Outsourcing, its Discontents, and some Solutions

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Introduction

Over the past two decades, corporate America has aggressively used "outsourcing" or "contracting out" to radically restructure employment for service workers. Colleges and universities have been no exception to this rule; indeed, this period has seen the diffusion of many business practices into academic management. *American School & University* magazine reports that in 1999, colleges and universities most commonly outsourced food service (66.0%), vending (57.7%), bookstore operations (39.2%), custodial work in academic buildings (22.7%), and laundry (22.7%).[1] At Harvard, roughly 90% of the guards, 55% of the custodians, and 30% of the dining service workers work for outside contractors. This was not always the case: ten years ago, Harvard's service work was done mainly through in-house providers. Moreover, it should be noted that outsourcing has not grown at all educational institutions: primary and secondary schools have actually scaled back on outsourcing because of the harm it does to workers and the instability and bad faith it brings to the educational community.

Companies and universities outsource service work for many *stated* purposes, but almost always with the goal of cutting labor costs. Often, stated arguments appeal to notions of "core competence" – Harvard administrators claim that the university excels at research and teaching, but it does not know much about providing custodial, dining, or protective services. They claim that it's best if such "specialized" services are left to the "experts," who excel in their respective fields. In other cases, managers defend outsourcing by arguing that it makes workplaces responsive to "the market," thereby promoting organizational efficiency through competitive discipline. In still other cases, managers argue that individual divisions or schools need the flexibility offered by outsourcing, and should not have to rely on supposedly monolithic and unresponsive internal providers.

Although superficially attractive, these arguments are often covers for less noble motivations: in particular, they obscure the fact that **outsourcing benefits institutions primarily through weakening workplace rights and reducing wages and benefits**. During the late 1800s and early 1900s, labor subcontracting was commonly referred to as the "sweating system." In 1893, the Illinois Bureau of Labor Statistics, a state agency, wrote the following: "In practice, sweating consists of the farming out of the competing manufacturers to competing contractors the material for garments, which, in turn, is distributed among competing men and women to be made up. *The middle-man, or contractor, is the sweater (though he also may be himself subjected to pressure from above) and his employés are the sweated or oppressed."* (Ill. Bureau of Labor Statistics 1893: 358, emphasis added). The return of subcontracting today has revived the same abusive structures common in late 19th century industrial production, and it is undercutting the basic labor rights which were established through much struggle during the nineteenth and twentieth centuries. Harvard University today is actively participating in this effort to bid down the standards.

[1] See Joe Agron, "Take it or Leave it," *American School & University*, Sept. 1, 1999.

This piece explores the ways in which outsourcing worsens standards of all kinds for workers and communities, and unfairly shifts both power and concrete benefits from workers to management. Outsourcing produces unequal power relations and unfair labor standards in several ways:

- Outsourcing, and managerial threats to outsource, reduces the power of directly-hired, unionized workers to win and maintain decent working conditions.
- Outsourcing severely restricts the ability of outsourced and non-union workers to organize unions.
- Outsourcing reduces transparency and obstructs flows of information, thwarting the ability of the Harvard community enforce internal standards —formal or otherwise.
- Outsourcing reduces management's incentive to enforce workplace regulations in two ways. First, the contractor's legal status as an employer reduces the liability of the institution where employees actually work, and where workplace regulations must be enforced. Second, outsourcing to smaller firms reduces the size of potential claims in litigation.
- Outsourcing divides workers into tiers which can be played against one another. At Harvard, management has used this strategy to discipline workers' wage demands so severely that nominal wages have declined significantly in some sectors.
- Outsourcing creates a dispensable, replaceable pool of workers who are easily exploited and can be used to drive down standards for other workers.
- Outsourcing creates loopholes which allow institutions to evade employment and labor laws.

In this report, we will investigate all of these claims in detail, and illustrate them with case studies.

We do not claim that managerial arguments for outsourcing have no value. However, we want to draw attention to the purposes of outsourcing that management does not state, but which are important and intended: these include the purposes of disciplining wages and weakening unions. In addition, we want to point out important flaws in managerial arguments:

- Outsourcing can actually be *less* efficient than in-house service provision. For instance, outsourcing creates search costs in finding contractors. At Harvard, it has also created supervision structures which are inefficient and possibly in violation of employment law.
- Outsourcing is not the only way to provide flexible, high-quality service provision. Harvard has often argued that the problem with in-house service provision is not the workers, but with the management operating without the discipline of the market. We will show concrete institutional alternatives to outsourcing workers that are compatible with the goals of flexibility, decentralization, and even bringing in outside expertise.

We will discuss all these points. We believe that they show that outsourcing is a legally and ethically inappropriate practice which can and should be avoided at Harvard University. We will specifically recommend that Harvard place a ban on outsourcing in the service sector, that it bring currently outsourced service workers back in-house, and that if it finds the need to promote competition in the service sector, it allow a board of faculty, workers, students, and administrators to decide whether to outsource *management* in specific sectors, not workers.

Destroying Workers' Right to Collective Bargaining

One of the ways in which outsourcing hurts workers is by weakening their right to organize unions and bargain collectively. The main point is simple: whereas a company has to bargain with a union if the workers are directly hired, it can, as a matter of law, simply switch contractors and destroy the union if the workers are employed by a contractor.

Outsourcing and workers' ability to strike

To understand the difficulty that outsourced workers have in organizing and maintaining strong unions, consider as an example the retaliation that outsourced workers face if they go on strike. Unlike directly-hired workers, outsourced workers who strike over unfair labor practices can be permanently replaced: all the employer has to do is terminate the contract and find a new contractor. Thus, outsourced workers essentially do not have the ability to strike—an ability which is a key source of leverage for workers and unions to make collective bargaining fair and meaningful.

Although U.S. labor law is relatively weak in defense of workers when compared with laws in other Western countries, it does offer some help to striking workers who are directly hired by their employer. For instance, employers are permitted to permanently replace workers who strike over wages, hours and working conditions ("economic strikers"), but workers remain on a recall-to-work list and must be offered their former or similar jobs as they become open. More importantly, employers may not permanently replace workers who strike over an employer's unfair labor practices ("ULP strikers"). ULP strikers may be temporarily replaced, but they must be reinstated when they decide to end their strike and return to work. Thus, U.S. labor law does not provide strong protection for striking workers, but direct employees striking over unfair labor practices do have some protection from permanent replacement.

In practice, many unions file unfair labor practice charges when they begin a strike, charging the employer with refusal to bargain in good faith. Unions charge unfair labor practices in order to protect strikers against permanent replacement.[2] Although not always successful, the possibility of prolonged conflict deters companies from using the permanent replacement weapon all the time. Moreover, temporary replacement induces

[2] See NAALC Publication: http://www.naalc.org/english/publications/prelim_5.htm

costs to the employer because it might be difficult to recruit employees who are willing to work on such an uncertain basis. Thus, directly-hired workers can present the employer with the threat of a work stoppage and the complete breakdown of cooperation without sacrificing their jobs. This ability gives workers leverage in negotiations, and is necessary if collective bargaining is to be meaningful.

In contrast, outsourced workers demanding better compensation or working conditions can be "permanently replaced" by Harvard without even any apparent legal conflict. The fact that Harvard University has no obligation to bargain with employees of contractors means that contract employees will find it difficult to pressure Harvard – their "economic employer" – on matters of compensation.

Outsourcing's effects on other forms of worker protest and pressure

Besides striking, organized workers can target offending employers through such strategies picketing, boycotting, and organizing community pressure. However, just as outsourcing curtails workers' right to strike, it also prevents workers from freely engaging in these acts of protest and pressure—acts which, like strikes, are the tools that workers have to make collective bargaining meaningful.

Outsourcing limits workers' ability to protest by placing the economic employer—e.g., Harvard—outside the reach of legal protest. U.S. law restricts "secondary boycott" activities, meaning that "secondary" or economic employers like Harvard cannot be targeted in the same ways for abuses experienced by outsourced workers on the Harvard campus. This limits workers' ability to engage in standard forms of protest against an employer, as they could be accused of illegally targeting the employer. [3]

In addition to imposing legal limits on workers' ability to protest, the creation of a secondary employer status has powerful symbolic effects. It creates a misleading impression of distance between Harvard and the people who work on campus, making it difficult to convey and enforce the actual moral and political responsibility of the institution to its workers.

