

WE TRIED TO MAKE THEM OFFER REHAB, BUT THEY SAID, “NO, NO, NO!”: INCENTIVIZING PRIVATE PRISON REFORM THROUGH THE PRIVATE PRISONER REHABILITATION CREDIT

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Mass incarceration in the United States has led many state governments to hand over the management and construction of prisons to private corporations, which are able to meet demand more quickly and are perceived as more cost-effective. There are approximately 100 private prisons housing about 62,000 inmates today, and this number is expected to increase to 360,000 in the coming decade. Unfortunately, private prisons have failed to effectively address many of the issues pervasive in public prisons—namely recidivism, violence, and poor living conditions. Furthermore, the government-customer has failed to effectively hold private prisons accountable for their failures. As a solution this Note proposes the Private Prisoner Rehabilitation (PPR) credit: a performance-based, refundable tax credit that incentivizes private prisons to address some of the key issues plaguing the criminal justice system.

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* Copyright © 2014 by Cassandre Monique Davilmar. J.D., 2013, New York University School of Law; B.S., 2010, University of Miami. Thank you to the Creator of the Universe for His blessings; please continue to order my steps toward Your will. Thank you to my beautiful mother, Wilberte Davilmar, for inspiring me to write this piece. Her intense love for me is all the motivation I need to be the best human I can possibly be. For their thoughtful comments and support, many thanks to my good friends and colleagues, Ihsan Saleem, Tumi Adebiji, Anthony Enriquez, Michele Yankson, Jon Shields, Yan Cao, Lauren Gambier, David Willard, and Dana Adams. For their amazing comments and dedication to my piece, thank you to my editors, Cristian Kelly, David Leapheart, Zachary King, and Seth Allen. Lastly, thank you to all the hard-working members of the *New York University Law Review*, particularly the diligent, awe-inspiring Fourth Line department.

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“It’s not necessarily that privatization is bad It’s about the way that the profit motive influences policy.”
 —Emily Tucker, Advocacy Policy Director, Detention Watch¹

INTRODUCTION

Alex Friedmann² spent six years in Tennessee’s South Central Correctional Facility, a facility operated by the Corrections Corporation of America (CCA).³ He was sentenced to ten years in

¹ Hannah Rappleye, *Profiting from Prisons*, THE CRIME REPORT (Feb. 14, 2012, 11:18 PM), <http://www.thecrimereport.org/news/inside-criminal-justice/2012-02-profiting-from-prisons>.

² Friedmann has dedicated his life to prisoners’ rights and criminal justice reform. He is now an editor for *Prison Legal News* and a head of the nonprofit watchdog Private Corrections Institute. James Ridgeway, *Ex-Con Shareholder Goes After World’s Biggest Prison Corporation*, MOTHER JONES (May 10, 2012, 12:01 AM), <http://www.motherjones.com/politics/2012/05/ex-con-alex-friedmann-cca-private-prison-rape>.

³ *Id.* The Corrections Corporation of America (CCA) is the largest player in the U.S. privatized prison industry. PHILIP MATTERA, MAFRUZA KHAN & STEPHEN NATHAN, CORRECTIONS CORPORATION OF AMERICA: A CRITICAL LOOK AT ITS FIRST TWENTY YEARS 1 (2003), available at [http://grassrootsleadership.org/sites/default/files/uploads/CCA AnniversaryReport.pdf](http://grassrootsleadership.org/sites/default/files/uploads/CCA%20AnniversaryReport.pdf); DAVID SHAPIRO, AM. CIVIL LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 12 (2011), available at http://www.aclu.org/files/assets/bankingonbondage_20111102.pdf. CCA currently operates sixty-seven correctional facilities, including forty-seven facilities that it owns. CORR. CORP. OF AM., 2012 ANNUAL REPORT ON FORM 10-K 5 (2013) [hereinafter CCA 10-K]. CCA’s facilities are capable of housing approximately 92,500 inmates in twenty states and Washington, D.C. *Id.* I refer to CCA frequently simply because it is the most prominent private prison company in the United States. I also discuss The GEO Group, Inc. (GEO), which is the

prison for attempted murder, armed robbery, and attempted aggravated robbery.⁴ Alex Friedmann now owns a modest \$2000 worth of stock in the company that operates the very correctional facility in which he was once imprisoned.⁵ As an activist shareholder,⁶ Friedmann recently submitted a controversial resolution tackling the issue of rape in CCA's prisons.⁷ Friedmann's actions exemplify an unconventional strategy in private prison reform: He has chosen to work within the corporate framework, identifying areas where his policy goals and the corporation's profit motive may be aligned.

U.S. prison privatization in the modern era began in 1979⁸ when the U.S. Immigration and Naturalization Service contracted with privately owned companies to house immigrant detainees facing hearings and deportation.⁹ These contracts eventually ushered in the contemporary private-prison movement.¹⁰

In the mid-1980s, as state governments began contracting with private firms for prison management, the nation entered a debate concerning "the legality, propriety, and desirability of private

second-largest private provider of correctional and detention facilities worldwide. GEO GRP., INC., 2010 ANNUAL REPORT 11 (2010) [hereinafter GEO ANNUAL REPORT]; *About Us*, GEO GRP., INC., http://www.geogroup.com/about_us (last visited Jan. 29, 2014) (noting that, internationally, GEO owns and/or manages ninety-six correctional facilities with about 73,000 beds).

⁴ Ridgeway, *supra* note 2.

⁵ *Id.*

⁶ For a discussion on shareholder activism, see generally LISA M. FAIRFAX, *SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION* (2011).

⁷ Ridgeway, *supra* note 2. The Prison Rape Elimination Act, 42 U.S.C. § 15601 (2006), informed Friedmann's resolution. See Ridgeway, *supra* note 2 (noting that Friedmann believes CCA-run institutions have failed to comply with all mandates of the federal law). Congress voted unanimously on the Act, which President Bush signed, mandating the comprehensive collection of prison rape data as well as a "zero tolerance policy" among detention facilities. *Id.* In his resolution, Friedmann noted that "[a] failure by the Company to adequately address this issue, and the negative publicity, loss of business and litigation that results, constitutes a risk to the Company and a threat to shareholder value." *Id.* Unfortunately, CCA's board of directors and shareholders voted down the resolution. Press Release, HUM. RTS. DEFENSE CTR., CCA Prison Rape Shareholder Resolution Gains Over 18% of Voting Shares (May 14, 2012), available at http://www.ncdsv.org/images/HRDC_CCAPrisonRapeShareholderResolutionGainsOver18PercentVotingShares_5-14-2012.pdf.

⁸ Various forms of privatization, sometimes involving forced labor, existed in the U.S. and U.K. in the eighteenth and nineteenth centuries. See DOUGLAS McDONALD ET AL., *PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE* 4 (1998) (detailing the growth of private juvenile offender facilities in nineteenth-century New York City); SHAPIRO, *supra* note 3, at 10 (describing privately run prisons in eighteenth-century England and the post-Civil War convict lease system in the U.S.).

⁹ McDONALD ET AL., *supra* note 8, at 5.

¹⁰ *Id.*

imprisonment.”¹¹ The “War on Drugs” was in full swing.¹² Mandatory minimum sentencing, “truth in sentencing,” and “three strikes” laws helped the U.S. attain the highest incarceration rate in the world.¹³ Existing federal and state prisons did not have the capacity to meet demand. Prisoners were “sleeping in hallways, day rooms, gymnasiums, [and] sometimes even in bathrooms, or were doubled up in small cells.”¹⁴ Governments were in a bind: Voters wanted tougher crime laws, but they also wanted government spending to decrease. Private prisons appeared to be the solution.¹⁵

Various states have pursued prison privatization as a “low-cost” solution to rising incarceration rates.¹⁶ In the United States, there are approximately 100 private prisons housing about 62,000 inmates; that number is expected to increase to 360,000 in the coming decade.¹⁷

The effectiveness of private prisons is usually measured in terms of financial cost-benefit analysis.¹⁸ However, the results have been largely inconclusive.¹⁹ Though some studies have found private

¹¹ *Id.* at 6. Even though many associations and agencies were opposed to prison privatization, the opposition could not withstand the growing demand for prison facilities. *See id.* (analyzing the debate surrounding correctional privatization).

¹² *See* MACQUARIE RESEARCH EQUITIES, CORRECTIONS CORP OF AMERICA 5 (2008) (“We link the sharp rise in the US inmate population over the past three decades to: the US ‘War on Drugs’ campaign of the 1980s; the passage of mandatory sentencing and the ‘three strikes law’ in the 1990s; and tough post-9/11 immigration laws.”) (on file with the *New York University Law Review*).

¹³ *Id.*; SHAPIRO, *supra* note 3, at 10–11; Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, at 56, available at <http://cooley.libarts.wsu.edu/schwartzj/pdf/schlosser.pdf>.

