioning, associations of 'informal economy' workers, new forms of profit-making social enterprises and social entrepreneurs, and NGOs that are having to shift from a dependence on donations and grants to sustaining themselves via income-generating activities.").

143. *See* Morley, *supra* note 127, at 23–24 ("This is because profit-seeking organisations will inevitably focus on improving the existing system—a system that is consistent with their own long-term success—rather than making fundamental changes that may conflict with their desire to maintain the status quo.").

144. *See generally* MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS, 22–23 (Univ. of Chi. Press ed., 1953).

savvy social investors. The integration of financial incentives for the private sector into the delivery of public services—a marketization of social welfare service delivery—runs the risk of undermining the moral and ethical value of governmental, nonprofit, and philanthropic organizations dedicated to civic missions.[145] Taken to its logical conclusion, what happens to the much-needed SIB program that is unable to turn a financial profit for impact investors? Is it simply abandoned as a failure, even if it makes an impact that is difficult to quantify in monetary terms? Further, the work of staff at social service organizations may suffer if their intrinsic motivation for public service work and personal identities as public servants are negatively influenced by an awareness of their role in delivering profits to external financial stakeholders.[146] This, in turn, may compromise the long-term effectiveness of some social welfare programs.

One might conclude that the purpose of the SIB is not true innovation at all but merely to perpetuate an increasingly neoliberal approach to governance. While the SIB model seemingly strikes a balance between place-based and people-based economic development strategies by providing resources to marginalized populations in the communities where they live, it nevertheless sustains a dogma of free-market fundamentalism that grew to prominence under President Ronald Reagan; continued into the Bush, Clinton, and Obama eras; and remains a salient force in economic life today under the Trump administration.[147] This ideology builds upon a political and

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145. *See* Daniel Edmiston & Alex Nicholls, *Social Impact Bonds: The Role of Private Capital in Outcome-Based Commissioning*, 47 J. SOC. POL'Y 57, 72 (2018) (arguing, "the marketization introduced through private social investment, runs the risk of undermining 'the distinctive contributions that nonprofit organizations make to creating and maintaining a strong civil society' through value-driven services, advocacy, voluntarism, community-focused social networks and civic participation") (quoting Angela M. Eikenberry & Jodie Drapal Kluver, *The Marketization of the Nonprofit Sector: Civil Society at Risk?*, 64 PUB. ADM. REV. 132, 132–40 (2004)).

146. Julian Le Grand, *Knights and Knaves Return: Public Service Motivation and the Delivery of Public Services*, 13 INT'L PUB. MGMT J. 1, 59 ("For those who are motivated to perform effectively by internal factors, such as their sense of professional duty and their altruistic concern for the welfare of the people they were serving, the use of external rewards or penalties at best leads to discouragement and demoralisation, and at worst actively promotes damaging, self-interested behavior.").

147. Indeed, during the 1990s, advocates and scholars continued to advocate for development strategies centered on enabling the private sector to create businesses in distressed neighborhoods. It was often presumed, couched in stereotype and a disregard for the impact that structural shifts in a community can have on low-income residents, that "[g]iven the workforce, low-skill jobs are realistic and economically viable . . . . Over time, successful job creation will trigger a self-reinforcing process that raises skill and wage levels." Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV.

economic theory that upholds the belief that human well-being and social innovation can best be achieved by promoting entrepreneurial freedom in a libertarian system of limited state intervention, one that fosters strong private property rights, intellectual property rights, free markets, individualism, and personal responsibility.[148]

Additionally, there may be power dynamics at play that call into question the ethical dimension of SIBs. Scholars have argued that our nation's turn away from the Keynesian fiscal and monetary policies embodied in President Lyndon B. Johnson's Great Society,[149] and toward supply-side solutions to the economic stagflation of the 1970s,[150] was driven to some degree by a desire to restore or "reconstruct" the class power of economic elites that came under attack during the Civil Rights Movement.[151] Under this bold theory, our market-based approach to economic development was intentionally designed to establish the necessary conditions for capital accumulation by the economic elite and not to address the increasing problem of concentrated wealth and power among a small segment of our capitalist society.[152] If this is indeed true, then the notion of liberating the market economy to correct market failures is coded language for turning a blind eye to poverty and fodder for the emergence of an oligarchical society committed to the rule of the few. Under this framing of economic development, neoliberalization offers, as social philosopher Karl Polanyi argued, a contradictory kind of "freedom for those whose income, leisure and security need no enhancing, and a mere pittance of liberty for the people, who may in vain attempt to make use of their democratic rights to gain shelter from the power of the owners of property."[153] However, according to Polanyi, the

May–June 1995, at 55, 62.

148. *See* HARVEY, *supra* note 36, at 64–65.

149. *See generally* Robert Higgs, *The Economics of the Great Society*, INDEP. INST. (Feb. 1, 2011), http://www.independent.org/issues/article.asp?id=3157 [https://perma.cc/W4U2-JSW4] (explaining that Johnson's Great Society programs included job training, housing, food stamps, and other forms of assistance that inadvertently helped to define Black inequality as primarily an economic question).

150. *See* HARVEY, *supra* note 36, at 22 ("During the Carter presidency . . . deregulation of the economy emerged as one of the answers to the chronic state of stagflation that had prevailed in the US throughout the 1970s.").

151. *See id.* at 19 ("We can, therefore, interpret neoliberalization either as a utopian project to realize a theoretical design for the reorganization of international capitalism or as a political project to re-establish the conditions for capital accumulation and to restore the power of economic elites.").

152. *See id.* (explaining that neoliberalism has not been successful in revitalizing global capital accumulation outside of serving the goal of establishing an economic elite).

153. *See id.* at 37.

achievement of a "neoliberal utopianism is doomed" by the evils of "authoritarianism, or even outright fascism" in certain instances.[154] The rise of President Donald Trump has already ushered in fears that we may be heading in this direction.[155]

It is becoming increasingly convincing that a neoliberal political ideology has led many governments to conceptualize their role in the praxis of economic development theory as mere legislators of targeted incentives for private market action, rather than as public servants committed to the social and economic well-being of all citizens.[156] This has led to the increased privatization of public welfare initiatives,[157] further evidenced by the evolving SIB model. Underlying the ecosystem of the emerging SIB model are the principles and values of a neoliberal political theory that espouse a pro-business view of economic life—(1) personal and individual freedom in the marketplace as paramount to a thriving economy and (2) individual responsibility and personal accountability as determining factors of social mobility, whether up or down the ladder of success. SIB programs routinely cast social problems as personal issues. This, arguably, is necessary to perpetuate American exceptionalism and sustain notions of an "American Dream" within a hegemonic global capitalist system,[158] all while simultaneously pulling the shades on America's bitter legacy of state-sponsored racism and chronic imperialism.

As a result, the SIB seemingly works according to the neoliberal plan,[159] nurturing the vestiges of a cancerous, racially tainted and economically skewed vision of economic development. It provides opportunities for capital accumulation and the concentration of power amongst the economic elite by elevating the role of private enterprise and entrepreneurial initiative in the provision of public welfare.[160] At the same time, it downplays the importance of a moral and ethical commitment to advancing

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154. *Id.*

155. *See* Robin Wright, *Madeleine Albright Warns of a New Fascism—and Trump*, NEW YORKER (Apr. 24, 2018), https://www.newyorker.com/news/news-desk/madeleine-albright-warns-of-a-new-fascism-and-trump [https://perma.cc/M2Q5-SHZV].

156. *See* HARVEY, *supra* note 36, at 48.

157. *See id.* at 76.

158. *See generally* TERRENCE E. PAUPP, THE FUTURE OF GLOBAL RELATIONS 41 (2009); *see also* HARVEY, *supra* note 36, at 50, 65–66.

159. *See* McFarlane, *supra* note 33, at 323 (explaining that neoliberal thought "favored 'facilitating capital mobility and *cutting community programs that might distort private investment decisions*'" (quoting Susan E. Clarke & Gary L. Gaile, *Local Politics in a Global Era: Thinking Locally, Acting Globally*, 551 ANNALS AM. ACAD. POL. & SOC. SCI. 28, 33 (1997) (emphasis added))).

160. *See* Harvey, *supra* note 36, at 47.

participatory democracy, as well as an authentic commitment to our nation's foundational democratic values. Due to its prioritization of individual accountability and responsibility, the capitalistic regime and neoliberal orthodoxy that drives the design of the SIB model has led to the continued creation of individualized programs to assist marginalized peoples in solving their own poverty, regardless of the role of the state in sustaining institutional barriers to social mobility.[161] The SIB model integrates a systemic bias for capitalistic endeavors with limited state intervention yet allows for special state interventions when they further business interests and foster increased financialization by experts and elites.[162] This imbalance of power and perpetuation of wealth disparities bears the marking of Debra Satz's unethical, noxious market.

Lastly, the current SIB model fails to incorporate any meaningful systems of social solidarity or significant restraints on capital accumulation that would help foster community economic empowerment and promote economic justice.[163] Impact investors who are committed to advancing economic justice should reflect upon their various motivations for selecting and funding SIB programs. If the reduction of financial risks and the maintenance of profits remain a guiding force for how impact investors select and design SIB programs, then community economic empowerment will undoubtedly take a back seat, and true innovation in poverty alleviation will be a second thought. This Article argues that impact investors should prioritize the integration of a *moral* motivation into the calculus of their engagement with the SIB model, one grounded in a desire for social justice. Looking forward, scholars should explore new economic development frameworks that offer principles to guide the implementation of the SIB model. An intentionally designed "justice-based" approach to economic development would not only lead to more progressive social welfare programs but would also open the door for new ideas about economic life that can impact the root causes and structural determinants of poverty in America.

161. *Id.* at 76 ("As the state withdraws from welfare provision and diminishes its role . . . it leaves larger and larger segments of the population exposed to impoverishment. The social safety net is reduced to a bare minimum in favour of a system that emphasizes personal responsibility.").

162. *Id.* at 74 ("This tendency on the part of the core states like the US to protect financial interests and to stand by as they suck in surpluses from elsewhere both promotes and reflects the consolidation of upper-class power within those states around processes of financialization.").

163. *Id.* at 75.

III. SOCIAL IMPACT BONDS AND CRIMINAL JUSTICE

Initially, social impact bonds were used to fund social welfare programs targeting challenges in the criminal justice sector, specifically homing in on the problem of prisoner recidivism.[164] This was largely due to the strong alignment between challenges impacting the criminal justice system and the need for quantifiable SIB assessment metrics. The criminal justice system offered monetizable assessment outcomes—the reduction of recidivism rates could be traced directly to a reduction in public expenditures.[165] Additionally, there has been a high degree of political interest in reducing the negative collateral consequences of mass incarceration, especially given its harmful impact on predominantly black, low-income communities.[166]

The first SIB was launched in September 2010 in the city of Peterborough in the United Kingdom.[167] By funding the Peterborough Prison Project (the "Peterborough SIB"), a prisoner rehabilitation program designed to reduce prisoner recidivism for short-term male prisoners, the impact investment paved the way for future criminal justice SIBs around the globe. The first SIB in the United States, launched by New York City in August 2012 at the Rikers Island Prison (the "Rikers Island SIB"), was also designed to reduce young adult recidivism.[168]

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164. *See* Gustafsson-Wright et al., *supra* note 21, at 13 ("The criminal justice system has clearly defined and monetizable outcomes, and there is high political commitment due to the large number of negative outcomes and resulting community pressure.").

165. Peter Walker, *Investors to Pay for Prisoner Rehabilitation*, GUARDIAN (Mar. 19, 2010), http://www.theguardian.com/society/2010/mar/19/investors-pay-for-prisoner-rehabilitation [https://perma.cc/LF7F-4TQL] ("According to the St Giles Trust, a recent economic evaluation of its Through the Gates scheme for ex-prisoners reduced re-offending by 40%, saving the government £10 for every pound invested.").

