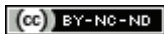


HEALTH IMPACT BONDS: REMOVING THE
LEGAL BARRIERS

Whitney Coble

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HEALTH IMPACT BONDS: REMOVING THE LEGAL BARRIERS*

Whitney Coble**

Healthcare has been one of the most discussed topics in the United States during the past five years. The United States spends more than 15 percent of its gross domestic product, or \$2.7 trillion a year, on healthcare—mostly focusing on treatment, hospitalization, and medical care. In contrast, investments in preventative health may result in quality of life improvements, fewer visits to doctors and hospitals, and lower claims costs for employers. These benefits could result in significant savings for investors. At present, however, there are few incentives for insurers or providers to invest in prevention due to a fee-for-service model—even if preventative measures cost less than treatment. To complicate matters, within the next year, insurers will be limited in the profits they can share with their stakeholders due to a provision within the Patient Protection and Affordable Care Act. It is to insurers' benefit to find alternative ways to invest the extra money. This is where social impact bonds come in.

Social impact bonds, also associated with pay-for-success contracts in the United States,¹ are an innovative financing mechanism in which government agencies pay for clearly delineated, measureable social outcomes only after those

* *Note from the Author:* This Note was written in March 2013 and may not reflect the latest developments pertaining to social impact bonds.

** University of Pittsburgh School of Law, Carnegie Mellon University, J.D./M.S. in Public Policy and Management 2014; College of Charleston, B.A. 2008. The author thanks her family for their support.

¹ A social impact bond is a financing mechanism, whereas, pay-for-success is a contracting mechanism and does not specify the means of payment. Therefore, all social impact bonds finance pay-for-success contracts, but the opposite does not necessarily hold true. See Steven Goldberg, *What's the Difference Between SIBs and "Pay-for-Success"?*, SOC. IMPACT BOND TRIB., Issue No. 1, 7 (Nov. 2012), available at http://payforsuccess.org/sites/default/files/sib_trib_no._1.pdf.

results have been achieved.² In the meantime, private investors provide operating funds and are repaid with a modest return if the initiative achieves its goals.³ If targets are not met, the government does not have to compensate the external organization that issued the bonds. It is dependent on performance and sold only to qualified investors, making it a more structured product than traditional bonds.⁴

According to experts in the field, the following elements must be present for a social impact bond to work:⁵

- Target outcomes must be clearly defined and achievable;
- The proposed intervention should reflect best practices;
- Measuring outcomes must be independently validated;
- A clearly defined “savings” or return value should be established; and
- Public agencies, nonprofits, investors and community stakeholders must be willing to work together.

In Part I of this Note, I outline the history and benefits of social impact bonds. In Part II, I explore how these bonds can be applied to preventative health initiatives in the United States. In Part III, I discuss legal and legislative barriers that make utilizing social impact bonds difficult. In Part IV, I conclude by outlining how social impact bonds and my legal recommendations may be applied to Pennsylvania and, specifically, the Allegheny Mental Health Court. These recommendations are applicable to similar mental health courts across the country.

² Kristina Costa, Sonal Shah & Sam Ungar, *Frequently Asked Questions: Social Impact Bonds*, CENTER FOR AM. PROGRESS (Dec. 5, 2012), <http://www.americanprogress.org/issues/economy/report/2012/12/05/46934/frequently-asked-questions-social-impact-bonds/>.

³ *Id.*

⁴ Randall Jensen, “*Social Impact Bond*” *Buzz Heads West*, THE BOND BUYER (Jan. 10, 2013, 4:13 PM), http://www.bondbuyer.com/issues/122_8/fresno-california-pilot-project-social-impact-bonds-1047541-1.html.

⁵ Maria Hernandez, S. Len Syme & Rick Brush, *Impact Investing in Sources of Health*, 5 (2012), available at http://collectivehealth.files.wordpress.com/2012/04/impact-investing-in-health_tce-paper_feb-2012.pdf.