¹⁴ McDONALD ET AL., *supra* note 8, at 8.

¹⁵ *Id.*

¹⁶ *See id.* (noting that most privatized prisons do not replace existing public prisons, but instead satisfy the demand for the increasing prison population).

¹⁷ Vicky Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RESEARCH (Jan. 31, 2013), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289> (“Ten years ago there were only five private prisons in the country, with a population of 2,000 inmates; now, there are 100, with 62,000 inmates.”).

¹⁸ *See, e.g.*, McDONALD ET AL., *supra* note 8, at 33, 47 (analyzing the cost savings of private prisons); DAVID W. MILLER, THE DRAIN OF PUBLIC PRISON SYSTEMS AND THE ROLE OF PRIVATIZATION: AN ANALYSIS OF STATE CORRECTIONAL SYSTEMS 2, 12–13 (2010), available at <http://www.csa.com/discoveryguides/prisons/review.pdf> (using a cost-benefit analysis to compare private prisons to state-run prisons); *see also* James F. Blumstein, Mark A. Cohen & Suman Seth, *Do Government Agencies Respond to Market Pressures?: Evidence from Private Prisons*, 15 VA. J. SOC. POL’Y & L. 446, 450–51 (2008) (discussing the role of economic analysis in private prison studies); Richard A. Oppel Jr., *Private Prisons Found to Offer Little in Savings*, N.Y. TIMES, May 19, 2011, at A1 (noting that cost savings has been the main focus of privatized prison evaluations and that it is unclear whether or not private prisons are in fact cheaper than public prisons).

¹⁹ *See* PAUL ASHTON & AMANDA PETTERUTI, JUST. POLICY INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE

prisons to be cost reducers, there are also studies that have found private prisons to be cost drivers.²⁰ Regardless of whether private prisons are more cost-effective than public prisons, the growing demand for prison services has led many state governments to hand over the management and construction of prisons to the private sector, which has been better able to meet demand at a faster pace.²¹

Given that prisons carry out a complex public function,²² these private corporations should be incentivized not only to decrease the monetary costs of prisons, but also to address key issues plaguing the criminal justice system, particularly recidivism and its causes—some of which can be traced to prisons themselves.²³ Unfortunately, private prisons have failed to remedy many of the issues pervasive in public

INEFFECTIVE INCARCERATION POLICIES 6 (2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf (“Despite no conclusive evidence in the cost savings of private corrections, and growing evidence of significant collateral expenses borne by the public of incarcerating people in private prisons, the trend of for-profit prison privatization continues.”); SHAPIRO, *supra* note 3, at 6 (noting that the “evidence for supposed cost savings is mixed at best”).

²⁰ See, e.g., CHARLES L. RYAN, ARIZ. DEP’T OF CORR., FY 2010 OPERATING PER CAPITA COST REPORT: COST IDENTIFICATION AND COMPARISON OF STATE AND PRIVATE CONTRACT BEDS 3 (2011), available at http://www.azcorrections.gov/adcr/reports/ADC_FY2010_PerCapitaRep.pdf (revealing neutral and negative cost savings from in-state contract beds); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-96-158, PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE 2–3 (1996), available at <http://www.gao.gov/archive/1996/gg96158.pdf> (concluding that a multistate comparison of operational costs yielded mixed results and offered “little generalizable guidance for other jurisdictions about what to expect regarding comparative operational costs and quality of service if they were to move toward privatizing correctional facilities”); KEVIN PRANIS, PRIVATE CORR. INST., COST-SAVING OR COST-SHIFTING: THE FISCAL IMPACT OF PRISON PRIVATIZATION IN ARIZONA 7–9 (2005), available at http://www.prisonpolicy.org/scans/AZ_PP_Rpt_v4.pdf (arguing that there is little evidence of cost-savings by private prisons and the reports available fail to take into account material factors that affect costs); Oppel Jr., *supra* note 18, at A4 (noting that research financed by private prison companies often shows private prisons to be cost reducers).

²¹ See MACQUARIE RESEARCH EQUITIES, *supra* note 12, at 1, 9 (noting that, due to heavy demand, state governments are often forced to outsource to private prison companies who are better able to build facilities ahead of demand).

²² There are many philosophies on the purpose of incarceration. Rationales include rehabilitation, retribution, and utilitarian ideals. See Joycelyn M. Pollock, *The Rationale for Imprisonment*, in PRISONS: TODAY AND TOMORROW 3, 3–8 (Joycelyn M. Pollock ed., 2d ed. 2006) (outlining retributive and utilitarian approaches to punishment).

²³ This Note assumes that, first and foremost, corporations exist to create profits for their shareholders. They aim to minimize costs because cost cutting expands profit margins. It is therefore desirable, where corporations are hired to fulfill a traditional government function, to utilize corporate cost-cutting expertise in ways that benefit both the government-customer (or society) and the shareholder. This Note advocates using the power of corporate profit-seeking to prevent the negative externalities currently created by private prisons. For more discussion, see *infra* Part I. Furthermore, throughout this Note, I focus on recidivism as an ill that private prisons have failed to solve. I take the position that prison inefficiencies, such as poor prisoner quality of life and inadequate rehabilitation programs, contribute to high recidivism, and therefore should be corrected to reduce

prisons; the government-customer, meanwhile, has failed to effectively hold private prisons accountable.²⁴ With these shortcomings in mind, stakeholders in affected states should ask themselves: (1) Why are private prisons, as structured, unable to satisfy societal expectations? and (2) How can the private prison system be restructured to remedy these issues?

There is little academic literature discussing methods of aligning private prison incentive structures with the needs of society as a whole.²⁵ This Note seeks to fill that void by arguing that the performance-based, refundable Private Prisoner Rehabilitation (PPR) credit is a viable tool to align incentives between private prison companies and government-customers.²⁶

Part I of this Note discusses in more detail the key issues facing U.S. prisons. Part II identifies the current conflicting incentives within the private prison enterprise, while proposing that policymakers can improve private prisons through incentive alignment. Part III argues that the government-customer should consider the PPR credit as a viable solution to the misaligned interests of private prisons.

I

THE U.S. PRISON SYSTEM AND ITS FAILURES

In the United States, state and federal governments attempt to balance the goals of retribution, utilitarianism, and rehabilitation in forming and operating the prison system.²⁷ In recent years, retribution and utilitarianism—reflected in harsher sentencing laws and a broader

recidivism. For further discussion on how PPR credits can help decrease recidivism in the long-run, see *infra* Part III.

²⁴ See *infra* Part II.C (discussing the disincentives government actors face for exercising effective oversight over private prisons).

²⁵ Though some pieces offer solutions primarily rooted in regulations and contracts, they fail to consider other incentive-aligning strategies. See, e.g., Lisa M. Fairfax, *Achieving the Double Bottom Line: A Framework for Corporations Seeking to Deliver Profits and Public Services*, 9 STAN. J.L. BUS. & FIN. 199, 201 (2004) (discussing privatization in a positive light and suggesting government regulation and monitoring as solutions to ensure corporations are serving the public interest while making a financial profit); Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359, 397–99 (1996) (arguing that with proper contracting, privatization can be very beneficial). Many academics have also called for an end to private prisons. See, e.g., Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 614 (2012) (“[I]n the face of such inequities, a nation-wide moratorium on prison privatizations is paramount. The solicitation of new private prison contracts must end and current contractual obligations should be fulfilled but not renewed.”).

²⁶ See *infra* Part III.B. The PPR credit is my innovation. In this Note, I argue that it is a simple tool to help align the incentives of private prison shareholders with the needs of society.

²⁷ See Pollock, *supra* note 22, at 3–11 (discussing the rationale behind imprisonment).

characterization of what constitutes a crime—have been prominent in policy.²⁸ Unfortunately, U.S. prisons have largely failed to address the goal of rehabilitation. The advent of private prisons has entrenched this shortcoming, and private prisons have yet to meaningfully lower recidivism.²⁹

The following Subpart discusses how private prison effectiveness has been measured in terms of short-term financial benefits, without appreciation for other externalities³⁰ that affect the overall value of prison privatization. The remaining Subparts discuss these externalities in more detail.

A. Prison Costs

Prison costs are a burden to federal, state, and local governments, as well as to taxpayers. Overall, corrections costs have almost quadrupled over the past twenty years.³¹ Currently, prisons cost taxpayers about \$39 billion each year, although states have only budgeted about \$33.5 billion for prison expenses.³² This burden pressures governments either to reduce federal and state prison costs, reform sentencing policies, or contract out the operation of prisons to low-cost providers.

Researchers have debated at length whether or not private prisons are more cost-effective than public prisons.³³ Proponents of

²⁸ See *supra* notes 12–13 and accompanying text.