Difficulties in bargaining with the contractor

[3] A secondary boycott occurs when a union having a labor dispute with Company A tries to force Company B to stop doing business with Company A. Company A is the "primary employer," and direct efforts (including picketing) by the union to put economic pressure on Company A are lawful. When the union action involves Company B, a neutral employer with whom it has no dispute, however, this is an unlawful secondary boycott. When employees of a primary employer and those of a secondary employer work on the same premises it is called a "common situs," and special rules apply. Picketing at a common situs is permissible if directed solely at the primary employer, and is prohibited if directed against secondary employers regularly engaged at the site.

If outsourced workers are unionized and have a site-based agreement,[4] they do still have the right to bargain with and take action against their direct employer, the contractor. But realizing that right, and winning gains with it, is quite difficult. This is because even if workers are able to receive better terms from the contractor, Harvard might simply terminate the contract and switch contractors. The threat of switching contractors will almost always prevent substantial improvements in the conditions of contract workers, because the contractor will not agree to better standards without assurance that Harvard will bear the added costs. This is the conundrum facing the workers of a contractor: the bidding process ensures that Harvard University is their economic employer, since it will "pay for" better wages, benefits, and work conditions through the increased value of the contract; yet the workers do not have the power to collectively bargain with Harvard.

In some cases, unionized workers can win gains from a contractor by securing informal promises from the economic employer. In these cases, the economic employer gives a “wink and a nod” to the contractor, promising to absorb the costs of improving workers' conditions. At Harvard, HERE Local 26 is able to use such informal agreements to maintain wage parity between workers at the Harvard Business School (employed by Restaurant Associates) and workers at the Harvard Dining Service (employed by Harvard directly). However, the informality of such agreements between the union and the economic employer, and the limits on recourses available should informal agreements break down, creates only tenuous protections for workers. If the economic employer refuses to wink, workers and unions face serious obstacles in taking action against it through strikes, pickets, boycotts, and other strategies.[5]

Furthermore, securing parity through informal channels is only possible when unions and community coalitions are very strong. During the most recent negotiations, for instance, Restaurant Associates threatened to change job classifications of dining service workers at the Harvard Business School, which would have reduced wages significantly. Harvard had no formal responsibility to bargain with the union on this, and stood to gain from the reclassification. The attempt to reclassify workers and cut wages was eventually warded off, but only after an exceptional display of community opposition—last spring's sit-in. A week into the sit-in, Harvard gave the “wink,” guaranteeing that it would pay to maintain higher wage standards. Clearly, most workers cannot rely on a sit-in or similar action to produce the environment necessary to make the employer "wink." If a union is internally weak, or if the community does not mount a campaign of support for workers, the union can lose parity agreements for outsourced workers, and might find it very difficult to win back.

[4] A site-based agreement holds a contractor to meet higher standards for the subset of its employees working at a particular site. For instance, SEIU Local 254 represents some outsourced janitors in the Boston area who work for a number of different contractors. All these workers are covered by a master agreement between the union and the contractors, which sets minimal standards for contractors to meet at all worksites. At some sites like Tufts University, the union has also won site agreements which establish better standards for the contractors' employees who work there.

[5] Of course, we are not saying that such pressure is not possible, but merely that legal constraints mean that such pressure is more difficult. In a politically charged atmosphere, a well organized union with a strong capacity to mobilize workers and community members might well downplay legal hurdles.

In discussing outsourced workers' bargaining agreements, it should be noted that Harvard's outsourced custodians do not even have a site-based contract. As a result, their wages are determined solely by the "master contract" negotiated between Boston area building service contractors and the workers' union, SEIU 254. In general, such master contracts are inferior to other building service contracts, since they are designed to provide the lowest standard that all sites must meet.

The tiered workforce and workers' reduced bargaining power

Outsourcing establishes a bottom tier of workers who are easily replaced and exploited. The creation of a tiered workforce weakens all workers' ability to bargain for and maintain decent working conditions in several ways.

- The creation of a bottom tier limits the demands that directly-hired workers can make. This is because workers must bargain under the constant threat that they will be outsourced and join the bottom tier if they demand too much.
- Creating a bottom tier often involves converting union jobs to non-union jobs. This decimates union membership, reducing the bargaining power of unionized workers. And it robs non-union, outsourced workers of collective bargaining rights entirely.
- Creating a bottom tier inhibits worker organizing by dividing the workforce. Directly-hired workers fear "demotion" and resent the bottom tier for lowering standards; outsourced workers resent directly-hired workers for what (possibly meager) advantages they have.
- Workers in the bottom tier are especially vulnerable to exploitation because they are easily replaced. Since contractors employ a pool of workers across many locations, they gain from structuring the work as generically as possible. This makes workers dispensable, which in turn weakens their bargaining position.

The creation of a bottom tier not only robs workers of bargaining rights and power, but it enhances the power of the employer in two ways.

- *Outsourcing highly exploited workers protects and even improves the employer's reputation.* Companies typically try to outsource their lowest-wage and most defenseless workers when the gap between internal and "market" wages widens. Instead of paying these workers decent wages and benefits that "real employees" should get, Harvard might instead outsource them to firms that will slash their wages and benefits. This not only cuts costs for the university, but it has the insidious effect of distancing Harvard from its most exploited workers. It allows Harvard to claim—as administrators do in their "Facts and Fallacies" document—that "Harvard employees" receive decent wages and benefits. Outsourcing insulates and even improves Harvard's reputation by making it the indirect employer of its most exploited workers.
- *Outsourcing makes the employer less vulnerable to drops in worker morale.* All companies need to maintain "internal norms"—standards of treatment and

> conduct—in order to motivate and retain employees. In general, layoffs and cuts in pay and benefits violate internal norms and lower worker morale. This fact places important limits on employers: they cannot single-mindedly pursue cost-cutting policies that destroy workers' lives. However, if there are two tiers of workers—an internal workforce and a subcontracted one—the company can cut wages and benefits for outsourced workers without inducing the same morale loss for "core" workers. In other words, the company can concern itself less with the well-being and morale of many of its workers.

The most recent dining service negotiations provide an example of the potential problems that a tiered workforce creates for workers. Harvard's directly-hired dining hall workers are themselves divided into two tiers. "Cash operation" employees work at sites like Loker Commons, where purchases are made with money. By contrast, "board operation" employees work in undergraduate dining halls, where purchases are made through board plans. Employees in cash operations are paid less, even when they perform similar jobs. Until this spring, outsourced dining service workers at the Business School had an implicit parity agreement, guaranteeing them wages equivalent to directly-hired board operation workers. However, in negotiations, Harvard indirectly pushed to reclassify these outsourced workers at the lower cash operations rate. This is a classic dynamic, where a tiered wage structure interacts with the outsourcing to put severe pressure on the entire workforce: Harvard was threatening to push workers into a lower tier, and it was starting with outsourced workers, who are most vulnerable to threats. As the union correctly gauged, this would have structurally weakened the organized workers. The union fought this move, and with the help of the publicity and pressure brought upon Harvard through the April sit-in, it was able to maintain the original parity. However, the threat posed by a tiered and outsourced workforce was made clear.

Outsourcing as a reflection of worker strength

Workers and their unions generally oppose moves to outsource because it weakens their rights and bargaining power. It therefore comes as no surprise that an employer's ability to outsource is usually a reflection of the level of worker organization and bargaining power that already exists: well-organized workers are more able to fend off threats of outsourcing, while workers who are not organized, or whose unions are weak, are more vulnerable. This fact brings out the exploitative nature of outsourcing: it is a weapon used against workers which typically erodes already-tenuous workers' rights and possibly deteriorating working conditions.

Managerial prerogative to outsource depends on several factors. If the contract between the union and the management does not explicitly deal with this issue, in many instances the decision to contract out is a mandatory subject of bargaining. However, federal and state laws tend to be very fact specific. [6] Often, management tries to

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[6] See, e.g., Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 85 S. Ct. 398, 13 L.Ed.2d 233 (1964) [although an employer can make the decision to terminate an entire business without bargaining, contracting out which involves the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment is a statutory

incorporate its right to outsource explicitly in the collective bargaining agreement, allowing it to choose to outsource at any point in the duration of the contract. Such contractual provisions for the employer range from the managerial right to outsource without any restrictions (very weak for workers) to the right to outsource coupled with no-layoff policies for the affected workers (somewhat weak for workers) to a no-outsourcing clause (strong for workers). Even in the last instance however, management always has the option to try to bargain over outsourcing when the contract with the union is renegotiated.

At Harvard, there is a patchwork of contractual arrangements as well as actual outcomes, and they reflect the different levels of worker organizing and strength in different sectors. The HERE contract has a "no layoff" clause for outsourcing, and has a site-based contract with Restaurant Associates at the Business School; this is a fairly strong agreement reflecting the strong organization of dining hall workers on campus. By contrast, SEIU, which represents custodians, has no site contract for outsourced workers at Harvard, reflecting the weaker organization of workers in the union.