I. INNOVATIVELY ACCESSING CAPITAL

A. *History of Social Impact Bonds*

Social impact bonds have been used in the United Kingdom, Australia, and, more recently, the United States. The United Kingdom pioneered the first social impact bond project in 2009. Using funds from the United Kingdom's "Big Lottery," the Macarthur Foundation, and private investors, the Ministry of Justice issued social impact bonds to several nonprofit organizations that contracted to improve the recidivism rate of prisoners at Petersborough Prison from 60 percent to 50 percent.⁶ One repeat offender in Petersborough Prison can cost up to \$126,000 for one year.⁷ Based on the savings from housing fewer prisoners, the Ministry of Justice will pay out dividends up to a 13.5 percent rate of return to the bond investors.⁸ Though initial results will not be available for another two years, anecdotal feedback has been positive. Prisoner recidivism is an excellent example because there is immense research available on which approaches are successful. In addition, prisoner reentry is a nonessential government service; therefore, few repercussions will result if the project fails.⁹

Over the past year, it has become apparent that social impact bonds have made landfall in the United States. The White House has established an Office of Social Innovation.¹⁰ President Barack Obama's fiscal year 2012 budget included a proposal to invest \$100 million in "pay-for-success" projects in several pilot areas, including job training, education, juvenile justice, and care of children with disabilities.¹¹ The primary conference on Social Enterprise, hosted by Harvard University, featured a session track dedicated to social impact bonds, and Tracy Palandjian, the Chief Executive Officer of Social Finance, served as the keynote

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *Id.*

⁹ Michelle Host, *Social Impact Bonds: Passing Fad or Revolutionary Innovation?*, THE SHRIVER BRIEF (Oct. 16, 2012), <http://www.theshriverbrief.org/2012/10/articles/legal-aid/social-impact-bonds-passing-fad-or-revolutionary-innovation/>.

¹⁰ OFFICE OF SOCIAL INNOVATION AND CIVIC PARTICIPATION, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/sicp> (last visited May 29, 2014).

¹¹ *Massachusetts First State in the Nation to Announce Initial Successful Bidder for Pay for Success' Contracts*, MASS.GOV, <http://www.mass.gov/anf/press-releases/fy2013/massachusetts-first-state-in-the-nation-to-announce-ini.html> (last visited May 29, 2014).

speaker.¹² Senator Curran Price (Democrat, Los Angeles) has introduced a bill that would create the California Office of Social Innovation and Entrepreneurship.¹³ Most significantly, as of August 2012, several government agencies in the United States are experimenting with social impact bonds.

Goldman Sachs in New York City, for example, is investing nearly \$10 million in a jail program to reduce recidivism rates at Rikers Island.¹⁴ Goldman lends the money to MDRC, a nonprofit group that oversees the work of two charities running the program, and another nonprofit evaluates the results of the four-year program.¹⁵ Goldman will be repaid in full if recidivism is reduced by 10 percent. If the recidivism rate drops more, Goldman could profit by \$2.1 million.¹⁶ If the rate does not drop, Goldman will lose a substantial portion of its investment.¹⁷

In addition, the Massachusetts is pursuing pay-for-success contracts in the areas of juvenile justice and homelessness.¹⁸ For juvenile justice, the specific goal is to reduce recidivism and improve education and employment outcomes over several years for a significant portion of the 750 youths exiting the juvenile justice system and the several thousand who exit the probation system yearly. For chronic homelessness, the goal is to reduce emergency shelter and Medicaid costs while improving the wellbeing of the individuals. Stable housing will be provided for several hundred homeless individuals.¹⁹

The following are additional examples of the social impact bond movement in the United States. The Manhattan Borough President would like to use these bonds to support early childhood education.²⁰ Whirlpool, which manufactures major

¹² Keynote—Tracy Palandjian, THE SOCIAL ENTERPRISE CONFERENCE, <http://socialenterpriseconference.org/videos/keynote-tracy-palandjian/> (last visited June 8, 2014).

¹³ Jensen, *supra* note 4.

¹⁴ Caroline Preston, *Getting Back More Than a Warm Feeling*, N.Y. TIMES, Nov. 9, 2012, at F1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Host, *supra* note 9.

¹⁸ *Massachusetts First State in the Nation to Announce Initial Successful Bidder for Pay for Success' Contracts*, *supra* note 11.

¹⁹ *Id.*

²⁰ Host, *supra* note 9.

home appliances, is considering an asthma prevention health impact bond for its employees in either Michigan or Ohio.²¹ County Health and Human Services directors, philanthropic organizations, and more than one hundred service providers, community members, and advocates in Cuyahoga County, Ohio, are discussing the concept as well. In addition, the Global Impact Investing Network is developing “a common framework for reporting the performance of impact investments” with help from the United States Agency for International Development, the Rockefeller Foundation, Deloitte Consulting LLP, and PricewaterhouseCoopers.²² Other programs that might benefit from social impact bonds include foster care reentry prevention and unemployment.²³ This Note will focus on the application of social impact bonds to preventative healthcare in the United States.