166. Centuries of racial oppression in America have impacted the social and economic development of marginalized, predominantly black communities. Since the Civil Rights Movement, tremendous progress has been made in advancing social justice for these marginalized communities. However, an era of targeted criminal justice policies following the civil rights movement instituted a new form of "Jim Crow," establishing a law enforcement system that seemingly prioritized the mass incarceration of black men in predominantly low-income communities, painting a narrative of American criminality largely defined by poverty and race. The United States is now one of the highest incarcerators of its citizens among countries worldwide, and an alarmingly high percentage of those incarcerated citizens are both low-income and black. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6–7 (2010).

167. *See* Callanan et al., *supra* note 64, at 19; *see* Walker, *supra* note 165 ("The pilot scheme for the so-called social impact bonds will see investors pay £5m towards intensive education and support for short-term prisoners leaving Peterborough prison in Cambridgeshire.").

168. *See* Toussaint, *supra* note 13, at 74; *see also* Burand, *supra* note 26, at 457 ("Like the Peterborough SIB, the New York City SIB is aimed at reducing prisoner recidivism and

These SIB programs have faced criticism and have yielded mixed results. After the Peterborough SIB showed early promise, the UK government ended the intervention earlier than planned and modified its national approach to probation and rehabilitation services. In an effort to scale the program's success, the UK government decided to provide rehabilitation services for incarcerated individuals across the UK by using a diverse network of public service providers and private investors in a fashion similar to the Peterborough SIB.[169] In contrast, the Rikers Island SIB in New York City was shut down early after failing to meet its performance benchmarks. Although the Rikers Island SIB was able to reach nearly 2000 adolescent males during the three years of its operation, it faced significant challenges navigating the unique climate of Rikers Island Prison and struggled to validate its evidence-based intervention with the target population.[170] These two examples reveal that the SIB model is still in its early phases, and best practices are still being defined as new programs are rolled out.

A. *The Peterborough Prison Social Impact Bond*

Research on the social impact bond model began in the United Kingdom in 2007 after the Prime Minister's Council on Social Action was asked to explore economic innovations to help finance social welfare initiatives.[171] The UK government began exploring SIBs as a potential funding platform to spur social change, and by 2010, the government had published a green paper describing plans to utilize pilot pay-for-success programs to address shortcomings in the criminal justice system.[172] In September 2010,

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does so by providing funding to scale preventative social interventions.").

169. *See* EMMA DISLEY ET AL., MINISTRY OF JUSTICE, THE PAYMENT BY RESULTS SOCIAL IMPACT BOND PILOT AT HMP PETERBOROUGH: FINAL PROCESS EVALUATION REPORT 1–2 (2015) [hereinafter FINAL PROCESS EVALUATION REPORT], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486512/social-impact-bond-pilot-peterborough-report.pdf [https://perma.cc/A2Q6-UBPA] (stating that change to Peterborough model was driven by reforms to probation).

170. *See* IMPACT EVALUATION OF THE ADOLESCENT BEHAVIORAL LEARNING EXPERIENCE (ABLE) PROGRAM AT RIKERS ISLAND, VERA INST. JUSTICE (July 2015), http://secondowelfare.it/edt/file/adolescent-behavioral-learning-experience-evaluation-rikers-island-summary.pdf [https://perma.cc/83SA-DP75].

171. *See* KATE BELL & MATTHEW SMERDON, DEEP VALUE: A LITERATURE REVIEW OF THE ROLE OF EFFECTIVE RELATIONSHIPS IN PUBLIC SERVICES 72 (2011) ("The Council on Social Action (CoSA) was an initiative chaired by Prime Minister Gordon Brown between 2007 and 2009. It brought together innovators from every sector to generate ideas and initiatives through which government and other key stakeholders could catalyse, develop and celebrate social action.").

172. MINISTRY OF JUSTICE, BREAKING THE CYCLE: EFFECTIVE PUNISHMENT,

Social Finance UK, a nongovernmental organization that helps fund social service organizations, led the development of the first SIB in the UK. As the intermediary constituent in the deal, Social Finance UK raised £5 million in upfront seed capital from seventeen private investors and philanthropists.[173] The program was originally designed as a pilot to test the theory that providing incarcerated individuals with comprehensive and individualized support would help them not only stay out of prison but also craft a better life once they returned to their home communities.[174] Under the terms of the Peterborough SIB, if the program succeeded in reducing the rate of recidivism among the target population (as assessed by an independent third party), the UK Ministry of Justice, with financial support from the UK Big Lottery Fund,[175] agreed to pay a return to the SIB investors that included the principal amount invested and a success fee, based on a capped sliding scale.[176] However, if the predetermined performance targets were not met, the UK government would not have any payment obligations to the SIB investors.[177]

The Peterborough SIB utilized the investment capital raised

REHABILITATION AND SENTENCING OF OFFENDERS 71 (2010), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/185947/green-paper-evidence-a.pdf [https://perma.cc/53JP-TLKC].

173. The pool of investors included several notable charities and foundations such as Barrow Cadbury Trust and the Esmee Fairbairn Foundation as well as several "high net worth" individuals. *See* Burand, *supra* note 26, at 454–55 n.12; *see also* EMMA DISLEY ET AL., LESSONS LEARNED FROM THE PLANNING AND EARLY IMPLEMENTATION OF THE SOCIAL IMPACT BOND AT HMP PETERBOROUGH 23 (2011), https://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR1166.pdf [https://perma.cc/G4EJ-KXSJ].

174. Approximately sixty percent of short-term prisoners in the United Kingdom re-offend within one year of their release from prison. *See* PRISON REFORM TRUST, PRISON: THE FACTS, BROMLEY BRIEFINGS 14 (2017), http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Summer%202017%20factfile.pdf [https://perma.cc/B4KW-SAJP].

175. *See* FINAL PROCESS EVALUATION REPORT, *supra* note 169, at 3.

176. Under the Peterborough SIB, the investors would be paid in years four, six, and eight of the program, based upon the performance of the One Service intervention. SOC. FIN., A NEW TOOL FOR SCALING IMPACT: HOW SOCIAL IMPACT BONDS CAN MOBILIZE PRIVATE CAPITAL TO ADVANCE SOCIAL GOOD 9 (2012), https://www.socialfinance.org.uk/sites/default/files/publications/small.socialfinancewpsinglefinal.pdf [https://perma.cc/6A6P-VVAF] [hereinafter A NEW TOOL]. The value of the outcome payments was expected to generate an annual rate of return between 2.5% and 13%. *Id.* at 40.

177. The Peterborough SIB guaranteed repayment to investors if the program achieved at least a 7.5% reduction in the frequency of reconviction events across all 3,000 male prisoners in the target group, or a 10% reduction for each cohort, as compared to a control group of other short-term male prisoners. While measuring the frequency of reconviction events (as opposed to a binary calculation of whether a reconviction event occurs) was believed to better correlate with the costs associated with recidivism, it also posed a risk of statistical sampling errors in measuring performance outcomes, especially considering the small number of prisoners in the Peterborough SIB cohorts. *See id.* at 9.

by Social Finance UK to fund a seven-year prisoner rehabilitation program that provided three cohorts of 1000 short-term male prisoners at Her Majesty's Prison Peterborough with "through-the-gate" transition services for up to twelve months during and after their release from prison.[178] Specifically, Social Finance UK coordinated the creation of a nonprofit organization called "One Service," which facilitated a voluntary prisoner rehabilitation program comprised of a network of nonprofit organizations throughout the UK.[179] These social service providers worked one-on-one with the incarcerated individuals, providing them with housing, education, vocational training, and healthcare services as they transitioned out of prison.[180] The flexibility of the Peterborough SIB funding, coupled with the local management and operations of the One Service program, enabled the Peterborough SIB partners to create an adaptive service offering that responded to the needs of returning citizens in the UK.[181] Additionally, the long-term nature of the One Service program increased engagement between the nonprofit service providers and the target population.[182]

The first phase of the One Service program did not reach the necessary performance benchmark—a 10% reduction in recidivism for each cohort and a 7.5% reduction across all

178. *See* FINAL PROCESS EVALUATION REPORT, *supra* note 169, at 11, 13.

179. *See id.* at 11–12.

180. Nonprofit service providers contracted by One Service included the St. Giles Trust, Ormiston Families Trust, John Laing Training, Mind, the YMCA, and Supporting Others through Volunteer Action (SOVA). *See* FINAL PROCESS EVALUATION REPORT, *supra* note 169, at 26. The program was not prescribed as a part of release conditions for prisoners, and prisoners could choose whether or not to engage with the service. This required case workers to find mechanisms for cohort engagement and to build meaningful relationships. *See id.* at 9, 42–48; *see* Callanan et al., *supra* note 64, at 20.

181. Some of the returning citizens received housing, mental health and addiction support, and training for employment opportunities. *See* FINAL PROCESS EVALUATION REPORT, *supra* note 169, at 30, 43, 48. As one returning citizen in the program explained, "[t]he One Service has helped me with a training course, housing needs, food, electricity and someone has always been on the end of the phone even if it's just someone to talk to . . . . If it hadn't have been for this I would be back in prison by now." *See* Press Release, Soc. Fin., Peterborough Social Impact Bond Reduces Reoffending by 8.4%; Investors on Course for Payment in 2016 (Aug. 7, 2014), https://assets.rockefellerfoundation.org/app/uploads/20150316202925/Peterborough-Social-Impact-Bond-Reduces-Reoffending-by-8.4-percent.pdf [https://perma.cc/AX64-L6LU] [hereinafter Press Release].

182. David Robinson, chair of the Peterborough SIB Advisory Board, stated, "[t]he project was deliberately set up to be a long-term project so that we can learn, improve and refine the best ways of supporting prisoners on release." *See* Andrew Holt, *Results Show Peterborough Social Bond Demonstrate a Reduction in Reconvictions*, CHARITY TIMES (July 8, 2014), http://www.charitytimes.com/ct/Results_Peterborough_Social_%20Bond_demonstrate_reduction_in_reconvictions.php [https://perma.cc/GU9Y-JTMH].

cohorts—to trigger early repayments for private investors.[183] Nevertheless, by August 2014, Social Finance UK announced that the Peterborough SIB had successfully reduced reoffending in the first cohort of 1000 prisoners by 8.4%, as compared to the national baseline, and was on track to disperse investor outcome payments by the year 2016.[184]

Prompted by the early success of the Peterborough SIB program, the UK Ministry of Justice launched a program toward the end of 2014 called *Transforming Rehabilitation*.[185] Funded by the UK government, the program was designed to provide rehabilitation services for incarcerated individuals across the UK using a diverse network of public service providers and private investors in a fashion similar to the SIB funded *One Service* program.[186] Beginning in February 2015, Transforming Rehabilitation created the framework for the development of twenty-one Community Rehabilitation Companies ("CRC") to help supervise the reentry of short-term prisoners across the UK.[187] Each CRC represents a diverse mix of public, private, and voluntary stakeholders who work collaboratively to provide critical social services to returning citizens.[188] Transforming Rehabilitation has embraced the SIB model with the new CRCs as the service providers are only paid in full if they are successful in reducing recidivism based upon predetermined performance

183. *See* MINISTRY OF JUSTICE, PETERBOROUGH SOCIAL IMPACT BOND HMP DONCASTER 2 (2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/341682/pbr-pilots-cohort-1-results.pdf [https://perma.cc/W8LJ-GW9L].

