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David M. Siegel

New England Law | Boston, dsiegel@nesl.edu

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INTERNALIZING PRIVATE PRISON EXTERNALITIES: LET'S START WITH THE GED

DAVID M. SIEGEL*

ABSTRACT

Prison education is a remarkably good investment for society, yet an increasing proportion of inmates have no access to it because the operators of the prisons in which they are held have a powerful incentive not to provide it: they make more money that way. Critics and analysts of private prison operators have suggested various incentive structures to improve their performance, but most jurisdictions focus on the operator's cost to the contracting entity. The social costs imposed by foregoing prison education are not part of the arrangement between a private prison operator and a jurisdiction with which it contracts. Although these costs are real and substantial to the inmates who bear them, because the inmates are not parties to the contract, these costs are externalities. Imposing these social costs on prison operators could improve the conditions for inmates in their custody and is very likely to improve these inmates' success after release. Unlike more complex strategies for imposing incentives on correctional programs to reduce recidivism, prison education is a known, straightforward rehabilitative strategy whose provision can be measured quite easily at the point of release. There is even a well-accepted metric for prison education administered by an independent third party: the General Educational Development Test ("GED"). This article proposes using the GED to internalize the cost of reduced or poor inmate education by imposing financial penalties on private prison operators whose inmates do not obtain, or make progress toward, a GED during their incarceration. This would provide the social benefits of inmate education, alter private prison operators' behavior at minimal administrative cost, and most importantly, benefit inmates being released.

I. INTRODUCTION

The increased use of private, for-profit entities to perform traditionally governmental functions has been a phenomenon of the delivery of public services

* Professor of Law, New England Law | Boston. Address correspondence to 154 Stuart Street, Boston, MA 02116. Email: dsiegel@nesl.edu. The author gratefully acknowledges the assistance of New England Law | Boston's research librarians.

since at least the 1980s.¹ This development presents especially controversial aspects when applied to “core” governmental functions in which private actors assume otherwise discretionary functions, such as military or law enforcement tasks.² Apart from the ideological controversy of allowing entities that may not be subject to the same restrictions and legal control as traditional government actors and civil servants to exercise these forms of legal authority,³ the systemic goal of profit maximization provides an inherent conflict of interest. The desire to maximize profits may affect the way any contractor, including a public contractor, performs its contractual obligations. When the contractor authorizes the exercise of discretionary authority, the risk that this authority may be exercised in ways to increase profits poses heightened concerns.⁴

Perhaps nowhere is this concern greater than in the exercise of discretion by private prison operators. The potential that private prison operators’ profit-maximization impulses could lead to exercising authority to extend incarceration periods, and thereby compensation, led the ABA to recommend that private prisons operators have no role in such decisions.⁵ Even without this exercise of authority, the goal of profit maximization could incline private prison operators to reduce costs by sacrificing quality.⁶ This risk seems particularly great when those who bear the effects of quality reduction, i.e., detainees and inmates, may be unsympathetic, lack political power or means of publicizing reductions in quality, and legally deserve punishment.

While oversight and contract monitoring are always potential means to prevent this risk, any administrative scheme is necessarily imperfect and imposes additional

¹ See Lucas Anderson, Comment, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113 (2009). According to the Bureau of Justice Statistics, between 2000 and 2013, the number of state inmates in private correctional facilities increased from 76,100 to 92,100, and the number of federal inmates in private correctional facilities increased from 9,400 to 31,900. LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP’T OF JUSTICE, NCJ 248479, CORRECTIONAL POPULATIONS IN THE UNITED STATES 12 (2014).

² See Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012) (arguing no inherent difference between public actors and private contractors but that empirical outcomes such as cost, efficiency, or quality may distinguish them).

³ See Mary K. Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 152 (2010) (arguing that, regardless of comparative efficiency, only public prisons avoid terminating the “dialogue between [offenders] and their community”).

⁴ Cf. Volokh, *supra* note 2, at 141–42 (citing private prison opponents’ arguments).

⁵ The American Bar Association’s Standards for Criminal Justice on the Treatment of Prisoners concerning privately operated correctional facilities states bluntly: “Core correctional functions of determining the length and location of a prisoner’s confinement, including decisions relating to prisoner discipline, transfer, length of imprisonment, and temporary or permanent release, should never be delegated to a private entity.” ABA STANDARDS FOR CRIM. JUST. (THIRD): TREATMENT OF PRISONERS standard 23-10.5(e) (2011).