B. Strengths and Weaknesses

Like many innovations, social impact bonds present challenges. First, nonprofit organizations must demonstrate that social impact bonds produce savings and must justify the efficacy of their intervention design and evaluation methods.²⁴ Second, the layers of involving multiple nonprofits, investors, and the government drive up the program’s transaction costs, sometimes requiring difficult collaboration.²⁵ Politicians may be uncomfortable about creating profits based on the needs of the underserved. Third, it may be hard to accurately capture “savings” from an intervention across state or federal agencies and separated program budgets. Fourth, nonprofit leaders have expressed concern that donors will drift toward impact investing models and away from outright donations.²⁶ Each of the program’s challenges, however, can be matched with equally compelling strengths.

Consistency, cost-effectiveness, and accountability rank among the greatest benefits that social impact bonds provide. Even when government budgets are constrained, social impact bonds provide an incentive to use novel approaches to

²¹ Manuela Badawy, *California City Seeks to Cut Asthma Rate by Bond Issue*, REUTERS, Oct. 19, 2012, available at <http://www.reuters.com/article/2012/10/19/us-investing-impactbonds-health-idUSBRE89I0U120121019>.

²² Host, *supra* note 9.

²³ *Id.*

²⁴ Badawy, *supra* note 21.

²⁵ Hernandez et al., *supra* note 5.

²⁶ Preston, *supra* note 14.

social problems because the initial funding is coming from the private sector.²⁷ Taxpayers do not pay until the organization reaches its targets. These performance targets reduce the possibility of the government continuing to support a program that is not achieving its objectives²⁸ and allow good programs to receive funding long enough to prove their value (e.g., the Massachusetts' legislature budgets \$50 million for repayments to investors whenever programs prove their worth).²⁹ This results in a "long-term" sustainable impact for those who benefit directly from the intervention and for the broader community, with likely improved results for future populations. In addition, receiving money upfront to produce targeted results allows nonprofits to avoid investing exorbitant resources applying for funding on an annual basis.³⁰

II. HEALTH IMPACT BONDS

Social impact bonds are often called "health impact bonds" when applied to preventative health. Health impact bonds include raising capital from private investors for "evidence-based interventions that reduce health care costs by improving social, environmental, and economic conditions essential to health."³¹ These bonds could provide multiple benefits for insurers because they reduce the expense associated with the care of patients, allow insurers to make more money, and likely enable them to write off the money because it goes toward a bond with social impacts.

In Fresno, California, the first health impact bond pilot program in North America will be used to address asthma.³² Fresno is the second most impoverished United States city, with over 500 thousand people. Fresno is also the second most polluted city in the country,³³ and 17.3 percent of the city's residents suffer from

²⁷ Host, *supra* note 9.

²⁸ *Id.*

²⁹ Renée Loth, Editorial, *Bonds That Bring Social Dividends*, BOS. GLOBE, Aug. 18, 2012, <http://www.bostonglobe.com/opinion/2012/08/17/first-for-massachusetts-social-innovation-financing/iW4tO4PrI0bSUo6t63eT2K/story.html>.

³⁰ Hernandez et al., *supra* note 5.

³¹ *Id.*

³² Badawy, *supra* note 21.

³³ Rob Waters, *Obamacare Spurs New Thinking on Using the Market to Pay for Prevention*, FORBES (Nov. 12, 2012, 2:20 AM), <http://www.forbes.com/sites/robwaters/2012/11/02/obamacare-spurs-new-thinking-on-using-the-market-to-pay-for-prevention/>.

asthma, as compared to 8 percent nationally. Each day, twenty people go to the emergency room and three are hospitalized for asthma-related reasons. Asthma is the number one reason children miss school in Fresno. Public health researchers have shown that asthma symptoms can be greatly reduced by removing or cleaning moldy carpets, providing indoor air filters, and reducing infestations of dust mites and cockroaches.³⁴

Collective Health, a Connecticut-based firm, has been developing a pilot program using health impact bonds that started in April 2013 with support from the California Endowment.³⁵ The firm, plus partners including Clinica Sierra Vista, has identified two hundred high-risk asthma patients who each average \$16,371 in medical bills per year for hospital stays and emergency room visits. Collective Health intends to cut these bills by \$7,773 by cleaning each home to get rid of mold, roaches, mice, and dust mites.³⁶ For \$540 thousand the firm hopes to save about \$1 million per year, and it expects to decrease emergency room visits by 30 percent and hospitalizations by 50 percent.³⁷ Public and private insurers that cover the patients will document the costs and savings. At the end of the year, Collective Health hopes to provide similar services to a future group of eleven hundred Fresno asthma patients by convincing investors to put roughly \$3 million into a health impact bond.³⁸ Collective Health believes this will result in a future net savings of \$5.5 million, which will enable it to reward investors, generate money for itself, and expand the program further.³⁹