In general, then, how well the workers are organized, the level of community support and organization, and the state of the particular labor market will determine the employer's ability to outsource, and the actual impact of outsourcing on wages and other outcomes. For instance, in 2001 Harvard Medical School attempted to outsource the directly-hired custodians to a contractor, American Cleaner. Even though Harvard had the contractual right to change management, the workers at that unit powerfully resisted this move. Due to the fact that they were internally well organized, and due to the community support for them during the Harvard Living Wage Campaign's sit-in, the administration first offered them full wage and benefits parity, as well as retroactivity of any wage increases resulting from the January 2002 negotiations. This would have then become a site-specific agreement with parity. However, the workers declined this and pressed for retaining their in-house status. Eventually, they won, and were hired directly by the Medical School. There is of course, no guarantee that in the next round of negotiations, Harvard management will not press for outsourcing yet again. The success of employees to stay in-house will depend on the balance of power at that juncture.

Likely outcomes of employer efforts to outsource can be mapped onto a spectrum such as the one below. We do not claim that the "regimes" on this spectrum exhaust the entire logical space of possibilities, but rather are the empirically likely candidates.

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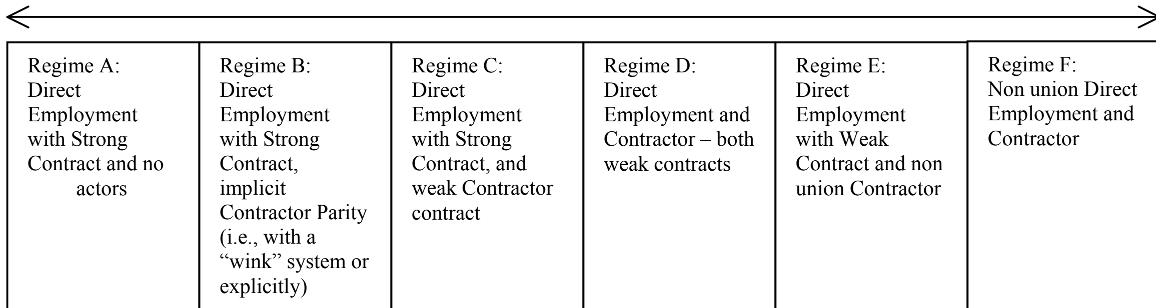
subject of collective bargaining under the NLRA, Section 8(d)]; University of Chicago v. NLRB, 514 F.2d 942 (7th Cir. 1975) [unless transfer of work outside of the bargaining is expressly prohibited by the collective bargaining agreement, the employer may make such a transfer if the employer bargains in good faith with the union and the employer is not motivated by anti-union animus]; First National Maintenance Corp v. NLRB, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981) [an employer can terminate part of its business without bargaining with the union]; Otis Elevator Co., 269 NLRB 891 (1984) [the decision to subcontract is a mandatory subject of bargaining if it turns on labor costs rather than a fundamental change in the nature or direction of the business]; Mid-State v. Ready Mix, 307 NLRB 809 (1992) [regardless of whether the decision turns on labor costs, subcontracting which involves replacing current employees with contract employees doing the same work at the same facility is a mandatory subject of bargaining].

Moreover, any particular union at Harvard, for instance, can reside in various regimes depending on when various moves to outsource were attempted. In that sense, this set of regimes is not one of cumulative results for a given union, but rather about a particular outsourcing result.

Strong and Well Organized Union Weak and Unorganized Union



Outsourcing and the ability to organize unions

Besides weakening the bargaining power of workers in existing unions, outsourcing also makes it very difficult to organize new sites. There are two reasons for this.

- *The economic employer can prevent the contractor from signing a union contract.* Even if outsourced workers win a union certification drive, it is exceedingly difficult to win a first contract without an informal agreement from the economic employer. This is for the reason cited above: the contractor risks losing its contract if it implements costly improvements without checking them with the economic employer. Recognizing the power of the economic employer, workers are unlikely to undertake the risks involved in organizing a union.[7] Moreover, unions recognize the difficulty of organizing in an outsourced environment, and are wary of trying to do so except in areas where they can build up significant union density in a market. Outsourced workers in isolated areas or small markets are practically unorganizable in the United States today.

- *The economic employer can look the other way while the contractor busts the union.* Companies and universities often outsource work to anti-union contractors which operate at the edges of legality and establish reputations as

[7] This risk should not be underestimated: in the United States, workers are illegally fired for organizing activities in one out of four unionization drives.

> union-busters. Negative publicity might prevent Harvard University from engaging in the blatant and illegal anti-union practices routinely employed by Sodexho-Marriott. However, the informational and symbolic distance Harvard creates through outsourcing allows it to benefit from such efforts without paying the publicity price.

Another way to explain these two points is to say that outsourcing enables economic employers to *invisibly* engage in egregious union-busting activities. Taking one route, the economic employer can invisibly bust the union by refusing to make an informal agreement to absorb the cost of better working conditions. Taking another route, the economic employer can let the contractor do the dirty work of firing and threatening workers while it reaps the benefits of an exploited, non-union workforce. It is no exaggeration to say that working people have struggled and died for more than a hundred years in this country so that workers today should not have to endure these kinds of union-busting tactics. Outsourcing not only permits them, but it encourages and sanitizes them.

CASE STUDY A: Janitors at Wesleyan University – Unionizing in an Outsourced Environment

On December 30, 1999, Wesleyan University's custodial contractor Initial agreed to recognize the unionization of 29 janitors. This came on the heels of protests by students and community members and the SEIU local which would represent the janitors. Initial had refused to enter into a contract which would pay benefits to its employees, claiming that such a move would be too costly. The real source of intransigence, however, was the university. As a student from Wesleyan's United Student Labor Action Coalition (USLAC) said, "In the end it's Wesleyan that's paying the money. The real power … was never Initial, the subcontractor. Basically a subcontractor is a way to hide an employer behind his employee."

Recognizing the university as the economic employer which would determine the outcome of collective bargaining, USLAC demanded that the University agree to a "code of conduct" for outsourced employees which included a wage floor, benefits coverage, freedom to unionize, and other provisions. Moreover, they demanded that Wesleyan explicitly agree to pay for the added labor costs that the benefits would create. The administration's refusal ushered a wave of protests culminating in a sit-in inside the Admissions Office in April, 2000. After 30 hours, the President of Wesleyan agreed that the university had the moral responsibility towards outsourced janitors, and agreed to fully pay for the benefits and sign the code of conduct. Almost immediately afterwards, Initial agreed to the union's demand.

This example clarifies something which is very obvious to both unions and workers on the one hand, and to university administrators and labor relations professionals on the other. Be it an informal "wink" or an explicit statement, the

economic employer has to acquiesce to any rise in labor costs before the contractor can agree to them. The goal of the Wesleyan sit-in was to make this link clearer and to make the university adopt some base-line principles which would allow workers to demand and contractors to agree to better conditions.

Even an agreement such as the one Wesleyan made in signing a Code of Conduct, however, is not enough to diffuse the power of the economic employer. As long as the employees remain outsourced, similar problems will arise in every cycle of contract negotiations. Although the code of conduct has a wage floor and benefits provisions built-in, any future wage rise will need a "wink" from the administration. And if history is a guide, guaranteeing such a "wink" will in turn require substantial political pressure and mobilization of the community.

Legal Shielding through Outsourcing

In this section, we examine the ways in which outsourcing weakens the relationship between worker and employer, and in doing so, weakens workplace rights. Generally, when conflicts arise about enforcement of workplace rights, the critical question is "Who is the employer?" When an employer outsources work, it redefines its relationship to its workers, allowing itself to evade employment and labor laws. We refer to this strategy as legal shielding.

In enabling employers to skirt the law, outsourcing can force employees to work under intolerable conditions. For instance, Kristine Ruckelhaus of the National Employment Law Project has noted that outsourcing can promote many forms of discrimination:

> In some circumstances, companies may discriminate on the basis of national origin, race or sex by selecting temp firms or subcontractors according to the demographic makeup of their workers. Such companies often will argue that they are not liable for the discrimination because it is the subcontractors who control their own workforces. In other cases, temp firms refer workers to jobsites where workers suffer harassment or discrimination but claim not to be able to investigate every worksite.[8]

In practice, outsourcing shields employers from a variety of legal liabilities, including OSHA and FLSA violations, as well as Title VII discrimination. In turn, the employer profits—literally—by shifting liability to contractors. The employer may not entirely evade the costs associated with implementing labor and employment laws, because the value of the contract will, to some extent, reflect the contractor's assumption of liabilities. However, the economic employer will generally save money in two ways:

- The contractor is likely to incur reduced financial damage claims.

