

# THIRD THOUGHTS ON CONTRACTING OUT

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Like many libertarians, I used to accept without question the idea that contracting out for government services was a good idea. After all, it puts production back into the hands of relatively efficient private producers. However, after reviewing the literature on contracting out for law enforcement services (Benson 1990, pp. 179–99), I had some second thoughts, concluding that while contracting out might solve some problems of government inefficiency, other more serious problems would remain. Nonetheless, I continued to cling to the idea that contracting out was better than nothing, noting (pp. 195–96) that

the major criticisms of the government production of law and order are not alleviated by contracting out. One problem—bureaucratic inefficiency—may be partly overcome if corruption and the bureaucratic tendencies for over-regulation do not eventually destroy the potential for such benefits. But, the other problems remain. Private firms under contract to the government will produce what interest groups want, not what individual taxpayers want. And contracting creates *new* interest groups—the contracting firms and their employees—that will demand greater output of whatever good or service they sell to the government (not unlike bureaucrats). . . . [It is inappropriate to assume] that contracting for services will necessarily reduce the size of the resource pool controlled by government, particularly the number of persons dependent on public funds.

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Furthermore, because consumers who directly benefit from the services do not pay a unit price, the excess demand will lead to crowding or congestion and alternative allocation techniques will have to be established. The misallocation of resources due to interest group demands and nonprice rationing could be far more significant than misallocation due to bureaucratic production inefficiencies. Thus, the major shortcoming of contracting out is that it can only overcome a few of the problems that arise from government failure. . . . Of course, gains in production efficiency are better than no gains at all.

Since writing this, however, I have had third thoughts about contracting out (Benson, forthcoming). In particular, "gains in production efficiency" are not desirable if what is being produced is not desirable.

Many normative criteria can be applied when answering the question, Should government services be contracted out? "Efficiency" is presumably the norm applied by strong advocates of contracting out, but there is more than one dimension to the concept of efficiency. In particular, while contracting may lead to gains in "technological efficiency" (a higher "quality" of some defined set of services can be produced at a lower cost), it may not lead to improvements in "allocative efficiency" (it may be less likely that scarce resources are allocated to their highest and best use, because resources should not be allocated to the defined set of services). Furthermore, when another normative criterion, liberty, is applied, the potential technological efficiency benefits of contracting out may not be worth the costs. This point is illustrated below with an examination of contracting out for prison services.

The benefits of contracting out for government services in general and prison services in particular have been clearly and forcefully enumerated (see, for example, Logan, 1990). For the most part, these benefits take the form of improvements in technological efficiency: Under the right circumstances, the costs of providing the service will be lower and the quality of the services will be superior when they are produced by a private firm rather than by a public bureau. These benefits arise in large part because the incentives and constraints facing public bureaucrats are very different from those facing private producers. Bureau managers face strong incentives to strive for expanded budgets and power, with relatively little concern for efficiently providing quality services (Niskanen, 1971; Benson, 1990, pp. 87-104 and 127-58).

Private firms may have similar incentives. Their managers too want to expand and prosper, so they seek economic power; but when comparing a market situation with government production, there are very important differences. In particular, private entrepreneurs' desires for expanding power through the market are constrained by two factors: First, they must compete for the attention of consumers with other firms offering similar goods or services, and second, they must produce something consumers will *voluntarily choose* to buy, at a price that consumers are *willing* to pay. If the public contracting process is appropriately structured, the cost-reducing and quality-enhancing incentives associated with the first point can be instilled. Indeed, when the incentives and competitive pressures of the market system are harnessed through contracting out, as they clearly can be (Logan, 1990; Benson, 1990, pp. 184–92), and bureaucratic inefficiencies are avoided, the benefits in the form of cost savings and quality enhancement can be significant (Logan, 1990). However, the second source of incentives in private markets is much less likely to be implemented in the context of contracting for government services.

Private firms in free markets must persuade consumers to buy their products. Individual consumers are the source of demand, and they are free to choose where to spend their money. If government provides services, whether through direct bureaucratic production or through contracting out, individual "buyers" (taxpayers and/or voters) have virtually no influence as to what they buy. Indeed, government can *coerce* them into buying something they may not want. The demands that concern political decision makers are those of powerful organized interest groups rather than those of unorganized individual voters and taxpayers (Benson, 1990, pp. 87–126). Thus resources are allocated to generate benefits for members of powerful political groups, even though the aggregate benefits may be smaller than the costs dispersed among general taxpayers. Furthermore, because the consumers of most government services do not pay a unit price (or at least a price that reflects the full opportunity cost of the resources), the resulting excess demand leads to crowding or congestion whether the product is provided by private firms or public bureaus (Benson, 1990, pp. 131–44). As noted above, "[t]he misallocation of resources due to interest group demands and non-price rationing could be far more significant than misallocation due to bureaucratic production inefficiencies" (Benson, 1990, p. 196), and this could easily mean that the "gains in production efficiency" are not better than no gains at all—they may actually be worse. Indeed, in the political arena, improve-

ments in technological efficiency through contracting out could even lead to a reduction in allocative efficiency and in individual liberty. To see why, contracting out for prison services must be considered in context of the politics of crime and punishment rather than as simply a technological issue.

## I. THE POLITICS OF CRIME AND PUNISHMENT

Private firms under contract to the government produce what interest groups want, not what individual consumer-buyers (taxpayers) want. This is as much the case in the area of criminal law and its enforcement as it is in any other area of government (Benson, 1990, pp. 87-126). As Quinney (1970, pp. 15-18) states, "criminal definitions describe behaviors that conflict with the interests of the segments of society that have the power to shape public policy," and "since interests cannot be effectively protected by merely formulating criminal law, enforcement and administration of the law are required. The interests of the powerful, therefore, operate in applying criminal definitions." Similarly, Chambliss and Seidman (1971, p. 67) observe:

Deviancy is not a moral issue, it is a political question. No act, nor any set of acts, can be defined as inherently "beyond the pale" of community tolerance. Rather, there are in effect an infinite number and variety of acts occurring in any society which may or may not be defined and treated as criminal. Which acts are so designated depends on the interest of the persons with sufficient political power and influence to manage to have their views prevail. Once it has been established that certain acts are to be designated as deviant, then how the laws are implemented will likewise reflect the political power of the various affected groups.

Neely's (1982, p. 29) view is not quite so all-encompassing, as he points out that Anglo-American common law has always made a distinction between customary-law crimes such as murder, robbery, and rape (on this see also Benson, 1990, pp. 11-83) and positive-law crimes, which "have become crimes exclusively because some group lost a political battle." Nonetheless, developments in criminal law are just as political today as they were when the breaking of basic customary law was declared a crime against the king, so the king could collect fines and confiscate property, rather than a tort with restitution owed to the victim (Benson, 1990, pp.

43-83). Today the objectives of criminalization are somewhat less clear because of multiple demands of special interest groups, but "criminal law is in every regard political" (Neely, 1982, p. 162).<sup>1</sup> Consider, for example, the study by Berk et al. (1977) of changes in the California Penal Code. They found that during the 1950s the making of criminal law in California could be characterized as an "agreed-bill" process involving only a few major criminal justice lobbies, generally the California Peace Officers Association or CPOA (made up of district attorneys, sheriffs, and police chiefs), the American Civil Liberties Union, and the State Bar of California. The agreed-bill process is one wherein lobbyists and a few members of relevant legislative committees negotiate directly in making important decisions (p. 11; also see Heinz et al., 1969). The important part of the legislative process takes place behind closed doors, and most open legislative debate is simply rhetoric for public consumption. Thus legislators do not initiate or shape criminal law policy; they simply react to the demands of lobbies (Berk et al., 1977, pp. 85-86).

During the 1960s criminal law in California began to involve a wider range of groups than were active in the 1950s, but the process did not change (p. 86). The most active groups continued to be the ACLU (and its frequent ally, the Friends Committee on Legislation or FCL), the CPOA, and the Bar Association; but small vocal groups of citizens also appeared to initiate attempts to alter the Penal Code. Often they allied themselves with the law enforcement interests or the ACLU. Several established interest groups whose original purpose was not directed at criminal justice also often supported an established criminal justice lobby. For example, the ACLU often enjoyed support from the state NAACP, the Mexican-American Political Association, the Northern and Southern California Council of Churches, the Association of California Consumers, and the Federation of the Poor (p. 62).