III. LEGAL AND LEGISLATIVE ISSUES

A. Overview

Jeffrey B. Liebman, a public policy professor at Harvard University, noted that the first use of social impact bonds in the United States “will get attention as perhaps the most interesting government contract written anywhere in the world this year.” Commentators believe that “[p]eople will study the contract terms, and

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

the New York City deal will become a model for other jurisdictions.”⁴⁰ Social impact bonds are likely to produce a host of legal and legislative issues, some of which will be realized only during and after the first pilots are completed. This section provides an overview of the procurement and legislative challenges with a focus on legislation.

State procurement law favors competitive situations. However, this tradition relies upon two assumptions that might not fit with social impact bonds: (1) that there are multiple qualified firms in the market; and (2) that standard contracts can be prescribed to establish a “level playing field” for all respondents. The special nature of pay-for-success contracts raises questions, including, for example, whether requests for proposals can be structured considering the small number of qualified intermediaries, and that the initial contracts will be limited to demonstration projects. In addition, questions arise whether flexible contracts can be developed that leverage the capabilities of non-governmental organizations.⁴¹

In addition, there are stark differences between state and local governments in their ability to make long-term financial commitments within the scope of the law. Legislative authority is likely determined on a case-by-case basis. It serves two primary functions: “enabling” and “securing”—enabling because private investors might be loath to enter into these special kinds of contracts, the enforceability of which is ambiguous without express authorization from the legislature.⁴² Even if the contract is authorized by the legislature, it does not automatically ensure that investors will get paid once the conditions of the contract have been satisfied.⁴³ A current legislature cannot enact future legislation to spend taxpayer funds in a specified manner; a future legislature can decide not to allocate funding for that purpose, thereby suspending the operation of the law.⁴⁴ Because appropriations are almost always made annually, investors in social impact bond contracts covering

⁴⁰ Martha Neil, *Goldman Sachs to Loan \$9.6 Million to NYC Jail Program; ‘Social Impact Bonds’ Pay More for Less Recidivism*, A.B.A. J. (Aug. 2, 2012, 5:01 AM), http://www.abajournal.com/mobile/article/goldman_sachs_to_loan_9.6m_to_nyc_jail_program_social_impact_bonds_pay_more/?utm_source=dlvr.it&utm_medium=twitter%20.

⁴¹ See generally Costa et al., *supra* note 2. This guide, produced by the Center for American Progress, addresses some of the most common questions concerning social impact bonds.

⁴² Goldberg, *supra* note 1, at 8.

⁴³ “Sovereign immunity” prohibits a state from spending money unless the legislature has voted to “appropriate” the money from the approved budget. *Id.*

⁴⁴ *Id.*

several years face the risk that the legislature will not pay them when the agreed upon deadline arrives.⁴⁵ Due to the uncertain nature of politics and the fiscal environment, “appropriations risk” represents a significant obstacle.⁴⁶

B Examples of Social Impact Bond Legislation

Thus far, statutes and bills related to social impact bonds have been enacted in Massachusetts, Connecticut, and New Jersey.⁴⁷ Massachusetts passed a statute establishing the Social Innovation Financing Trust Fund, which is designed to fund pay-for-success contracts.⁴⁸ The state Secretary of Administration and Finance must determine that pay-for-success contracts are likely to produce “significant performance improvements and budgetary savings.”⁴⁹ This language likely protects the Secretary’s judgment from third parties and the courts. Empowering the Secretary to enter into the contracts possibly facilitates better communication between departments because the Secretary authorizes substantial control over state agencies and departments.⁵⁰ The Massachusetts Act is sensitive to the unusual nature of pay-for-success contracts in that it requires some essential terms but allows the parties involved to determine the details.⁵¹ In addition, instead of providing direct funding itself, the Act imposes a “sinking fund requirement.” The Secretary is, therefore, obligated to request an annual appropriation.⁵² If the legislature rejects the appropriations request, no funds will be available for payment—a fact that makes impact investing a potentially risky endeavor for investors.⁵³ To provide security to investors, a full faith and credit requirement ensures that Massachusetts will meet its payment obligation. The Massachusetts Act provides that the total amount of payments cannot exceed \$50 million and is the only statute thus far to institute a full faith and credit requirement.⁵⁴

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 8–15.