[8] See www.nelp.org/pub42.pdf.

- The contractor is less likely to enforce the law, either because it is financially unable or because it is less concerned about negative publicity surrounding legal violations. It thus spends less money maintaining workplace standards and passes on savings to the economic employer. (And if the contractor is ever sued for violating the law, the economic employer can terminate its contract to avoid having the cost of workplace standards passed along.)

In practice, legal shielding takes different forms in relation to different laws and managerial goals. We will examine several manifestations of legal shielding, and discuss the specific legal and institutional conventions involved.

Getting around OSHA and the FLSA

Many of the most familiar and basic workplace rights are guaranteed by the Office of Safety and Health Administration (OSHA) and the Fair Labor Standards Act (FLSA). OSHA protects workers' health and safety, while the FLSA's basic requirements include payment of the minimum wage, overtime pay of time-and-one-half for time worked over 40 hours in a work week, restrictions on child labor, and preparation and maintenance of employment records.

Bringing in contractors reduces or eliminates Harvard's responsibility for enforcing these laws. It does so by creating an informational firewall which obfuscates responsibility. For instance, whereas FLSA mandates that employers keep track of information about compensation for direct employees, this is not the case for contract employees. That is why, for instance, today Harvard University claims that it knows very little about its contractors' employees, although this is changing due to political pressure from the community. The obfuscation of responsibility might reduce Harvard's penalties in cases where Harvard is responsible for maintaining the building safety, but a contractor is actually employing workers who perform in those building. In many cases, both Harvard and the contractor might avoid responsibilities.

Because the legal standards used to measure employer responsibility were not necessarily designed to protect workers in contract environments, it can be very difficult to hold economic employers responsible for any violations of outsourced workers' rights.[9]

[9] If Harvard is a joint employer, what legal recourses do workers have? They depend on the purpose of claiming such "joint employment." Unfortunately, in the case of collective bargaining the National Labor Relations Board (NLRB) uses the restrictive common law on agency to determine joint employment. The common law standard generally is called the "right to control" test. A company will not be deemed to be an individual's "employer" unless it has the power to control both the outcome of the individual's work and "the manner and means by which it is performed." *Community for Creative Non-Violence v. Rei*d, 490 U.S. 730, 751-752 (1989) ("*CCN*V"). The Court has stated that, "as a practical matter, it is often difficult to demonstrate the existence of a right to control without evidence of the actual exercise" of the right to authoritatively direct and control the way in which the workers perform their tasks. *CCN*V, 490 U.S. 730, at 750, fn. 17; *see Standard Oil Co. v. Anderso*n, 212 U.S. 214 (1908). The common law test traditionally led courts to conclude that a subcontractor or labor contractor is the *sole* employer of the worker and relieved the dominant enterprise of employer responsibilities. See www.nelp.org/pub42/.

Employer responsibility for FLSA violations, which is by no means easy to show, is actually considered one of the easier responsibilities to prove.[10] OSHA, by contrast, uses an even more restrictive measure, insulating employers from health and safety claims.[11]

Getting around Title VII

Title VII prevents employers from discriminating on the basis of race, sex, age, and disabilities.[12] Title VII violations can result in serious consequences for employers: there may be jury trials, punitive damages, and possible "tort-like" damages including pain, suffering, and emotional distress. However, by outsourcing work, employers reduce their aggregate liability in several ways.

Even under these circumstances, for example, one joint employer may escape liability upon proving that it had no reason to know that the other joint employer discharged a worker based on union activities and could not have prevented the illegal conduct. See *Bultman Enterprises, Inc. d/b/a/ Le Rendezvous Restauran*t, 332 NLRB 445 (Sept. 25, 2000). Overall, the added uncertainty created by informational gaps often created deliberately through outsourcing ends up reducing the expected aggregate liability faced by the economic and formal employers.

[10] For FLSA claims, generally, a court will look at the "economic reality" of a worker's relationships with alleged joint employers and will de-emphasize contractual labels and technical concepts developed under the common law. The court will try to determine whether the worker is "economically dependent" on the alleged joint employer(s). This "economic dependence/economic reality" standard is broader than the common law standard and than other "economic reality" tests (such as under OSHA).

[11] In considering whether an employment relationship exists, the OSHRC states that it relies primarily on who has control over the work environment such that “abatement” of occupational hazards can be obtained. The OSHRC examines a series of factors related to control over the day-to-day details of a worker’s employment. The Control Test is even more difficult to meet here than under common law, but allows a (weaker than FLSA) version of “economic realities” test. See www.nelp.org/pub42.
O S H A’s Field Service Manual specifies that the “supervising entity” or “utilizing employer” will generally be the responsible entity for purposes of ensuring a safe workplace. Each employer, however, must comply with the safety requirements of the act, and each employer is generally responsible to assure the safety of its employees. This duty extends to the protection of employees from hazards created by others. An affirmative defense is available when an employer can show it did not create or control the hazard and took realistic measures to protect employees from hazards it knew about or should have known about. http://www.ntsa.com/html/geninfo/legal.pdf

[12] Title VII prohibits discrimination by an “employer” and any “agent” of the employer. Under the common law definition of agency, a separate entity may be considered an agent, and the agent’s conduct can create liability for the larger company (the agent’s “principal”). See *Miller v. D.F. Zee’s,* 31 F. Supp. 2d 792 (D.Ore. 1998) (Denny’s chain, under contract and Oregon law, had the right to control a franchise restaurant and is therefore responsible for restaurant’s discrimination under Title VII agency theory). However, some courts believe that this statutory provision simply means that the actions of a supervisor or other employee of an employer can cause the employer to be liabl*e. Williams v.Grimes Aerospace Co*., 988 F. Supp. 925 (D. S.C. 1997). Recent court opinions regarding independent contractor status and joint employment under the Americans with Disabilities Act and Title VII have applied the restrictive common law approach that has been developed under the National Labor Relations Act, which is described above. *See Cilecek v. Inova Health System Service*s, 115 F.3d 256 (4 th Cir. 1997); *Llampallas v. Mini-Circuits Lab., In*c., 163 F.3d 1236 (11 th Cir. 1998). See www.nelp.org/pub42.pdf.

- It might actually be *legal* to discriminate against employees by contracting out a certain segment of workers. For instance, an employer might pay directly-hired, mostly white janitors higher wages than are paid to outsourced Latino employees who do the same work.

- An institution like Harvard will certainly be more vulnerable to publicity stemming from a discrimination lawsuit than a contractor would. In turn, it would be more pressured to abide by the law or to settle the case if it were the direct employer; either option would cost money.

- In the case of tort-like claims, the damage awards might very well reflect Harvard's stratospheric endowment if workers are directly-hired, and would be lower if the legal employer is a less wealthy contractor.

- Even if it is found that Harvard is a "joint employer," the informational firewall created by outsourcing protects it from certain claims. Especially in the case of punitive damages, the employee has to prove that the employer knew that it may be acting in violation of federal law. So, for example, if Harvard is found to be a joint employer, but did not "know" about the violation, it might not actually be held liable.

Outsourcing and the increased likelihood of legal violations

In passing on responsibility for enforcement of labor and employment laws to contractors, outsourcing does not merely allow Harvard to divest itself of basic obligations to its workers: it actually increases the likelihood that labor and employment laws will be violated.

First, almost any contractor will be less concerned about negative publicity than Harvard is. In particular, "low-ball" contractors like Sodexho-Marriott already have such negative reputations that the impact of another case would be negligible. (As we will discuss in a case study, Sodexho-Marriott has a litany of cases pending against it already, and is not terribly worried about its reputation.) Thus, contractors are less likely to comply with labor and employment laws.

Second, outsourcing to a contractor will typically pass on responsibility for enforcing workplace laws to a party with fewer resources to do so. All contractors are under pressure to cut corners in order to underbid their competition, and especially in markets where the profit margin is small, managers might willingly forego certain precautions and ignore violations in order to stay competitive. In this way, contracting out passes on the responsibility for compliance to a party which is *least likely* to do so.

It is important and disturbing to note that in these scenarios, Harvard literally profits from contractors' violations of workers' rights. When contractors do not spend the money necessary to guarantee basic workplace rights—as many Harvard contractors do

not—they pass the savings on to the university.[13] Indeed, between this source of savings and others already discussed—lower damage awards, lower reputation costs, thin profit margins—Harvard gains a great deal from "outsourcing liability" to contractors which care less and have less to fear from litigation. These are not the kinds of "savings" that Harvard advertises when it argues for outsourcing, and it is doubtful that they are the kinds of "savings" the community would support if they were made more transparent.