⁶ See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 500–02 (2005) (positing functional equivalence between public and privately-operated prisons, except that privately operated prisons systematically underinvest in labor); see also ABA STANDARDS FOR CRIM. JUST. (THIRD): TREATMENT OF PRISONERS standard 23-10.5 cmt. (2011) (“Without recommending a categorical ban on private prisons, this Standard is founded on a high degree of discomfort with the idea of profitable prisons, where—as in every type of commercial enterprise—money may gain priority over law, morality, and rights. Prison privatization can create a financial incentive system in which stockholders become richer when prisoners are fed less, housed in smaller cells, or provided substandard health care, less education, or fewer programs.”).

costs. The simple problem is that private prison operators have a profit incentive to reduce their costs by reducing the quality of the services they provide to inmates, but inmates—who are not parties to the contracts between private prison operators and governments, and have relatively little power—bear the resulting costs in quality reduction. These costs, which can translate into additional health and safety costs later if rehabilitation is less effective or recidivism is increased, ultimately fall on society at large, so the challenge is how to internalize these costs back onto the private prison operator to provide a disincentive to reduce quality in the first place.

One recent approach to remedy the inherent conflict between the goal of profit maximization and ensuring performance quality by private entities that contract with governments has been to internalize the costs of inadequate performance and the possible advantages of superior performance by allowing public contractors to keep the benefits of cost savings that their programs provide the public entity. These incentives can even be structured as an investment, through “social impact bonds,” which provide a profit incentive through investment returns calibrated to measures of social benefit, for socially desirable outcomes.⁷ A similar approach, “Performance Incentive Funding,” is even starting to be used with public agencies which receive funding from other public entities, and are able to add to the budget savings they achieve, which would otherwise be passed on to different public agencies.⁸ For example, states are experimenting with programs that return money to local agencies that successfully supervise probationers or parolees, without returning them for incarceration, thereby saving money for the state by avoiding the costs of re-incarceration.⁹

Fundamental philosophical concerns exist about placing the exercise of discretionary authority with the force of law in the hands of entities that have an inherent incentive to exercise that discretion in order to advantage their profits.¹⁰ Nevertheless, given the documented risks to inmates, the greater likelihood of poor quality treatment for inmates and detainees, the reduced cost savings over the longer period, and the difficulty of monitoring, public policy might best be served by ending private prisons and detention facilities. However, to the extent that they are used, contracts should include provisions that explicitly internalize costs for providing inmate services and rehabilitation through external quality measures by third parties, which are tied to financial penalties or bonuses on contracts. Monitoring should be

⁷ The UK has the largest number of such investments underway. The Peterborough Social Impact Bond (supported in part by the Rockefeller Foundation), for example, involves a re-entry and supervision program for inmates that pays investors for reconviction that is 10% less than the “comparable national baseline.” The first year of the project showed an 8.4% reduction, which did not qualify for a payment, but will if the reduction stays at least 7.5% below the comparison through 2016. Press Release, Soc. Fin. Ltd., 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>.

⁸ VERA INST. OF JUSTICE, PERFORMANCE INCENTIVE FUNDING ALIGNING FISCAL AND OPERATIONAL RESPONSIBILITY TO PRODUCE MORE SAFETY AT LESS COST (2012).

⁹ *See id.*

¹⁰ *Cf.* ABA STANDARDS FOR CRIM. JUST. (THIRD): TREATMENT OF PRISONERS standard 23-10.5(a) (2011) (“Contracts with private corporations or other private entities for the operation of a secure correctional facility should be disfavored. Governmental authorities should make every effort to house all prisoners in need of secure confinement in publicly operated correctional facilities.”).

done not only through on-site monitors but also through unannounced inspections akin to the inspection models for medical accreditation bodies. More importantly, monitoring through externally validated tests that are designed to measure attributes that are independent of the correctional setting should be preferred.