⁴⁸ *Id.* at 8.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 9–10.

⁵⁴ *Id.* at 10.

Like Massachusetts, Connecticut places the state's Secretary in charge.⁵⁵ However, the state offers less legislative assurance of payment than Massachusetts. In addition, Connecticut embraces a "full-service" intermediation model in which an organization creates financial instruments and works with service providers on the delivery of preventative programs.⁵⁶ The Connecticut Act also specifies that the Secretary may execute this kind of contract "for the purpose of accepting" a Department of Justice grant. Like the Massachusetts Act, the Connecticut Act does not allocate any funding to the repository for payments.⁵⁷ Unlike Massachusetts, however, the state Secretary is not authorized to pledge full faith and credit for any payments due. The bill restricts disbursement from the account to the program that the social impact bond is designed to address and allows the General Assembly to enact future legislation to deposit funds in the account.⁵⁸ The Secretary is provided broad discretion to "secure supplemental funding for investor payments from virtually any 'public or private sources.'"⁵⁹

On the other hand, the New Jersey Act proves quite different in that the state itself must issue the social impact bond and determine whether outcome targets have been reached.⁶⁰ Despite concerns that social impact bonds are useful primarily for scaling up successful preventative programs, as opposed to providing consistent costs savings, the New Jersey Act states explicitly that if the services do not reduce government cost by the agreed upon amount, investors will not be paid. It remains ambiguous whether the New Jersey Act is shifting most of the financial risk to private investors.⁶¹ The New Jersey Act provides that investors contract directly with government agencies.⁶² This provision may create consternation for investors because the government may be incentivized to fall just short of achieving the agreed upon outcomes to avoid repaying investors.⁶³ The absence of a private intermediary creates further uncertainty with respect to government control. As has

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 12.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 13.

⁶³ *Id.*

been typical thus far with social impact bond legislation, investors assume an appropriations risk in that they may not be repaid even if all contractual obligations have been met, subject to the decision of the legislature.⁶⁴ Furthermore, both the investor payments and the debt obligations of the state are limited to the amount of public sector savings.⁶⁵ Like Massachusetts and Connecticut, the New Jersey Act establishes a fund for social impact bond proceeds and other authorized deposits. Unlike the other two states, however, it requires that the savings subaccount be “made up of DHS savings realized from the social impact bond-funded intervention.”⁶⁶

In December 2012, California State Senator Curren Price introduced a bill to establish an Office of Social Innovation and Entrepreneurship.⁶⁷ The bill also established a Social Impact Fund where appropriated funds could be deposited. The Office would be used to “develop a strategic plan for promoting social impact bonds, to develop model provisions for performance-based contracts, and to report annually to the legislature on the use of social impact bonds.”⁶⁸

IV. RECOMMENDATIONS

The Commonwealth of Pennsylvania is ripe for social impact bond experimentation. The Commonwealth can benefit from emulating the following strong points of the legislation already passed in other states.

Pennsylvania, like New Jersey, should administer a five-year social impact bond pilot program and study commission. Specifically, Pennsylvania should adopt the assurances of payment to investors that Massachusetts offers while following the legal framework more clearly outlined in Connecticut’s law.⁶⁹ It may be advisable for drafters to provide more guidance than the Massachusetts legislation on the specific amount that can be paid to service providers and investors while allowing the state Secretary reasonable discretion.⁷⁰

⁶⁴ *Id.* at 8.

⁶⁵ *Id.* at 12.

⁶⁶ *Id.* at 15.

⁶⁷ S.B. No. 9, 2013–2014 Reg. Sess. (Ca. 2013) (as introduced by Sen. Price).

⁶⁸ *Id.*

⁶⁹ Goldberg, *supra* note 1, at 8, 10.

⁷⁰ *Id.* at 9.