Berk et al. went beyond other studies of interest groups' impact on changes in criminal codes to provide statistical support for the contention that this influence is extremely important. They looked at the influence of the law enforcement lobby (LEL), primarily the CPOA, and the civil liberties lobby (CLL), primarily the ACLU and FCL, recognizing that these principal groups often worked with others. "Effective influence"

<sup>1</sup> For a review of additional literature drawing similar conclusions, see Benson, 1990, pp. 87-126.

was identified in a number of ways. Using newsletters and journals published by the interest groups and information from journalists, politicians, and criminal justice professionals, the researchers made independent evaluations of how effective lobbyists were in shaping the Penal Code. They found that year by year, the LEL achieved significant changes leading to more resources and powers for police; but more significantly, in regard to the issue of contracting for prison services, LEL demands also led to increasing criminalization (thereby expanding the scope and power of the law enforcement bureaucracies), and to more severe penalties.<sup>2</sup> That is, the LEL's demands tended to increase the demand for prison space. They also had a significantly negative impact on the rights for defendants, judicial discretion, and, to a lesser degree, the rights and resources going to corrections officials. The CLL's efforts were positively correlated with substantial gains in defendants' and corrections officials' rights and in judicial discretion; they had a negative impact on criminalization, penalty severity, and police powers. The two groups were not in direct and constant opposition in all instances, however, and their agendas and impacts were somewhat different. The LEL apparently emphasized criminalization and penalties, while the CLL was more interested in limiting police powers and expanding judicial discretion (pp. 201-03).

The Berk et al. study also found that "public opinion" played no identifiable role in Penal Code revision. Moreover, legislators did not develop and seek support for their own criminal justice agendas; they simply responded to the interest groups concerned with such legislation. They concluded that criminal law was unquestionably enacted for the benefit of interest groups rather than for the "public good."

Because the costs of forming an interest group can be high, strong incentives (high expected per-capita gains or high anticipated losses in the absence of organizing to resist another group's efforts) are probably required to induce individuals to organize. The benefits accruing to a

<sup>2</sup> Police are traditionally very active in the political arena, acting as lobbyists and frequently employing tactics common to labor unions, such as strikes, demonstrations, and protests. Police strikes are often illegal, but "blue flu" has a long history and is increasingly giving way to outright strikes. In addition, as Glaser (1978, p. 22) observed, "the leaders of a law enforcement bureaucracy have special advantages for promulgating their views because of their ready access to the heads of the executive and legislative branches of government, their ability to issue official reports and call news conferences, and their consequent control over public information on the effectiveness of the law and need for it."

particular group from passage of a law that provided the initial incentive to organize are probably very large, but the *additional* cost of demanding further statutory changes may be very small. In other words, the "price" paid for additional laws is effectively zero, and laws are supplied to active interest groups because they press their demands. Furthermore, the laws that are supplied need not generate sufficient benefits to even cover the cost of their enforcement, since those demanding laws do not have to pay for enforcement (Benson, 1990, pp. 115–22).

Under this institutional arrangement, enforcement requirements arising from the quantity of laws demanded and instituted through legislation should exceed the limited supply of enforcement resources (pp. 131–44). The legislature and the courts can pass laws at fairly low cost, of course, so the result of excess legislation is really reflected in the allocation of enforcement resources. Laws that generate relatively low value when enforced will compete for the attention of law enforcers with laws that can generate relatively greater value. Allocation of enforcement resources according to willingness to pay would mean that the laws producing the greatest benefit would typically be enforced, but law enforcement resources are not allocated on this basis. Instead, interest groups also have a great deal of say in the rationing of law enforcement resources (pp. 112–15). One possible result, given non-price means of allocating prison space, is that some criminals who pose relatively serious threats to citizens when they are released (for example, potentially violent criminals) will be released early in order to accommodate incoming criminals who pose relatively little threat to citizens or their property (for example, marijuana users) (Benson and Wollan, 1989). There is an increasing trend to define more and more activities as crimes and to lengthen prison sentences for some crimes, in reflection of the strong lobbying efforts of law enforcement bureaucrats, thereby adding to the problem. For example, Cole (1973, pp. 23–24) reported that an important "factor in the crisis of criminal justice is the 'law explosion'—the increasingly complex and demanding pressures placed on law and legal institutions. . . . [This reflects] the tendency to utilize the criminal law to perform a number of functions for society outside the traditional concerns for the protection of persons and property." These "functions" are typically associated with enforcement of so-called "victimless" crimes, but they appear to be putting ever-increasing pressure on the resources of the criminal justice system, including prisons. A victimless crime is defined as one in which there is no readily identifiable party who has been directly injured. Thus, the

"plaintiff" must be the state or a governmental agency, since no individual has strong incentives to pursue prosecution. Almost without exception, victimless crimes involve prohibitions of voluntary exchange relations. They include drug use, gambling, and prostitution, all of which are marketed by entrepreneurs and voluntarily purchased by consumers.

The most significant increases in "criminalization" and in law enforcement effort throughout this century have been with regard to such victimless crimes. We can look to the experiment with liquor prohibition in the 1920s, the prohibition of various narcotics beginning with the Harrison Act of 1914, and the prohibition of marijuana after the Marijuana Tax Act in the 1937 for dramatic examples, but state and federal governments have also increased the severity of punishment mandated for drug crimes since their initial illegality while allocating larger and larger amounts of law enforcement resources to the control of such activities. Two "Drug Wars" have been declared since the mid-1960s, for example. The first occurred between 1965 and 1970. Prior to this period, police resources in the United States were allocated so that one drug arrest was being made for every twenty Index I arrests (Index I crimes are reported crimes against persons and property, including murder, manslaughter, sex crimes, assault, robbery, burglary, larceny, and auto theft). During the 1965-70 War on Drugs, arrests for drug crimes rose more than five fold. In fact, criminal justice system resources were reallocated so that one drug arrest was being made for every four Index I arrests. Drug enforcement relative to effort against Index I offenses remained relatively constant from 1970 to around 1983, but then a new War on Drugs was declared. By 1989, criminal justice resources were being allocated to make only 2.2 Index I arrests for each drug arrest. The result is that the most dramatic changes in criminal law emphasis in the last decade have clearly been in the area of illicit drug enforcement.

The War on Drugs has been a primary factor in producing record increases in prison populations and budgets which have in turn forced local, state, and federal administrators to consider contracting with private firms (Krajick, 1984b, pp. 20-21), in order to continue meeting the political demands for increased uses of imprisonment. According to the recent court rulings, 60 to 80 percent of the nation's jails and prisons are "overcrowded" (Poole, 1983, p. 4). As prison costs rise, taxpayer dissatisfaction with the correctional system is mounting. They see prisons as ineffective and costly, with high rates of recidivism and repeat offenders, and the critics are calling for reform and innovation. The potential for an



organized taxpayer "revolt" in this regard may not be imminent, but if trends continue it may become a distinct possibility. Furthermore and perhaps more significantly, other groups (for example, groups seeking increased funding for education) are beginning to see prisons as a major competitor for a large share of state and local budgets.

Politicians and existing interest groups, recognizing this threat, have reacted by looking for some sort of technological innovation in corrections (alternatives to imprisonment, boot camp programs, sentencing guidelines, determinant sentencing, and the like). But as Peter Greenwood concluded in his study of the correctional system (quoted in Poole, 1983, p. 2), "when you're looking for innovators you don't look to government; you look to business." Thus, contracting out is also seen as a potential source of innovation. When contracts are narrowly focused on imprisonment, however, then so is the resulting innovation. If private firms are successful at lowering costs, and perhaps making prisons relatively more effective, then the use of prisons for purposes beyond the control and punishment of property and violent criminals may become *more* acceptable to voters and taxpayers, and the incentives (and therefore the potential) for innovations in the alternative forms of treatment or punishment will be reduced (see Benson and Wollan, 1989, in this regard). Furthermore, the incentives to consider fundamental changes in criminal law are reduced. Those who benefit from existing laws (and in fact, from increasingly harsh prison sentences and expansion of the scope of criminal law) are less likely to be opposed by those who must pay for the system, if costs are lowered and/or the system becomes technologically more efficient (that is, less bothersome). Let us consider the implications of contracting out for prison services in greater detail in the context of the recent changes in emphasis in criminal law enforcement with regard to the control of illicit drug markets.