²⁹ See SHAPIRO, *supra* note 3, at 18, 30–31 (“[T]he supposed benefits (economic and otherwise) of private prisons often fail to withstand scrutiny.”); MATTERA ET AL., *supra* note 3, at 69 (concluding that there is no clear evidence that privatization has lowered recidivism).

³⁰ A positive externality occurs where “the behavior of one party makes another party better off but the first party does not receive the benefits of doing so” Lily L. Batchelder, Fred T. Goldberg & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 44 (2006). Conversely, a negative externality occurs where the behavior of one party makes another party worse off but the first party does not incur the cost of doing so. Left unchecked, actors tend not to incorporate these benefits and costs into their decisions about whether to engage in particular behaviors. *Id.*

³¹ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 2 (2012), available at http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf (assessing “corrections costs,” which include costs associated with prisons and parole programs).

³² *Id.* at 6. Non-budgeted prison costs were as high as thirty-four percent of the original budget in some states. *Id.* at 7. Prison costs in general were similarly varied: “Among the 40 states surveyed, representing more than 1.2 million inmates (of 1.4 million total people incarcerated in all 50 state prison systems), the total per-inmate cost averaged \$31,286 and ranged from \$14,603 in Kentucky to \$60,076 in New York” *Id.* at 9.

³³ See *supra* notes 18–20 (discussing the alleged cost effectiveness of private prisons). In fact, proponents of private prisons have relied upon a number of studies when arguing the benefits of private prisons. See, PRANIS, *supra* note 20, at 7–9 (discussing studies that found private prisons to be cost effective); STEPHEN RAHER, COLO. CRIMINAL JUSTICE REFORM

privatization argue that market forces drive down costs, causing corporations to perform more efficiently than government-run institutions.³⁴ However, according to opponents of privatization, competition in the private prison industry is virtually nonexistent because the private prison market is a monopsony³⁵ and because many prison companies exist as geographic monopolies.³⁶

Sadly, the focus on short-term monetary savings and the pressing need for prison services and facilities shifts the focus away from other externalities. In assessing the effectiveness and efficiency of prisons, the government-customer should also consider recidivism, rehabilitation, and prisoner quality of life. The following Subparts explore the current status of these issues in contemporary prisons.

B. Prisoner Quality of Life

When George Zoley, the chief executive officer of GEO,³⁷ was interviewed about the violent incidents that have taken place in

COAL., PRIVATE PRISONS AND PUBLIC MONEY: HIDDEN COSTS BORNE BY COLORADO'S TAXPAYERS 3-4 (2002) (discussing the flaws of pro-privatization reports), available at <http://www.cjrc.org/pdf/CostDataReport2002.pdf>. However, opponents of privatized prisons argue that such studies are flawed because they fail to account for cost variances between private actors and the government. See PRANIS, *supra* note 20, at 7-9 (critiquing the assumptions, methods, and conclusions of various studies); RAHER, *supra*, at 3-4 (surveying various studies conducted on the subject). New studies have shown that there are many hidden costs. *Id.* at 2. Specifically, government prisons invest greater resources than do private prisons. *Id.* at 7-9. Examples include (1) high security levels for high-risk prisoners; (2) comprehensive health care for prisoners with expensive health problems; (3) rehabilitation programs; and (4) other state overhead costs. *Id.* at 7-9. When these differences are accounted for, privatized prisons may cost more than publicly run prisons. For example, the Arizona Department of Corrections showed in its FY 2010 Operating Per Capita Cost Report that once it applied an "Adjusted Expenses for Cost Comparison," privatized prisons were no more cost-effective. RYAN, *supra* note 20, at 3.

³⁴ According to proponents, this competition-based cost control incentive makes private prisons the ideal choice. See ASHTON & PETTERUTI, *supra* note 19, at 6 ("The basis for the belief that private prisons would be more economical is that market competition would drive down costs. And since private firms must compete not only with industry rivals, but also the government, it was assumed they'd have increased incentives to develop less expensive corrections practices . . .").

³⁵ Monopsony occurs in a market where there is only one buyer. *Monopsony*, ROUTLEDGE DICTIONARY OF ECONOMICS, 397 (Donald Rutherford ed., 3d ed. 2013). In the prison context, "there is only one customer—the state—and even though contract prisons are operated by private entities, the funding still comes entirely from the public sector." RAHER, *supra* note 33, at 6.

³⁶ A geographic monopoly exists when one producer provides a good or service to a geographic region. Geographic monopolies typically appear in isolated locations that can only support one supplier. DAVID EDWARD O'CONNOR, THE BASICS OF ECONOMICS 120 (2004). Together, CCA and GEO control seventy-seven percent of the market, "resulting in a thin market where states can become 'captive to' their own contractors due to limited competition within the industry." *Id.*

³⁷ See *supra* note 3 (discussing GEO).

GEO's facilities, he noted that "[a] correctional organization is subject to numerous allegations of that nature That's part of the business; it's a tough business. The people in prison are not Sunday school children."³⁸ Zoley's glib comment may reflect a troubling dynamic in the private prison system: So long as the various failings of private prisons do not affect the bottom line, management will not take them seriously.

Prisoner quality of life in the United States is in a dire state. On average, about twelve percent of youth in juvenile facilities³⁹ experience sexual victimization, while some juvenile facilities have sexual victimization rates exceeding thirty percent.⁴⁰ About ten percent of former state prisoners have reported being sexually victimized during their most recent stay in prison.⁴¹ More than half of all prisoners have mental health problems.⁴² Furthermore, many prisoners are also exposed to other ills in prisons, such as solitary confinement⁴³ or violence at the hands of fellow inmates.⁴⁴

³⁸ *Locked Inside a Nightmare*, CBSNEWS.COM (May 9, 2000), <http://www.cbsnews.com/stories/2000/05/09/60II/main193636.shtml>.

³⁹ Many states contract private prison companies to run juvenile facilities. *See id.* (discussing the conditions of juvenile facilities owned by GEO).

⁴⁰ ALLEN J. BECK, PAIGE M. HARRISON & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008–09*, at 1 (2010), available at <http://www.bjs.gov/content/pub/pdf/svjfry09.pdf>.

⁴¹ *Nearly 10 Percent of Former State Prisoners Reported Being Sexually Victimized During Confinement*, BUREAU OF JUSTICE STATISTICS (May 17, 2012), <http://bjs.gov/content/pub/press/svrfsp08pr.cfm> (noting that thirty-nine percent of homosexual males and thirty-four percent of bisexual males reported being victimized and noting that about twenty-nine percent of all victims were physically injured during such encounters).

⁴² *Study Finds More Than Half of All Prison and Jail Inmates Have Mental Health Problems*, BUREAU OF JUSTICE STATISTICS (Sept. 6, 2006), <http://www.bjs.gov/content/pub/press/mhppjipr.cfm> (reporting that mental health issues are prevalent in seventy-three percent of females and fifty-five percent of males).

⁴³ *See generally* CTR. FOR CONSTITUTIONAL RIGHTS, *TORTURE: THE USE OF SOLITARY CONFINEMENT IN U.S. PRISONS* (n.d.), available at <http://ccrjustice.org/files/CCR-Factsheet-Solitary-Confinement.pdf> (describing solitary confinement and its deleterious effects on prisoners).

⁴⁴ *See generally* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUSTICE, *CONFRONTING CONFINEMENT* (2006), available at http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf (describing the effects of prison violence and its harm to the prisoner and society as a whole). Reports of abuse in prison are common. For example, in Louisiana's Jena Juvenile Justice Center—owned and operated by GEO—many of the employees engaged in sexual acts with, sold drugs to, and participated in drug use with the prisoners. *Locked Inside a Nightmare*, *supra* note 38. The Jena facility had five different wardens and overturned the staff three times in one year. *Id.* The U.S. Department of Justice (DOJ) investigated the Jena facility and found it to be a dangerous environment. *Id.* The DOJ discovered that GEO often failed to conduct background checks and that many of the guards lacked experience and some had criminal records. *Id.*

According to some observers, quality of life in private prisons is worse than in public prisons, due to lack of training and cost cutting. Specifically, there may be more violence in for-profit prisons than in public prisons.⁴⁵

Low quality of life in prisons is not just a humanitarian concern. Academics have concluded that poor prison conditions, including violence and lack of rehabilitation programs, contribute to recidivism.⁴⁶ This subject is discussed further in the next Subpart.