Instead of drafting a nebulous pay-for-success contract, Pennsylvania should commit fully to shifting most financial risk to private investors and utilizing social impact bonds as an innovative financing mechanism. The New Jersey Act goes further than Connecticut and Massachusetts with its emphasis on costs savings: investors do not get paid if the services do not produce costs savings for their respective states.⁷¹ While it is understandable that other states are merely experimenting at this point by focusing on improved social outcomes, Pennsylvania should fully embrace the potential of innovatively accessing private capital. Furthermore, the Commonwealth should utilize an independent commission with limited ties to government officials to set the terms and conditions of the bond contract.⁷²

The Commonwealth should lower investors' risk as much as possible. At a minimum, the Commonwealth must pledge full faith and credit to ease the minds of investors and to ensure repayment if benchmarks are met.⁷³ If, however, Pennsylvania truly wants to ensure the confidence of investors, drafters should consider expressly waiving the Commonwealth's right of sovereign immunity.⁷⁴ Without doing so, full faith and credit will be secured only if and when the legislature makes an appropriation, which still presents measureable risk to investors. Even more ideal, the Commonwealth should enact legislation by a supermajority, which would negate appropriations risk by making payments enforceable.⁷⁵ Furthermore, the Commonwealth should give the Secretary discretion to receive funding from investor payments from both public and private sources.⁷⁶

In addition, the Commonwealth should ensure that investors have a seat at the table from the beginning of the conversation. It is crucial that policymakers understand investors' perspectives.⁷⁷ Investors must be involved in questions regarding who the target population is and what the goals are. Risk can be

⁷¹ *Id.* at 13.

⁷² *Id.* at 14.

⁷³ *Id.* at 10.

⁷⁴ *Id.*

⁷⁵ Steven Goldberg, *The Investor Perspective*, SOC. IMPACT BOND TRIB., Issue No. 2, 9 (Jan. 2013), http://payforsuccess.org/sites/default/files/sib_trib_no_2.pdf.

⁷⁶ Goldberg, *supra* note 1, at 12.

⁷⁷ *Id.*

decreased by utilizing “frequency” metrics, in which investors receive repayment for reducing the incidence of events like reincarceration for a nontechnical violation of parole.⁷⁸ Frequency metrics are in contrast to “binary,” or all-or-nothing metrics, such as whether an offender is reincarcerated for any offense.⁷⁹ The Commonwealth should provide payments to investors in installments as performance milestones are achieved.⁸⁰ Investors would, thereby, lose some, but not all, of their principal if all of the agreed upon outcomes are not achieved.⁸¹

*Pennsylvania should adopt a “full-service” intermediation model such as the one endorsed by Social Finance US and McKinsey & Company.*⁸² Drafters should distinguish service providers from intermediary organizations and craft a narrow arrangement in which the intermediary contracts with the Commonwealth on behalf of both service providers and investors.⁸³ Godeke and Resner concisely outline the important role of intermediaries:

Intermediaries are expected to play an important role in catalyzing these complex public-private partnerships by surfacing ideas in the public sector, coordinating service providers, raising capital from investors, working with evaluators and managing the transaction during its multi-year life. . . . Ultimately, intermediaries could aggregate investor capital, brokering deals and acting as fund managers operating on a fee basis and possibly assuming a share of the outcome performance risk.⁸⁴

Unlike previous legislation, Pennsylvania should adapt the “social innovation investment enterprise” outlined in Connecticut’s law to include delivery of preventative programs by for-profit social enterprises and hybrid models (e.g., benefit corporations) in addition to nonprofits. After all, Pennsylvania is one of a small number of states that currently permit businesses to register as benefit

⁷⁸ Goldberg, *supra* note 75, at 10.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 10.

⁸³ *Id.* at 11.

⁸⁴ STEVEN GODEKE & LYEL RESNER, BUILDING A HEALTHY & SUSTAINABLE SOCIAL IMPACT BOND MARKET: THE INVESTOR LANDSCAPE, 10 (2012), <https://www.missioninvestors.org/system/files/tools/social-impact-bond-investor-landscape-godeke-consulting-dec-2012.pdf>.

corporations, which allows “a corporation’s directors to consider non-financial interests when making decisions, without breaching any fiduciary duty to shareholders.”⁸⁵ By adding the use of social impact bonds to the mix, Pennsylvania will unquestionably establish itself further as a leader in the innovation field.

*Finally, Pennsylvania, like Connecticut, should authorize the state Secretary to enter into a pay-for-success contract potentially for the purpose of accepting a federal grant (e.g., a United States Department of Justice Second Chance Act Adult Offender Reentry Program Demonstration Category 2 Implementation grant). The language here should explain the legislature’s reasoning in enacting the statute rather than serving as a limitation upon the Secretary’s authority.*⁸⁶