184. *See* Brinda Ganguly, *The Success of the Peterborough Social Impact Bond*, ROCKEFELLER FOUND. (Aug. 8, 2014), https://www.rockefellerfoundation.org/blog/success-peterborough-social-impact/ [https://perma.cc/GWM9-2TEG]. David Hutchison, CEO of Social Finance, noted, "[t]he SIB has given our delivery partners the resources and the freedom to meet the complex needs of our prison leavers very effectively." *See* Press Release, *supra* note 181.

185. Ganguly, *supra* note 184.

186. *Id.*

187. *See generally* MINISTRY OF JUSTICE, TRANSFORMING REHABILITATION: A STRATEGY FOR REFORM (2013), https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation/results/transforming-rehabilitation-response.pdf [https://perma.cc/2N4B-XAL2].

188. Almost 1,000 organizations, with 700 listed as voluntary, community or social enterprise, have joined the movement to develop new innovations in reducing recidivism and enhancing opportunities for returning citizens. Under the new system, each CRC is responsible for crafting a plan for each offender's rehabilitation as soon as they enter prison, and the same organization is responsible for supporting them during their time in prison and helping them reintegrate into their home communities after their release. *See* Press Release, Ministry of Justice, Charities in Front Seat of New Reoffending Drive (Dec. 18, 2014), https://www.gov.uk/government/news/charities-in-front-seat-of-new-reoffending-drive [https://perma.cc/NMT7-VVKB].

metrics. The Ministry of Justice announced a curtailment of the Peterborough SIB in June 2015 to avoid any duplication of services being provided to the target population by Transforming Rehabilitation.[189]

B. The Rikers Island Prison Social Impact Bond

Modeled after the Peterborough SIB in the UK, the Rikers Island SIB in New York was the first social impact bond launched in the United States.[190] In August 2012, then New York City Mayor Michael R. Bloomberg announced that investment bank Goldman Sachs had agreed to invest $9.6 million to finance a prisoner rehabilitation program targeting 3000 mostly low-income adolescent males, sixteen to eighteen years of age, at the Rikers Island Correctional Facility.[191] Coordinated by MDRC, a nonprofit service provider serving as the SIB intermediary (paid by Bloomberg Philanthropies for serving in that capacity), the Rikers Island SIB aimed to achieve at least a 10% reduction in the rate of recidivism among young adult males leaving Rikers Island.[192]

The Riker's Island SIB provided the investment capital to finance a social service program called Adolescent Behavioral Learning Experience ("ABLE"), which was a part of Mayor Bloomberg's comprehensive New York City Young Men's Initiative that sought to address disparities between young African American and Hispanic males in New York City and their non-minority peers.[193] MDRC contracted with two nonprofit

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189. See Alice Sharman, *Peterborough SIB Did Not Foster Innovation, Evaluation Finds*, CIV. SOC'Y MEDIA (Jan. 7, 2016), https://www.civilsociety.co.uk/news/peterborough-sib-did-not-foster-innovation--evaluation-finds.html [https://perma.cc/FK5G-F2ZM]; *See* FINAL PROCESS EVALUATION REPORT, *supra* note 169, at 52 ("Although the SIB pilot in Peterborough was originally intended to operate until 2017, it only operated on a payment by results basis for the first two cohorts of released prisoners, while the third cohort of prisoners received support under a fee-for-service arrangement.").

190. *See* Toussaint, *supra* note 13, at 74.

191. *See* Press Release, N.Y.C. Office of the Mayor, Mayor Bloomberg, Deputy Mayor Gibbs and Corr. Comm'r Schriro Announce Nation's First Social Impact Bond Program (Aug. 2, 2012), http://www1.nyc.gov/office-of-the-mayor/news/285-12/mayor-bloomberg-deputy-mayor-gibbs-corrections-commissioner-schriro-nation-s-first#/0 [https://perma.cc/TXN8-K4E3].

192. *See* Berlin, *supra* note 77, at 4.

193. The cross-agency enterprise instituted broad policy changes and agency reforms that, over the course of three years, planned to invest more than $127 million into programs connecting young African American and Hispanic males in New York City to educational, employment, and mentoring opportunities. Notably, the initiative planned to overhaul the Department of Probation by connecting probationers to economic and educational opportunities, strengthen educational support, and target the achievement gap by providing mentoring, literacy, and college and career readiness services. Additionally, the initiative sought to target the wealth gap by connecting young men to employment

organizations to facilitate the ABLE Program, which planned to break the cycle of re-incarceration using an evidence-based cognitive behavioral therapy intervention called Moral Reconation Therapy ("MRT").[194] Delivered through the jail's onsite school, the facilitators of the ABLE program sought to engage detained youth and help them transition to life outside of prison by helping them develop critical social and decision-making skills, while also teaching them principles of personal responsibility to help them avoid "unwise" future decisions.[195]

Unlike the Peterborough SIB, only one impact investor supported the Rikers Island SIB, global investment bank Goldman Sachs.[196] Additionally, the investment was to be made in the form of a multiple-disbursing loan, a staggered and conditional disbursement schedule that would permit Goldman Sachs to stop making loan disbursements if interim program targets were not met.[197] Under the SIB contract, Goldman Sachs stood to earn a return on their investment of as much as $2.12 million in profitswith outcome payments structured on a capped sliding scale.[198] Upon the successful completion of the rehabilitation program, Goldman Sachs would be repaid by the New York City Department of Correction, which served as the outcome payer for the SIB. The outcome payment would be based upon the city's cost savings after gaining the ability to close a section of Rikers Island Correctional Facility due to reduced incarceration rates.[199]

opportunities. Discussing the New York City Young Men's Initiative, Mayor Michael R. Bloomberg stated, "[w]hen we look at poverty rates, graduation rates, crime rates, and employment rates, one thing stands out: Blacks and Latinos are not fully sharing in the promise of American freedom and far too many are trapped in circumstances that are difficult to escape." *See* Jennifer Epstein, *Bloomberg's Own $30M for Program*, POLITICO (Aug. 4, 2011), https://www.politico.com/story/2011/08/bloombergs-own-30m-for-program-060654 [https://perma.cc/Q4DB-9H2Y].

194. The ABLE program, which was administered by the Osborne Association and Friends of Island Academy, engaged with 87% of the adolescents that entered Rikers Island Prison in 2013. Program participants were provided with education, job training, and counseling. *See* Jim Parsons et al., *Impact Evaluation of the Adolescent Behavioral Learning Experience (ABLE) Program*, VERA INST. JUSTICE 5, 7, 14 (Sept. 2016), https://www.vera.org/publications/rikers-adolescent-behavioral-learning-experience-evaluation [https://perma.cc/X8J9-JZV4].

195. *See* Berlin, *supra* note 77, at 5.

196. *See* Toussaint, *supra* note 13, at 74–75.

197. *See* Godeke & Resner, *supra* note 43, at 22.

198. The outcome payment ranged from $4.8 million for a two-year recidivism reduction rate of at least 8.5% to $11.7 million for a two-year recidivism reduction rate of at least 20%. *See* Berlin, *supra* note 77, at 5.

199. The government's cost savings, which would always exceed private investor returns and were projected beyond the length of the SIB deal, were predicted based upon the program serving approximately 3000 participants each year. The success payments were to be prorated if the program was unable to serve the projected number of participants.

However, if the rate of reincarceration events was not reduced by at least 10% from its historical rate, no payment obligations would be triggered under the SIB. Interestingly, even if the ABLE program was deemed unsuccessful, Goldman Sachs would only lose up to $2.4 million of its $9.6 million investment, due to a partial payment under the capped sliding scale and a loan guarantee provided by Bloomberg Philanthropies.[200]

The Vera Institute of Justice ("Vera"), which served as the independent evaluator for the Rikers Island SIB, was paid by the Mayor's Fund to Advance NYC to evaluate the success of the ABLE program. Vera conducted its performance assessment of the ABLE program by comparing the selected study group with a matched historical group of men previously jailed prior to the program's establishment.[201] In August of 2015, after evaluating the first year of program delivery, Vera concluded that the program was failing to meet its recidivism goals, and the ABLE program at Rikers Island was discontinued.[202]

Although the ABLE program was able to reach nearly 2000 adolescent males during the three years of its operation, it faced significant challenges throughout its lifespan. For example, only 9% of the target population completed all 12 stages of the program,

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See Berlin, *supra* note 77, at 7; *see also* David Chen, *Goldman to Invest in City Jail Program, Profiting if Recidivism Falls Sharply*, N.Y. TIMES (Aug. 2, 2012), http://www.nytimes.com/2012/08/02/nyregion/goldman-to-invest-in-new-york-city-jail-program.html [https://perma.cc/7BU9-RZ7N].

200. Unlike the Peterborough SIB, the impact investor in the Rikers Island SIB, Goldman Sachs, secured a credit enhancement in the form of a $7.2 million rolling loan guarantee from Bloomberg Philanthropies. At the end of the ABLE program, if performance targets were missed, MDRC would not be required to pay back anything to Goldman Sachs beyond the guaranteed funds. If the program was successfully completed, and there were leftover guarantee funds, MDRC could retain the funds to support future SIBs. This rolling guarantee structure provided an incentive for MDRC as the intermediary to ensure that the SIBs performance targets were met, so that leftover guarantee funds could be used to finance future projects. *See* Burand, *supra* note 26, at 458–59; *see also* V. Kasturi Rangan & Lisa Chase, *The Payoff of Pay-for-Success*, 4 STAN. SOC. INNOVATION REV. 28, 32–33 (2015).

201. Vera was forced to use a quasi-experimental approach in its evaluation, rather than employing a "randomized control trial" method, because adolescents at Riker's Island Prison are moved frequently between different housing units which would have interfered with coordinating separate treatment and control groups. Vera tracked "recidivism bed days" (RBDs) which captures the number of days that a member of the study group was held in jail during the 12 months following their release from prison. In addition to tracking RBDs for the study group and comparing it to a matched historical group, Vera also tracked RBDs for 19-year-olds during the same period because rates of recidivism fluctuate over time, and group changes may be the result of factors that are unrelated to the program, such as citywide changes in crime rates or policing. *See* Parsons, *supra* note 194, at 8–11.

202. The deal had included an option for the partners to end the program early with the city paying nothing to the investor if it failed to reduce recidivism by at least 9% in the first year. *See* Berlin, *supra* note 77, at 5.

largely due to the instability of the adolescent's length of time in prison and the periodic cancellation of scheduled program activities.[203] Additionally, a high level of stress among adolescent inmates and a culture of gang violence and intimidation at Rikers Island often conflicted with the primary goals of MRT and the benefits of group therapy.[204]

Although the Rikers Island SIB was deemed unsuccessful, advocates of the SIB model have highlighted the valuable lessons learned from the program that hold promise for the future of the SIB model in the United States. Alongside saving the government from using limited taxpayer dollars to fund an ineffective social service program, both the government and the nonprofit service providers gained support to explore new innovations in criminal justice reform.[205] The New York City Department of Correction and the City's Office of Management and Budget had limited discretionary funding to finance the MRT program at Rikers Island, and it was unclear at the outset whether cognitive behavioral therapy would work for adolescents in such a prison setting.[206] The Rikers Island SIB provided the necessary risk capital for New York City to explore this innovation and determine its viability. Goldman Sachs has continued to invest in the SIB marketplace, demonstrating a continued commitment to the SIB model among impact investors.[207]

IV. THE OPPORTUNITIES OF SOCIAL IMPACT BONDS

Advocates of the SIB model have highlighted several opportunities that emerge from its use in the social impact space, premised on its unique design and market-based funding structure.[208] First, SIBs promote the expansion of investment capital toward traditionally underfunded social welfare programs

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203. The adolescents experienced security-related events at Riker's Island Prison on a daily basis, such as lockdowns and alarms that often interfered with MRT sessions. *See id.* at 6.