## II. THE POLITICS OF DRUG ENFORCEMENT AND PRISON CROWDING: IS CONTRACTING THE APPROPRIATE SOLUTION?

Some advocates of contracting out for prisons suggest that such privatization could reduce prison crowding by lowering costs, thereby increasing the supply of prisons. However, prison crowding reflects both supply and demand forces (Benson and Wollan, 1989). Non-price rationing always produces excess demand, of course, so crowding is a possibility even with

large increases in supply, particularly if demand grows over time as well. As suggested above, one important source of the increased demand for prison space which has substantially increased crowding in recent years has been the growing emphasis on drug enforcement.

Federal, state, and local criminal justice officials joined forces to declare a War on Drugs in 1984 (an explanation of the underlying political and bureaucratic incentives that led to this drug war is provided below). As a result, more and more of the nations' law enforcement resources have been allocated to drug control for several years now, as noted above. To get a clearer picture of the consequences, however, let us consider what has been happening in Florida as a case study. In 1980, 7.4 percent of all arrests in Florida were for drug offenses, while 31.8 percent were for Index I crimes (murder, forcible rape, aggravated assault, robbery, burglary, larceny and motor vehicle theft). The remaining 60.8 percent of arrests were for non-drug Index II crimes. Index II offenses include a variety of crimes, such as simple assault, arson, narcotics, vandalism, vice, fraud, and major traffic violations. In fact, almost 60 percent of Florida's Index II crimes are simply categorized as "miscellaneous." Index I property-crime arrests (burglary, robbery, larceny, and auto theft) made up 26.5 percent of total arrests in 1980. The War on Drugs appears to have really accelerated around 1984 (Benson, Rasmussen, and Sollars, forthcoming) when drug arrests increased to 7.6 percent of the total. (In fact, drug arrests as a portion of total arrests actually fell to 6.9 percent in 1982 and 7.1 percent in 1983.) By 1989, drug arrests accounted for 12.5 percent of total arrests while Index I arrests had fallen to 28.7 percent and Index I property crimes made up only 23 percent of the total. Put another way, police resources were allocated so that 0.28 drug arrests were made for each property arrest in 1980, but by 1989 0.54 drug arrests were being made for each property arrest. Certainly, police resources have been substantially increased over this period as Florida's population has grown, but these arrest figures indicate that they have also been reallocated in order to focus increasingly on drug crimes. Drug arrests increased 167 percent (from 32,029 in 1980 to 85,525 in 1989), while property arrests increased by only 36.7 percent (from 115,240 to 157,512) and Index I arrests as a whole increased by just 41.4 (138,548 to 195,888).

As a direct consequence of the increase in drug arrests and convictions, the demand for scarce prison space has been growing dramatically. Florida's prison population rose from 19,681 at the end of the 1980-81 fiscal year to 38,059 as of June 30, 1989. However, this increase does not

reflect the full increase in demand for prison space; rather, it reflects the increase in supply. New admissions have gone up substantially faster than new spaces have been built. This has forced a more rapid turnover of inmates. Indeed, an early release program has been implemented to deal with the problem of rationing scarce prison space. Advocates of contracting out might point to this situation and suggest that crowding could be alleviated by reducing costs and therefore increasing the supply of prison space. Indeed, the 1993 Florida legislature began considering the possibility of contracting for prisons, and it is likely to be on the agenda in 1994. However, we should also consider the source of the increase in demand that has produced the crowding.

A substantial portion of the increased pressure on the prison system traces directly to the War on Drugs. For example, there were 1,620 prison admissions for drug offenses during the 1983-84 fiscal year (FY), accounting for 12.9 percent of total admissions. By FY 1986-87 this figure had risen to 22.9 percent of total admissions (5,274). This compares to 15,802 drug admissions for FY 1989-90, or 36.4 percent of total admissions (Florida Department of Corrections, various years). Thus prison admission for drugs rose by 875.4 percent between FY 1983-84 and FY 1989-90, while non-drug admissions rose by only 158.2 percent (from 10,896 to 27,585). And since prison capacity was increased by less than even the increase in non-drug admissions during this period (capacity apparently increased by about 95 percent between 1981 and 1989), the ability of the prison system to perform its functions of punishment, incapacitation, and rehabilitation of criminals, as well as deterrence of potential criminals, has diminished markedly (Benson and Wollan, 1989). For instance, the historic norm prior to the 1980s War on Drugs was that prisoners served 50 percent or more of their sentences on average. Indeed, this continued to hold during the early years of the drug war: for example, inmates released during January of 1987 had served an average of 52.8 percent of their sentences. However, as drug admissions continued to increase at an increasing rate, the prison crowding problem became acute. By January 1988, the average portion of sentences served in Florida had fallen to 40.6 percent, and it reached 33 percent in December 1989. In fact, about 37 percent of the prisoners released in December 1989 had served less than 25 percent of their sentence, and some served less than 15 percent. The Florida legislature was forced to hold a special session in 1993 in order to allocate more funds to prison construction and avoid the "gridlock" that was anticipated late in 1993 when no criminals eligible for early release would

remain in the system (many prisoners cannot be released early under statutes regarding habitual offenders and various specific crimes).

Given that drug enforcement policy is a major determinant of recent trends in prison crowding, does it follow that crowding should be alleviated by increasing supply (e.g., through contracting out) or would it be more appropriate to reduce demand by reducing the flow of drug criminals into prison? To answer this, the politics of drug crime must be considered.

### *The Politics of Drug Crime*

The criminality of drug use is a relatively recent phenomenon, and numerous self-interest political motivations for original drug criminalization legislation have been identified. Some studies (for example, Thornton, 1991) have noted the incentives of professional organizations such as the American Pharmaceutical Association to create legal limits on the distribution of drugs (there was significant competition between pharmacists and physicians for the legal right to dispense drugs). Others have focused on the strong racial impacts of illicit drug laws and the desire by some groups to control racial minorities through the enforcement of such laws (Helmer, 1975; Musto, 1973, 1987), while still others have noted that the policing bureaucracies have been a major source of demand for the initial criminalization legislation (Himmelstein, 1983; Becker, 1963; Dickson, 1968; Lindesmith, 1965; Hill, 1971). The Marijuana Tax Act of 1937, for example, was passed because of pressure from the Narcotics Bureau of the Treasury Department (Becker, 1963; Dickson, 1968; Lindesmith, 1965; Hill, 1971). In fact, as Thornton (1991) indicates, all of these various self-interests combined to produce the laws against drug use. But even if this were not the case, the "information" (much of which is inaccurate and/or unsubstantiated (Michaels, 1987, pp. 311-24)) used to justify today's "War on Drugs," including the increasingly long prison sentences for various drug offenses, has been supplied primarily by politicians and the police, and a major source of prison crowding in recent years has been the War on Drugs. Through contracting out, these drug criminals could be imprisoned more efficiently and crowded conditions might be alleviated as supply increases with a cost reduction (assuming that the new supply does not create its own demand—an assumption that is clearly questionable (Benson and Wollan, 1989)). In terms of allocative efficiency, though, would reducing the cost of prisons in order to accommodate more drug criminals for longer periods of time be desirable? One must con-

sider the costs and benefits of illicit drug enforcement to answer such a question.

Primarily as a result of information promulgated by police (Barnett, 1984, p. 53), it is now widely believed that drug crime is the root cause of much of what is wrong with society.<sup>3</sup> That is, even though drug use is a victimless crime, it is claimed that large negative spillovers arise as a direct consequence of drug market activity. In particular, drug use is said to be a primary cause of non-drug crime because, it is contended, property crime is a major source of income for drug users. This has translated into political demands for the criminal justice system to do something about the drug/crime problem (demands that largely emanate from the police lobbies), and in turn, it has lead to an increasing emphasis on control of illicit drug traffic as a means of general crime prevention. Such a reallocation of resources would appear to be justified if drugs truly are the root cause of most other crime. Indeed, if this were true, a crime control policy that focuses on drugs should be a positive-sum game in the sense that increasing drug arrests (and imprisonment of drug users) would reduce both drug crime and non-drug crime. Thus, more efficiently providing prisons and increasing their supply through contracting out might be justified. But as a larger share of law enforcement resources have been allocated to the drug war, it has become increasingly apparent that the other ills of society are not being solved. In particular, efforts at controlling the drug market are not producing the anticipated reductions in other types of crime. Again consider what has happened in Florida.