C. Recidivism

Recidivism is a major problem in the U.S. criminal justice system. Over forty-five percent of prisoners released in 1999 were back in prison within three years.⁴⁷ The prevailing “tough on crime” approach has created a prison culture that encourages many prison operators to focus primarily on punishment,⁴⁸ failing to acknowledge that a toxic prison environment can lead to negative outcomes for individual prisoners and society as a whole.⁴⁹ On the other hand, prisons that focus on rehabilitation—through vocational, educational, and

⁴⁵ See, e.g., SCOTT D. CAMP & GERALD G. GAES, FED. BUREAU OF PRISONS, GROWTH AND QUALITY OF U.S. PRIVATE PRISONS: EVIDENCE FROM A NATIONAL SURVEY 16 (2001), available at http://www.bop.gov/news/research_projects/published_reports/pub_vs_priv/orepres_note.pdf (“Advocates of prison privatization have argued that private prisons can pay workers less, offer fewer benefits, and still deliver a product that is as good or better than that provided by the public sector. The evidence to date contradicts such an encompassing assertion.”); SHAPIRO, *supra* note 3, at 23 (“The perverse incentives to maximize profits and cut corners—even at the expense of safety and decent conditions—may contribute to an unacceptable level of danger in private prisons.”); Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons: A Comparison of Select Characteristics*, FED. PROBATION, June 2004, at 27, 29 (“[T]he private sector experienced more than twice the number of assaults against inmates than did the public sector.”). But see Dina Perrone & Travis C. Pratt, *Comparing the Quality of Confinement and Cost-Effectiveness of Public Versus Private Prisons: What We Know, Why We Do Not Know More, and Where to Go from Here*, 83 PRISON J. 301, 309 (2003) (finding inconclusive results on safety when comparing private and public prisons).

⁴⁶ See *infra* notes 48–50.

⁴⁷ PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 2 (2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolution_Door_America_Prisons%20.pdf; see also PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf> (studying a group of offenders released in 1994 and finding that within three years 67.5% were rearrested and 51.8% were back in prison).

⁴⁸ See Etienne Benson, *Rehabilitate or Punish?*, MONITOR ON PSYCHOL., July/Aug. 2003, at 46 (“[A] combination of strict sentencing guidelines, budget shortfalls and a punitive philosophy of corrections has made today’s prisons much more unpleasant—and much less likely to rehabilitate their inhabitants—than in the past, many researchers say.”).

⁴⁹ See *id.* at 47 (describing the negative impact of the prison environment). See generally JAMES GILLIGAN, PREVENTING VIOLENCE (2001) (arguing that treating violence as a

psychotherapy programs—can shape former prisoners into more productive members of society.⁵⁰

The evidence indicates that private prisons, unfortunately, have not proven adept at preventing recidivism.⁵¹ In Oklahoma, for example, “private prison inmate groups had a greater hazard of recidivism than did public inmate groups.”⁵² Opponents of private prisons argue that this disparity results from a lack of incentives for private prisons to reduce future crimes.⁵³

Although dynamics outside of the prison system certainly play a role in recidivism,⁵⁴ correctional facilities should still attempt to provide prisoners with the tools they need to successfully reintegrate into society. Private prisons are not exempt from this critical responsibility. The rest of this Note explores why private prisons may perpetuate recidivism, and how governments might incentivize private prisons to address these negative externalities.

public health problem deserving of rehabilitation is a more effective method of reducing crime and making prisons a productive correctional tool).

⁵⁰ Benson, *supra* note 48, at 47. See generally U.K. DEP’T FOR BUS., INNOVATION & SKILLS & U.K. MINISTRY OF JUSTICE, MAKING PRISONS WORK: SKILLS FOR REHABILITATION (2011), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/230260/11-828-making-prisons-work-skills-for-rehabilitation.pdf (describing the United Kingdom’s efforts to focus on rehabilitation in order to lower instances of recidivism).

⁵¹ Andrew L. Spivak & Susan F. Sharp, *Inmate Recidivism as a Measure of Private Prison Performance*, 54 CRIME & DELINQUENCY 482, 503 (2008).

⁵² *Id.* But see Lonn Lanza-Kaduce, Karen F. Parker & Charles W. Thomas, *A Comparative Recidivism Analysis of Releasees from Private and Public Prisons*, 45 CRIME & DELINQUENCY 28, 35 (1999) (finding lower recidivism rates among prisoners from private Florida prisons as compared to prisoners from public Florida prisons).

⁵³ See SHAPIRO, *supra* note 3, at 30 (“Not only is there little incentive to spend money on rehabilitation, but crime, at least in one sense, is good for private prisons: the more crimes that are committed, and the more individuals who are sent to prison, the more money private prisons stand to make.”).

⁵⁴ See, e.g., JOHN R. HEPBURN & MARIE L. GRIFFIN, AN ANALYSIS OF RISK FACTORS CONTRIBUTING TO THE RECIDIVISM OF SEX OFFENDERS ON PROBATION 5 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/203905.pdf> (noting that multiple factors including the offender’s age, educational history, and marital status can impact recidivism rates among sexual offenders); Charis E. Kubrin, Gregory D. Squires & Eric A. Stewart, *Neighborhoods, Race, and Recidivism: The Community-Reoffending Nexus and Its Implications for African Americans*, 32 SAGE RACE REL. ABSTRACTS 7, 8–9 (2007) (finding that the neighborhoods that ex-prisoners return to can impact their likelihood of recidivating).

II

THE BUSINESS DYNAMICS OF PRIVATE PRISONS COMPOUND THE PROBLEMS COMMON TO THE U.S. PRISON SYSTEM

As discussed in Part I, high recidivism rates plague both public and private prisons. The following Subpart discusses why private prisons have fared no better than public prisons, and further suggests that the institutional structure of private prisons tends to exacerbate these problems. Part II.B goes on to argue that, as profit-seeking corporations, private prison companies can be incentivized to address negative externalities.

A. Interest Divergence Between Customer and Shareholder

The divergence of interests between the government-customer and prison corporations is one of the main reasons private prisons have not meaningfully addressed high recidivism for prisoners. Specifically, the government-customer should aim for lower costs in the short term and lower recidivism in the long term. In contrast, private prisons stand to profit by managing more prisons and keeping those facilities well stocked with inmates.⁵⁵ Consequently, any decrease in the prison population cuts into revenues, while every instance of recidivism is a potential windfall.

The relationship between private prisons and the government-customer, as structured, is inherently misaligned. Perhaps CCA said it best:

The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them. . . . Legislation has also been proposed in numerous jurisdictions that could lower minimum sentences for some non-violent

⁵⁵ See THE SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION 4 (2004), available at http://www.sentencingproject.org/doc/publications/inc_prisonprivatization.pdf (“[B]ecause most private prisons operate on a per diem rate for each bed filled, there is a financial incentive not only to detain more inmates but also to detain them for a longer period of time.”); Al Lewis, *Private Prisons Prove That Crime Does Pay*, MARKET WATCH (Nov. 9, 2011, 9:12 AM), http://articles.marketwatch.com/2011-11-09/commentary/30810260_1_private-prisons-detention-center-county-judges (“The ACLU argues that an industry with an economic incentive to lock people away is going to find all sorts of creative ways to do just that.”).

crimes and make more inmates eligible for early release based on good behavior. Also, sentencing alternatives under consideration could put some offenders on probation with electronic monitoring who would otherwise be incarcerated. Similarly, reductions in crime rates or resources dedicated to prevent and enforce crime could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities.⁵⁶

This excerpt illustrates how the goal of maximizing shareholder value can be in direct conflict with the normative long-term goals of the government-customer. The needs of the government-customer are not limited to low-cost management of prison populations; prisons should also provide reasonable conditions and play an active role in reducing long-term incarceration rates.

B. The Impact of Interest Divergence on Prison Conditions

Private prison staffing practices are a prime example of how corporate dynamics lead to negative externalities in private prisons. The private prison system is plagued with low-paid, inexperienced, and poorly trained workers; inadequate staffing, in turn, leads to dangerous prison conditions.⁵⁷

Prison labor is costly.⁵⁸ For privatized prisons to retain government-customers and please shareholders, they must offer savings over public prisons, while keeping operating costs low enough to generate a profit margin. Because labor constitutes sixty to eighty percent of operating expenses,⁵⁹ it is a prime target for cost-cutting. As a result, private prisons stand to profit substantially by employing fewer workers and depressing wages.⁶⁰ The result is problematic: Private prisons end up attracting and hiring inexperienced workers, who in turn receive lower pay, fewer benefits, and little training.⁶¹ Many private prison corporations also concentrate their services in geographic markets that are hostile to unions, such as the southern states.⁶²

⁵⁶ CCA 10-K, *supra* note 3, at 28–29.

⁵⁷ See *supra* Part I.B (describing instances where inadequate staffing has led to poor prison conditions).

⁵⁸ See Schlosser, *supra* note 13, at 65 (describing private prisons' efforts to cut labor costs).

⁵⁹ CAMP & GAES, *supra* note 45, at 2.