204. Although ABLE also offered MRT in various locations in the community where adolescents leaving Rikers Island Prison were returning, few of the adolescents attended due to competing activities like school or court-mandated meetings. *See id.*

205. *See* Jones, *supra* note 20, at 361 (noting "because SIBs require data, metrics, and benchmarks, nonprofit service providers and government can gain insight from data and use it more effectively; this result is not available in a traditional social service model where data is collected after the fact, tracking the amount of service provided or the number of beneficiaries receiving the service").

206. *See* Berlin, *supra* note 77, at 7.

207. *See* Jones, *supra* note 20, at 361.

208. *See* Caroline Preston, *Getting Back More Than a Warm Feeling*, N.Y. TIMES (Nov. 8, 2012), https://www.nytimes.com/2012/11/09/giving/investors-profit-by-giving-through-social-impact-bonds.html [https://perma.cc/3MWU-A3D5].

addressing critical social issues, especially important during an era of governmental fiscal austerity and decreased funding for social welfare initiatives. Secondly, the SIB model shifts the investment risk of funding social welfare programs to the private sector, which not only stands to reduce public spending on risky initiatives but also can increase the efficient management of public funds. Lastly, the SIB model shifts government contracts away from a commonly reactionary approach to social service provision toward evidence-based, preventative social welfare programs, which can lead to long-term government cost savings and meaningful social impact in marginalized, underserved communities. The sections below discuss each of these opportunities in turn.

A. Expanding Investment Capital for Social Innovation

One of the opportunities of the SIB is its ability to funnel additional capital toward traditionally underfunded social welfare programs,[209] especially important during an era of fiscal austerity at the federal, state, and local government levels.[210] The government has historically utilized strategic partnerships with private institutions to help finance large-scale public infrastructure projects.[211] Governments have recently taken an interest in leveraging these same public-private partnerships to help meet the funding gap for the delivery of social welfare programs, targeting a wide range of social issues from education to poverty, the environment, and public health. The private and philanthropic sectors have also demonstrated an interest in

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209. *See* Eva Coruzzi Schneider, Note, *Disparate Impact Lacks an Impact: The Need for Pay for Success Programs to House Formerly Incarcerated People*, 44 FORDHAM URB. L. J. 529, 570 (2017) (noting that "the PFS model expands access to a market previously unavailable to nonprofits").

210. *See* UTTING, *supra* note 31, at 8–9 ("The capacities of welfare states have been undermined by market forces, neoliberal ideology and fiscal constraints, particularly in contexts of regressive taxation, structural adjustment in developing countries and austerity policies associated with the fallout from financial crises in parts of the global North."); *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 [https://perma.cc/VP3P-8HEK] ("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.").

211. For example, governments have used public-private partnerships to finance toll roads, airports, and even energy generation facilities. *See Government Support in Financing PPPs*, WBG (Sept. 8, 2016), https://ppp.worldbank.org/public-private-partnership/financing/government-support-subsidies [https://perma.cc/29C6-43FM].

addressing these social challenges, which has resulted in a growing market for social impact investments. These impact investments are "intended to create positive impact beyond the financial return" for socially-minded investors.[212] The SIB provides a unique platform for the convergence of these interested stakeholders around structured social welfare programs that target critical social issues.[213]

Despite the SIB model's growing popularity, advocates hold varying opinions on how SIBs should be used to help expand investment capital for social innovation, largely based upon different views of the preferred risk profile for SIB projects. As noted earlier in this Article,[214] some advocates believe that SIBs should focus on providing low-risk investment capital for *proven* social welfare programs. This strategy will not only help to reduce the financial risk for impact investors but also potentially reduce public spending on expensive remedial programs. Other critics suggest that SIBs should solely focus on identifying and scaling innovative, *unproven* ideas that are too risky for the government to explore and would otherwise go underfunded or untested. These preventative social welfare programs may yield long-term governmental cost savings for the communities they serve and offer more meaningful resources for their constituents.

Driven by impact investors who seek to maximize social impact while minimizing financial risk, the design of the current SIB model will likely lead local and state governments to prioritize institutional social service providers who offer low-risk, *proven* social welfare programs. Unfortunately, this may come at the expense of riskier innovations or may undermine smaller, community-based service organizations that are well positioned to leverage local assets. Notwithstanding, due to a lack of data on the effectiveness of many large-scale social welfare programs, it will

212. O'DONOHOE ET AL., *supra* note 26, at 5. A 2015 survey of 158 investors revealed that the global impact investing market committed more than $15 billion to impact investments in 2015 and plan to increase capital committed by 16% in 2016. *See* ABHILASH MUDALIAR ET AL., J.P. MORGAN CHASE & CO., 2016 ANNUAL IMPACT INVESTOR SURVEY, GLOB. IMPACT INVESTING NETWORK 5 (2016), https://thegiin.org/assets/2016%20GIIN%20 Annual%20Impact%20Investor%20Survey_Web.pdf [https://perma.cc/29GH-ZZPQ]. 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, BANK OF AM. MERRILL LYNCH, MILLENNIALS AND MONEY 12 (2013), http://files.webydo.com/15/156383/UploadedFiles/f37e3c56-3213-49fd-a201-df7b9e596f35.pdf [https://perma.cc/YKG2-NFVX].

213. *See* Gustafsson-Wright et. al., *supra* note 21, at 2 ("[I]mpact bonds can focus on the delivery of human services as opposed to the traditional physical infrastructure that has often been the center of both public-private partnerships and performance contracts.").

214. *See supra* Section II.C.

remain difficult in the short-term for impact investors to easily identify proven programs that should be expanded or sustained.[215] Further, even if investors are able to identify proven, low-risk social welfare programs that stand to benefit from increased funding, it is unclear whether the administration of such programs should remain the primary role of the government.[216] Indeed, the precedent set by the UK government with the Peterborough Prison SIB is compelling. After the One Service program at the Peterborough Prison was deemed successful at reducing prisoner recidivism, it was retooled into a broader government-funded initiative.[217] The UK government not only reclaimed control over the administration of the rehabilitation program but also simultaneously opened the door for impact investors to fund new SIBs exploring other innovative solutions to pressing social challenges.[218]

Impact investors who take an interest in the SIB model will likely vary in both the profile of their risk appetite and the size of their capital contributions to SIB contracts. While some investors will seek to maximize the achievement of social justice, other investors may prioritize a financial return on their investment at the expense of achieving all the stated social goals of SIB funded social welfare programs. This is to be expected, as the current SIB model is designed as an alternative approach to advancing social good within our current global capitalist system, a system built upon the maximization of private profit as a foundational principle. These conflicting values not only complicate the capital structure of SIB deals, they may ultimately hinder the success of some SIB projects, making the government stakeholder a critical player in advocating for the underlying civic mission of every program.[219] This Article urges SIB advocates to explore the development of a more progressive justice-based CED framework that can help shift the priorities of impact investors toward more democratic, "moral" motives that will help advance economic justice.

215. *See* Berlin, *supra* note 77, at 20–21.

216. *See supra* Section II.D.

217. *See generally* MINISTRY OF JUSTICE, *supra* note 187, at 8.

218. *Id.*

219. *See* Edmiston & Nicholls, *supra* note 145, at 5 ("[T]he syndicate of social investors within any given SIB are likely to have different (and potentially conflicting) motivations, which can lend itself to a layered capital structure.").

B. Transferring Investment Risk to the Private Sector

Traditionally, government contracts for social welfare services are premised on the achievement of programmatic *outputs* rather than performance *outcomes*.[220] Additionally, financial risks are typically shared by both the contracting government entity and the contractors providing the social service.[221] In some instances, contractors assume most of the financial risks in the transaction by agreeing upfront to secure capital from investors to fulfill their contractual obligations. These contractors often only receive payment from the contracting government entity after their predetermined programmatic outputs have been achieved. In other instances, the contracting government entity bears most of the financial risks by agreeing upfront to provide a fixed payment to the contractor, coupled with additional "success fees" if the predetermined programmatic outputs have been met. Thus, the investment risks of social welfare delivery typically lie in the hands of service providers or government stakeholders.

The SIB model shifts the traditional government contracting paradigm by placing private investors into the middle of the government-contractor relationship. Impact investments become the source of upfront working capital for contractors, and governments are required to repay private investors only after predetermined, quantifiable performance outcomes have been achieved. This shift in investment risk provides an opportunity to reduce public spending on risky social service initiatives, which scholars have argued may increase the efficient usage of public funds, as well as reinforce the importance of social innovation.[222]

Nevertheless, scholars have also noted that the financial risks imposed on SIB investors under the conventional SIB model may limit the pool of impact investors because of the underlying capitalist values that are embedded in the model's market-based design.[223] SIB advocates have sought to incorporate a number of financial risk-mitigation and risk-sharing tools into SIB deals, such as credit enhancements and loan guarantees, in an effort to

220. *See* Leventhal, *supra* note 30, at 528.

221. *See supra* Section IV.B.

222. *See* Burand, *supra* note 26, at 467.

223. *See id.* at 478. *But see id.* (noting that as SIBs evolve, "other financial risk-mitigation and risk-sharing tools, such as credit enhancements that provide external collateral or support senior investment tranches in the capital structure of the SIB could be incorporated into the SIB structure").

cater to investors profit-seeking motivations.[224] As the SIB marketplace continues to evolve, creative risk-sharing strategies[225] or alternative investment schemes[226] may help to further expand the pool of SIB investors. Notwithstanding the diversity of efforts to address tangible market concerns, this Article argues that the pool of impact investors interested in the SIB marketplace will likely not dramatically increase until their funding motivations shift away from profit maximization toward social and economic justice.

Additionally, due to their market-based design, SIBs that seek to shift the investment risk of social welfare programs to the private sector may in fact hinder innovation in service delivery. As private stakeholders take a more active role in the delivery of public services, more oversight and accountability are to be expected. However, the introduction of additional systems of performance measurement and program management can lead social service providers to shift their focus from flexible service delivery to efficient outcome achievement.[227] As a result, social service providers may engage in less experimentation during service delivery and instead focus more attention on innovations that reduce short-term costs rather than improve service quality or program effectiveness.[228] In some instances, the SIB model may even run the risk of promoting dysfunctional or unethical practices by certain social service providers where such behavior can lead to more effective outcome achievement.[229] In short, the marketization of public services may lead to unethical decision-making. This Article calls for a shift in the framing of the SIB model that can lead impact investors to rethink their funding

224. For example, see the risk mitigation strategies used in the Rikers Island SIB, *supra* Section III.B.

225. *See* A NEW TOOL, *supra* note 176, at 15, 22 (discussing the potential impact of creative risk-sharing innovations to the growth of the SIB marketplace).

226. For example, the concept of a "micro" SIB could facilitate smaller investments. *See* EAN GARRETT ET AL., THE MICRO SOCIAL IMPACT BOND: A FRAMEWORK FOR 21ST CENTURY SOCIAL INNOVATION, INFINITE 8 INSTITUTE L3C 3–5 (2015), https://issuu.com/infinite8institute/docs/themicrosibwhitepaper_final_ [https://perma.cc/WJX3-JKAY].

227. *See* Edmiston & Nicholls, *supra* note 145, at 65 (explaining that for some SIB service providers, "the degree of micro-management built into the SIB was actually reducing their flexibility to autonomously pursue their social mission . . . stakeholders felt that the resources and time that went into these additional forms of performance management and measurement could be better spent on front-line services").

228. *See id.* at 66 ("Whilst intensive, real-time performance measurement and management introduced a heightened degree of responsiveness, discipline and rigor to contracts, it also detracted resources from front-line service provision and reduced the autonomy of some front-line practitioners.").