II. PRIVATIZATION'S IMPACT ON INMATES

A. Conflict Between Profit Maximization and Increased Quality of Inmate Experience

A 2010 report for the ABA Criminal Justice Section on privatization of juvenile correctional facilities noted arguments based on public policy and outcomes, i.e., recidivism, against the use of private detention facilities for juveniles.¹¹ Cost comparisons of private and public, or private and non-profit correctional facilities, show any cost advantage for private prisons is short lived, and over longer periods non-profit or publicly-operated correctional facilities offer lower costs and reduced recidivism.¹² One extensively cited study concluded that, “[a] for-profit prison operator [] has almost no contractual incentive to provide rehabilitation opportunities or educational or vocational training that might benefit inmates after release, except insofar as these services act to decrease the current cost of confinement.”¹³

The U.S. Supreme Court has acknowledged, in a different context, the significance of market forces on the behavior of private prison operators.¹⁴ The conflict between the profit-maximization motive of private prisons and their contractual obligations to provide inmate services or rehabilitation has been documented. Ratios of inmates per facility employee, for example, as surveyed by the Bureau of Justice Statistics, have shown consistently higher ratios, i.e., fewer employees to more inmates, at private as opposed to public facilities.¹⁵ Inmates who

¹¹ Allen Bonner, *Privatization of Juvenile Detention*, in A.B.A. CRIMINAL JUSTICE SECTION, 2010 HANDOUTS 4 (2010).

¹² See, e.g., Patrick Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 582 (2005) (“cost-benefit analysis implies that the short-run savings offered by for-profit facilities over nonprofit facilities are reversed in the long run due to increased recidivism rates.”).

¹³ *Id.* at 554.

¹⁴ In holding that guards in private prisons, operating facilities under long-term contracts with a state, were not entitled to qualified immunity from § 1983 liability, the Court suggested that market forces could operate to supply the incentives for adequate action by private prison operators that qualified immunity was intended to provide. *Richardson v. McKnight*, 521 U.S. 399, 409 (1997) (“Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job.”).

¹⁵ JAMES J. STEPHAN, U.S. DEP’T OF JUSTICE, NCJ 222182, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005 (2008). Ratios of inmates per employee at public facilities in 2000 were 3:1 and in 2005 were 3.4:1, while the same ratios for private facilities nationwide were 3.8:1 and 4.2:1 respectively. *Id.* at app. tbl.14. Ratios for inmates per correctional officer showed even greater proportional disparities between public and private facilities. The inmate per correctional officer ratios at public facilities were 4.7:1 (in 2000) and 5:1 (in 2005), while the corresponding ratios in private facilities were 6.4:1 (in 2000) and 6.9:1

leave private prisons sooner, with better rehabilitation and reduced likelihood of recidivism, offer lower profits through shorter periods of incarceration and reduced likelihood of returning. Yet reduced recidivism is an obvious benefit for society and the explicit goal of many public programs.

To the extent that a correctional system's funding depends on caseloads, whether a private or public system, this is a systemic disincentive to improve outcomes and will have the secondary effect of reducing caseloads. Recognizing this inherent conflict even in the public correctional system, eight states have actually established a public sector analogue to performance-based contracting for private prisons: performance incentive funding schemes ("PIFs"). These PIFs provide local jurisdictions greater state funding in return for reduced recidivism.¹⁶ These nascent programs would provide localities a portion of the savings they generate for the state. Similar considerations might apply to other measures of an inmate's experience (e.g., health services or educational services), which raise the question: are there mechanisms for addressing this conflict between private prisons' effort to reduce cost and society's goals for the quality of inmates' experience during incarceration?

B. *Incentives Realignment*

So long as the social costs of inadequate inmate programs and services do not affect private prison operators, this will not change. But, incentives can be added to contracts. As structured, there is no financial consequence to contractors that do not effectively internalize social costs.¹⁷ Identifying quantifiable measures of quality services and treatments, independently verifiable by third parties, with financial penalties and bonuses for outcomes, could change private prison operators' incentives. Long-term social cost goals, such as reduced recidivism, reduced unemployment, improved family stability, etc., are obviously desirable, but short-term goals may be easier to measure and provide faster, more direct incentives to private contractors.

The idea of aligning policy goals and market rewards is not new. The 2010 ABA Criminal Justice Section report noted:

A concern with for-profit detention centers is that their private "profit" interest is not aligned with the public interest in rehabilitating and lowering recidivism rates among juvenile offenders. A for-profit model incentivizes detainment for financial profit, whereas public policy does not. Public policy interprets detainment as a means by which a child offender is punished and rehabilitated. Contrastingly, a for-profit model views detainment as a mechanism by which profit goals are met.

(in 2005). These reflected inmate-to-correctional-officer ratios in private facilities that were about twenty-seven percent higher than those in public facilities. *Id.*

¹⁶ See VERA INST. OF JUSTICE, *supra* note 8.

¹⁷ By costs, I do not mean those that are borne by the private prison operator. Reducing payments upfront, or requiring them as part of the contract, while beneficial, do not ensure that prison operators pay for costs that are external to the transaction, i.e., imposed on society at large.