⁶⁰ See ASHTON & PETTERUTI, *supra* note 19, at 34 (noting that employees in private prisons are often paid less than employees in public prisons).

⁶¹ See SHAPIRO, *supra* note 3, at 27–28 (describing the low pay and high staff turnover in many private prisons).

⁶² Schlosser, *supra* note 13, at 65 (“Although private-prison companies are now moving into northern states and even signing agreements with some labor unions, the overwhelming majority of private-prison cells are in southern and southwestern states hostile to unions.”).

Without unions, individual workers struggle to successfully negotiate for higher pay, safer working conditions, and sufficient training.⁶³

Inadequate training is particularly troubling.⁶⁴ Poor training coupled with inexperience in a high-risk environment is a formula for a dangerous enterprise. Prison companies like CCA and GEO have been sued for wrongful death,⁶⁵ prison escape,⁶⁶ and medical neglect.⁶⁷ After being fired over a mistaken prisoner release, one employee stated that he never received formal training.⁶⁸ The ACLU notes that these shortcuts create grave risks, as low pay and high turnover may “contribute to the higher levels of violence seen in the private sector.”⁶⁹

The CCA’s owner-operated prison at Youngstown provides a textbook example of the risks associated with inadequate staffing in privatized prisons.⁷⁰ From the moment the prison opened, it was “plagued with stabbings and disturbances.”⁷¹ In July 1998, six prisoners—including four convicted murderers—fled the prison “in broad daylight,”⁷² generating a national controversy. At the time of the escape, CCA was defending a class action lawsuit filed on behalf of its prisoners, who claimed that the facility was unsafe.⁷³ U.S. District Judge Sam Bell noted that CCA’s actions amounted to “a deliberate indifference to the conditions of the prisoners.”⁷⁴

⁶³ ASHTON & PETERUTI, *supra* note 19, at 34.

⁶⁴ *See id.* (noting that private prison employees often receive less training than their public counterparts).

⁶⁵ *See, e.g.*, Jamie Ross, *Disturbing Complaint Against Private Prison*, COURTHOUSE NEWS SERVICE (Feb. 17, 2012, 10:08 AM), <http://www.courthousenews.com/2012/02/17/43997.htm> (describing a lawsuit brought against CCA after one prisoner stabbed another prisoner 140 times).

⁶⁶ *See, e.g.*, SHAPIRO, *supra* note 3, at 29 (detailing the escape of a convicted murderer from a CCA prison in Arizona and noting that much of the staff was inexperienced).

⁶⁷ *See, e.g.*, Margaret Winter & Gabriel Eber, *Private Prisons Are the Problem, Not the Solution*, ACLU (Apr. 30, 2012, 4:38 PM), <http://www.aclu.org/blog/prisoners-rights-criminal-law-reform/private-prisons-are-problem-not-solution> (asserting that in Mississippi, GEO had starved mentally ill prisoners, put them in solitary confinement, and denied them medical care, leading to high rates of suicide and suicide attempts).

⁶⁸ MATTERA ET AL., *supra* note 3, at 4.

⁶⁹ Blakely & Bumphus, *supra* note 45, at 30.

⁷⁰ *See* MATTERA ET AL., *supra* note 3, at 15–17 (describing the many problems at the Youngstown prison as indicative of issues at other private prisons suffering from inadequate staffing).

⁷¹ *Id.* at 17.

⁷² *Id.*

⁷³ *Id.* From the time the lawsuit was filed to the time the case was decided, nineteen stabbings had occurred in the prison, some of them fatal. *Id.*

⁷⁴ *Id.* CCA paid \$1.6 million to prisoners and \$756,000 in legal fees to settle the class action lawsuit, and eventually lost its contract when the District of Columbia declined to renew. *Id.* In this incident, cost-cutting eventually led to a loss in revenue. Nonetheless, private companies continued to attract serious lawsuits due to poor management,

It seems that neither shareholders nor government-customers are effectively pressuring private prison companies like CCA to invest in their workforce. As discussed in the next Subpart, the “capture” of government-customers may help explain this hands-off approach.

C. Compounding Disincentives

In addition to the conflict between the government-customer and the shareholders, the interaction between private prisons and the government creates compounding disincentives. Specifically, the government agents responsible for overseeing private prisons may be “captured” as a result of the revolving door between corporate and government personnel, lobbying, and campaign funding.⁷⁵ Consequently, administrative bureaucracy, coupled with agency capture, prevents some states from demanding better service from private prison companies or reassigning prison contracts to new competitors.⁷⁶ Governmental actors justify the continued use of private prisons by pointing to short-term cost savings, while ignoring prison recidivism.⁷⁷

Furthermore, lobbying organizations like the American Legislative Exchange Council (ALEC)—an organization that has

employee negligence, and lack of training. *See id.* at 5–9 (describing suits against the CCA in the early 2000s); *see also* Bilbo Poynter, *Private Prison Companies Look to Canada as Industry Faces Lawsuits in US*, *THE GUARDIAN* (June 19, 2012, 11:20 AM), <http://www.guardian.co.uk/world/2012/jun/19/private-prison-companies-canada-lawsuits> (noting that private prison companies are starting to expand to Canada due to the increasing number of lawsuits they face in the United States).

⁷⁵ *See* SHAPIRO, *supra* note 3, at 36 (describing how the revolving door can create conflicts of interest); ASHTON & PETTERUTI, *supra* note 19, at 15 (noting how private prison companies such as GEO and CCA use campaign donations, lobbyists, and relationships with governments to promote favorable policies).

⁷⁶ Even though private prisons have been shown to have subpar conditions, government-customers rarely fire prison companies. *Compare* Alex Friedmann, *The Societal Impact of the Prison Industrial Complex, or Incarceration for Fun and Profit—Mostly Profit*, *PRISON LEGAL NEWS*, [https://www.prisonlegalnews.org/\(S\(wpyjgg2qotqqd0rkMZ0hr545\)\)/24106_displayArticle.aspx](https://www.prisonlegalnews.org/(S(wpyjgg2qotqqd0rkMZ0hr545))/24106_displayArticle.aspx) (last visited Jan. 29, 2014) (noting that recidivism and violence are higher in private prisons and that little is being done to correct these failures), *with* MACQUARIE RESEARCH EQUITIES, *supra* note 12, at 18 (“We would view a contract loss as [CCA’s] primary fundamental risk. That noted, contract losses are rare, as reflected in [CCA’s] 90%-plus renewal rate.”), *and* RBC CAPITAL, *CORRECTIONS CORP. OF AMERICA* 4 (2009) (on file with the *New York University Law Review*) (“We believe it is unlikely that governments would risk handing prison management to an unproven new competitor and that maintaining market share will allow for ample growth across the group.”).

⁷⁷ *See* Friedmann, *supra* note 76 (arguing that, as long as prison companies are available to provide more prison beds, government officials will postpone meaningful prison reform, and noting that prison lobbying efforts play an important role in postponing reform).

advocated for harsh sentencing laws⁷⁸—help ensure that government actors do not place meaningful pressure on private companies to work toward prison reform that translates into long-term benefits for society.⁷⁹ These direct and indirect relationships with the government-customer are often hard to track due to lobbying regulations that vary by state and the lack of transparency in political donations.⁸⁰

In particular, the influx of lobbying in the prison industry detracts from the disturbingly high rates of recidivism. The lack of attention on curbing recidivism contributes to a self-perpetuating cycle that not only creates more profits for private prisons, but also makes society more dependent upon them. When government-customers focus exclusively on short-term cost reduction and refuse to enlist private prisons in the fight against recidivism, the prison population grows unchecked, thereby ensuring that cost reduction remains the ongoing priority for many governments.

For society to benefit from private prisons, it must demand more than a short-term, convenient solution to the prison problem. Otherwise, if prison corporations are allowed to focus solely on short-term cost-reduction, their long-term revenue stream will continue to increase to the detriment of society.

⁷⁸ SHAPIRO, *supra* note 3, at 14; *see also* *NOW: Prisons for Profit* (PBS television broadcast the week of May 9, 2008), available at <http://www.pbs.org/now/shows/419/index.html> (explaining that ALEC, in drafting business-oriented laws for state legislators, has played a significant role in bringing about laws that have “pushed our prison populations beyond the capacity of our public prisons”).