229. *See id.* at 65; *see also supra* notes 137–39 and accompanying text.

motivations, as well as lead to more creative economic development strategies that may better advance community economic empowerment and foster democratic engagement in CED.

C. Prioritizing Evidence-Based Preventative Programs

Alongside expanding the funding pool for social welfare programs and transferring investment risk to the private sector, the SIB model provokes a shift in the culture of traditional, performance-based government contracts by encouraging government stakeholders to prioritize evidence-based, preventative social welfare programs.[230] Typically, in performance-based government contracts, government constituents negotiate directly with social service providers to accomplish predefined goals or objectives. The government constituent identifies a social problem and seeks to minimize the financial risk to taxpayers by marketing an achievable social service contract to private contractors.[231] Under such contracts, government payments are typically based upon performance *outputs*—i.e., the number of individuals reached through the social welfare program.[232] These contracts are often remedial in nature, targeting social problems as they arise, or after they have materialized, all of which further mitigates political and financial risk.[233] In these traditional performance-based government contracts, the government assumes a substantial percentage of the financial risks, often leading to a preference for short-term projects lasting from one to two years.[234]

In contrast, evidence-based SIB programs are premised on the achievement of performance *outcomes*, not performance *outputs*. A SIB program typically determines success based upon the achievement of measurable changes in the behavior of the individuals within the target population. Although such behavioral changes are difficult to predict, when this approach is

230. *See* JOHN K. ROMAN ET AL., FIVE STEPS TO PAY FOR SUCCESS: IMPLEMENTING PAY FOR SUCCESS PROJECTS IN THE JUVENILE AND CRIMINAL JUSTICE SYSTEMS 14 (June 2014), 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 [https://perma.cc/39D4-NR58]; *see also* Gustafsson-Wright et al., *supra* note 21, at 2 ("Insufficient attention to performance and to measuring and being held accountable for results can lead to poor outcomes even with abundant funding. These failures are often inextricably linked to political and institutional constraints.").

231. *See* Burand, *supra* note 26, at 464–65.

232. *See* Leventhal, *supra* note 30, at 528.

233. *See* Callanan et al., *supra* note 64, at 12; *see also* Burand, *supra* note 26, at 463.

234. *See* Burand, *supra* note 26, at 465.

successful, it can yield beneficial long-term impacts for the target community. For example, in the case of social welfare programs targeting prisoner recidivism, traditional performance-based government contracts would determine success based upon the number of individuals receiving job training or educational counseling. The SIB model pushes stakeholders to develop more robust assessment metrics linked to concrete evidence of behavioral change.[235] In the case of prisoner recidivism, such evidence has been defined as a reduction in the rate of reconviction events among the target population. By prioritizing evidence-based programs, state and local governments learn to better quantify the costs of addressing social inequities, and social service providers learn to better measure the benefits of their social service interventions, all of which may drive enhanced performance management for human service delivery.[236] Early intervention and prevention strategies have already proven to yield benefits for children and adults in various sectors.[237] Further, the SIB model attracts longer-term financing from impact investors, which can extend the period of time over which pay-for-success contracts are conducted by facilitating funding maturities with longer performance horizons, all of which supports better programming.[238]

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235. With improved data collection processes, governments and social service providers can develop a better understanding of how their target constituents interact with their social programs. *See* Leventhal, *supra* note 30, at 526. This, in turn, can lead to services that are better fitted to the needs of marginalized communities. *See* Justin Milner & Matthew Eldridge, *From Evidence to Outcomes: Using Evidence to Inform Pay for Success Project Design*, URB. INST. 8 (May 3, 2016), https://www.urban.org/research/publication/evidence-outcomes-using-evidence-inform-pay-success-project-design [https://perma.cc/NSP7-C6A8] (asserting that "[u]sing evidence to make public welfare decisions improves government effectiveness and drives better outcomes for society").

236. *See* Gustafsson-Wright et al., *supra* note 21, at 43; *see also* David Stoesz, *Evidence-Based Policy: Reorganizing Social Services Through Accountable Care Organizations and Social Impact Bonds*, 24 RES. ON SOC. WORK PRAC. 181, 181 (2014) ("As evidence-based policy replaces unconditional entitlements, lawmakers will prefer program activities that are substantiated through field experiments, especially randomized controlled trials, which show lower cost while producing superior outcomes, over predecessors. . . . [S]ocial service employment opportunities will shift toward more effective programs and away from programs that have not demonstrated comparable efficacy.").

237. For example, Goldman Sachs recently became the first "successful" social impact investor in the United States with their investment in a SIB program in Utah focused on early childhood education. Principals at Goldman Sachs explained, "[w]e believe this model holds promise because it is scalable, replicable and sustainable. It provides a new framework for thinking about how the public and private sectors can work together to address pressing social needs in a way that results in better outcomes for children, alleviates some of the financial burden on taxpayers and generates savings for governments." Berlin, *supra* note 77, at 19.

238. *See* Burand, *supra* note 26, at 465 (noting that "whereas traditional government contracts typically articulate the amount of funds to be expended, the type of services to be

By incorporating a broader network of stakeholders in deal making, SIBs enable governments to share the risks of funding economic development, which may encourage the creation of innovative social welfare programs that are both preventative and forward-looking in nature.[239] The SIB model gives the private sector a substantive role in deciding which social services are delivered to the public and a voice in influencing the methods used to achieve negotiated performance outcomes.[240] However, notwithstanding assertions that diversity at the decision-making table can help promote social justice, there is risk in placing decision-making authority that is traditionally reserved for the government—such as determining the amount of funds to be expended, selecting social service providers, defining the types of services to be delivered, and replacing underperforming stakeholders—into the hands of private sector stakeholders.[241] When private sector stakeholders can disrupt the continuity of critical social welfare services solely based upon a financial risk assessment, community constituents who are the beneficiaries of such social welfare programs stand to suffer.[242] This risk is further amplified by the fact that many SIBs premise their performance metrics on the validation of administrative data and not on more complex evaluation methods that may better assess program performance in light of the social dynamics and historical frameworks impacting target populations.[243] Indeed, SIBs often oversimplify the complexity and intersectionality of historic social challenges in an effort to identify quantifiable performance metrics.[244]

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delivered, and the delivery methods to be used, SIBs can be structured so as to give private sector players more latitude to decide which services are to be delivered and which methods are to be used to achieve targeted levels of performance outcomes").

239. *But see infra* text accompanying Section V.A (explaining that institutional investors seeking to minimize financial risk may shy away from funding unproven, innovative social welfare programs, thereby hindering innovation).

240. For example, in the Peterborough SIB, the SIB intermediary, Social Finance UK, was delegated authority over selecting program service providers, a role typically conducted by the government stakeholders until that time. *See* Burand, *supra* note 26, at 465 (noting that "government procurement processes typically give government officials the ultimate decision-making authority regarding which social service providers to fund and whether to replace underperforming social service providers").

241. *See id.*, at 466.

242. *See* Sinclair et al., *supra* note 119, at 126 ("This can lead to 'mission-drift' (or shift) as investors pressure service providers to prioritize outcomes that are more readily measured and away from the most needy.").

243. *See* Edmiston & Nicholls, *supra* note 145, at 69.

244. Jones, *supra* note 20, at 362 (revealing that "the complexity of social problems requires comprehensive and multiple interventions and not short-term results; 'quick fix' approaches to social problems may hinder public discourse about the complexities and

There may be further hurdles in delegating traditional governmental functions to non-governmental stakeholders, ranging from statutory roadblocks to cultural challenges. Administrative laws governing public-private partnerships at the state level may limit the authorities and rights that can be contractually delegated to private parties.[245] Additionally, government stakeholders, who retain authority to modify or cancel the terms of SIB contracts, may threaten the success of SIB programs when politics clashes with policy. If a government stakeholder modifies or cancels a SIB program during a change in political leadership, or when the benefits of long-term contracts are revealed to heighten short-term political risk, private stakeholders may find their hands tied even if they are guided by a moral conviction to advance economic justice at great financial costs. There is need for knowledge sharing and the development of best practices for SIB governance models that can overcome these dangers. Further, SIB advocates need to identify how best to integrate a diverse network of stakeholders while maintaining the integrity of every SIB's civic mission.[246]

V. THE CHALLENGES FACING SOCIAL IMPACT BONDS

Notwithstanding the opportunities offered by the SIB model, each opportunity also poses challenges for stakeholders. First, the complexity of negotiating SIB deals presents a hurdle to their widespread adoption. They are expensive, require extensive due diligence, and can impose a high level of financial risk on private investors. Secondly, SIBs often face significant execution risks. Under-resourced governments may lack the resources to implement SIB deals, and social service providers may fail to live up to their performance goals or collaborate effectively with other stakeholders. Lastly, a high level of political risk faced by government stakeholders has challenged the widespread adoption of the SIB model as a viable social impact tool. Government stakeholders must not only be adequately resourced to navigate the complex SIB development process but must also contend with

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realities of social problems. . . . Other approaches, such as reducing misdemeanor arrests, disrupting the school-to-prison pipeline, changes to the bail system, and raising the age of criminal responsibility would have significant impact on the numbers who cycle though Rikers." (citation omitted)).

245. *See* Burand, *supra* note 26, at 466.

246. *See* Burand, *supra* note 26, at 467 ("The likelihood of refinements reinforces the need for those participating in early SIB arrangements to engage in what at least one commentator has termed 'high value learning,' so that the lessons of both successful and unsuccessful SIB structures can be shared broadly and quickly." (quoting LIEBMAN, *supra* note 44, at 20)).

the politics of administration changes and the impact of diverse political opinions about social welfare programs in the face of long-term contractual obligations. The following sections discuss these challenges in turn.

A. Minimizing Transaction Complexity

SIBs are often touted as bringing enhanced "market discipline" to government contracts for social welfare programs, leading to more robust due diligence, enhanced accountability, and improved managerial expertise.[247] However, in practice, SIB deals face a range of complexities that can make them an impractical tool for many communities. First, private investors may lack the subject matter expertise to adequately assess program design and evaluation, while government entities may lack the expertise necessary to connect program success metrics with short-term or long-term budgetary savings. Second, SIB advocates may undermine the importance of the intermediary, who plays a critical role in connecting SIB stakeholders to community constituents and also helps stakeholders understand the needs of the target community. An ill-equipped intermediary can cripple the implementation of a SIB deal before it has a chance to reap social rewards for impact investors. Lastly, impact investors will face continued financial risks as they strive to promote innovative programs while also seeking to earn a financial return on their investments. This Article argues that a shift in motivation is necessary for impact investors to resolve these contradictory goals.

Because SIBs integrate evidence-based outcome metrics into their program design, SIB deals require a high level of due diligence beyond that of the traditional public-private partnership.[248] Not only is due diligence for each new SIB program

247. Berlin, *supra* note 77, at 13; *see* Burand, *supra* note 26, at 461; *see* Jennifer Miller Oertel et al., *Proving That They Are Doing Good: What Attorneys and Other Advisors Need to Know About Program Assessment*, 59 WAYNE L. REV. 693, 696 (2013) (noting that "donors are looking for objective means to assure that the funds they have given have achieved the intended outcomes"). *But see supra* Section II.B (noting that the introduction of additional systems of performance management may hinder innovations in service provision).