This contrast in interpretation results in a direct conflict with the public purpose, and it is this direct conflict that creates undesirable results.¹⁸

The ABA Report criticized paying firms for each juvenile housed as providing a “disincentive to design efficient programs, rehabilitate youths, reduce recidivism or create re-integration programs.”¹⁹ While this misalignment of incentives could be avoided with private, not-for-profit detention facilities, which “can readily incorporate re-integration programs as part of their mandate,” similar perverse incentives can arise for these providers as well “if funding is tied to facility populations.”²⁰ Are there mechanisms for aligning public goals of quality treatment and rehabilitative services to detainees and inmates and the financial incentives private for-profit providers face? The ABA Report suggests “funding contingent on reducing recidivism would better align with the public interest than a ‘cost-per-bed’ setup.”²¹ This would better align public goals and private incentives, but is there a simpler way that could be implemented more quickly and with less administrative costs?

III. REALIGNING INCENTIVES OF PRIVATE PRISON OPERATORS TO MINIMIZE NEGATIVE EXTERNALITIES

At the most basic level, several incentive structures that operate with respect to private prisons have the effect of creating negative externalities. First, they are profit-maximizing businesses. As the principal U.S. private prison firms are publicly held companies,²² this means a focus on maximizing shareholder value. For contracts with unit price components, i.e., per detainee or inmate, this means private prison operators can increase profits by increasing the number of detainees or inmates (largely beyond the prison’s control), decreasing costs, or both. As the principal cost in operating a correctional or detention facility is labor,²³ this means reducing staff ratios, paying staff less, or both, increases profit. Similarly, reducing the resources used for staff, for example, by reducing expenditures on training and education of staff, also increases profit.²⁴ But poorly trained staff can produce negative outcomes

¹⁸ Bonner, *supra* note 11, at 6.

¹⁹ *Id.* at 6–7.

²⁰ *Id.* at 7.

²¹ *Id.*

²² The world’s largest private prison operator by beds under its contracts, the GEO Group (formerly Wackenhut), and the second largest private prison operator, Corrections Corporation of America, are both publicly held corporations (organized as real estate investment trusts). See GEO GROUP, 2013 ANNUAL REPORT (2014); *Who We Are*, CORRECTIONS CORP. OF AM., <http://www.cca.com/who-we-are> (last visited Oct. 14, 2015).

²³ Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons: A Comparison of Select Characteristics*, 68 FED. PROBATION J. 41, 42 (2004) (“Since labor accounts for approximately 70% of all prison expenses, the secret to low-cost operations is to have the minimum number of officers watching the maximum number of inmates.” (citations omitted)).

²⁴ *Id.* Comparing data that reflected 88% of all public sector prisoners in the U.S. and data obtained from private prison operators (85% of which came from Corrections Corporation of America and Wackenhut, the forerunner of GEO Group), the authors found officer turnover rates in the private prison sector were about three times as high as in the public prison data (43% versus 15%). They also found that salaries (both starting and

for detainees and inmates. This ensures a conflict between profit maximization and quality of service for detainees and inmates. The negative effects of reduced quality do not directly affect either of the contracting parties (the private prison operator or the public entity with which it has contracted).²⁵ Instead, these effects are passed on to a third party outside the transaction—the affected detainees and inmates.²⁶

Second, while some of the broader negative effects of reduced expenditures for inmates in private prisons, such as worse outcomes for inmates after release, may be passed on to society at large, they do not accrue to the prison operators. These externalities are passed on to a third party (society at large) which has the same goals as the private prison operator's customer—the governmental entity with which it contracted.²⁷ Thus, to the extent there are cost savings from having a private prison operator as opposed to a publicly operated prison (about which there is intense debate²⁸), when cost savings come from reduced expenditures on services to inmates that might increase social costs after inmates are released (from reduced employment, recidivism, etc.), these savings are further eroded by increased societal costs, which are ultimately borne by the private prison operator's customer. There is another reason to align private prison operators' incentives so as to eliminate negative externalities: the reduction in the availability of legal remedies to the consequences of these negative externalities. To the extent that there are legal consequences to private prisons reducing the quality of their services, which might act as a disincentive to reduce service, such consequences have been reduced through case law. In recent years, the U.S. Supreme Court has precluded the availability of a private right of action by inmates against both corporations operating private prisons for actions their employees take which violate inmates' constitutional rights (so

the overall range) were lower in the private sector (\$5,327 lower as of 1998), with less range for advancement. They also found private prison guards underwent 25% less pre-service training, and that inmate on inmate assaults at private prisons were roughly double the rate at public prisons, although the rate of inmate on staff assaults were roughly equivalent. *Id.*