Going where no state has gone before by applying a pay-for-success contract to mental health courts using a social impact bond as a financing mechanism is a good bet for bold Pennsylvania lawmakers. After all, a surfeit of research on the Allegheny County, Pennsylvania, Mental Health Court (“MHC”) shows not only positive social outcomes but also fiscal savings. The MHC diverts individuals with nonviolent criminal charges who have a documented diagnosis of a mental illness to community-based services.⁸⁷ In 2007, the RAND Corporation conducted research on the MHC, producing a report that was confirmed in 2011 by the Allegheny County Department of Human Services. Over a two-year period, there were savings of approximately \$3.6 million for just the two hundred people who were in the court.⁸⁸ This may be attributed to the reduction of recidivism rates among graduates and time in incarceration, as well as reduced use of the most expensive types of mental health treatment. In addition, between 2006 and 2008,

⁸⁵ *Pennsylvania Registers First “Benefit Corporations,” Implements New Law to Attract Socially, Environmentally-Conscious Businesses*, PR NEWSWIRE (Jan. 22, 2013), <http://www.prnewswire.com/news-releases/pennsylvania-registers-first-benefit-corporations-implements-new-law-to-attract-socially-environmentally-conscious-businesses-187936431.html>.

⁸⁶ Goldberg, *supra* note 1, at 11.

⁸⁷ MENTAL HEALTH COURT, ALLEGHENY COUNTY DEPARTMENT OF HUMAN SERVICES, <http://www.county.allegheny.pa.us/dhs/mhcourt.aspx> (last visited May 29, 2014).

⁸⁸ Ann Belser, *Mental Health Court Cost-Saving Alternative to Jail*, PITTSBURGH POST-GAZETTE, Mar. 1, 2007, available at <http://www.post-gazette.com/breaking/2007/03/01/Mental-Health-Court-cost-saving-alternative-to-jail/stories/200703010520>. See also M. SUSAN RIDGELY, JOHN ENGBERG, MICHAEL GREENBERG, SUSAN TURNER, CHRISTINE DEMARTINI & JACOB W. DEMBOSKY, JUSTICE, TREATMENT, AND COST: AN EVALUATION OF THE FISCAL IMPACT OF ALLEGHENY COUNTY MENTAL HEALTH COURT, RAND CORP. (2007), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR439.pdf.

170 individuals graduated from the MHC with a 72 percent graduation rate.⁸⁹ The three-year recidivism rate was 10 percent, compared to the Bureau of Justice's three-year reconviction rate of 47 percent.⁹⁰ This research has already covered the primary feasibility considerations for social impact bonds, which consist in the "size and identity of the target population that benefits from the service provider" and the "projected financial value of the improvements as a result of the social impact bond investments," including "projected public sector savings," the "projected return to investors," the "ease of the measurability of the outcomes," and an analysis of "social outcomes."⁹¹ Additional research would need to be conducted to determine bond contract terms and conditions, to formulate metrics to measure both financial and social outcomes, and to identify qualified intermediaries.

Consulting firms like McKinsey & Company have questioned the feasibility of producing government savings in addition to social outcomes.⁹² By creating legislation amiable toward applying social impact bonds to mental health courts, Pennsylvania lawmakers can be leaders in proving that social impact bonds can result in fiscal savings. Furthermore, because mental health court outcomes have already been tested, Pennsylvania has the opportunity to be the first state to jump straight to acquisition of private investors without soliciting philanthropic funding for a pilot program. Investors, who often care more about chances for success than financial returns, will find an appealing target in mental health courts because of their proven track record. With respect to the remaining research requirements, states can tap into one of their main sources of underutilized intellectual capital: graduate students. At Carnegie Mellon University's Institute of Social Innovation in Pittsburgh, Pennsylvania, for instance, graduate students would likely jump at the opportunity to produce pioneering research in this area.⁹³ Importantly, by establishing that social impact bonds can be applied successfully to mental health courts, it will increase the chance that they may also be applied to similar court models such as veterans' court and drug court.

⁸⁹ KIMBERLEY C. FALK & STEPHANIE MORAVEC, AN ANALYSIS OF ALLEGHENY COUNTY MENTAL HEALTH COURT, ALLEGHENY COUNTY DEPARTMENT OF HUMAN SERVICES (2011), available at <http://www.alleghenycounty.us/WorkArea/DownloadAsset.aspx?id=35527>.

⁹⁰ *Id.*

⁹¹ Goldberg, *supra* note 1, at 13–14.

⁹² *Id.* at 15.

⁹³ INSTITUTE FOR SOCIAL INNOVATION, CARNEGIE MELLON UNIVERSITY HEINZ COLLEGE, <http://heinz.cmu.edu/institute-for-social-innovation/index.aspx> (last visited May 29, 2014).