Index I crimes in general and property crime in particular have been rising in Florida throughout most of the period of an accelerating War on Drugs. Index I crime rates were falling in Florida in the early 1980s (from 8,387.8 crimes reported per 100,000 population in 1980 to 6,837.9 in 1983) but they have risen steadily since 1983, reaching 8,755.9 in 1989. Thus, from 1983 (the year before the War on Drugs began to take off)

<sup>3</sup> Former Director of the Office of National Drug Control or "drug czar" William Bennett, for example, claimed in detailing the effects of drugs and drug use that "we can cite violent crime, the broken home, the bad schools that are closely associated with—and often mistaken for—the country's drug problem; we can speak of poverty, of disease, of racism" (Office of National Drug Control Strategy, 1990, p. 2). Note in this regard that police bureaucrats obtain significant benefits from the War on Drugs, including increased general revenue budgets and discretionary funds from drug-related confiscations (Benson, Rasmussen, and Sollars, forthcoming).

to 1989, the Index I crime rate in Florida has risen by 28 percent. The property crime that drug users allegedly commit to support their habits has also been increasing: Robbery rates are up by 50.1 percent, larceny is up by 20.1 percent, and burglary is up by 24.7 percent.<sup>4</sup> It appears that either the drugs-cause-crime argument is wrong or that the level of drug use is rising even in the face of the War on Drugs.<sup>5</sup> Evidence from the 1988 *National Household Survey on Drug Abuse* indicates that drug use among a large segment of the population has actually been on the decline since before the War on Drugs started. The use of both marijuana (including hashish) and cocaine by the groups sampled in this survey was rising through much of the 1970s, but use of both began to decline in the 1979–82 period. Some might suggest that this is a reflection of the War on Drugs, but this is questionable since the reversal occurred before

<sup>4</sup> Auto theft is up even more. However, a substantial portion of auto thefts apparently involve "joy rides" and then abandonment, so they are clearly not perpetrated in order to generate income for drug purchases.

<sup>5</sup> There is another possibility as well, which has actually received a great deal of attention in the literature on heroin. The market demand for drugs is typically assumed to have a very low price elasticity because drug addicts with highly inelastic individual demand dominate the market (Eatherly, 1974; Holahan, 1973; Koch and Grupp, 1971; Erickson, 1969). As long as there is some elasticity to the demand curve, supply-side efforts which raise the risk to suppliers and therefore raise the price, reduce the size of the drug market. But when demand is inelastic, expenditures rise as price rises, and it is often assumed that the only option would be to commit more predatory crimes (Erickson, 1969; Koch and Grupp, 1971; Clague, 1973; Holahan, 1973; Eatherly 1974; White and Luksetich, 1983). Even if this scenario is correct (and there is some weak empirical support for it (Brown and Silverman, 1974; Silverman and Spruill, 1977)), it does not appear to explain the aggregate changes in Florida property crime rates. The fact is that despite increased law enforcement effort against drugs, the price of the most important drug in Florida appears to have fallen dramatically over the last few years. Estimates indicate that the wholesale price of cocaine in Miami fell within a range of \$28,000 to \$37,000 per kilogram in 1985, but the range was down to \$12,000 to \$15,000 by 1987 (*Narcotics Control Digest*, April 12, 1989, pp. 5–6). This general trend has apparently continued. Florida Department of Law Enforcement estimates are that wholesale cocaine prices have fallen by 69.4 percent between 1987 and 1989, from \$32,000 to \$9,800 per pound (FDLE internal memo). Falling wholesale prices does not prove that retail prices are falling, of course, but when this trend is added to the fact that demand for drugs also appears to be declining, as indicated below (see the 1988 *National Household Survey on Drug Abuse*), the implication seems to be that falling retail prices are likely. Beyond that, a substantial portion of the drug arrests in Florida are for possession rather than for sale, distribution, or production (Trager and Clark, 1989), which implies that Florida law enforcement is not exclusively focused on a supply-side policy.

the drug war really began to accelerate. And more significantly, the same trends in use also hold for legal drugs (alcohol and tobacco), implying that education about the effects of drug use may be the primary source of such changes. It is therefore appropriate to question the drugs-cause-crime argument and to ask if scarce resources should be allocated to imprisonment of drug offenders, regardless of whether the resources are used by a government bureau or a private firm under contract.

Clearly, many people arrested and convicted for non-drug crimes are drug users. During the second quarter of 1989, for instance, approximately 84 percent of the male arrestees and 88 percent of the female arrestees in U.S. metropolitan cities tested positive for one or more drugs (O'Neil and Wish, 1989). Similarly, in a 1989 Bureau of Justice survey of 12,000 prison inmates, over 75 percent admitted that they had used drugs, 56 percent acknowledged using drugs in the month prior to their incarceration, and one-third claimed to be under the influence of drugs at the time of their offense. Clearly, it appears that some of the same factors which influence the propensity to commit non-drug crimes also influence the propensity to use drugs, but these facts do not imply a causal connection running from drugs to crime.<sup>6</sup> In particular, the fact that many criminals use drugs does not prove that most drug users commit non-drug crime.

<sup>6</sup> There is a large literature addressing the issue of a drug-crime causal connection (see Wilson and Herrnstein, 1985, chapter 14, and Gottfredson and Hirschi, 1990, for overviews). The drugs-cause-crime argument is based on the contention that drugs affect the mental and emotional states of users, making them aggressive or impulsive; the academic literature, however, does not support this simple causal argument. Another view in the literature, consistent with the arguments presented here, is that some of the same factors which influence the decision to commit crimes also influence the decision to consume illicit drugs. In other words, drug use and criminal activity are simply coincident symptoms of other problems such as the lack of economic opportunity. Yet another characterization of the drug-crime relationship is that it is the illegality of drugs that produces the correlation between drug use and non-drug crime. Kaplan (1983), for example, concludes that because drugs are illegal, (1) the price of drugs is forced up, requiring users to acquire greater resources (this argument is discussed in more detail in footnote 3 earlier), (2) steady employment is difficult because of the time and effort required to find a safe source of supply, (3) holding any job becomes difficult because of arrests and general harassment by police, and (4) drug users are forced into the criminal subculture by being forced to deal with criminals. These kinds of arguments are all predicated on the assumption that drug use and crime are highly correlated, of course. Evidence discussed below indicates that this may not be the case.

Several recent studies cast considerable doubt on the drugs-cause-crime argument itself, particularly with reference to property crimes. First, note that this argument generally involves an explicit statement to the effect that *drug addicts* are driven to commit crimes in order to finance their habits. But not all drug users are addicts. Longitudinal analysis of drug involvement suggest that cocaine and heroin users are more likely to cease consumption than alcohol users, and much more likely than tobacco users. Furthermore, many drug users report only occasional consumption. Among persons reporting cocaine use in the last year, for example, almost 80 percent said they used the drug once a month or less. An alternative measure of the frequency of addiction is to compare the lifetime "prevalence rate" (the portion of the surveyed population reporting that they had consumed a drug sometime during their lifetime) for drug use to the prevalence rate for the last month. Since addiction requires current consumption, the ratio of the last-month and lifetime prevalence rates provides an index of how many individuals have been able to use drugs without becoming addicted (or have been successfully treated for addiction). Data from the 1988 *National Household Survey of Drug Abuse* provides such ratios. For cocaine they vary from 0.324 for the 12–17 age group to 0.228 for the 18–25 age group and 0.091 for the over-25 group. Thus, even if the drugs-cause-crime argument is true for addicts, it does not follow that an indiscriminate war on drug use by addicts and non-addicts alike is an appropriate crime control policy, let alone a policy that should be made more efficient by contracting our prison service to support it. But it also appears that property crime is not the sole source of income for drug users, including drug addicts.