²⁵ DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 71 (Tricia K. Bennett ed., 1995) ("In the case of private prisons, inmates have a more complex web of relationships in which they are dependent on the government agency, the officials of the entity that is bestowed with the legal authority to punish, and the 'hired hand' private company that executes the punishment Because of their inability to go out and shop around in the marketplace, inmates are more dependent on the organization than the clientele usually is in other bureaucracies. On the other hand, the service providers in this relationship are much less dependent on the clients than on the customers (government agencies) for their economic success. It is more important for the providers to satisfy the customers than the needs and wishes of the clients.").

²⁶ This idea has been expressed as the "correctional triad" in private prisons: between the "customer" (a government agency), the "service provider" (a private corporation), and the "clients or users" (inmates). *Id.* (noting "the traditional client-provider or customer-seller relationship is altered and becomes more complex because, usually, those who pay for the goods or services are the ones who benefit from the purchase, whereas in this situation the buyers of the services (government agencies) are not identical with the recipients of the services (clients)").

²⁷ *Contra* Cassandre Monique Davilmar, Comment, *We Tried to Make Them Offer Rehab, but They Said, "No, No, No!": Incentivizing Private Prison Reform Through the Private Prisoner Rehabilitation Credit*, 89 N.Y.U. L. REV. 267, 278–79 (2014).

²⁸ *See, e.g.,* Bonner, *supra* note 11.

called “constitutional torts”)²⁹ and against the employees themselves.³⁰ Although employees of private prisons are not entitled to the same qualified immunity that shields employees of public prisons when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,”³¹ remedial structures to address conflict internalize the externalities that are socially deleterious and provide incentives and disincentives for affecting their increase or decrease.

A. Identify Negative Externalities

The degree to which prison inmates have experiences that reduce recidivism, enhance their successful re-entry into free society, and enable them to more effectively obtain employment has long been an object of incarceration. Although it fell out of favor for several decades, rehabilitation is the key goal of most modern correctional systems. To the extent that the operational methods of private prisons either increase recidivism or do not effectively rehabilitate inmates, they create negative externalities.³² If private prisons, as compared with public facilities, have higher rates of inmate violence, reduced inmate health outcomes, or greater harms to the families of inmates, these too are negative externalities.

B. Identify Measurable Outcomes

Proponents of realigning incentives of private prisons have suggested as outcome metrics various measures for reductions in recidivism such as rearrests, returns to incarceration, violation of probation or parole, and successful completion of supervision. While improvements in any of these areas might be desirable, they have drawbacks as incentives for a private prison. Their measurement is delayed sometime after an inmate’s release, and the number of post-release factors that can affect a former inmate’s successful re-entry into free society complicates measurement. Perhaps most significantly, there is no general consensus of a definition of recidivism, i.e., whether to use rearrests, reconvictions, re-incarcerations, or technical

²⁹ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (Inmate of private prison under federal contract may not bring suit against corporation running the prison for a guard’s allegedly unconstitutional act which caused inmate to have a heart attack, because *Bivens* actions for constitutional torts may not be brought against government agencies nor corporations acting under color of law, but only against their individual employees.).

³⁰ *Minneci v. Pollard*, 132 S. Ct. 617, 625 (2012) (Existence of alternative state tort law remedies, available in each state in which private contractors are operating federal prisons, precludes need to extend *Bivens* actions to reach individual employees of private prisons operated for federal government, since these provide “roughly similar incentives” for constitutional compliance by potential defendants.).

³¹ *Richardson v. McKnight*, 521 U.S. 399, 404, 409 (1997) (rejecting the application of qualified immunity standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) to employees of private prisons operating under state contract because there was no “firmly rooted” tradition of immunizing employees of private detention and correctional facilities, and because market incentives would operate to avoid the functional concerns that fear of suit would make private prison employees “too timid” in exercising their duties).

³² See generally Davilmar, *supra* note 27.

violations, which further undermines recidivism as a standard.³³ While these outcomes are undeniably desirable, their utility as metrics is reduced by these characteristics.

Useful outcomes are objectively quantifiable, easily measurable with a high degree of agreement, and minimally susceptible to “gaming the system.” If an independent third party measures the outcomes, the risk of fraud is reduced and additional costs of auditing are avoided. Finally, outcome measures should be relevant to transforming negative externalities into positive ones. The best outcome measures actually measure the desired change, i.e., they are valid and the desired change is one that is beneficial.