V. WHY POLICYMAKERS SHOULD CARE

Sir Ronald Cohen, Chairman of Big Society Capital in London once noted that “[g]overnment is out of money and out of breath.”⁹⁴ The political status quo needs disruption, and the timing is right to reimagine how public service is delivered. Experts, including experienced regulatory lawyer Steve Goldberg, believe that social impact bonds have the capacity to transform antipoverty programs in a manner unparalleled since Lyndon B. Johnson’s “Great Society.”⁹⁵ Policymakers should care about this innovative financing mechanism because it has the potential to engender bipartisan support, increase collaboration, and add value to the government.

First, both the Obama administration and the American Enterprise Institute (a conservative think tank) have touted social impact bonds as a means to address some of the gravest problems in American society. The premise of social impact bonds allows the most vulnerable populations to receive more effective aid, while promoting the principles of self-reliance and commitment to the free market.⁹⁶ In using social impact bonds, taxpayers only fund projects that work.

Second, social impact bonds promote collaboration and innovation not just among policymakers but with other stakeholders as well. Social impact bonds, by their very nature, force all stakeholders to come around the table and work together.⁹⁷ The hope is that social impact bonds will align the “interests and incentives of the parties” involved in such a way that they complement each other.⁹⁸ In order to work together to achieve these outcomes, they may have to gain a better understanding of the other stakeholders’ perspectives—valuable lessons that can bear fruit in other aspects of government.⁹⁹

Third, social impact bonds add value to the government. They allow government to “shift outcome performance risk and upfront cost to investors,”

⁹⁴ Goldberg, *supra* note 75, at 18.

⁹⁵ *Id.*

⁹⁶ James Wilson, *Angry About Inequality? Don't Blame the Rich.*, WASH. POST., Jan. 26, 2012, http://www.washingtonpost.com/opinions/angry-about-inequality-dont-blame-the-rich/2012/01/03/g1QA9S2fTQ_story.html.

⁹⁷ *Id.*

⁹⁸ Goldberg, *supra* note 75, at 1.

⁹⁹ Goldberg, *supra* note 1, at 6.

“create outcomes not just outputs,” “improve the lives of beneficiaries,” “expand preventative services,” and “monetize cost savings of prevention.”¹⁰⁰ Indeed, social impact bonds are complex and expensive but much less so than cleaning up problems after the fact.¹⁰¹ The expense comes from shifting systems from the status quo to a data-driven system that incentivizes effective programs and generates public-private partnerships.¹⁰² It is time to refocus public interest away from short-term sound bites to long-term results.

VI. CONCLUSION

The benefits of social impact bonds are numerous. Even when government budgets are constrained, social impact bonds provide an incentive to use novel approaches to social problems because the initial funding comes from the private sector.¹⁰³ Taxpayers do not pay until the organization reaches its targets. These performance targets reduce the possibility of the government continuing to support a program that is not achieving its objectives¹⁰⁴ and allow good programs to receive funding long enough to prove their value. In addition, receiving money upfront to produce targeted results allows nonprofits to avoid investing exorbitant resources when applying for funding on an annual basis.¹⁰⁵

Policymakers should care about this innovative financing mechanism because it has the potential to engender bipartisan support, increase collaboration, and add value to the government. Pennsylvania, in particular, should consider administering a five-year social impact bond pilot program and study commission. As one of the early adopters of “benefit corporations”—an innovative new business form—Pennsylvania can further position itself as one of the national leaders in innovation. Specifically, policymakers should consider applying a pay-for-success contract to mental health courts using a social impact bond as a financing mechanism because existing research demonstrates fiscal savings and improved social outcomes. When drafting legislation, lawmakers should lower investors’ risk by pledging full faith and credit, waive the state’s right to sovereign immunity, allow hybrid business

¹⁰⁰ Godeke & Resner, *supra* note 84, at 10.

¹⁰¹ *Id.* at 8.

¹⁰² *Id.*

¹⁰³ Host, *supra* note 9.

¹⁰⁴ *Id.*

¹⁰⁵ Hernandez, *supra* note 5.

models such as benefit corporations to be service providers, and adopt a “full-service” intermediation model. As a result, Pennsylvania lawmakers can be leaders in proving that social impact bonds can result in fiscal savings.

The bottom line is that Pennsylvania will be better as a result of using social impact bonds. If social impact bonds do not work, taxpayers are no worse off. If, however, social impact bonds work and investors retrieve their money with interest, it will spur further cost-efficient social services. Thomas Jefferson said, “[i]f you want something you’ve never had, you must be willing to do something you’ve never done.” In this case, what is there to lose?