⁷⁹ Private prison companies have aggressively promoted public policies that tend to increase revenues for private prisons. *See* *NOW: Prisons for Profit*, *supra* note 78 (stating that CCA and GEO have been closely involved with organizations advocating harsher sentencing, and have benefitted financially from resulting legislation); Laura Carlsen, *With Immigration Reform Looming, Private Prisons Lobby to Keep Migrants Behind Bars*, HUFFINGTON POST (Mar. 5, 2013), http://www.huffingtonpost.com/laura-carlsen/immigration-reform-privatization-prisons-lobby_b_2665199.html (noting that CCA has hired law firm Akin Gump Strauss Hauer & Feld to lobby for “[i]ssues pertaining to the construction and management of private prisons and detention facilities; the Commerce, Justice, State appropriations bill; the Homeland Security appropriations bill; Freedom of Information Act legislation; monitor immigration reform; Safe Prisons Communications Act”); Stephen Dinan, *Sen. Schumer’s Prison Lobby Ties Alarm Immigrant Advocates*, WASH. TIMES (Apr. 2, 2013), <http://www.washingtontimes.com/news/2013/apr/2/sen-schumers-prison-lobby-ties-alarm-immigrant-adv/> (noting that immigration rights advocates are pressuring Senator Schumer, a prominent figure in the fight for immigration reform, to stop accepting contributions from the private prison lobby, given the lobby’s interest in the detention of immigrants).

⁸⁰ *See* SHAPIRO, *supra* note 3, at 38–40 (concluding that, although variable state lobbying disclosure requirements make exact calculations difficult, private prison companies spend large sums on lobbying and campaign contributions).

III

SOLUTIONS FOR REDUCING RECIDIVISM IN THE PRIVATE PRISON SYSTEM

The promise upon which private prison corporations market themselves extends beyond simple cost savings; these companies purport to offer broad solutions to the shortcomings of public prisons.⁸¹ One reason why prison corporations may be unmotivated to fulfill this promise is that, to the extent their efforts result in a reduction in recidivism, they jeopardize their own future revenue streams.⁸² Fortunately, this dynamic is not immutable: The government-customer can restructure economic incentives to align corporate profit-seeking with the broader needs of society.⁸³ Government-customers should consider implementing strategic tax policies that force private prisons to internalize externalities.⁸⁴ This Part provides an overview of refundable tax credits and recommends the PPR credit as a tool to align the interests of private prison companies with those of society and the government-customer.

A. *Incentivizing Corporate Behavior Through Refundable Tax Credits*

Social reform is one of several goals underlying U.S. tax policy.⁸⁵ There are three primary taxation tools that positively reinforce desired behavior: exemptions, deductions, and credits.⁸⁶ Of these, aca-

⁸¹ See *The CCA Story: Our Company History*, CORR. CORP. OF AM., <http://www.cca.com/our-history> (last visited Jan. 29, 2014) (claiming that CCA was founded in part to address “government-only failures” with “smarter, more effective solutions” and that CCA continues to develop “innovations” regarding “high quality safety and security, and rehabilitation and re-entry”).

⁸² For a discussion of the economic disincentives associated with tackling recidivism, see *supra* Part II.A.

⁸³ This line of reasoning comes from corporate social responsibility literature. See, e.g., Joanna Semeniuk, *The Alignment of Morality and Profitability in Corporate Social Responsibility*, ERASMUS STUDENT J. PHIL., July 2012, at 17, 17 (explaining that if there is a socially valuable interest that corporations are failing to take into account, it is best to align this interest with the profit interest of shareholders). Once negative externalities are internalized, capitalism can work to the advantage of society, while simultaneously benefiting corporate shareholders. *Id.* For an in-depth discussion about internalizing externalities, see Tatiana Mosteanu & Mihaela Iacob, *Principles for Private and Public Internalisation of Externalities. A Synoptic View*, THEORETICAL & APPLIED ECON., Oct. 2009, at 36, 36–40 (assessing the role of government intervention in managing externalities and internalities).

⁸⁴ See *supra* Part II.B, for a discussion of why traditional market failures inadequately account for negative externalities.

⁸⁵ See Daniel M. Reach, *Fitness Tax Credits: Costs, Benefits, and Viability*, 7 Nw. J. L. & Soc. POL’Y 352, 359 (2012) (noting that, historically, social reform has been a legitimate goal of tax policy).

⁸⁶ See CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: TAX EXEMPTIONS, DEDUCTIONS, AND CREDITS 1 (2013), available at <http://www.cbpp.org/files/>

demics generally view credits as the superior method of incentivizing behavior.⁸⁷

Politicians can use two types of tax credits to effectuate policy: refundable tax credits and nonrefundable tax credits.⁸⁸ Refundable tax credits are offered to the eligible taxpayer regardless of whether or not the taxpayer actually owes taxes.⁸⁹ Nonrefundable tax credits are only credited against tax liability the taxpayer actually has to pay.⁹⁰ Today, refundable tax credits account for an increasingly significant portion of all tax incentives.⁹¹

Refundable tax credits have many benefits. First, they reduce administrative and compliance costs and are distributionally fair and efficient for the issuing government.⁹² Second, refundable tax credits are the most powerful tax subsidy for correcting negative externalities and encouraging positive externalities. These credits provide consistent cash output for socially beneficial activities since they do not vary based on a company's tax bracket (as would be the case with a deduction), and they do not depend on whether a company has a sufficient amount of income (as would be the case with a nonrefundable credit).⁹³ Instead, refundable tax credits allow legislatures to consider

policybasics-exempt.pdf (comparing the efficacy of tax exemptions, deductions, and credits in incentivizing certain behavior).

⁸⁷ See Brian H. Jenn, *The Case for Tax Credits*, 61 *TAX LAW* 549, 580 (2008) ("To the extent that it is possible to make general statements about the relative advantages of credits and deductions, the weight of the considerations seems to favor implementation of tax incentives as credits."). Since filers eligible for a tax credit receive a set amount, there is less room for variation. In contrast, the amount of a deduction will vary based on the individual or company's tax bracket, among other things. *See id.* at 570 ("Relative to a refundable credit, a deduction provides differential incentives for taxpayers along at least four notable dimensions: filers vs. non-filers, itemizers vs. non-itemizers, among taxpayers in different marginal rate brackets, and among taxpayers with different annual income volatilities."). A corporation can therefore predict more accurately how much of a credit it will receive in advance, thereby facilitating corporate financial planning. Also, because credits are more transparent than deductions, taxpayers respond to credits in a more predictable way. *Id.* at 580.

⁸⁸ See *CTR. ON BUDGET AND POLICY PRIORITIES*, *supra* note 86, at 2 (differentiating refundable tax credits from nonrefundable tax credits).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Batchelder et al., *supra* note 30, at 24 (noting that prior to 1975 individual tax incentives were not structured as refundable tax credits, but that by 2006 refundable tax credits accounted for eighteen percent of all tax incentives).

⁹² Refundable credits remain the same regardless of a taxpayer's income level; therefore, they are easier to implement and estimate. *See id.* at 42–57 (arguing generally that the uniform refundable tax credit should be the default structure for tax incentives because of its efficiency).

⁹³ *Id.* at 49. It should be noted that the two largest private prison companies, CCA and GEO, have recently transitioned from C corporations to Real Estate Investment Trusts (REITs), for tax purposes. CCA 10-K, *supra* note 3, at 5 ("Prior to the REIT conversion, we operated as a taxable C corporation for federal income tax purposes."); GEO GRP.,

the two most important factors in determining efficiency of the credit: the benefit to society and the responsiveness of the company to the incentive.⁹⁴

Refundable tax credits have not yet been used to align interests in the private prison industry—an industry whose interests are in dire need of realignment. The following Subpart builds on tax theory and interest alignment to advocate for the PPR credit—a refundable, performance-based tax credit that incentivizes private prison companies to effectively rehabilitate prisoners.

B. Proposal: PPR Credit

In recent years, prison reform advocates have argued against the continued use of private prisons.⁹⁵ However, even though privatized prisons are underperforming, the theory behind privatization is a positive one: Its aim is to promote efficiency and financial economy—through corporate expertise and market pressures—to lower cost and create value. Instead of discontinuing the practice of prison privatization altogether, the government-customer should encourage private prisons to implement programs that will benefit society as well as shareholders. In the following Subparts, I will discuss the relative advantages of my proposal, the Private Prisoner Rehabilitation tax credit. I will further explain why the PPR credit is better than other proposed alternatives, such as social impact bonds and contractual rewards.

1. Framework for the PPR Credit

The PPR credit consists of the following features: (1) funding through the tax system; (2) delayed conditional payment; (3) perform-

INC., 2012 ANNUAL REPORT ON FORM 10-K 38 (2012) [hereinafter GEO 10-K] (“GEO began operating as a REIT for federal income tax purposes effective January 1, 2013.”). Though REITs, unlike C corporations, generally do not pay federal income tax at the entity level, CCA and GEO will still have to pay federal taxes since they will have one or more taxable REIT subsidiaries (TRSs), which are subject to corporate income taxes. See CCA 10-K, *supra* note 3, at 6 (noting that CCA will still have to pay taxes due to the TRSs); GEO 10-K, *supra*, at 4 (same). State governments take varied approaches on the taxation of REITs. See Josie Lowman & Charolette Noel, *State Taxation of REITs: Understanding the Issues Faced by Taxpayers and State Tax Administrators*, TAX MGMT. WKLY. ST. TAX REP., Apr. 27, 2007, at 5 (noting that some states allow REITs not to pay an entity tax, while others require REITs to pay an entity level tax). Even if CCA or GEO never had any taxes to pay, the refundable tax credit would still be beneficial to these companies since the tax credit is not dependent on a taxpayer’s tax liability.