Heavy drug users can have several sources of income other than property crime. In fact, users apparently earn almost as much income through non-victim Index II crimes such as drug sales, prostitution, and pimping as they do through Index I property crimes (Kaplan, 1983, p. 54; Reuter et al., 1990). Indeed, Gould, et al. (1974) suggest that half or more of the money spent on heroin in the early 1970s was probably generated through the sale of the drug. Furthermore, drug users also often have legitimate sources of income (Kaplan, 1983) such as wages, welfare payments, and money from parents. Reuter et al. (1990) conducted a study of drug sellers in Washington, D.C. They found that drug sellers were also drug users, but that these sellers generated income both by selling drugs and by holding legitimate jobs. The majority of drug sellers held jobs that earned, on average, about twice the minimum wage. These facts



are important because they illustrate that estimates of the level of property crime committed by drug users can be highly misleading (see Michaels, 1987; Kaplan, 1983). As Kaplan (1983) explained, these estimates often involve an assumption that all drugs are purchased with income obtained through property crime, so the estimated amount of drugs consumed is multiplied times the estimated price of drugs to determine the predicted value of the property stolen to finance drug purchases. Through such a procedure, it was estimated that addicts supposedly stole ten times as much as was reported to police in all property thefts in New York City (p. 52). Certainly, under-reporting of crimes by victims cannot explain such a large discrepancy. Indeed, if the estimate of expenditures on drugs is anywhere close to being accurate, it would suggest that at most only about 20 percent of those expenditures could be generated through property crime, since victims apparently fail to report about half the property crimes they suffer (see Research and Forecasts, Inc., 1983), and this still assumes that all property crimes are committed by drug users.<sup>7</sup> In other words, perhaps 80 percent (or more) of the drug-using population is not involved in property crime. This suggestion is little more than a tenuous conjecture at this point, but there are several other findings that support this conclusion.

Trager and Clark (1989) examined the arrest history of persons in Florida having at least one misdemeanor or felony drug arrest during 1987. Of the 45,906 people arrested for possession, over 80 percent had never been arrested for burglary and over 90 percent had never been arrested for other property crimes. Of those arrested for sales, only slightly more than 25 percent had prior burglary arrests, and again over 90 percent had no previous arrest for other property crimes. Of course, if police are emphasizing drug crime to the virtual exclusion of property crime, such arrest statistics may be quite misleading. Nonetheless, these data suggest first, that a substantial portion of drug offenders do not appear to be committing property crimes (or violent crimes—see Trager and Clark, 1989), and second, that many criminals who commit Index I crimes also use drugs.

This two-tiered characterization of the drug population is reinforced by a recent recidivism study (Kim et al., 1993). The study identified 4,394 persons who had been imprisoned for a drug offense in Florida after 1985

<sup>7</sup> Actual estimates of the portion of property crimes committed by addicts range from about 25 percent to over two-thirds (Erickson, 1969, p. 485; Wilson et al., 1972, p. 12; Eatherly, 1974, p. 212), although these estimates are dated.

and released prior to April 2, 1990. By April 2, 1990, 49.6 percent (2,180) of these 4,394 had returned to the custody of the Florida Department of Corrections via probation or reincarceration. About 69 percent (1,504) of the returnees were convicted of another drug offense, while only about 31 percent were convicted of a non-drug offense (theft, burglary, and robbery accounted for about 20 percent of the 2,180 returnees). Again, it appears that the majority of drug users may not be involved in non-drug crime, although such a conclusion is not necessarily warranted if the criminal justice system is overlooking non-drug crime in order to obtain more drug convictions. In this regard, however, Kim et al. found that the tendency to recidivate was significantly lower for those individuals who only had convictions for drug offenses than for those who had convictions for both drug and non-drug crimes. This reinforces the perception that there are two distinguishable groups of drug offenders: those who also commit Index I crimes and those who do not.

Kim et al. also found that drug offenders respond to many incentives created by the law enforcement sector: Both increased policing efforts and imprisonment rather than probation appear to deter unlawful behavior for drug criminals. This implies that drugs do not dominate individuals to the degree that the drugs-cause-crime argument often claims.<sup>8</sup> Of course, the fact that drug activity can be deterred by criminal justice resources does not demonstrate that it should be. After all, the likelihood of drug consumption apparently can also be reduced through education and treatment programs, and criminal justice resources also have alternative uses (the control of property and violent crimes, for example). Indeed, one finding by Kim et al. bears directly on prison crowding. They found that the length of time served in prison did not affect the probability of recidivating. The War on Drugs has involved increasingly long sentences for drug offenders, thereby adding to the prison crowding problem (which contracting out is expected to alleviate), but these longer sentences apparently do not significantly affect future behavior of drug offenders. Thus even assuming that deterrence of drug use is an appropriate function of the criminal justice system, prison crowding could

<sup>8</sup> Fernandez (1969, p. 487), for example, contends that direct efforts against predatory crimes are likely to be ineffective because "for heroin users, jail sentences cease to be a deterrent." (See also Blair and Vogel, 1973). This claim appears to be incorrect, given the results in Kim et al., 1993.

be reduced by giving shorter sentences to drug offenders without reducing the deterrent effect of imprisonment itself.

Another piece of evidence on the drug-crime connection comes from the large body of empirical literature supporting the expectation that criminals respond to many stimuli. Becker's (1968) economic theory of crime generated a substantial number of empirical studies designed to explore the relationship between crime rates and the probabilities of arrest and conviction, the severity of punishment, and potential criminals' opportunity costs.<sup>9</sup> This literature suggests that police efforts can deter Index I crimes and that opportunity costs matter in the decision to commit crimes. If this is true then drugs clearly are not the only cause of non-drug crime. Of course, if drugs are a cause of non-drug crime then this large body of research might be flawed; by failing to control for drug use these empirical studies could be misspecified. Benson, Kim, Rasmussen, and Zuehlke (1992) develop a structural model of property crime using data from Florida counties for 1986 and 1987 and controlling for the level of drug activity. My colleagues and I get results quite consistent with the implications suggested by Trager and Clark's (1989) examination of arrest data and Kim et al.'s (1993) study of conviction data, both of which indicate that somewhere around 20 percent of the drug-using population also commit property crimes. Specifically, our estimates imply that a 1 percent increase in drug-market activity is associated with a 0.183 percent increase in property crime. In addition, we also found that controlling for drug-market activities does not change the general implications of the economics of crime literature. Policing still deters property crime and opportunity costs appear to matter, so the fact that other studies did not control for drug activity does not necessarily mean that they are misspecified.

The evidence discussed here all suggests that a substantial portion of the drug-consuming population is not heavily involved in property crime. Of course, none of this evidence proves that drugs do not cause crime for a subset of the drug-consuming population. Yet another related issue deserves attention, however. What happens to the demand for drugs as illegally obtained income rises? In other words, instead of asking, Does drug use lead to crime, we might ask, Does crime lead to drug use? If the expected return to illegal activities rises (because, say, the probability

<sup>9</sup> For reviews of the literature see Cameron, 1988; Brier and Fienberg, 1980; and Rasmussen, Benson, Kim, and Zuehlke, 1990.

of being arrested falls), then under most circumstances, the illegal activity should increase. The increased income can be spent on goods, including illicit drugs, and if a drug is a normal good the increase in income will produce an increase in demand for the good. Of course, if the drug is an inferior good demand will fall.

There appears to be little attention given to the potential causal relationship running from crime to drug use, a perspective in sharp contrast to the much more frequently claimed causal flow from drug use to crime in order to finance a habit. The recent study of Washington, D.C. drug dealers suggests that there could be an important connection of this type (Reuter et al., 1990). In particular, the Rand Corporation researchers found that when juveniles start dealing drugs they are typically not drug users. Thus they are not committing the crime of drug dealing in order to finance a drug habit.<sup>10</sup> However, the longer someone stays in the drug supply business, the more likely he will become a user and ultimately an addict. In fact, most adult dealers in Washington, D.C. apparently are addicts. Other studies of the temporal sequencing of drug abuse and crime also suggest that criminal activities generally precede drug use (Gadossy et al., 1980; Greenberg and Alder, 1974). Indeed, Chein et al. (1964, pp. 64–65) conclude that delinquency is not caused by drug abuse, but rather, that “the varieties of delinquency tend to change to those most functional for drug use; the total amount of delinquency is independent of drug use.” It clearly could be the case that once an individual has decided to turn to crime as a source of income, thus moving into the criminal sub-culture, he may discover that drugs are more easily obtained within this sub-culture than they were previously, and perhaps that the risks posed by the criminal justice system are not as great as he had initially anticipated. Furthermore, criminal activity generates the income to buy goods that one previously could not afford, including drugs. In this sense crime can lead to drug use, rather than the reverse. Of course, if the individual then becomes addicted so his preferences are altered, the drugs-cause-crime relationship might come into play.