248. Under a typical partnership between traditional community economic development lenders, due diligence is focused on assessing the ability of the loan recipient to execute the deal or project, while also identifying any risks that would preclude future repayment of lenders and investors. Conversely, in a SIB deal, stakeholders must conduct due diligence within a broader matrix of issues, including: the design of the social service program and its ability to effectively address the identified social problem within the targeted population; the framework for measuring the success of the social service program and its connection to the program's selected evidence-based outcome metrics; and the connection between the program's success metrics and the host government agency's cost-accounting system, which is critical to calculating the success payment for investors that,

expensive, it is also time-consuming, which could threaten the prospect of future cost savings altogether.[249] Impact investors and philanthropists are currently exploring innovative program models that, once widely adopted and standardized, may reduce due diligence and transaction costs. However, as investors seek to lower the risk profile and transactions costs of SIB deals by standardizing and replicating proven social welfare programs, community-based organizations and community coalitions may become further silenced in community development conversations. Institutional investors and national nonprofits that deliver social welfare programs built upon "best practices" may not reflect the true needs of residents living in low-income, marginalized communities. Their assumptions and biases, based upon national statistics and generalized survey data, may impede the efforts of grassroots, community-based organizations that understand how to leverage existing community assets and community relationships that are constantly in flux.[250] Seeking to minimize transaction costs may undermine efforts to engage smaller, less resourced community stakeholders, which can hinder long-term economic justice.

The selection of the SIB intermediary plays an important role in the due diligence process.[251] Government stakeholders often lack reliable budgeting and costs data systems, making it difficult to craft reliable estimates of cost savings for SIB programs. A competent and reliable SIB intermediary can help government stakeholders navigate the SIB research and development process. Nevertheless, even with an experienced and reliable intermediary, a preference for *innovative* social welfare programs that are

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in part, justifies their investment. *See* Berlin, *supra* note 77, at 19.

249. *See* Edmiston & Nicholls, *supra* note 145, at 70 ("A number of cross-sectoral stakeholders interviewed for this study felt that the high transaction costs associated with developing the SIB threatened the future cost savings achievable."); STELLINA GALITOPOULOU & ANTONELLA NOYA, OCED, UNDERSTANDING SOCIAL IMPACT BONDS 3 (2016), http://www.oecd.org/cfe/leed/UnderstandingSIBsLux-WorkingPaper.pdf [https://perma.cc/E8Y3-K6MY] ("They have entailed significant transaction costs that stakeholders should consider before embarking on them.").

250. Indeed, the success of the Utah SIB was based, in part, on the assumption that all of the at-risk children in the program, for whom English was a second language, would have been placed in special education without the intervention. *See* Berlin, *supra* note 77, at 19–20.

251. For example, in the Rikers Island SIB, MDRC conducted significant due diligence to learn about Rikers Island Prison's daily operations and assessed whether cognitive behavioral therapy could both fit into the culture and routine of the facility and be integrated into the life of returning citizens in their home communities. Additionally, MDRC identified potential savings to the New York City Department of Corrections and created payment terms for the SIB investors, all of which required an analysis of the city's complex budgeting formula. *See id.* at 11–13.

untested or *unproven* will expose SIB investors to financial risk,[252] ultimately leading to increased transactional complexity. Investors in SIB deals have limited means to manage the risks of their investment during the lifecycle of the SIB because repayment is triggered by an independent third-party's evaluation of the program's net "social" impact. If impact investors maintain a primary focus on minimizing the risk of financial loss by embedding safety measures into deals, and not on maximizing social impact, SIB deals will inevitably retain a high level of complexity or simply choose to avoid innovative, yet risky projects altogether.[253]

Alongside loan guarantees from the philanthropic community,[254] some SIB contracts also contain provisions that release parties from their contractual obligations if another party is unable to fulfill their agreed-upon responsibilities. Some SIBs have even incorporated early termination provisions for impact investors, which can have harmful impacts on government stakeholders who are left to service the community constituents left behind.[255] While these provisions offer protections for investors, they also introduce challenges for the sustainability of SIB programs as they evolve over time. This Article urges both impact investors and SIB advocates to explore alternative

252. SIBs that prioritize innovative and unproven social welfare programs—far similar to an equity investment for a venture investor than a typical loan or bond repayment for a CED lender—bring even greater financial risks. *See id.* at 9.

253. For example, some private investors have required loan guarantees from the philanthropic community to mitigate their financial risk. In the Rikers Island SIB in New York City, Goldman Sachs relied upon a guarantee from Bloomberg Philanthropies to provide security for potential financial losses. Bloomberg Philanthropies also provided funding for the deal in a variety of other ways, including grant money to pay for a pilot phase of the program and funding for the operating expenses of the intermediary organization. *See* Eduardo Porto, *Wall St. Money Meets Social Policy at Rikers Island*, N.Y. TIMES (July 2015), http://www.nytimes.com/2015/07/29/business/economy/wall-st-money-meets-social-policy-at-rikers-island.html?_r=0 [https://perma.cc/4CYR-J727].

254. As the SIB ecosystem evolves and becomes an increasingly attractive impact investment for financial institutions, philanthropists will likely continue to play an important risk mitigation role because of the challenge in establishing risk profiles for SIB investments and quantifying expected rates of return for innovative and "unproven" SIB programs. This is not unlike the role played by philanthropists during the evolution of financing for low-income housing. *See* Berlin, *supra* note 77, at 18. Some scholars suggest that philanthropists should play a more principal role in SIB structures. SIBs provide philanthropists with the commitment of governments to help support and scale their successful programs. Moreover, the philanthropic community has a variety of tools, including grants and program-related investments, which positions it to more readily provide risk capital for innovative and "unproven" models for social reform. *See id.* at 21.

255. The Rikers Island SIB included such a provision, enabling investors to terminate the deal after three years if performance targets were not being reached. *See* Gustafsson-Wright et al., *supra* note 21, at 19.

economic systems that can shift economic development programs away from the market moralities of capitalism and toward more community-oriented frameworks, such as the community-focused "social and solidarity" economy.[256] Unfortunately, unless they are driven by a primarily moral and philanthropic motivation to advance economic justice, rather than a profit-seeking motivation to minimize financial losses, impact investors will likely continue to complicate SIB deals with financial risk mitigations schemes.

Currently, SIB stakeholders have sought to overcome financial risks by introducing flexibility into the management of SIB deals.[257] SIBs are often built upon inflexible loan agreements with predetermined performance metrics and program benchmarks, fixed time periods for program implementation, and fixed costs that influence the calculation of expected returns for investors. The rigidity of SIB contractual terms can become a stumbling block for program adaptability and real-time innovation. However, social welfare programs operating in low-income, marginalized communities with unpredictable challenges require operational flexibility.[258] As a result, it is important for SIBs to include mechanisms that enable stakeholders to respond quickly to unexpected operational challenges given the complexity and intersectionality of the myriad social factors that challenge community development efforts. In other words, transaction complexity may be a necessary evil of many SIB deals moving forward.

B. Navigating Execution Risk

SIBs face a high level of execution risks due to the complexity of each SIB deal, which is designed to address the unique challenges of the target community. Governments with limited experience in using pay-for-success contracting for social welfare

256. *See supra* note 142 and accompanying text.

257. *See* Berlin, *supra* note 77, at 16.

258. Similar to the Rikers Island SIB in New York City, other SIBs in the United States targeting recidivism have encountered challenges with meeting their recruitment goals during the early stages of their programs. For example, both the Center for Employment Opportunities (CEO) SIB project in New York State and the Roca PFS SIB Project in Massachusetts met similar challenges. A decrease in the size of the target population that can be reached by the service provider not only impacts projected government cost savings but also decreases the population sample size required for effective program evaluation. The New York State CEO SIB project sought to overcome this program design risk by building in additional time in the program schedule to accommodate shortfalls in program recruitment. However, this also lengthened the term of the program, exposing the deal to greater political risk and imposing greater financial risk on the investors. *See id.* at 15–16; *see generally* Jones, *supra* note 20, at 362–69.

services may face difficulty linking the selected social issues with governmental budgetary expenditures. Further, not all governments are equipped to effectively collaborate with private sector stakeholders, determine measurable performance targets, estimate the costs of funding social service initiatives, or calculate appropriate performance success fees that can provide a return to impact investors while ensuring cost savings for the public.[259] Some government stakeholders may even resist the delegation of public decision-making authority to private stakeholders due to ethical considerations.[260]

Under-resourced governments face the risk of inappropriately pricing the financial costs and returns that will be generated from SIB deals. Some of the benefits, or hidden costs, of SIB deals may only be realized in the medium- to long-term, and critical insights may only be learned in hindsight.[261] As a result, as in other types of public-private partnerships,[262] governments may face pressure from private investors to renegotiate the terms of SIB deals over time or even to shut down SIB programs that are failing to meet performance goals, which can have a harmful impact on SIB beneficiaries.[263] This risk is even more likely when a market-based perspective drives the funding decisions of impact investors. Without an informed understanding of the long-term implications of certain governmental expenditures, government stakeholders may be forced to rely upon outside experts, which adds additional transactional costs to SIB deals.

Ensuring the sustainability of social welfare programs and the continuity of services is also a critical component of measuring success. While it might be feasible for private investors to simply terminate a failing project that does not meet performance

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259. *See* Burand, *supra* note 26, at 474.

260. *See supra* notes 133–36 and accompanying text.

261. *See* Burand, *supra* note 26, at 474 (explaining that this design element leaves sponsoring host governments "vulnerable to the criticism that the SIB returns payable to investors are too rich for the risks that are being taken").

262. *See, e.g.*, Eduardo Engel et al., *Soft Budgets and Renegotiations in Public-Private Partnerships*, 2 (Nat'l Bureau of Econ. Research, Working Paper No. 15300, 2009), http://www.econ.uchile.cl/uploads/publicacion/34605e1898c5635608b0e744498f19d5829ca a48.pdf [https://perma.cc/8NMG-2WY7] ("One of the problems with PPPs is that renegotiations of contracts are pervasive. Guasch (2004) examined nearly 1,000 Latin American concession contracts awarded between the mid 1980s and 2000, and found that 30% of all contracts were renegotiated. The pro- portion reaches 54.4% in the transportation sector (roads, ports, tunnels and airports) and 74.4% in the water sector.").

263. *See* Burand, *supra* note 26, at 475 (noting that "[o]ne way to mitigate this risk is to build success-fee formulas for SIBs that correlate directly with the savings generated by the performance outcomes being funded").

benchmarks,[264] government stakeholders cannot as easily turn a blind eye to communities that need the important social services that are being provided by SIBs. In fact, government stakeholders may suffer long-term costs by not continuing to fund and operate even moderately successful social welfare programs that are launched by SIBs, even when they fail to meet performance benchmarks.[265] Governments that embrace the SIB model will need to identify contingency strategies to account for missed performance targets, budgeting missteps, and underperforming stakeholders that threaten the success of SIB deals.[266] Scholars have noted that this private sector induced "shut down" risk may be compelling reason enough not to use SIBs to finance and scale *core* governmental public services.[267]

One of the most significant contributors to execution risk is the role of social service providers and the SIB intermediary. Although a SIB deal and its accompanying social welfare program may be designed in accordance with best practices, the selected social service providers may nevertheless fail to live up to performance goals or collaborate effectively with other stakeholders.[268] Additionally, the SIB intermediary may not adequately coordinate and manage the ecosystem of SIB stakeholders.[269] To address this concern, scholars have argued for a focus on social service providers and SIB intermediaries with a proven track record of success and the capacity to grow programs to scale without sacrificing the quality of service delivery.[270] However, preexisting biases and/or assumptions may favor well-known, institutional organizations at the expense of smaller, or emerging community-based groups.[271] An economic development

264. *See* Edmiston & Nicholls, *supra* note 145, at 70 ("By virtue of the outcome-based contracts underpinning the SIB model, services focus on achieving social outcomes, rather than the continuity of service outputs characteristic of conventional public-sector commissioning.").