The more an outcome measure is within the control of a correctional facility, the greater sense it makes to use it as an incentive. However, control of achieving an outcome measure is ideally separate from measurement of the outcome. Prison-based educational attainment may be one form of a useful measure that might also provide effective incentives.

C. Prison-based Educational Attainment Through GED Passage as an Outcome Measure

Prison-based education involving instruction and preparation for the GED is a near-universal practice,³⁴ and research on outcomes of prison inmates who attain a GED show modestly improved income after release.³⁵ A 2011 study by the American Council on Education found that about ten percent of all GED tests given in the U.S. in 2010 were administered in correctional institutions.³⁶ When inmates take the GED, they pass it at very similar rates as test-takers in non-correctional settings. The total national pass rate for GED test takers in correctional settings (the total number of test takers who completed the test / total passers) in 2010 was 75.1%,³⁷ while the national pass rate for test-takers in non-correctional settings was 73%.³⁸ While the pass rates are similar for correctional and non-correctional takers, the opportunity for inmates to take the GED appears to differ between public and private correctional institutions—and reduced educational opportunities could be seen as a negative externality.

³³ See John Lewis, *Correctional Education: Why It Is Only “Promising”*, 57 J. CORRECTIONAL EDUC. 286, 290 (2006).

³⁴ See John H. Tyler & Jeffrey R. Kling, *Prison-Based Education and Re-Entry into the Mainstream Labor Market* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 12114, 2006), <http://www.nber.org/papers/w12114.pdf> (“Prior research on the effects of ‘prison GEDs’ on post-release outcomes is relatively limited in spite of the fact that the 2000 Census of State and Federal Correctional Facilities (Bureau of Justice Statistics 2003) showed that 83 percent of the state correctional facilities in the U.S. offered ‘secondary education programs,’ of which the primary type are GED preparation programs.”).

³⁵ *Id.* at 22–23 (finding minority inmates in Florida who earned a GED increased post-release annual earnings by about twenty percent for two years compared with minority inmates who did not participate in GED programming).

³⁶ AM. COUNCIL ON EDUC., GED TESTING IN CORRECTIONAL CENTERS 4 (2011), <http://www.gedtestingservice.com/uploads/files/2192d30439b285ca4ada09e2641ea0dd.pdf>.

³⁷ *Id.* at 5.

³⁸ *Id.* at 11.

The overall rate at which correctional educational programs are offered, particularly adult secondary education programs, appears to vary considerably between public and private facilities. The 2005 Bureau of Justice Statistics *Census of State and Federal Correctional Facilities* (the latest available) divides educational programs offered at correctional facilities between those offered at all public versus all private facilities.³⁹ This data show a dramatic difference between secondary education offerings (which include the GED) at public and private facilities. Nationally, among the 1,406 public facilities surveyed, 1,215 (86.4%) offered secondary education, while among 415 private facilities surveyed, only 184 (44.3%) did so.³⁹ One benefit of an incentive structure using correctional education outcomes might be the increase in offerings and expenditures at private facilities on educational offerings.

Education could be mandatory (as it is at federal correctional facilities), but even mandatory participation does not necessarily produce educational attainment. A 2008 meta-analysis of eleven studies showed a variety of methodological shortcomings, but concluded that correctional education in general reduced recidivism, though the size of the effect was uncertain.⁴⁰

A more recent and comprehensive 2013 meta-analysis by RAND Corporation researchers examined fifty studies, done over three decades, measuring the effect of correctional education on recidivism.⁴¹ This meta-analysis concluded that when examining the effect of all forms of correctional education on recidivism (adult basic education, high school or GED programs, postsecondary education, and vocational education), while the underlying studies varied in “methodological quality and rigor, on average, the odds of recidivating among inmates receiving correctional education are 64 percent of the odds of recidivating among inmates not receiving correctional education.”⁴² Given the national recidivism rate (measuring recidivism as re-incarceration within three years of release), the authors estimated a recidivism rate for those who participated in correctional education as 30.4%, or about thirteen percentage points lower than average.⁴³

This finding is especially important with regard to possible use of GED success as an incentive for private prison operators because nearly half of the studies examined (twenty-two) addressed high school/GED programs (which are the predominant form of correctional education across the country).⁴⁴ The researchers concluded that, based on these studies, the likelihood of recidivating among inmates

³⁹ STEPHAN, *supra* note 15, at app. tbl.18 (number of facilities under state or federal authority that provided educational programs to inmates).