<sup>10</sup> The explanations for this behavior include the apparent fact that these juveniles perceive drug dealing to be an attractive economic opportunity relative to their legal opportunities. These juveniles tended to underestimate the risks associated with law enforcement activities as well, although they also tended to overestimate the risks of violence and injury.

Even if drugs were an important determinant of criminal activity for a portion of the drug-consuming population, an indiscriminate war on drugs may not be a positive-sum crime policy. First, as explained earlier, the benefits of imprisoning drug offenders are probably much smaller than is generally claimed in bureaucratic and political rhetoric. Beyond that, there are substantial hidden costs as well. Benson, Kim, Rasmussen, and Zuehlke (1992), Benson and Rasmussen (1991), and Sollars et al. (1994) used different data sets and found that reallocating scarce police resources away from the control of property crime toward the control of drug crime significantly reduces the risks that property criminals face. This reduction in deterrence leads to a significant increase in property crime. Indeed, in sharp contrast to the political rhetoric, it seems that *drug enforcement causes property crime*. A 1 percent increase in drug arrests as a portion of total arrest leads to an estimated 0.199 percent reduction in the probability of arrest for property crimes. Furthermore, a 1 percent reduction in the probability of arrest for property crimes leads to an estimated 0.826 percent increase in property crimes. Therefore, as resources are reallocated to control drug crime, property crime is rising. The reallocation of policing resources to control drug use actually explains a substantial portion of the increase in property crimes that has occurred in Florida since the War on Drugs started. Similarly, Rasmussen, Benson, and Sollars (forthcoming) found that drug-control efforts also cause violent crime. As one policing jurisdiction increases its drug-control effort, drug-market participants have incentives to relocate into jurisdictions with less effort directed at drug markets. This creates conflicts over "turf" and violent confrontations. Furthermore, the early release program that has been instituted to reduce prison crowding in the face of the large increase in drug arrests and convictions and longer drug sentences has further reduced the expected punishment and therefore, perhaps, the deterrent effect for Index I crimes, thus increasing the level of those crimes. The costs of the War on Drugs, including the use of prison space to house drug criminals, appear to be substantially greater than the benefits, implying that the criminal justice resources allocated to this war are being used inefficiently.

Given these high opportunity costs and the general failure of the drug war to solve the problems that politicians and policy makers claimed it would, it is reasonable to ask why the war was actually waged. A "War on Drugs" was declared by President Reagan in October of 1982. Such an offensive has to be waged by local police, however, and these agencies generally did not significantly increase their relative efforts against drugs

in a dramatic fashion until 1984, when a substantial reallocation of state and local criminal justice system resources towards drug enforcement began. My colleagues and I (Benson, Rasmussen, and Sollars, forthcoming) explain that state and local policing officials faced an exogenous change in bureaucratic incentives in 1984 that induced an increase in drug enforcement efforts. In particular, one section of the Comprehensive Crime Act of 1984 established a system whereby any local police bureau that cooperated with federal drug enforcement authorities in a drug investigation would share in the money and/or property confiscated as part of that investigation. As a result, police in many states whose own laws or constitutions limited confiscation possibilities began to circumvent state laws by arranging for federal authorities to "adopt" their seizures.<sup>11</sup> Then, under the 1984 federal statute, a substantial percentage of these seized properties went back to the agency that made them, even if the state's laws mandated that confiscations go someplace other than to law enforcement. The 1984 federal confiscations legislation followed a period of active advocacy by federal, state, and local law enforcement officials who emphasized that it would foster cooperation between their agencies and increase the overall effort devoted to and the effectiveness of drug control; that is, law enforcement bureaus maintained that they needed to be paid to cooperate, whether or not the cooperation was in the public interest. Benson, Rasmussen, and Sollars (forthcoming) demonstrate that the resulting confiscations provided police bureaucrats with substantial increases in discretionary budgets and created strong incentives for the reallocation of police resources toward the now-lucrative area of drug control. The increase in drug arrests naturally led to the increase in drug convictions with prison sentences that are discussed earlier.

### *Drug Crime and Prison Crowding*

Assuming that control of property crime truly has been a primary motivating force for the War on Drugs (an assumption which is rejected above), then the increasingly apparent failure of the criminal justice system

<sup>11</sup> Many states mandate that confiscated assets be turned over to a general government authority, while others require that some or all seized assets be used for specific purposes, such as drug treatment or education. Various states also limit the kind of assets that can be seized. For instance, in 1984, only seven states allowed seizure of real estate used for illegal drug activities. The federal statute had no such limitation.

in this regard and the rising costs in the form of prison crowding, early release, and reductions in the effectiveness of imprisonment as a sanction, would seem to imply that individual policing jurisdictions should move rapidly toward a declaration of peace in the War on Drugs. De-emphasizing drugs and other such "crimes" (perhaps even decriminalizing them) and "the consequent reduction of pressure on police, courts, and correctional services would have a massive impact on the criminal justice system" (Goldstein and Goldstein, 1971, p. 293). Clearly, a reduction in the resources allocated to the control of such crimes could simultaneously reduce prison crowding problems and allow some redirection of criminal justice resources toward the control of violent and property crimes. For instance, in 1971, the Los Angeles district attorney began filing all marijuana possession cases as misdemeanors rather than as felonies. As a direct result, approximately 10,000 fewer felony cases were filed during the 1971-72 period than during the previous year, cutting the system's felony caseload by 25 percent (Poole, 1978, p. 53).

None of this discussion implies that contracting out itself is undesirable. Rather, it suggests that the use of imprisonment to control drug "crime" appears to be inappropriate. The cost of doing so is obviously very high, while the social benefits are questionable at best. Contracting out for prison services could reduce some of the direct (most obvious) costs, of course, but as reducing the cost might reduce the incentives for taxpayers to demand changes in the laws against drug use and/or to demand increased use of alternatives to imprisonment for the treatment of drug use, then contracting out may actually allow this allocatively inefficient policy to remain intact longer than it otherwise might. Thus, while contracting out might improve technological efficiency, it could actually reduce allocative efficiency. Furthermore, going beyond the efficiency norm, and considering a normative standard of liberty, this use of imprisonment becomes even more undesirable. Drugs certainly may harm individuals who choose to consume them (just as tobacco clearly does) but in the absence of significant spillover effects (such as the lack of a strong causal relationship between drugs and crime, as discussed above), government-imposed limitations on individual choice clearly are not warranted on liberty grounds either. Similar normative issues come into play in another use of prisons involving victimless crimes, and in this case, contracting out has clearly become very important already.

### III. USING PRISONS TO CONTROL LABOR SUPPLY

"Houses of correction" were first established in England under Elizabeth

I to punish and reform able-bodied poor who refused to work (Beattie, 1986, p. 492). A "widespread concern for the habits and behavior of the poor" is often cited as the reason for the Poor Laws regarding vagrancy and the establishment of facilities to "reform" the idle poor by confining them and forcing them to work at hard labor (p. 497). Chambliss (1964, p. 69), however, reported that "there is little question but that these statutes were designed for one express purpose: to force laborers (whether personally free or unfree) to accept employment at a low wage in order to insure the landowner an adequate supply of labor at a price he could afford to pay." Prisons are still being used today to control labor markets for the benefit of special-interest groups. The most obvious example may be the use of prisons to hold illegal aliens who enter the U.S. seeking employment, and contract prisons are playing a major role in this process.