Shielding at Harvard

Harvard is currently circumventing a number of laws through outsourcing.

- In the construction sector, many of Harvard's contractors systematically misclassify employees as "independent contractors" and hence circumvent laws that do not cover independent contractors. These include laws guaranteeing workers' right to organize and requiring the employer to pay social security taxes.

- Harvard's custodial sector exhibits many OSHA violations, forcing janitors to work in physically dangerous environments without the proper equipment or instructions. Some contractors do not provide health and safety training, and some do not even have basic supplies. Several contractor-operated worksites investigated by Workers' Center representatives had serious OSHA violations. The violations that seem the most common fall into the following categories: Hazard Communication, Personal Protective Equipment, Medical Services and First Aid, and Hand Protection.

- Custodial contractors routinely violate the FLSA. For instance, several grievances have been filed recently by janitors who did not receive overtime pay.

Not only does Harvard engage in legal shielding, but it illuminates the ways in which outsourcing creates an informational firewall that prevents the community from investigating and correcting violations. Consider Harvard's code of conduct with contractors. Among other things, the code mandates that contractors provide subsidized health insurance to employees working at Harvard 16 hours a week or more. Moreover, it mandates that contractors must "not manipulate the schedule of [their] employees to circumvent the [benefits] requirements." These requirements represent a step in the right direction, but have proven almost impossible to enforce because, according to Harvard management, it is too difficult to get employment information from contractors. These requirements would be much easier to implement if workers were directly-hired, since Harvard's Department of Human Resources can report on the distribution of hours for classes of employees with very little effort, and can make the information public. As this example makes clear, direct employment eliminates layers of bureaucracy, facilitating disclosure and verification of information. In turn, it allows for community enforcement of standards.

The information firewall at Harvard also reveals the way in which economic employers are complicit in contractors' violations of laws and standards: Harvard deliberately blinds itself in order to avoid responsibility. At Harvard, as the Living Wage Campaign has requested information on wages, the university has periodically released some basic data on directly-hired employees. However, it has claimed that it knows little or nothing about wages of outsourced workers on campus—those who are most severely exploited. It was often true that Harvard did not have this information, but in many cases this was because the university never tried to obtain it. In fact, at Harvard it apparently took a sit-in to get the administration to request detailed wage and demographic information from contractors. For Harvard and other economic employers, ignorance truly is bliss, as it shields them from numerous responsibilities; even when it is possible for them to obtain information to enforce necessary standards, they have financial and political incentives not to do so.

A final example from Harvard shows the way in which direct employment has enabled the community to correct labor abuses, and has created proper incentives for the university to comply. During the 1990s, Harvard was employing "permatemps" by breaking its own rules governing the casual payroll and most likely breaking the law. Specifically, it was wrongly employing full-time and long-term workers as "casual employees" in order to keep their pay low, deny them benefits, and bar them from campus unions. In the face of opposition from unions and the community, and following some high-profile national cases which brought attention to these matters, Harvard negotiated an agreement with the Harvard Union of Clerical and Technical Workers which brought the university into compliance with its own policies and the law. This settlement would have been much more difficult to reach if the workers in question had been hired through contractors: Harvard would have been less likely to act because the cost of non-compliance would have been smaller, and claimants might not have been able to show the university's responsibility.

Of course, as information about contractors' abuses at Harvard is becoming prevalent, the same information firewall that has helped Harvard can now become a liability. With a lower ability to enforce standards, yet an inability to feign ignorance, Harvard might find itself in the uncomfortable situation of being named in claims as a joint employer. Especially in custodial and protective service sectors, where the workers are managed by supervisors from the contractor as well as Harvard, the "control test" over employment might find Harvard to be a joint employer. And as community members point out and publicize the illegal practices of Harvard contractors, the university's ability to claim ignorance (an important element in determining liability) becomes ever more tenuous.

CASE STUDY B: Sodexho-Marriott

Many of the problems with contractors discussed above are nicely summarized by one particularly notorious contractor – Sodexho-Marriott. Sodexho-Marriott manages the

cafeterias at Harvard Law School and the Kennedy School of Government. They have roughly 80 to 100 employees who work on campus. None of these employees is unionized, the lowest verified pay amongst them is $8.00/hour, and most employees make around $9.00/hour.

Nationally, Sodexho-Marriott is the largest food service contractor, with over 100,000 employees and an additional 55,000 workers that it manages but who are not on its payroll. Sodexho's employment record is poor, and it has engaged in extremely aggressive, and often illegal, anti-union practices. Currently, there are 17 Title VII lawsuits pending against the company nationally.

By contracting work to Sodexho-Marriott, Harvard management benefits from the firm's unconscionable and illegal practices:

- Conversations with Sodexho employees on Harvard campus indicate that race-specific treatment is quite prevalent.
- Since 1998, there have been 39 inspections of Sodexho-operated sites by the Occupational Safety and Health Administration (Department of Labor), resulting in 39 citations (12 of them being serious).
- Sodexho is also notorious for its anti-union practices. Its employee handbook used to contain illegal work rules prohibiting employees from talking to outsiders about their working conditions or talking to each other at the work site before or after their shifts. In February 2000, the National Labor Relations Board negotiated a landmark settlement with Sodexho-Marriott Services. The settlement required Sodexho to amend its employee handbook by dropping the illegal rules and to post federal notices at more than 5,000 US locations. The federal notices inform employees that they have the right to join unions and are permitted to talk about their work conditions among themselves and with others. However, Sodexho did not comply with this agreement, and in February 2001, the General Counsel's office compelled Sodexho-Marriott to once again post the federal notices at certain locations for a period of sixty days. In spite of this, when members of the Harvard Workers' Center spoke to employees of Sodexho at Harvard, they discovered that employees had been ordered to not speak about wages to others, a clear violation of the law, Sodexho's own agreement with NLRB, and of Harvard' code of conduct for contractors which demands that contractors not break employment or labor laws.

Who benefits from these transgressions? Besides Sodexho-Marriott, its clients, including Harvard, reap the benefits of a company whose "core competencies" are oppressing workers, busting unions, and circumventing the law. Nationally, more than 90,000 Sodexho-Marriott workers have no recognized union; thanks to ruthless and illegal opposition to union organizing, the company has a much lower rate of unionization than its two main U.S. competitors, Compass Group and ARAMARK. Every time Harvard renews its contract with Sodexho-Marriott, it cashes in on the reduced labor costs delivered by the firm's unconscionable tactics. It profits from the gratuitous, illegal exploitation of workers. In the clearest terms, Harvard's savings are

extracted from people whose fundamental economic *and legal* right to organize and bargain collectively is being violated.

Keeping such staunchly anti-union contractors around also provides a "discipline" to the tiered workforce – it tells unionized employees to take note of what might happen to them if they try to push too far.

However, all of this does not come completely for free. It is becoming common knowledge that Sodexho's practice of thwarting unionization is happening right here at Harvard University. This opens doors for possible litigation which might name Harvard as a co-defendant and a "joint employer" which has knowledge of such rampant violation of labor law. This is the slippery slope of outsourcing – whereas clients benefit from "not knowing," such strategic ignorance can bite the client back as well.

Issues of Quality, Core Competency, and Decentralization

As we said in the introduction, we do not claim that there are never situations in which contractors might have certain core-competencies or specialties (more legitimate than union-busting) that Harvard might seek. Moreover, we acknowledge the possibility that having alternatives to an internal provider might sometimes improve managerial efficiency and quality. However, as we stated earlier, we find these rationales are often disingenuous covers for exploitative motives when applied to labor-intensive, low-wage sectors such as food, building, and protective services. In this section, we will show some of the problems with these arguments, and present practical alternatives to outsourcing that Harvard can use when it truly does have concerns about quality and efficiency.

In some cases – especially custodial services – we find that quality typically *suffers* when work is contracted out. This is because outsourcing creates redundant and conflicting supervision structures which worsen service. Many outsourced janitors at Harvard have pointed out that they are supervised both by Harvard and the contractor which employs them, and that they frequently receive conflicting orders. The supervisor from the contractor will often want to focus only on contractually specified tasks, while the Harvard supervisor points out other relevant but non-contractually-specified tasks which might become apparent only over time. However, the janitor's primary responsibility is to his or her employer – i.e., the contractor. As a result, when Harvard contracts out, it finds that it might lose a significant amount of flexibility over what gets done and how.