³⁹ *Id.*

⁴⁰ See Gerald G. Gaes, *The Impact of Prison Education Programs on Post-Release Outcomes* 11 (Feb. 18, 2008) (unpublished manuscript), <http://www.ceanational.org/docs/Gaes.pdf>.

⁴¹ LOIS M. DAVIS ET AL., *EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS* (2013), http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR266/RAND_RR266.pdf [hereinafter *EVALUATING EFFECTIVENESS*].

⁴² *Id.* at 29.

⁴³ *Id.* at 38–39.

⁴⁴ Davilmar, *supra* note 27, at 278–79.

who participated in high school or GED programs was seventy percent of the likelihood of recidivating compared to inmates who did not participate in education.⁴⁵

One challenge in researching the impact of prison GED programs is the variety of factors that can affect participation. These include eligibility of inmates (some programs are restricted to inmates who have earned good time or are near release, for example) and motivation to participate (which could be for personal improvement or to impress or curry favor with prison officials). A 2008 study by the California Department of Corrections recommended expanding incentive structures for inmates to not only enroll in, but also attend and advance in, prison educational programs.⁴⁶ It found that fewer than half of inmates enrolled in correctional education programs actually were in class on a daily basis because of lockdowns, staffing vacancies, and inadequate funding for the programs.⁴⁷ No program apparently offers incentives to correctional facilities to enhance inmate educational participation and outcomes. An incentive structure for private prison operators could do this, and structuring access to the program is completely within the control of the facility.

One program that appears to have significantly improved quality of life for both inmates and staff in a correctional system is Arizona's "Getting Ready," which is based on an earned incentive structure for inmates that keys much of program participation to obtaining a GED.⁴⁸ The program was implemented in 2003 (FY 2004), and by 2007 (FY 2008), seventy-four percent of Arizona's prison inmates had a GED.⁴⁹ The program further improved the inmate and staff quality of life in other ways through reduced institutional violence, and the GED itself is obviously not causal. However, the GED was used as a key, measureable marker for advancement in the program—which also parallels its significance in the outside world.

If incentives to participate in prison-based educational programs are already offered to inmates (in the form of early release credits, greater privileges and access to visits, phone contact, and the commissary), one might reasonably question the purpose of additional incentives directed at the institution. But, institutional incentives for inmate educational attainment offer several benefits.

First, a principal obstacle to inmate educational attainment appears, in some systems at least, to be structural impediments in the institutions' operations. Classes apparently are cancelled, do not meet regularly, or staff are not available, all of which are outside the control of an individual inmate.⁵⁰ All of these factors are, however, within the control of the facility's operator.

Second, inmates in a variety of studies report a desire for additional education. A 2007 National Institute of Justice study of 935 serious and violent offenders participating in a federal re-entry initiative found that the most requested re-entry

⁴⁵ EVALUATING EFFECTIVENESS, *supra* note 42, at 35.

⁴⁶ See BRIAN BROWN, LEGISLATIVE ANALYST'S OFFICE, FROM CELLBLOCKS TO CLASSROOMS: REFORMING INMATE EDUCATION TO IMPROVE PUBLIC SAFETY (2008), http://www.lao.ca.gov/2008/crim/inmate_education/inmate_education_021208.aspx.

⁴⁷ *Id.*

⁴⁸ See Gerald Gaes, *Evaluation of Getting Ready*, 263 NIJ J. 3 (2009), <http://www.nij.gov/journals/263/pages/evaluation-of-getting-ready.aspx>.

⁴⁹ Dora Schiro, *Getting Ready: How Arizona Has Created a 'Parallel Universe' for Inmates*, 263 NIJ J. 3 (2009), <http://www.nij.gov/journals/263/pages/getting-ready.aspx>.

⁵⁰ See BROWN, *supra* note 47.

need (ninety-four percent) was additional education—and this was among a cohort sixty-two percent of which already had high school diplomas or GEDs.⁵¹ This suggests the depth of the need.

Third, there are many institutional policies, such as staffing rotation, shift schedules, classroom arrangement, etc., that could impact an inmate's sustained opportunity to attend, complete, and succeed in a GED course, and institutional incentives to improve outcomes could aid inmate success. Affording an incentive for these outcomes would put the impetus on the private prison to identify ways it could obtain the incentives. To the extent that private prison operators respond to financial incentives, this would add an incentive of potentially increased revenue (or a disincentive to avoid revenue decreases from a penalty structure).