The tremendous poverty in Mexico makes the U.S. labor market very attractive. Unskilled laborers who are lucky enough to have a job in Mexico earn two or three dollars a day. In fact, an estimated 17 percent of the Mexican population earns less than \$75 a year. And things are not likely to improve with population growth expected to double Mexico's population within twenty-five years. Similar conditions exist farther to the south in El Salvador, Guatemala, and Columbia, as well as in many Caribbean countries. To the north, on the other hand, an illegal alien in the United States can earn at least \$25 a week as a maid, or possibly \$1.75 an hour as a stoop laborer in agriculture, or five to six dollars an hour as a construction laborer. Perhaps up to 30 percent of the illegal workers in the United States earn more than the legal minimum wage (Goodman and Dolan, 1985, p. 161), and many work two different jobs, putting in sixteen hours a day in order to send money back to their families in Mexico. Employers are more than happy to give illegal aliens jobs. After all, many of the jobs these laborers are anxious to have are jobs that U.S. citizens generally are not willing to take, and the aliens are usually found to be exceptionally good workers. But this is an illegal market and the Immigration and Naturalization Service (INS) is responsible for policing it. The INS is obviously having an effect. Many aliens now must pay a guide or "coyote" to avoid the INS and smuggle them into the U.S. Smugglers make millions of dollars a year as a result. Furthermore, increasingly large numbers of aliens are arrested, imprisoned, and then deported for the "crime" of seeking employment in the United States. As the INS has stepped up its efforts to slow the flow of aliens and to deport those who have successfully entered the country, the cost to



American taxpayers has risen. One aspect of this is the increasing need to house captured aliens in secure facilities (prisons) until they can be deported. This requirement is being met in many instances by private firms, in part because the private sector has been able to respond to the rapidly growing demand much more quickly than the INS itself could if it were to build and staff its own prisons (Krajick, 1984a, p. 24). Thus, the ability of the private sector to respond quickly and effectively is actually allowing (encouraging) the INS to step up enforcement efforts. As a result, perhaps the fastest growing aspect of contracting out for prisons is in the area of federal detention facilities for aliens.<sup>12</sup> Is contracting out desirable in this case? Again the answer hinges on an understanding of the politics of the issue.

### *The Politics of Immigration*

Immigration in the United States was not restricted during the country's first century. The first general statute affecting immigration was only passed in 1882. It established a head tax and provided for the exclusion of certain kinds of people. This was followed by the Chinese Exclusion Laws in the first decade of the twentieth century. Large-scale immigration from Europe and Asia, sometimes exceeding a million people a year, continued until the Quota Acts of 1921 and 1924 were passed. The first major flow of immigrants from Mexico occurred between 1910 and 1914, when an estimated four million immigrants arrived over four years. The next fifty years saw cycles in this northward flow, largely determined by labor-market conditions in the United States (Goodman and Dolan, 1985, p. 160). World War II and its resulting labor shortage even saw a formal agreement between the U.S. and Mexico, the Bracero Program, to bring

<sup>12</sup> Several firms are presently running large facilities of this type. Behavioral Systems Southwest, for instance, the first company to operate a major adult detention facility, currently runs minimum-security facilities for 600 to 700 illegal aliens for the INS in San Diego and Pasadena, California, as well as in Arizona. The company also had a contract for a facility in Aurora, Colorado, but the contract ended in 1987 when Wackenhut got a contract to build a new facility there. In 1985, the Federal Bureau of Prisons awarded a contract to Palo Duro Private Detention Services for a 575-bed, minimum-security prison for illegal aliens. Corrections Corporation of America, Inc., formed in 1983, had a 350-bed minimum-security jail in Houston for the INS in operation in 1984. In 1985, the company received a second INS contract for a Laredo, Texas, facility with a daily population of 175. It now incarcerates alien criminals for the Federal Bureau of Prisons as well.

hundreds of thousands of Mexicans into the country on a temporary basis. This formal agreement ended in 1947 with the return of large numbers of servicemen. However, the number of illegal aliens began to rise substantially, and in the early 1950s the federal government initiated Operation Wetback: Almost 3 million people were rounded up and deported in three years. With the Korean conflict and the strong economy of the 1950s, however, the Bracero Program was reinstated under Eisenhower; it lasted until 1964, when Congress terminated the program. Clearly, the "criminality" of the act of moving from Mexico to the U.S. in order to work is subject to the forces of politics.

Today, with quotas severely limiting legal immigration, illegal immigrants flow into the country by the millions. On the surface, the modern politics of immigration is fairly straightforward: Organized labor lobbies hard to limit immigration while some types of business support easing or elimination of immigration restrictions (racial considerations probably also play a role). Labor interests have dominated, however, in recent years. This may reflect several factors. First, labor unions are well organized and their interests in this regard are homogeneous. Any American workers who actually might be in a position to compete with the immigrants would face lower wages if immigration increases, but the fact is that most American workers are not willing to take the jobs filled by aliens, so there really is almost no direct competition between American citizens and illegal aliens. Indeed, it would be surprising if there were. After all, if an American worker wanted a job held by an illegal alien, he would simply have to report the alien to the INS, and both the employer and the alien would suffer the consequences. Thus, aliens tend to seek jobs that American workers do not want in order to avoid detection, and employers tend to offer jobs to aliens that Americans do not want in order to avoid being reported. Even if this were not the case, the fact is that very few members of organized labor, the major source of political demands for immigration restrictions, would actually be directly affected, because they do not compete directly with the immigrants in the unskilled labor market.

There still is an indirect impact on labor union members, however, in the form of indirect competition. Many products can be produced with different technologies. Availability of a large pool of unskilled labor at low wages creates strong incentives for producers to adopt technologies that use relatively more unskilled labor and relatively less capital requiring the skills that organized labor possesses. Substitution of unskilled labor for capital and skilled labor would reduce demand for skilled labor and

clearly impact organized labor adversely (Anderson, 1987; Goodman and Dolan, 1985). But note that this substitution would actually enhance allocative efficiency and reduce consumer prices for those goods produced with the lower-cost technology. Thus, the resources used to prevent such a substitution, including the private prisons under contract with the INS, are being used to reduce allocative efficiency.

In contrast to the united front that labor unions provide on the issue of immigration restrictions, those business interests that are affected by immigration restrictions are less well organized, and their interests are less homogeneous. Some labor-intensive businesses that benefit from low-cost unskilled labor have significant location-specific capital and therefore have strong interests in seeing a change in the law. However, other labor-intensive businesses can relocate outside the U.S. in order to gain access to low-wage labor (an issue examined below) at a lower cost than the costs associated with lobbying legal change, particularly given the strong opposition they would face and the uncertainty about achieving a significant easing of immigration restrictions. Furthermore, some businesses that may face high moving costs but who can benefit from employing unskilled labor at low costs are relatively capital intensive, so the gains from employing immigrants are relatively small, and their incentives to invest in a lobbying effort in the face of the low probability of success are relatively weak. Indeed, some businesses that have adopted capital and/or skilled-labor-intensive technologies may side with the labor unions on this issue because they want to limit competitive pressures from other businesses with unskilled-labor-intensive technologies. Thus the heterogeneity of the business interests regarding immigration policy and the resulting lack of a united front explains why organized labor has dominated the politics of immigration in recent years.

Business and unionized labor are not the only interest groups involved in the politics of immigration, of course. Mexican-Americans have also become active recently in the political arena, for example, although there does not appear to be unanimous agreement among this loosely organized group. Many support the granting of amnesty to illegal aliens who have been in the U.S. long enough to establish themselves as part of the community, but many legal immigrants object to giving a general amnesty to illegal aliens who could then more easily compete with them. One more "interest group" deserves mention. State and local governments see higher costs arising from providing schools and other services to immigrants without sufficient increases in state and local taxes to cover those costs.

Thus, they too advocate federally imposed and enforced restrictions on immigration. In fact, these immigrants would probably pay more in taxes than the costs of the services they require, but the majority of the taxes they would pay would be to the federal government in the form of income and Social Security taxes, while the cost of the services are largely born at the state and local level (Simon, 1984).