The cost of switching contractors can also worsen service. In general, clients have little control over their contract: if they are dissatisfied, an important way of addressing unsatisfactory work is to switch contractors. However, doing so might entail not only hardships for workers but reduced quality of services. The reduced loyalty of workers in a contract environment manifests itself in higher turnover and lower incentives. These issues become apparent in looking at University of Pennsylvania's

aborted attempt to outsource building services functions to Trammel Crow. (See Appendix A for an article on this issue by Martin Van der Werf that appeared in the *Chronicle of Higher Education*.)

It is also important to point out that at a large institution like Harvard University, there are alternatives to outsourcing within the "in-house" option. For instance, if one is concerned that keeping work in-house will reduce competition and dull managerial incentives to innovate, there are "internal" solutions to this problem. In the custodial sector, FMO is Harvard's internal contractor, but each division has a choice to: 1) use FMO to manage custodial workers, 2) manage the custodial workers directly, or 3) use an outside contractor. At Harvard, we see all three of these options utilized. What we want to point out is that the ability to switch to direct management provides a powerful alternative to the use of the internal contractor, and can eliminate the need to use an outside contractor. If a school within Harvard decides that FMO management is performing unsatisfactorily, it can switch the management to its own administration. Besides contributing to flexibility and control, this option also acts as a good disciplining device to FMO management. Today, several schools use this option, including the Medical School and DEAS. The Medical School is a particularly interesting example, because initially managers wanted to switch from FMO to an outside contractor. However, due to community and worker resistance, they kept the employees in-house while switching to direct management. (See Appendix B: Case Study of Harvard Medical School)

As we stated earlier, there might be legitimate cases where outside expertise would significantly add value. If all other options (including decentralization) have been exhausted, there are further avenues for utilizing outside expertise without jeopardizing service workers. In food services, it is possible to use the franchise model, where the food and other materials are obtained from a reputed vendor (Starbucks, Pizzeria Uno, etc.). However, it might be the case that the outside capability in question is managerial expertise, and this might be difficult to reproduce in-house. In this case, a possible solution entails the contracting out managerial services while keeping workers in-house. This practice combines some attractive features. If Harvard really is seeking such outside capabilities and not merely a way to cut compensation, then this accomplishes its goal. Meanwhile, keeping workers in-house protects their workplace rights, full access to benefits, and their loyalty to the community.

This sort of arrangement is not purely hypothetical. In the public sector, including schools, much outsourcing of cafeteria or janitorial services entails keeping employees in-house. To use a contractor Harvard is familiar with, Sodexho-Marriott manages about 55,000 workers in such hybrid situations in addition to about 110,000 workers on its own payroll. Finally, Harvard Medical School had used such a hybrid system for its cafeteria services in the past, before bringing management back in-house. Many practitioners recommend this hybrid option for higher education institutions as

mitigating some of the most negative impacts of outsourcing.[14] Of course, switching to a for-profit vendor for management might still harm workers and negatively affect quality.[15] And it is important to structure the contract to ensure that the vendor does not have perverse incentives to cut employment—especially full time jobs with benefits. However, we believe that when a clear case can be made for outside contractors, this hybrid system, done correctly, is an acceptable alternative to the outright outsourcing of all workers.

In the final analysis, however, contracting out cannot be seen as a panacea for workplace problems—it does not improve the workplace in itself, and cannot substitute for instituting better accounting standards and better performance measurement of the managerial staff. The act of outsourcing sometimes is used to "prove" that an organization is taking a "hard look" at its operations. Unfortunately, contracting out can sometimes help an institution avoid real evaluation. As a result, it is not surprising to find that while outsourcing proceeds at a break-neck pace, bureaucratic overhang and inefficiency can increases in the university's operations. At Harvard, for instance, there has been a mushrooming of the bureaucracy at the same time that there has been a large increase in contracting out of "non-core" services. This has occurred while employment in service and clerical work has remained relatively constant. What exact "core" activities are these managerial employees doing? Freed from having to worry about "non-core" activities, has their productivity skyrocketed? It would be interesting indeed to investigate this proposition more closely. At any rate, having internal evaluations, developing better guidelines, and putting in place comprehensive training programs are all more effective ways to obtain "best practices" of the industry than farming out entire operations to outside contractors and hoping that "market discipline" will magically transform the quality of services. Many "high performance work systems" today rely on continuous evaluation and investment through training to achieve superior outcomes. Harvard can learn some lessons here. Instead of systematically outsourcing various functions over the past decade, perhaps Harvard should have provided workers with better training and enabling them to use more up-to-date equipment and methods.[16]

Conclusion and Recommendations

In this report, we have pointed to the myriad ways in which outsourcing attacks workers' rights. We have also highlighted various alternatives to outsourcing workers which might nevertheless allow flexibility and foster competition. In light of this information, we make several recommendations:

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[14] See K.L. Ender and K.A. Mooney, From Outsourcing to Alliances: Strategies for Sharing Leadership and Exploiting Resources at Metropolitan Universities. Metropolitan Universities: An International Forum, v5 n3 (1994) at 51-60.

[15] See Nelson, F. Howard, How Private Management Firms Seek to Make Money in Public Schools, The Journal of School Business Management, 9(1), Spring, 1997.

[16] The Harvard Guards provide a case where Harvard should have done this. The university has outsourced all but 20 guard positions, destroying morale and many lives without improving service in any measurable way. Meanwhile, directly-hired guards have gone without training since the mid-1990s.

- Harvard University must adopt an enforceable policy disallowing outsourcing in the labor services sector – including custodians, guards, and dining service workers.
- Workers who are currently working for contractors in building, food, or protective services should be brought back in-house.
- In situations where a compelling argument for outside managerial expertise can be made, a standing committee not appointed by the administration, with representation from faculty, students, workers, and administration, should be empowered to determine whether such managerial outsourcing is to be permitted. Moreover, in all such circumstances, non-managerial workers are to be kept in-house.

Over the past decade, contracting out has been a root cause of the devastating real wage declines of service workers at Harvard University. While establishing a "living wage" floor and benefits for all Harvard workers – direct or contracted out – is an important step to reversing this decline, serious limits on outsourcing will be necessary to ensure the long-term well-being of service workers on this campus.

Appendix A: Outsourcing at University of Pennsylvania

April 7, 2000
How the U. of Pennsylvania Learned that Outsourcing is no Panacea : A Lucrative and Controversial Deal Fails to Meet Expectations

By MARTIN VAN DER WERF
Philadelphia

Professors say the housekeeping at the University of Pennsylvania simply never got better: The trash cans still didn't get emptied and the roofs still leaked, despite the outside supervision of the so-called experts, the Trammell Crow Company.

Penn labor-union officials say they knew from the start that the university's outsourcing strategy would never work. The flaws in the approach, they say, are why Penn last month scaled back its closely watched contract with Trammell Crow for operation and maintenance of campus buildings.

Neither explanation is correct, say officials at Penn and at the company. The key factor was that Trammell Crow was asked to do the impossible: maintain buildings that are essentially unmaintainable because they are in such bad repair. Trammell Crow couldn't make any money, and the collaboration was destined to sour.

Penn's experience may offer lessons for other universities that are rushing into outsourcing as a solution to their myriad management problems. Penn officials say they have concluded that outsourcing won't solve a thing if the priorities of the institution are not well defined.

"The approach is usually, 'This is really screwed up. Let's outsource it. Let's make it someone else's problem.' Nine times out of 10, that will fail," says John A. Fry, Penn's executive vice president.

Penn and Trammell Crow, a diversified construction and real-estate company based in Dallas, jointly announced that the company would no longer supervise day-to-day operations and maintenance of on-campus buildings, terminating a contract that was to last 10 years. The company will remain in charge of supervising all construction projects on campus and managing the buying, selling, and leasing of all real estate on and off the campus. The renegotiated contract means the annual revenue for Trammell Crow from the Penn contract will be cut from about $18-million to about $11-million. And Trammell Crow will only pay about half of the $30-million it had agreed in 1997 to give to Penn in exchange for exclusive access to the campus.

The college outsourcing business is growing so quickly -- in volume and in scope -- that there has been very little time to step back and determine how effective much of it is, says Manuel R. Cunard, executive director of the National Association of College Auxiliary Services.

"Institutions need to be thoughtful, and understand what their mission is," says Mr. Cunard. Outsourcing "might save money in the short run, but in the long run, it potentially can have a negative impact on the educational priorities of the institution."

In recent years, colleges have been exploring every opportunity to outsource any activities that are not at the core of teaching and research. For decades, institutions have had outside companies come in and manage their bookstores and dining operations, but that has now expanded to such things as operating college sports arenas and parking lots, and managing mail delivery and groundskeeping.