IV. A GED PASSAGE PERFORMANCE INCENTIVE PROGRAM

An ambitious program of Private Prisoner Rehabilitation (“PPR”) tax credits has recently been proposed, which provides delayed conditional payments to private prisoner operators as tax credits once third parties have certified that rehabilitative goals have been met.⁵² Unfortunately, building the models by which to measure rehabilitation, and the impact that the private prison's program has made, is complicated. An immediate way to operationalize this idea, however, would be to use an existing outcome measure—the GED test—which is already evaluated by a third party assessor (the test administrator) to determine whether payment is merited.

Building on the PPR tax credit would be to simply designate an incentive credit for each inmate who achieves GED passage during his or her incarceration. While this is crude, and overlooks the fact that inmates come with different readiness, that GED passage might require greater or lesser expenditures for a range of inmates, etc., it is a simple way to start that would not require third party involvement. Certified reporting of an inmate's GED passage could satisfy the tax credit requirement. Inmates who arrive with educational preparation that should enable them to succeed on the GED within the period of their incarceration, but who do not obtain their GED, could also serve as a penalty structure. This could provide a direct incentive to the private prison operator to offer increased and more effective high school and GED instruction, and to internalize the cost of failing to do so through an explicit penalty.

In addition to the comparative simplicity of a GED passage incentive program, as opposed to a future-oriented tax credit, this is an extremely low-cost program that could offer significant public savings. The RAND researchers projected a return of five to six dollars in reduced public costs from rehabilitation for every dollar spent on the direct costs of correctional education.⁵³ Simply using the average reduction in recidivism the studies found, and comparing a hypothetical group of 100 inmates who received correctional education to those who did not, the authors found a savings in reduced re-incarceration from reduced recidivism expected in the group that

⁵¹ Christy A. Visher & Pamela K. Lattimore, *Major Study Examines Prisoners and Their Reentry Needs*, 258 NIJ J. 30 (2007), <http://www.nij.gov/journals/258/Pages/reentry-needs.aspx#note3>.

⁵² See Davilmar, *supra* note 27.

⁵³ See EVALUATING EFFECTIVENESS, *supra* note 42.

received correctional education of \$0.87 million to \$0.97 million.⁵⁴ While figures of under a million dollars are relatively small in terms of corrections costs overall, these are significant because the direct costs of providing correctional education are comparatively low. In absolute terms, i.e., actual dollars expended, the authors found correctional education costs about \$1,400–\$1,744 annually per inmate.⁵⁵ This is a return of \$6.21–\$5.56 for every dollar spent on correctional education.⁵⁶ Since the public already bears these costs of added re-incarceration, this provides ample range to offer an incentive to the private prison operator to spend \$1,400–\$1,744 annually per inmate on correctional education, pay an incentive for each inmate who passes the GED, and still have considerable savings from reduced incarceration—to say nothing of the social benefit of an inmate post-release with higher education.

There may be similar opportunities for specific target outcomes, either educational or health, that are easily measured. Health targets such as vaccinations, for example, have well-established protocols and methods and require some degree of institutional effort to secure inmate consent. There may be many more such existing, beneficial educational or health-related outcomes that are easily measurable and self-auditing, i.e., verified necessarily by third parties. These types of programs may be faster and easier to implement than ones that provide incentives for improved rehabilitation or reduced recidivism, and could also provide correspondingly faster benefits to the specific inmates involved.

V. CONCLUSION

This paper has outlined a means of internalizing the costs of reduced staffing and programs for inmates at privately operated prisons in order to blunt the negative externalities that inmates at these institutions and society face because of the profit-maximization incentives that drive private prison operators. This should not be taken as an endorsement of private prison operation, but it could provide a model for mitigating one of the deleterious aspects of the incentive structures that may incline them to reduce correctional education programs. Apart from the benefit to inmates of internalizing this externality (through increased educational opportunities), it also has the prospect of reducing recidivism and saving money for public entities that must both contract with private prison operators and bear the cost of these externalities. Moreover, it employs a well-established, independently verified measure (the GED) for triggering this incentive. To the extent that private prison operators propose that they can offer correctional services that are more effective at lower cost than public entities, this seems an easy way to test that proposition.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Savings from reduced re-incarceration per 100 inmates (\$870,000 - \$970,000) / Annual direct costs of correctional education per inmate x 100 (\$140,000 - \$174,000) = \$6.21 - \$5.56.