265. *See* Berlin, *supra* note 77, at 22; *see also* Edmiston & Nicholls, *supra* note 145, at 71 (noting that "the fragility with which certain social outcomes are secured and maintained points to the importance of service continuity and support infrastructure existing alongside SIBs offering more intensive, if only temporary, assistance to target populations").

266. *See* Burand, *supra* note 26, at 470.

267. *See* LIEBMAN, *supra* note 44, at 4 ("The duty to avoid harming treatment populations may limit social impact bonds to programs that don't provide 'core' services.").

268. *See supra* Section II.C.

269. *See* A NEW TOOL, *supra* note 176, at 21.

270. *See* Burand, *supra* note 26, at 469 (defining capacity as "leadership talent, staff, governance, management information systems, quality controls, back-office systems, etc.").

271. SIBs run the risk of excluding smaller organizations from funding and delivering services. *See* Sinclair er al., *supra* note 119, at 126. For example, under the Peterborough

initiative that undermines or ignores existing community-based assets may prove to be ineffective in the long-term mission of addressing the root causes of structural inequality.[272] There are mixed opinions within the nonprofit community about the value of SIBs, perhaps tied to these very concerns.[273] Encouragingly, SIB advocates have already begun to develop important program assessment tools to aid the implementation of SIBs.[274] Nevertheless, as new SIB programs are created and SIB advocates target potential service providers with the capacity and resources to operate social welfare programs, they must also consider how their programs are helping to develop an "ecosystem of support" for community-based social service providers as well.[275]

SIB, it was "estimated that a SIB contract would need to be worth at least 12 million to cover such overheads as legal fees, evaluation expenses and investor's due diligence costs." *Id.*; *see also* Edmiston et al., *supra* note 145, at 60 (noting that "the majority of SIB contracts have been awarded to larger third sector organizations, which suggests a lack of sufficient risk redistribution to allow smaller third sector organizations to participate").

272. *See* McFarlane, *supra* note 33, at 304 ("The discourse fails, however, to take into account the structure and relational constraints placed on certain geographic places, like low-income, inner-city communities, that are currently marginalized and increasingly disconnected from the mainstream of American society."); *see also* Morley, *supra* note 127 at 21 ("For example, job creation SIBs may address certain problems related to structural unemployment, but may fail to address the fundamental problems of economic growth, class issues, poverty and poor educational attainment among lower socioeconomic groups that are the root cause of youth unemployment.").

273. *See Pay for Success, Social Impact Bonds: Principles on New Funding Mechanisms*, NAT'L COUNCIL NONPROFITS (Aug. 22, 2016), https://www.councilofnonprofits.org/trends-policy-issues/pay-success-social-impact-bonds-principles-new-funding-mechanisms [https://perma.cc/3UJR-VCR2] (noting that SIBs are "neither the cure-all remedy for every social problem or public funding short-fall as promoted by some nor the guaranteed disaster in every circumstance warned by others. Rather, they are nuanced tools that can be appropriate in certain situations").

274. *See* Lantz & Iovan, *supra* note 116 (discussing the Project Assessment Tool developed by the Urban Institute Pay for Success Initiative, which was designed to "promote 'good practices' in defining social problems, selecting strong interventions, designing and implementing PFS projects, and conducting rigorous evaluations"); *see also id.* (discussing key principles to guide entities considering pay-for-success projects or other social finance models).

275. *See* Burand, *supra* note 26, at 469. It is worth noting that educational institutions have played an influential role in the development of the SIB "ecosystem of support." For example, the Government Performance Lab at Harvard University Kennedy School (GPL), a product of its Social Impact Bond Technical Assistance Lab (SIB Lab), provides technical assistance to governments interested in pay-for-success initiatives. *See Government Performance Lab*, HARV. KENNEDY SCH., https://govlab.hks.harvard.edu/ [https://perma.cc/N5L2-BK6A] (last visited Sept. 8, 2018). The Sorensen Impact Center, housed in the Policy Lab at the David Eccles School of Business at the University of Utah, has promoted "private, public, and social sectors together in uncommon partnerships [to] harness the power of the capital markets to address critical social and environmental challenges." *See The Sorenson Impact Center and Social Finance Re-Open Pay for Success Competition,* SORENSON IMPACT, DAVID ECCLES SCH. OF BUS., UNIV. OF UTAH (July 12, 2018), https://sorensonimpact.com/pay-for-success-structuring-grant-press-release/?rq=social%20impact%20bond. In 2017, a Pay for Success and Social Impact

C. Overcoming Political Risk

The success of SIBs, and the continued commitment of impact investors to supporting social innovation, depends in part upon the ability of government stakeholders to remain invested in SIB deals. As a central figure in each SIB arrangement, government stakeholders can hinder SIB participants from meeting their respective obligations in a variety of ways. Government constituents agree to use predetermined cost savings that are generated during the lifecycle of the SIB to repay private investors upon the achievement of predefined outcome performance metrics. However, not all projected cost savings materialize in the short-term, especially as laws and policies change over time. Further, not all private investors are willing to wait more than three to four years to earn a return on their investment.[276]

The sophistication of the government stakeholder poses risks for the success of every SIB deal. Not all government stakeholders have the necessary resources or capacity required to navigate the transactional complexities and challenges of SIBs.[277] Moreover, with the cycle of government administrations typically lasting only a few years, SIBs face the risk that future government administration will not honor the terms of existing SIB contracts due to changes in government leadership or shifts in political/economic conditions. These are critical areas of concern, particularly considering the increasing role that government stakeholders are playing in the regulation and monitoring of the SIB marketplace.[278]

Finance conference was held at the University of Virginia, Darden School of Business, Institute for Business in Society. *See* Tori S. Yang, *Professor Mary Margaret Frank Leads Discussions at 2017 Pay for Success and Social Impact Finance Conference*, INST. FOR BUS. SOC'Y DARDEN (Feb. 24, 2017), https://blogs.darden.virginia.edu/ibis/2017/02/24 [https://perma.cc/HKW8-7N3D]. In May 2017, New York University Law School launched the Grunin Center for Law and Social Entrepreneurship, poised to be a leader on issues of law and social entrepreneurship. *See Grunin Center for Law and Social Entrepreneurship*, N.Y.U., http://www.law.nyu.edu/centers/grunin-social-entrepreneurship [https://perma.cc/PB5T-CXG7] (last visited Aug. 12, 2018).

276. *See* Burand, *supra* note 26, at 456–57 n.21 ("Social Finance representatives have noted that they think that three to four years may be the maximum length that SIB investors would be willing to wait for outcome payments, particularly given the illiquidity of SIB investments."); *see also* FINAL PROCESS EVALUATION REPORT, *supra* note 169, at 38–41.

277. *See* Burand, *supra* note 26, at 473–74 ("Among the minimum abilities that host governments will need in order to conduct a SIB negotiation are the abilities to determine performance targets, to estimate the likely costs of funding interventions to reach those targets, and to calculate the performance success fees (over those estimated costs) that are likely to attract sufficient investors to fund the SIB while still preserving savings for the host government.").

278. See *supra* Section II.B (discussing political history of SIB marketplace in the U.S).

The private interests of specific government actors can also pose counterparty risks that threaten the success of SIB deals.[279] SIBs require a high level of coordination among the various stakeholders in a typical deal, both during the design and the implementation of SIB programs. Weak governance, or poor executive leadership, can impair the long-term viability of SIB deals.[280] The lifecycle of SIBs generally needs to extend beyond the term of one government administration to reach their full maturation. As a result, there must not only be wide government support for a SIB program to be sustainable but also the support of public institutions and community stakeholders to hold future government administrations accountable. Unfortunately, it is often uncertain whether a future government administration will honor the payment commitments of a current political administration,[281] especially when changes in leadership bring changes in political ideology that conflict with the philosophical goals underlying the previous administration's social welfare initiatives.[282] Several states in the U.S. have taken legislative steps to advance the development of SIB transactions and counter

279. When governments transition from one political party to the next, some political figures may seek to avoid the reputational risk of supporting innovative SIB programs that fail to achieve their social service goals. *See* Burand, *supra* note 26, at 480 (discussing how reputational risk can have far-reaching implications for the SIB, including how a highly publicized SIB controversy could trigger the contagion risk of a wider collapse in the SIB marketplace); *see also* Lantz & Iovan, *supra* note 116 ("For example, an evidence-based teen pregnancy intervention that would increase women's access to long-acting reversible contraceptives may meet with moral or religious objections from elected officials, public agency leadership, or community-based groups. As another example, some people object to supportive housing interventions that combine subsidized/free housing with social services to people with active substance abuse problems, because they believe taxpayers should not be providing housing support to people who use illegal drugs.").

280. *See* Callanan et al., *supra* note 64, at 35 (discussing the value of executive leadership in catalyzing the development of SIB programs).

281. Governments generally cannot create budget obligations that extend into future legislatures and impose restrictions on future government spending. SIBs require appropriate legal conditions to ensure that governments can make payments under the contract beyond the fiscal year in which a contract is made. It may be necessary for legal conditions to be created to facilitate directing funds to an intermediary organization; to enable the intermediary to make certain decisions on behalf of government constituents, such as selecting service providers; and to define how the host government will treat hybrid investments that include both debt and equity components. *See* Gustafsson-Wright et al., *supra* note 21, at 6.

282. Multi-year SIBs that commit host governments to repay private investors based upon the future success of the program may need special authorization and appropriate legislation to bind the host government to long-term, pay-for-success contractual obligations. *See* Burand, *supra* note 26, at 476; *see also* Cox, *supra* note 30, at 979 ("Typical appropriations statutes are often unable to commit the government to either multi-year or contingent contracts . . . .").

the threat posed by these counterparty risks.[283] More work still remains.

Governments also face the risk of SIB stakeholders taking unethical actions to meet performance targets or overstating the impact of their service programs to attract future funding support, all of which comes at the expense of SIB beneficiaries and host communities.[284] This issue has already arisen in the microfinance sector, where the presence of increased private sector capital in recent years has led some microfinance institutions to rapidly scale their services without providing adequate customer protection safeguards.[285] Where a dishonest or overly ambitious SIB social service provider uses inappropriate means to ensure programmatic success, government stakeholders will be pressured to step in and fill the void, which will increase transaction costs and potentially erode government cost savings. Government stakeholders will need to negotiate these "step in" rights during the development of SIB deals to authorize their ability to act on behalf of other stakeholders; and to ensure that the beneficiaries of the SIB deal, especially the residents of the communities where SIB programs are located, are not negatively impacted by unanticipated program failures.[286]

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283. For example, in 2012 in Massachusetts, the government passed legislation establishing a trust fund to authorize up to $50 million for pay-for-success contracts and to provide that governmental payment obligations would constitute "a general obligation of the commonwealth for which the full faith and credit of the commonwealth shall be pledged for the benefit of the providers of the contracted government services." *See generally* MASS. GEN. LAWS ch. 10, § 35VV (2012); *see* Burand, *supra* note 26, at 476–78; *see also* Schneider, *supra* note 209, at 575 n.361 ("General legislation has been passed or introduced in California, Ohio, Rhode Island, South Carolina, and Washington; contract legislation passed or introduced in Colorado, Florida, Pennsylvania, Texas, and the District of Columbia.").

284. *See, e.g.*, Burand, *supra* note 26, at 470; *see also* Edmiston & Nicholls, *supra* note 145, at 59 ("In certain instances, the marketisation of social outcomes has been found to compromise service quality and integrity due to 'gaming' and perverse incentives."); *see also supra* Section II.D (discussing ethical concerns of SIBs).

285. For example, according to Burand, *supra* note 26, at 470:

> [A] social service provider participating in a SIB aimed at reducing the number of children residing in foster care might start returning children to dangerous family situations without sufficient regard for the children's safety. Or a social service provider participating in a SIB aimed at prisoner recidivism might interfere with legal processes to ensure that reconviction rates are delayed or inappropriately frustrated during periods when SIB reconviction targets are to be measured.