There are no readily available estimates of how large the outsourcing business is now in higher education, although the biggest segments of the industry are tracked. Slightly more than a third of all college bookstores are now operated by outside contractors, generating $5.8-billion in sales of course materials. The building of on-campus housing by private companies was a $500-million business last year, and may double this year.

Mr. Cunard's organization has just opened a center to try to track overall figures for outsourcing.
With every passing week, there seems to be another announcement of a college being among the first to outsource an operation. Some recent examples include:
* The University of Miami has contracted with Strategic Distribution, Inc., based in Bensalem, Pa., to acquire all materials required for maintenance, repair, and operations at its main campus and medical center. The company will purchase such items as electrical parts, janitorial supplies, pipes, fittings, and wiring.
* The University of Maryland at College Park has signed a contract with a private company to operate its steam plant and convert it to also generate electricity and chilled water.
* Chatham College has retained a management company to run its library and hire most of the staff.

Penn's target -- operation and maintenance of campus buildings -- would seem a likely candidate for outsourcing, but it has proved vexing to institutions that have tried to do it, says Sharon M. Oster, a professor of management and entrepreneurship at Yale University's business school, who has studied the topic.

"It's really interwoven in a complex way with the university that makes it hard to hand off to someone," says Ms. Oster. Maintenance workers are in constant contact with students and faculty and staff members, who are continually evaluating the quality of their work.

"The effect it has on a university is much more immediate than if you are contracting out accounting," she says.

The Trammell Crow contract with the university, signed in October 1997, was the most extensive facilities-management contract then in existence between a major university and a commercial business.

Trammell Crow agreed to pay Penn up to $30-million, partly in an attempt to give it visibility in the industry. Mr. Fry characterized the agreement as Trammell Crow "paying for a stage." A month later, the company issued its first stock offering. As if to further emphasize the importance of the Penn contract, Trammell Crow set up the headquarters of its new Higher Education Services division in Philadelphia.

Now, just a little more than two years later, Trammell Crow has contracted with 17 institutions. Some of the contracts cover the full range of services that Trammell Crow was performing at Penn, although Gregory S. Latran, group president of the company's higher-education division, declined to say which campuses.

"The news of our agreement with Penn registered across higher education, but we had already started marketing in other" cities, said Mr. Latran. "And we were starting to grow."
Penn and Trammell Crow officials say there was nothing in the contract that allowed Trammell Crow to renegotiate it. They jointly agreed, they say, to tear it up.

"I can't be in a partnership where my partner is losing money," says Omar Blaik, vice president for facilities services at Penn. As part of the contract, Penn paid a set amount of money annually to Trammell Crow -- the university and the company will not say how much. Trammell Crow's incentive was to cut costs and find efficiencies so that the job could be done for less than it was being paid by Penn. The difference would be the company's profit.

After about 18 months, "it became obvious we were going nowhere," says Mr. Blaik. "I'm trying to correct 25 years of neglect. This went beyond what Penn or Trammell Crow could invest."
Mr. Blaik has estimated that Penn has a backlog of deferred maintenance that will cost $200-million to $300-million to correct. He is now conducting a study that may place the figure much higher.

Poring over a construction plan for the 260-acre campus, he says, "These are the colors I hate": the orange and yellow that indicate buildings constructed in the late 1960's and early 1970's. Structures from that era, mostly drab concrete highrises, make up almost one-third of the 10 million square feet of buildings on Penn's campus.

"They need to be bombed," Mr. Blaik says in frustration. "The concrete is spalling, the rebar is rusting, the water is penetrating. Buildings of the 60's and 70's were really experimental. They didn't know what sorts of facades and window treatments and ventilation systems were going to work. Now all those systems are failing."

When Trammell Crow was hired, "the assumption was that the amount we were spending was appropriate," says Mr. Blaik. "We discovered that was faulty. You can't maintain something that is falling apart."

Trammell Crow officials declined to talk about specific Penn buildings, but generally agreed that Mr. Blaik's explanations were accurate, and that the conditions they found were unexpected. The contract was not working, in part, says Mr. Latran, because Trammell Crow did not consider all contingencies.

"It has taken us 10 years to become a household name in corporate outsourcing," he says. "In higher education, it's going to take some time and patience and realistic expectation-setting."

While Mr. Blaik praises Trammell Crow for bringing a greater measure of professionalism to the university, some management changes the company put in place led to problems.

For example, in an attempt to create efficiency, Trammell Crow divided the campus into five zones, and dedicated maintenance crews and supervisors to each one. The concept was that they would know their zones thoroughly, and would be able to respond more quickly to emergencies.

Nonetheless, all cleaning supplies and maintenance equipment were kept in one warehouse near the north end of the campus, instead of in several locations.

"Our members were ending up finding their own nooks and crannies to store supplies," says Jim Smith, the president of Local 115 of the Teamsters union, which represents about 500 maintenance and repair workers at Penn.

In some cases, repairs took longer because, in an attempt to cut costs, Trammell Crow tried to reduce the stockpile of spare parts. Mr. Blaik says he has heard such reports, but they played no role in renegotiating the contract.

Howard Deck , president of Local 590 of the American Federation of State, County, and Municipal Employees, which represents 157 library workers at Penn, says union members are afraid that Penn is using outsourcing as an excuse to break the unions, an assertion the university denies. There are about 1,100 union workers at Penn.

"Definitely, they see this as a victory, an indication that outsourcing doesn't work," says Mr. Deck.

The union members remained Penn employees throughout the life of the contract. But there have been wholesale changes among the supervisors, who were Trammell Crow employees. There has been a 70 percent turnover in the personnel managing building operations and maintenance crews over two years.

"Our workers feel it is more efficient when it's Penn employees supervising Penn employees," says Mr. Smith. "They bring in these strangers who are not familiar with the community, and the employees end up training their supervisors."

Mr. Fry says, however, that Penn still hopes to expand its partnerships with outside companies that can provide expertise.

"Outsourcing is something we are committed to over the long term. I am not going to say, 'This is not working. I'll never outsource again,'" says Mr. Fry, the architect of Penn's business strategy. But he believes the institution still has some thinking to do about giving outside companies a place in university operations.

"There's a huge responsibility on the part of university management to gain the requisite skills to deal with these outside companies," says Mr. Fry, adding that more training would be provided. In the case of Trammell Crow, he laments, "We didn't set the table more -- how we would define how these relationships would work, and how we would manage them. It's probably something in hindsight that I should have thought a lot more about."

Penn is learning the same difficult lesson that other universities have: It is hard to be a pioneer.
George Mason University, for example, has become known for its businesslike approach to running the campus. It has outsourced such operations as the management of special events, the bookstore, mail delivery, parking lots, and dormitories.

But it has not always been a smooth transition, says Kenneth E. Bumgarner, associate vice president for university services. The institution has frequently switched vendors, including those for food services, the bookstore, and dormitory management. And it is also constantly reminding employees that they must adjust to the arrangements.

"It isn't just me or my office or my staff," says Mr. Bumgarner. "It really has to be a university commitment to make these kinds of contracts work. You need help from the materials-management department, the legal-affairs office, the president, the buildings and grounds crew. Everyone has to adopt this mindset."

At Penn, says Mr. Fry, a cultural change still has to take place.

"I am trying to mainstream these decisions so they won't always be such a big deal," he says. "They will just happen, people will accept them, and move on."

Trammell Crow's Academic Clients
Following is a list of institutions that have signed contracts with the Trammell Crow Company:
Abilene Christian University
Andover Newton Theological School
DePaul University
Emerson College
George Washington University
Harvard University
Pepperdine University
Regis College (Mass.)
Southern Methodist University
Stanford University

Texas Tech University
Trinity College (Conn.)
University of Michigan
University of North Texas
University of Pennsylvania
Vanderbilt University
Virginia Commonwealth University
SOURCE: TRAMMELL CROW COMPANY

http://chronicle.com
Section: Money & Management

Appendix B: Case Study of Harvard Medical School

Until late April, the 86 janitors working at Harvard Medical School were employed by Harvard University through the internal contractor, FMO. The workers' wages, benefits and other work-rules were determined through collective bargaining between Harvard Labor Relations and SEIU Local 254, which represents the workers. The decision to outsource janitors at the Medical School was made before the janitors' union, SEIU Local 254, was placed into trusteeship in February 2001. It is unknown whether the decision was made with the former union leadership's approval. When union representatives began meeting with Harvard and with workers in late April, the plan for the janitors was that American Cleaning Company was to take over in July of 2001. Trammell Crow had been selected as the contractor to handle all of the Medical School's facilities operations, and Trammell Crow had subsequently chosen American Cleaning to manage the custodial work. At the time the Workers' Center had its first contact with janitors at the Medical School (in March, 2001), the janitors had organized themselves under the stewardship of Jean Phane to oppose this move to outsource. To this end, they had organized a "Workers' Committee" to fight the outsourcing without any help of the prior union leadership. They also viewed the union contract with Harvard University covering all FMO custodians - which doesn't expire until November 15, 2002- as a commitment from Harvard to protect their wages, benefits, and their jobs until the contract expired.