The primary beneficiaries of a strictly enforced immigration policy are the members of organized labor who face less indirect competition and therefore receive higher wages, the smugglers who have set up lucrative operations along the border, possibly some local taxpayers who anticipate higher taxes with increased immigrant demands for local government services, and perhaps those groups and individuals whose income comes from enforcing the immigration laws (INS employees and private suppliers of contract prison services, for example). There are several costs associated with limits on immigration, as well. The aliens who are excluded, or who are forced to pay smugglers to get into the country (and perhaps be robbed and/or killed in the process) and then take relatively less desirable jobs at lower pay than they otherwise would in order to avoid detection, obviously bear a large cost. Consumers, who pay higher prices because of the higher wages earned by organized labor, also bear a cost. Some American workers may also be facing adverse consequences as employers locate assembly plants ("maquiladora") in Mexico and elsewhere in order to gain legal access to low cost labor. The impact of such location decisions are clearly non-trivial. Over 400,000 Mexicans were employed in U.S.-owned maquiladora during 1990, generating \$3.5 billion in foreign exchange for Mexico (Reibstein, 1991, p. 43). Furthermore, a firm that might willingly employ both American and Mexican labor if its plant were located in the U.S. is much more likely to employ only Mexican workers if it locates the plant in Mexico. Federal taxpayers also bear a large share of the cost—that which is associated with enforcement.

### *Contracting Out and Immigration Control*

The increasing demand for housing captured aliens in prisons until they can be deported is being met by private firms in many instances. Is contracting out desirable in this case? In a narrow sense it may appear to be: Private firms can provide the service more quickly and at a lower cost than can the government itself. But in a larger sense it may not be. As the lower cost of enforcement that arises from contracting allows and

encourages more intensive enforcement, and tends to reduce the likelihood that there will be support for changes in the immigration laws, contracting may not be desirable, at least from some normative perspectives. This policy appears to reduce allocative efficiency, for instance, as noted above. By limiting the free flow of labor, laborers are not being allocated to their highest and best uses. Furthermore, from a liberty perspective the implications seem clear. Freedom of exchange includes freedom to sell labor services to the highest bidder and buy from the laborers offering the best work at the lowest wage. Thus, this particular use of prison resources, whether provided by private firms or government bureaus, is inappropriate.

Note that illegal migration is largely a victimless crime, as is drug use. The drug supplier and demander, the immigrant and his employer—all enter into a voluntary exchange, and the alleged third-party affects (for example, crime caused by drugs, or the taking of U.S. citizens' jobs by aliens) are much less significant than the political rhetoric would have us believe. Drug laws and immigration laws are attempts to prohibit mutually beneficial exchanges. Once again, it must be emphasized that the arguments presented here are not indictments of contracting out per se. Rather, they are intended to raise concerns about the results of enhancing technological efficiency in the production of victimless crime enforcement in response to the demands of powerful political interests. If Hitler had contracted out some of his law enforcement services, the rounding up and extermination of Jews might have been accomplished at a lower per-unit cost and more Jews could have been exterminated, but the fact that more of these politically defined "criminals" could have been exterminated more "efficiently" in a technological sense does not mean that the contracting out of this process would have been desirable. Indeed, if contracting out enhances technological efficiency, as its advocates argue it will, then it may encourage even more intensive law enforcement efforts against victimless crimes, thereby reducing both allocative efficiency and liberty.

#### IV. CONCLUSIONS

When contracting out is considered in the narrow sense of technological efficiency, contracting for prison services appears to be very desirable. But it must be recognized that the lower costs of prisons that can result from contracting out could make imprisonment even more attractive as

an "easy" solution to a wide variety of political problems. When contracting is considered in a broader sense, either in terms of an allocative efficiency or a liberty norm, it may not be as desirable. The concerns raised here go beyond the "moral" issues often discussed in the contracting debate, however. As Logan (1990, p. 49) explains, critics of contracting out for prison services often contend that this is a function that should only be provided by government. Logan convincingly refutes this argument, in part by exploring the question "By what right does the state imprison?" He points out, à la Locke, that authority does not originate with the state, but rather is granted to the state by individuals. Thus, government's right to imprison is itself a power that private citizens have delegated to the state, and "any *legitimate* governmental authority may be further delegated, through government, to private agents" (p. 53; emphasis added). The suggestion here is that some things for which government uses imprisonment are not "legitimate" from the perspective of either allocative efficiency or liberty.

In the context of interest-group politics, the "efficiency" that is gained through contracting out is a very narrow concept of efficiency: Specifically, what interest groups demand may get produced at a lower cost.<sup>13</sup> A substantial part of the reasons for imprisonment of drug users and illegal aliens is apparently that some people get utility from restricting other people's freedom to choose in the first instance, and some people collect rents by restricting access to low-cost labor in the second. As long as the rest of the criminal justice system remains largely controlled by the government and therefore by interest-group politics, prisons will be used in undesirable ways, and if the cost of doing so is reduced through contracting out, then the system as a whole could actually end up doing even more undesirable things.<sup>14</sup> The same appears to be true in many other areas of contracting out for government services.

<sup>13</sup> It should be noted that when contracting out for prisons is considered in the context of the interest group process of political allocation decisions it also become clear that there are forces at work which may actually limit the technological efficiency benefits relative to their potential (Benson, forthcoming). That is, it may be that governments will do a poor job of contracting just as they do with most of the other tasks they undertake. In the case of victimless crimes, the fact that government does a bad job of contracting out may turn out to be desirable, of course.

<sup>14</sup> Of course, prisons might also be used to do desirable things, like removing violent criminals from society, punishing criminals who do leave victims, deterring potential

In this regard, for instance, note that there are actually third-party effects which were not discussed above but which are associated with both drug use and immigration. They get relatively little political play, however, perhaps because they are actually a result of the government provision of many free-access resources. In a true free-market environment, all roads, streets, schools, welfare (charity) programs, and so on, would be private. As a result, an immigrant or a drug user would have to pay for access to all of these facilities and services. However, when government provides such services and grants free access to anyone, then a domestic drug user or an illegal alien who gets past the borders adds to the congestion costs that are inevitable with such free access goods (Benson, 1994). Drug markets can be established on public streets and sidewalks, crowding out others who might want to use those same streets and sidewalks. Similarly, both a drug user and an immigrant can roam the public streets and roads, loiter on them, harass passers-by through robbery or begging, and the like. Drug users who spend large portions of their income on drugs, because drugs are sold in black markets, can count on the public welfare programs and public schools to provide some care for their children, thus raising taxpayer costs and competing with relatively legitimate claimants to these services. Immigrants can also send their children to the public schools, to the detriment of local taxpayers and resident children with whom they compete for the attention of teachers. They can often obtain various welfare benefits (perhaps fraudulently), and indeed, may be attracted to the country by the prospects of public welfare (and/or public schools) rather than by the prospects of a job. As with prisons, contracting out for the provision of public streets, schools,

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criminals, and rehabilitating existing criminals. Thus, contracting out to do these things may be desirable from an allocative efficiency perspective as well as a liberty perspective. The question thus becomes, Is it appropriate to lower the costs of doing undesirable things, making it more likely that they will be done, in order to lower the cost of doing some desirable things? The answer is not always obvious. In fact, many of these things are desirable only in the context of the existing institutional setting. An alternative that emphasizes restitution for victims rather than physical punishment for offenders would lead to a very different system in which prisons would play a much smaller role (Benson, 1990, pp. 352-57). In such a system, where in effect both the demand and the supply sides of the legal system are privatized (pp. 349-78), "privatization" can be very desirable, in part because if demand is also privatized victimless crimes are much less likely to be relevant.

and welfare programs might improve the technological efficiency of their production, but it would not reduce these third-party effects; it would not improve allocative efficiency. Exclusionary laws, such as those regarding drug use and immigration, may reduce the crowding to a degree, and contracting out for prisons and police probably improves the technological efficiency of exclusion. However, these third-party effects can be internalized much more effectively through complete privatization of free-access facilities and services, an alternative that does not require limits on individuals' liberty to enter into voluntary exchanges. Thus, those of us who are concerned with promoting the complementary goals of liberty and allocative efficiency should be focusing our efforts on undermining government's (and therefore interest groups') power to decide how resources should be allocated, rather than blindly supporting the replacement of bureaucrats with contractors who may simply do a better job at restricting liberty and perpetuating allocative inefficiency.

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