⁹⁴ See Batchelder et al., *supra* note 30, at 42–57 (arguing generally that a uniform refundable tax credit should be the default structure for tax incentives because of its efficiency).

⁹⁵ See, e.g., SHAPIRO, *supra* note 3 (evaluating the role of private prisons in encouraging mass incarceration in the United States).

ance goals; and (4) third-party assessors. It would function as follows: Through the tax codes of participating governments, private prison companies could claim the various PPR credits⁹⁶ upon meeting specific, tangible, state-mandated benchmarks. For example, a benchmark might consist of a five percent annual decrease in rape incidents, a five percent annual decrease in prison assault incidents, increased employee training through a state-certified program, implementation of transitional programming that sixty percent of inmates attend with eighty percent of them meeting certain educational goals, or other specific goals.⁹⁷ Thus, the PPR credit allows the government to influence a private prison company's "double bottom line."⁹⁸

This strategy offers important advantages over a government-operated alternative. It allows the government to utilize the resourcefulness and efficiency of the corporate form without sacrificing important performance goals. The PPR credit also allows governments to support new programs without any upfront investment: The initial investment risk is completely allocated to the private prison company because the taxpayer incurs no additional cost unless the programs deliver results. Finally, the PPR credit is more politically feasible than a government-operated program because the general public tends to view tax subsidies more favorably than direct expenditures.⁹⁹

2. *Feasibility and Accountability*

a. Feasibility of Outcomes

The PPR credit is only useful to the extent that private prisons are capable of curbing negative externalities such as recidivism and poor quality of life in prisons. Although recidivism has a variety of causes, prisons, as institutions, are relatively well positioned to reduce

⁹⁶ Governments could offer PPR credits associated with smaller, interrelated goals. There could be PPR credits, for example, for decreasing violence and rape, increasing participation in life-skills classes, etc. Recidivism, in contrast, is something that cannot be measured in the short-term. I therefore recommend that certain intermediate goals be identified. These goals would create a pathway to lowering recidivism.

⁹⁷ Many organizations and state entities already evaluate prison conditions. However, in order for the PPR credit to work efficiently, a unified model for evaluating these metrics must be created. Building such a model is beyond the scope of this Note, but it is an issue that merits further discussion.

⁹⁸ The "double bottom line" applies to "those entities organized as for-profit corporations that are also responsible for delivering some public service. Because such entities focus on profits as well as their public social mission, they have two bottom lines." Fairfax, *supra* note 25, at 204 (internal citation omitted).

⁹⁹ See *The High Price of Tax Breaks: Not So Easy*, THE ECONOMIST, Apr. 28-May 4 2012, at 32, 32 (noting that tax expenditures are politically popular and often favored by politicians).

the probability that a given prisoner will return to prison.¹⁰⁰ Rehabilitation programs in particular have been recognized as an effective tool in lowering recidivism.¹⁰¹ Studies have found that, controlling for other variables, rehabilitation programs have reduced recidivism by up to thirty percent.¹⁰² About forty meta-analyses have since further confirmed the effectiveness of rehabilitation programs.¹⁰³ For example, a prominent meta-analysis found that individual counseling, interpersonal skills development, and behavioral programs are effective forms of rehabilitation among juveniles.¹⁰⁴ Furthermore, private prisons are well positioned to address drug abuse, sexual assault, and violence in prisons, which are exacerbated by overcrowding, understaffing, and poor training among prison personnel.

The evidence therefore suggests that, properly incentivized, private prisons are capable of improving prisoner quality of life while reducing recidivism. The following Subpart argues that, from an economic standpoint, the PPR credit can induce prisons to take the necessary actions to achieve these goals at a price that represents a net benefit to society.

b. Economic Feasibility

In order to be economically feasible, the PPR credit must offer a potential net gain to both the private prison company and the government-customer. In this context, the government-customer must identify performance measures and establish targets (a process I will refer to as “benchmarking”), and announce what it is willing to pay for those targets to be met. The following discussion will focus on

¹⁰⁰ See DORIS LAYTON MACKENZIE, *WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS* (2006) (examining the impact of correctional interventions, management policies, and rehabilitation programs on the recidivism rates of offenders and delinquents).

¹⁰¹ See Mark W. Lipsey, *Can Intervention Rehabilitate Serious Delinquents?*, in *Will the Juvenile Court System Survive?*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 142, July 1999, at 143–44 (Ira M. Schwartz, ed.) (noting that although the value of rehabilitation programs in reducing recidivism has been challenged, the effectiveness of rehabilitation programs can be proven using meta-analysis); see also D.A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL’Y & L. 39, 39 (2010) (concluding that, from a psychological perspective, “get tough on crime” policies do little to reduce recidivism or prevent crimes, and arguing that the criminal justice system should focus on rehabilitation instead).

¹⁰² Andrews & Bonta, *supra* note 101, at 44.

¹⁰³ JAMES MCGUIRE, *UNDERSTANDING PSYCHOLOGY AND CRIME* 158 (2004); see also Andrews & Bonta, *supra* note 101, at 44 (discussing a meta-analysis of 400 treatment studies showing reduced rates of recidivism).

¹⁰⁴ See Lipsey, *supra* note 101, at 145–46 (describing the difference between a forty-four percent recidivism rate for treated juveniles and a fifty percent rate for untreated juveniles as “modest” but “statistically significant”).

recidivism, which is perhaps the most pressing and most complicated issue to be addressed by the PPR.

We must recognize that, from the private prison's perspective, the costs of earning the PPR credit extend beyond the cost of improving prison services to include rehabilitation of more prisoners. Assuming the company holds a monopoly over prison facilities in the jurisdiction,¹⁰⁵ every would-be recidivist who is successfully rehabilitated represents a loss of future revenues and potential profits.¹⁰⁶ Setting aside the time value of money, a private prison must weigh the costs of its rehabilitation efforts against the expected gains from the PPR credit, while accounting for the loss of profit¹⁰⁷ associated with each new non-recidivist. The costs to prisons are therefore higher than they first appear.

However, while the costs to private prisons of reducing recidivism might be high, the potential value to society likely outweighs these costs. In calculating recidivism's cost to a given community, the most concrete factor is the aggregate per diem rate that society pays to incarcerate its repeat offenders.¹⁰⁸ However, the cost does not end there. The community incurs the cost of whatever crimes recidivists commit. The local economy loses the productive capacity of incarcerated recidivists, and the government loses a taxpayer. More difficult to quantify, but equally valid, is the value the recidivist might have offered to his or her family and community and the loss of life and enjoyment to the recidivist himself.

In order for the PPR credit to be economically feasible—that is, “profitable” to both parties—the aggregate cost of recidivism to society must outweigh the combined costs to private prisons of rehabilitating prisoners, plus the loss of expected profit associated with each would-be recidivist. While a thorough empirical analysis is beyond the scope of this Note, the promising results of prisoner rehabilitation studies¹⁰⁹ and the high costs of recidivism to society militate in favor of the PPR's conceptual viability. Government economists would be left with the task of analyzing the size of the margin and identifying optimal performance targets and credit quantities to incentivize the desired investments.

¹⁰⁵ Many private prison companies do hold monopolies in various states. *See supra* note 36 and accompanying text.

¹⁰⁶ *See supra* Part II.A.

¹⁰⁷ In this calculation, profit, rather than revenue, is the critical measure.

¹⁰⁸ That is, the private prison's incremental revenue per prisoner, rather than profit alone.

¹⁰⁹ *See supra* Part I.C.

c. Political Feasibility

As discussed above in Part II.C, compounding disincentives have the potential to make government actors and corporate management focus on the short-term solution of lowering costs at the expense of the long-term solution of decreasing recidivism. The PPR's incentive-aligning structure, however, would allow it to hurdle these potential political challenges. The PPR credit creates a win-win situation for private prison companies and government actors. The companies stand to benefit from a new source of income and, therefore, have no reason to exert political pressure against the scheme. Because the PPR credit also offers a net benefit to the community, it is in the interest of both the government-customer and the corporation to implement the PPR credit.

d. Program Accountability

For private prisons to receive the PPR credit, an independent third-party would need to confirm that the goals were in fact met. Currently, many private prison companies are accredited.¹¹⁰ However, private prison accreditations may not be entirely trustworthy for the following reasons: First, prisons generally pay for this accreditation. Second, accreditation is scheduled long in advance. Third, the accreditors often do not do a comprehensive assessment of the correctional facilities.¹¹¹

For the PPR credit to function effectively, assessments must be conducted by an independent third party who is not subject to capture and who would provide accurate information. The financial sector provides a useful analogy, as independent financial auditors are held to high ethical standards.¹¹² To evaluate performance-based outcomes in the private prison industry, a similarly independent auditor is necessary.