On April 29, 2001, union members and staff met with Harvard administration to discuss all employment issues affecting janitors. Present from Harvard were David Jones, Polly Scanell, Mary Maloley, and Jim Labua. Present from the union were trustee John Ronches, staff members Jim Gilmore and Terri Harkin, and several members including Jean Phane of the Medical School. John Ronches stated in this meeting that the union did not care what deals may have been made between Harvard and the union in the past; the union now wanted Harvard to reverse the decision to outsource the Medical School. He was told by David Jones "that ship has sailed;" in other words, the outsourcing decision was final. John Ronches made the point to the Harvard administrative team that the union's position was that all work should be brought in house and that campus-wide seniority of workers should be recognized. David Jones suggested at this meeting that severance packages for the Medical School janitors be discussed, but the union rejected this offer and insisted that the jobs be restored to the janitors who were employed by FMO. David Jones shared that there would be a commitment to study outsourcing as well as a possibility that a moratorium on outsourcing could be in effect during the study.

Several days before the living wage sit-in ended, Jean Phane organized the Medical School janitors, with the support of students and faculty, in a march and rally at the Medical School. All 86 workers attended, and they made several speeches emphasizing that they have worked at the Medical School for many years, they had been loyal to Harvard, they did a good job, and now they felt that by outsourcing their jobs, Harvard was throwing them out like trash. The janitors tried to march to Dean Martin's office to deliver petitions demanding that they not be outsourced, and they were prevented by the police from entering the building.

The agreement reached several days later between Living Wage campaign members and the Harvard administration provided for a moratorium on sub-contracting until the Katz Committee issued its report in December, unless the union agreed to any sub-contracting. This provision covered the Medical School.

On May 18 a meeting was held between Harvard administrators, the committee of janitors at the Medical School fighting sub-contracting, and staff representatives from Local 254. Present from Harvard administration were Polly Scanell, Jim Lebua, Paul Levy, Eric Buehrens, and David Jones. Jean Phane began the meeting by outlining again why the workers were opposed to subcontracting: they did their jobs well, they were loyal to the university, and they felt that by contracting their jobs out, Harvard was throwing them out like trash. Members of the Harvard administration recognized that the sub-contracting now could not move forward without the union's consent, but they wanted to propose concepts around outsourcing. The concepts included the following: any new agreement with a contractor would be negotiated between the union, employees, and the contractor; any contractor who came in would have an agreement with Harvard to provide the same ancillary and educational benefits that the workers received as FMO employees; employees would receive a severance package comparable to other universities; there would be a 'bridging agreement' whereby any current employee could retain seniority to bid on FMO job openings in other parts of campus; Trammell Crow would be required to re-open their contract with Local 254 on July 1st and expedite raises (and it was expected that wages would go up); and, if Local 254 negotiations with Harvard in January yielded pay raises that were higher, then all the Medical School janitors would receive those raises, retroactive to May 1st, as the sit-in settlement dictated for FMO employees.

It was at this meeting that Harvard representatives offered a brief history of the decision to outsource. A committee had been formed to review the question of facilities maintenance and subcontracting at the Medical School. This committee consisted of Eric Buehrens, HMS associate facilities director; Jane Garfield, HMS Director of facilities and administration; Judy Spognardi, Administrator for BCMP; David Moffett, Director of Operations at the Business School; and Lorn Walters, a consultant. Local 254 has twice asked that the report issued by the committee as well as the amount of compensation paid to Mr. Walters be released, and their requests have been refused. These pieces of information would be most helpful for reviewing more completely the history of outsourcing at the Medical School. It is crucial to understand what concrete cost-saving or quality targets the Medical School was hoping to attain through outsourcing, and to identify if these were driven primarily by expected future labor cost savings or from more effective management.

At this meeting, Paul Levy explained that Harvard had a four-year contract with Tom Vaughtin, Associate Vice President for facilities and environmental services, to manage custodial services at the Medical School. In January/February of 2000, the Medical School administration began considering bidding out the contract, which expired on June 30, 2001. It is an internal contract, and the ultimate authority lies with Dean Martin, whom Mr. Levy referred to as "the king of this place." They issued a request for

proposals, received proposals, and then the aforementioned committee and consultant was formed. Mr. Levy's explanation was that they at the Medical School aren't necessarily good at managing custodial services. Their preference was to roll maintenance and custodial services into one. If the union rejected this proposal, that would be the end of the line. The Medical School would then have to decide whether the custodians would report to Tom Vaughtin or Jane Garfield. Mr. Levy made the point that the administration likes the workers, respects them, respects their work, and has no intent to kick them out.

Regarding the problems the Medical School had with FMO, Mr. Levy explained that it was like a teenager with a credit card. The Medical School had no control over what FMO charged them until after the fact. Robert Sarason of Local 254 countered that if a teenager abuses a credit card, you take the card away or give instructions regarding its use. Therefore the Medical School could negotiate with FMO for services to be performed or not. Mr. Levy responded that he didn't think that was possible at this time. He did not feel there was enough accountability with the top level management of FMO.

The union asked what control the Medical School administration had over Trammel Crow's selection of American Cleaners. The answer was none; Trammel Crow had selected American Cleaners and there was no way to do another study.

Medical School administrators agreed that they would consider the preference of the workers, if they voted down the sub-contracting package, as to whether they would prefer to work for FMO or directly for the Medical School. Jean Phane informed the administrators that he would take into consideration all that had been said, but that he had to meet with the other workers, who would make the final decision.

On May 22, 2001, more than 50 janitors held a meeting with union staff, where they voted unanimously to reject the outsourcing proposal. They also voted unanimously to stay with FMO rather than report to Medical School management.

On June 6, 2001, the janitors' committee of 8 workers led by Jean Phane, along with union staff members Robert Sarason, Terri Harkin, and Frank Soza met with the following Harvard representatives: Eric Buehrens, Jane Garfield, Mary DuPont of Human Resources, David Jones, director of Labor and Employee Relations, and Jim Labua, deputy director of Labor and Employee Relations. The union and committee informed the group that the employees had voted to reject the contractor and remain with FMO. The Medical School indicated that despite the workers' preference to stay with FMO, they would now work directly for the Medical School. Robert Sarason pointed out that it was not fair that the workers had been told that their preference between working for FMO or the Medical School would be considered, but now it was not. Though the Medical School had the legal right to make this decision, it did not act in a proper manner with respect to the janitors. Jean Phane stated that it would be hard for the workers to trust the Medical School since the same people who had wanted to contract their jobs out would now be in charge of them: Jane Garfield and Eric Buehrens. Ms. Garfield insisted that the Medical School has deep and profound respect for the working men and women

as well as a desire to move forward and build relations with the workers. Both sides agreed that time will tell whether such a relationship can be forged. Jean Phane restated that the workers are totally committed to not letting their jobs be outsourced and that they will be watching the Medical School.

The example of the Medical School is interesting for several reasons, and demands further scrutiny from HCECP. First of all, it is a "natural experiment." Services were going to be outsourced were it not for intense political pressure from various sources. As a result, work was kept in-house, although the top management was switched from Harvard's internal contractor, FMO, to the HMS Facilities and Administration. This allows us to ask some interesting questions. Is this arrangement where janitors were kept as Harvard employees going to hamper the ability of the Medical School to procure services efficiently, as Paul Levy had predicted? Or is the arrangement a sufficiently flexible alternative which can discipline – to quote Paul Levy again – "a teenager with a credit card," i.e., FMO? Since one of the arguments often used for outsourcing is that it provides "discipline" to the organization and increases the efficiency of resource use, the ability to decentralize management of services might provide enough competition to the internal contractor, and HMS might be an example of this. Three months after the decentralized arrangement was put into place, HCECP should ask Paul Levy, Jane Garfield, and others to comment on their perceived success of this arrangement, and to comment on if and how this has changed their minds about their initial desire to outsource custodial services. Finally, this should inform us generally about the possibility of changing management (internally or otherwise) while keeping workers in-house as a compromise solution that both protects the workers while allowing Harvard to seek "competitive discipline" or "core competency" to increase managerial efficiency.