See also Edmiston et al., *supra* note 145, at 59 ("In certain instances, the marketization of social outcomes has been found to compromise service quality and integrity due to gaming and perverse incentives.").

286. To combat the risk of unethical behavior, host governments can require rigorous due diligence, include provisions in the SIB contract for termination or replacement rights in the event of unethical or inappropriate actions by stakeholders, and include financial penalties in the SIB contract in the event of a pattern of unethical or inappropriate behavior

Navigating the intervention model risk posed by the selected service program may prove more difficult. While some scholars suggest that limiting SIB funding to *proven* social welfare programs can minimize this risk,[287] this may obscure the role of government and undermine the potential for social finance to scale innovation.[288] Additionally, it may lead SIB advocates to overlook underfunded *innovative* social welfare programs, especially in cases where social welfare programs have outcomes that are difficult to quantify using performance metrics.[289] This seems to obscure the very purpose of SIBs, which many have argued is to promote innovation in public service delivery. Further, not all effective social welfare programs can be scaled without impacting the quality of services being offered. As the ecosystem of SIB deals evolve, it may be useful for governments to establish independent "watchdog" organizations that can help to regulate the behavior of stakeholders participating in SIB deals and ensure that the needs of vulnerable populations impacted by SIB programs are prioritized.[290] Additionally, SIB advocates should continue to create resource banks and toolkits to assist host governments in developing and managing SIB transactions.[291]

VI. CONCLUSION

"Philanthropy is commendable, but it must not cause the philanthropist to overlook the circumstances of economic injustice which make philanthropy necessary." – Rev. Dr. Martin Luther King Jr.

"[T]he term revolutionary, as I am using it does not connote violence; it refers to the qualitative transformation of fundamental

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by stakeholders. *See* Burand, *supra* note 26, at 471 n.59.

287. *See id.* at 468–69; *see also* Callanan et al., *supra* note 64, at 19.

288. *See* Sections II.C–D.

289. Meghan Joy & John Shields, *Social Impact Bonds: The Next Phase of Third Sector Marketization?*, 4 CAN. J. NONPROFIT & SOC. ECON. RES., Autumn 2013, at 39, 48; Toby Lowe & Rob Wilson, *Playing the Game of Outcomes-Based Performance Management. Is Gamesmanship Inevitable? Evidence from Theory and Practice*, 51 SOC. POL'Y ADMIN. 981, 992–95 (2017); McHugh, *supra* note 126, at 249.

290. *See* Burand, *supra* note 26, at 471–72; *see also* McGrath, *supra* note 20, at 822 ("One of the steps the government can take to greatly improve impact investing is strengthening the industry infrastructure through changes in regulation, as well as establishing sufficient leadership to monitor the market.").

291. *See* Burand, *supra* note 26, at 474 n.62; *see also* McGrath, *supra* note 20, at 822 ("Encouraging and developing specialists impact investment managers and impact investment intermediaries would attract investment, provide data and analysis, and implement the necessary cultural changes in mainstream finance.").

institutions, more or less rapidly, to the point where the social and economic structure which they comprised can no longer be said to be the same." – Bayard Rustin[292]

There is a story about capitalism that often goes untold in the narrative of the American Dream. When Andrew Carnegie built his famous steel empire in the rich tradition of American imperialism,[293] he did so on the backs of low-income workers, often through unethical business practices and shady corporate deals.[294] As corporations today receive praise for their corporate philanthropy and impact investment portfolios, many of which will increasingly include the SIB model of social welfare delivery,[295] they also routinely hunt for ways to lower their tax burdens and maximize their corporate profits at the expense of employee benefits, all while hiding the hypocrisy of unethical market moralities behind the thin veil of charity.[296] Indeed, while many have praised Jeff Bezos for embracing Andrew Carnegie's philanthropic tradition by donating millions toward the education of immigrants, few are lifting the veil and questioning why his company relies so heavily on independent contractors; why so many of his employees are on food stamps; why local governments with struggling educational systems are channeling limited

292. Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, *in* THE CIVIL RIGHTS READER; BASIC DOCUMENTS OF THE CIVIL RIGHTS MOVEMENT 337, 340 (Leon Friedman ed., 1968).

293. While a discussion of America's imperialist tradition of chattel slavery and racial terrorism, and its connection to the growth of America's global economy, is beyond the scope of this Article, *see generally* IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA (2000); DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE REENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (1st ed. 2008).

294. *See* Ed Burmila, *Jeff Bezos, Amazon and Why 'Charity' Is the Wrong Solution*, ROLLING STONE (Feb. 14, 2018), https://www.rollingstone.com/politics/amazon-jeff-bezos-richest-man-philanthropy-charity-w515535 [https://perma.cc/8FCV-72VJ] (["Andrew Carnegie's wealth] was built in no small part on the low pay and shabby treatment of his workforce for decades. And he hired strikebreakers to kill his employees who dared to unionize (the infamous Homestead Strike of 1892 was at the main Carnegie Steel plant and resulted in the workforce being replaced with non-union immigrants). He used every legal subterfuge available, as was common during the Robber Baron era, from price-fixing and collusion to bribery and brute force to build his business empire.").

295. Impact investing by U.S. foundations currently comprises approximately "one-half of 1 percent of grant spending" and "2 percent of endowment spending." Rangan, *supra* note 200, at 35. Accordingly, there is much opportunity for increased funding in social finance innovations like the SIB. *Id.*

296. *See* Burmila, *supra* note 294 ("Imagine if people like Bezos and companies like Amazon paid in practice anywhere close to the tax rates that apply to people of such great wealth in theory. Imagine if a company of such staggering wealth—$43 billion in revenue in a single quarter of 2017—paid its employees enough to send their own kids to college.").

taxpayer dollars to court his company as it seeks a new headquarters location; why a CEO donating 0.03% of his net worth, the equivalent of a person worth $1 million donating $300, is worthy of such widespread acclaim?[297] Amazon is just one example of many.

These facts point toward the need for a new "gospel of wealth," a reimagining of philanthropy that begins to explore the root causes of poverty and the structural determinants of systemic oppression. To many philanthropists and impact investors, the emerging social impact bond model seems to be a step in the right direction toward finally realizing that new vision. And it may very well be. The SIB, which seemingly finds a middle ground between place-based and people-based economic development strategies, represents a promising approach to addressing criminal justice and other social challenges. Tapping into the altruistic motivations of socially conscious impact investors, it provides a platform for the private market to bear the financial risks of preventative, forward-looking social welfare programs. Further, the SIB model is increasingly being used by governments around the world to address a wide array of social challenges, providing much needed investment capital for innovative social welfare programs that otherwise would likely go unfunded.

Specifically, as discussed in this Article, the SIB model provides for the expansion of investment capital for social innovation, the transfer of investment risk from the public sector to the private sector, and the prioritization of evidence-based preventative social welfare programs. Nevertheless, as this Article has revealed, the SIB model also presents critical challenges to its stakeholders, including the high level of transaction complexity of SIB deals, the significant execution risks that arise during the implementation of complex SIB deals, and the political risks that threaten the longevity of SIBs. Further, under the influence of a pervasive dogma of free-market fundamentalism, and a dominant neoliberal political orthodoxy that shape program design, the SIB model perpetuates the privatization of public welfare service delivery. This practice may erode the ability of governments to uphold the values and ideals of democratic citizenship and maintain their primary role as both the protectors and providers of public welfare.

The integration of financial incentives for the private sector into the delivery of public services—a marketization of public welfare service delivery—runs the risk of undermining the moral

297. *See id.*

and ethical value of nonprofit and philanthropic organizations who are dedicated to civic missions.[298] Perhaps this is to be expected, given the hegemonic capitalist system that undergirds America's philanthropic efforts.[299] Indeed, as Andrew Carnegie argued, perhaps capitalism and its discontents are "beyond our power to alter."[300] Nevertheless, as public service becomes increasingly "de-moralized," and economic development becomes increasingly less about delivering a vision of ethical democratic life grounded in solidarity, and more about maximizing private self-interests to advance collective benefit, SIB advocates must be wary of not only hindering community empowerment but also undermining social justice.

As a result, notwithstanding its potential for positive social impact across a wide range of social issues, including the criminal justice sector, the SIB model will likely struggle to meaningfully impact systemic social and economic inequality because of its grounding in a capitalist economic system that often hinders democratic engagement and undermines economic justice. The current SIB model fails to meaningfully wrestle with our nation's history of institutional racism and racial segregation that has entrenched entire communities into the ditches of poverty.[301] While the current SIB model has perhaps set us on the path toward a new "gospel of wealth," more work remains for us to find salvation from the sins of capitalism.[302] Looking forward, scholars should explore new economic development frameworks to guide

298. *See* Jones, *supra* note 20, at 361–62 ("SIBs divert investments away from philanthropy and increase the burden on the third sector, thereby undermining claims that the private sector is bearing the SIB risk.").

299. *See* CARNEGIE, *supra* note 4, at 1, 3 ("It is well, nay, essential for the progress of the race, that the houses of some should be homes for all that is highest and best in literature and the arts, and for all the refinements of civilization, rather than that none should be so. . . . The price which society pays for the law of competition, like the price it pays for cheap comforts and luxuries, is also great; but the advantage of this law are also greater still, for it is to this law that we owe our wonderful material development, which brings improved conditions in its train.").

300. *Id.* at 1.

301. *See* McFarlane, *supra* note 33, at 351 (explaining that economic development programs often ignore "configurations of poverty segregated by race or ethnicity" and "threaten[] to harden these boundaries beyond all hope of remedy because the program[s] ignored current structural and historical policies that have shaped and configured our racialized landscape").

302. As Michael Edwards has written, there is a class of social justice advocates who are looking for ways to "transform economic power structures and ways of living together, rather than just using markets as instruments to deliver social goods." Such individuals "put a lot more emphasis on supporting collective action and the empowerment of those usually classified as beneficiaries in order to seek systemic change in public health, in education, and elsewhere." *See* MICHAEL EDWARDS, SMALL CHANGE: WHY BUSINESS WON'T SAVE THE WORLD 28 (2010).

the implementation of the SIB model. Specifically, a justice-based approach to economic development—one that prioritizes economic justice and democratic engagement in the economic development process—can perhaps lead to more innovative social welfare programs, while also opening the door for new ideas that will meaningfully impact the root causes and structural determinants of poverty.[303]

This Article has not called for an abandonment of capitalism. Instead, it suggests that it may be worthwhile to explore new blended economic models that may better facilitate philanthropy and address the stubborn issue of poverty in America. Interestingly, if we dug below the surface of the word *philanthropy*, we would discover that it translates, stemming from the Greek and the Latin, to the phrase *loving people*.[304] Have we created an economic system where the few are gifted opportunities to profit from the oppression of the many and then invited to love *themselves*, more and more, through praised acts of so-called "charity" or "social" impact? Or should we instead reconsider *who* philanthropy is calling us to love? Dare I say, if we aspire to be a truly democratic nation who loves her citizens and values the ideals of justice and individual self-worth, then until *community* becomes an integral part of our new gospel of wealth, corporate philanthropy will simply be a misnomer, and impact investing another financial scheme of neoliberalism's economic ploy.

303. A robust discussion of such an economic justice framework, including the ways in which it may promote democratic values, is beyond the scope of this Article. The Author intends to explore this line of inquiry in future scholarship.

304. *See Philanthropy*, DICTIONARY.COM, http://www.dictionary.com/browse/philanthropy [https://perma.cc/NTH4-XRAX] (last visited July 2, 2018).