¹¹⁰ See RICHARD W. HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY* 64 (1997) (“The accreditation clause now, quite literally, appears in every private prison contract . . . [e]ven if the abstract law does not mandate this . . .”).

¹¹¹ See *id.* (noting that the accreditation process has drawn criticism because “the audit is too much a paper audit,” “the visits are scheduled well in advance,” “no unannounced visits are made during the three-year accreditation period,” and “the ACA is dependent on audit fees as its primary source of income”).

¹¹² See, e.g., *Code of Professional Conduct*, AICPA, <http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/default.aspx> (last visited Jan. 29, 2014) (setting out the ethical standards for certified public accountants).

3. *The PPR Credit Is Better Than Other Alternatives*

a. Social Impact Bonds

Social impact bonds (SIBs) represent a new approach to government contracts, rewarding third parties—nonprofit institutions, investors, and other stakeholders—*ex post* for reaching performance benchmarks, rather than *ex ante* for tendering the lowest bid.¹¹³ Put another way, a SIB is a type of “pay-for-performance” contract.¹¹⁴ In a SIB, investors provide low-interest loans to a nonprofit organization to support a specific project.¹¹⁵ If the nonprofit organization accomplishes its stated goals, only then will the government pay the value of the project.¹¹⁶ Investors are compensated, if at all, from that government payment.¹¹⁷

Though SIBs have theoretical benefits,¹¹⁸ there are also many uncertainties regarding their costs and feasibility.¹¹⁹ First, there are

¹¹³ MCKINSEY & CO., FROM POTENTIAL TO ACTION: BRINGING SOCIAL IMPACT BONDS TO THE US 7 (2012), available at http://mckinseysociety.com/downloads/reports/Social-Innovation/McKinsey_Social_Impact_Bonds_Report.pdf. McKinsey & Company describes SIBs as follows:

SIB investors provide capital that fulfills two purposes: up front, it pays for the services of the nonprofit service provider and, over the lifetime of the SIB, for the intermediary, the evaluation adviser, and the independent assessor. The intermediary raises capital from investors, selects the service providers, contracts with government, works with the evaluation adviser and the independent assessor to set and measure performance targets, and partners with the evaluation adviser to monitor and analyze interim results and suggest midcourse corrections. If the program meets performance targets, the government pays the intermediary an agreed amount. The intermediary is responsible for repaying the investors their capital plus a return on investment.

Id.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* In 2010, SIBs were first introduced in Britain to lower the recidivism rate at Her Majesty’s Prison Peterborough. Caroline Preston, *Getting Back More Than a Warm Feeling*, N.Y. TIMES, Nov. 9, 2012, at F1. Since then, New York has been among the first states in the U.S. to try out these new instruments in the prison context. *Id.* Unfortunately, because New York’s program is still new, conclusive results will not be available until 2016. *Id.* Although the results are still unknown, feedback has been positive and participation rates have been high. *Id.*

¹¹⁸ Proponents of SIBs note that SIBs offer many benefits to society. First, they provide financial capital to cash-strapped nonprofit organizations with innovative ideas. See Preston, *supra* note 117 (noting that SIBs will help governments spend taxpayer money more efficiently because governments will only pay for programs that work). Second, SIBs appeal to the growing market of “impact investors”: foundations and individuals who use their investment capital not only to reap financial returns but also to benefit society. *Id.* Lastly, SIBs shift all the risk of impact programs from the government to investors. *Id.*

¹¹⁹ *Id.*

many stakeholders in the social impact bond program.¹²⁰ Second, access to capital may be limited, given the risky nature of these investments.¹²¹ Third, compensating investors may ultimately prove to be unnecessarily costly to the government.¹²² Fourth, the investors who are most likely to take such risks are the large institutions that would have been granting these funds even in the absence of the bond program.¹²³ Finally, using SIBs to fund programs in private prisons ignores an essential stakeholder—private prison shareholders—further complicating the nature of the SIB program.¹²⁴

b. Contractual Terms

Some academics have argued that the contractual negotiation process is an adequate tool to remedy the ills of privatization.¹²⁵ In essence, payment can be conditioned on private prisons meeting cer-

¹²⁰ These stakeholders include: (1) the direct beneficiaries of the social programs; (2) the government; (3) nonprofit service providers; (4) investors; (5) intermediaries (who manage the entire SIB project from beginning to end); (6) third-party evaluators (who periodically monitor and adjust the program if need be); and (7) independent evaluators (who have the final say as to whether performance benchmarks were met). MCKINSEY & CO., *supra* note 113, at 7.

¹²¹ *See id.* at 19 (“Simply because they are so new, SIBs carry risks—both in their structural model and in their execution—that cannot be entirely mitigated in the near term.”); *see also* Preston, *supra* note 117 (“If the program falls short, the investors lose their money, sparing taxpayers the costs of the program.”).

¹²² If a program is successful, the government will have to compensate each participant enough to make the transaction and associated risk worthwhile. Though proponents of SIBs claim that the program incentivizes financial savings, there is some concern that these savings will not be realized because of the cost of compensating each stakeholder. MCKINSEY & CO., *supra* note 113, at 18, 19. McKinsey notes that “multiple funding streams, limited data systems, and lack of cross-agency coordination may inhibit government’s ability to fully recognize the financial savings from a SIB.” *Id.* at 18.

¹²³ *See id.* at 18 (noting that foundations will most likely participate due to their familiarity with program-related and mission-based investing, whereas other qualified investors will be hesitant to fund an untested model).

¹²⁴ Private prisons—as currently structured—will tend to oppose programs that threaten their future revenue streams. SIBs may fall within this category, because SIBs offer no direct benefit to private prison shareholders, but do indirectly aim to decrease future potential private prison revenue in the form of recidivism.

¹²⁵ *See, e.g.,* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000) (arguing that contractual design is the way to solve problems in government outsourcing). Theoretically, government regulation is another tool. However, government regulation of private prisons is seldom used because the contractual process is generally considered an equally strong tool to regulate private prison behavior. If private prisons breach certain contractual provisions, the government-customer generally would have the option to terminate the contract. *But see supra* Part II.C (discussing disincentives to effective government oversight of private prisons). Additionally, if the state went on to regulate private prisons, this would be in conflict with the state’s goal of privatization—that is, limited government interference with market forces; furthermore, private-prison lobbyists would have a strong influence on any regulations enacted. *See* Christine Bowditch & Ronald S. Everett, *Private Prisons: Problems Within the Solution*, 4 JUST. Q. 441, 449–50 (1987)

tain goals, such as lowering the number of sexual assaults. Unfortunately, this solution has failed to meaningfully reduce recidivism or improve prisoner quality of life.

Contractual agreements have been inadequate for two main reasons: First, contracts tend to be incomplete, and second, there is a lack of adequate oversight. Private prison contracts typically describe the general services sought, but do not dictate *how* that service should be provided.¹²⁶ This latitude may allow private prison companies to take shortcuts in order to provide services at the lowest possible cost. In addition to lack of enforceable terms in contracts, agency capture and political pressure may prevent the government-customer from effectively monitoring compliance.¹²⁷ In contrast, the PPR credit shifts the burden of proving satisfactory performance onto the private prison company; while the government-customer sets the benchmarks for acceptable performance, the private prison company must show that it has earned the PPR credit.

CONCLUSION

The U.S. prison system is plagued with a wide variety of problems arising from a wide variety of sources. My proposal is not a cure-all. It is an attempt at a pragmatic, solutions-oriented approach that utilizes the institutional structures already in place today. The PPR credit is founded on a belief in the positive power of market forces and the potential social benefit associated with properly-aligned corporate incentives. At the very least, I hope that this Note will stimulate conversation that improves rehabilitative prospects for the prison population of today, and stems the tide of recidivism for tomorrow.

(describing how the “capital-intensive” nature of private prisons will lead to efforts to protect developers’ interests with powerful lobbies).

¹²⁶ *Developments in the Law—the Law of Prisons*, 115 HARV. L. REV. 1838, 1877–78 (2002); see also Oliver Hart, Andrei Shleifer & Robert W. Vishny, *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1134 (1997) (describing how contracts must be sufficiently vague to allow for cost-cutting innovations without triggering a breach).

¹²⁷ See *supra* Part II.A.