Juvenile Correctional Industries: A Review of Federal and State Legislative Issues

Final Report

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Prepared by

Neal Miller
Institute for Law and Justice
Alexandria, Virginia

and

Robert Gemignani
National Office for Social Responsibility
Alexandria, Virginia

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Introduction

One of the newest "innovations" in juvenile corrections is the adoption of an industrial (productive work) model of inmate programming such as that espoused by such advocates as former Chief Justice Burger for the adult prison systems.[1] To date, however, adoption of juvenile industries programs employing inmates in productive work has remained modest in scope. One reason for the slow development of industrial work programs in juvenile institutions is ambiguity about legal restrictions on such programs. The absence of any clear understanding of the legal status of juvenile industries programs discourages state administrators from moving quickly to adopt these programs. Federal law ambiguity also mitigates against any significant federal leadership role in promoting state adoption of these programs.

Two types of legal issues predominate. First, federal law prohibits the sale of prison-made goods in interstate commerce except where the Department of Justice certifies that an industries program does not unfairly compete with private industry and labor. The question arises whether this law is applicable to industries operated in juvenile corrections facilities. A corollary question is whether other federal laws regulating the workplace apply to juvenile corrections. Second, state legislative authority may be needed for specific aspects of an industries program. The statutory authorities used for adult correctional industries can serve as models for laws establishing juvenile correctional industries.

Background: Adult Prison Industries Reform

Juvenile corrections grew, in part, out of adult correctional systems of the 19th and early 20th centuries.[2] For nearly all of this extended period, prison industries

[1] Warren Burger, "More Warehouses, or Factories With Fences?", 8 *New England Journal of Prison Law* 111 (1982).

[2] The other main source of the development of juvenile corrections was, of course, the juvenile court.

programs were an integral component of adult corrections.[3] Industries programs were of several kinds, including

- Contract system
- Piece-price system
- Lease system
- Public account system[4]

The first three of these prison industries systems involved partnerships between the state and private business that marketed the goods produced by inmate labor to the public. These systems differed primarily in who supervised the inmate labor: the state supervised inmates under the piece-price system; private business supervised inmates under the contract and lease systems. The public account system involved direct sales by state-run industries to the public.

State-Use Industries

In the late 19th and early 20th centuries, states began adopting the state-use system for prison industries. This system involved correctional operation of industries and limited sales of industries goods to the public sector–other state agencies.[5] Sale to the public is forbidden under the state-use system.

Federal restrictions on the sale of prison-made goods in interstate commerce accelerated the adoption of the state-use system. Foremost among these was the Hawes-Cooper Act of 1929 that permitted states to bar out-of-state prison-made goods from sale in the receiving state.[6] In 1940, the Sumners-Ashurst Act was enacted, making transportation of prison-made goods in interstate commerce a federal crime.[7] With the passage of this final piece of federal legislation, most of those few states that had not yet adopted the state-use system soon did so.

Free Venture Prison Industries

Prison industries programs under the state-use system lost contact with the private sector. Their primary "customer" became the larger correctional agency within which they operated. As a result, modernization of equipment and practices in the

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3 *Attorney General's Survey of Release Procedures, Prisons* (1940) 15-34. See also Neal Miller and Robert Greiser, "The Evolution of Prison Industries" in American Correctional Association, *A Study of Prison Industry: History, Components and Goals* (Washington DC: National Institute of Corrections, 1986).

4 Id.

5 Id.

6 Act of January 19, 1929, c.79 § 1,2, 45 Stat. 1084; codified at 49 U.S.C. § 11506.

7 Act of October 14, 1940, c. 872, 54 Stat. 1134.

private sector did not affect prison industries. Skills training of inmates in prison industries became further removed from business practices in the private sector.[8]

Beginning in the 1960s, both the U.S. Department of Labor and the Law Enforcement Assistance Administration sponsored programs to link federally subsidized employment training with correctional programs.[9] By the mid 1970s, attention was directed at prison industries.[10] Out of this grew the Free Venture experiment to modernize prison industries by encouraging them to adopt free world business practices. The main emphasis was upon self-supporting programs where proceeds from the sale of prison-made goods and services covered the total cost of production. This meant, among other effects, that prison industries' employment of excess workers (featherbedding) was too costly to continue.[11]

Privatization Approaches: 18 U.S.C. § 1761

The Free Venture approach built upon the existing state-run industries structures. In effect, it assumed continuation of the state-use system with modernization of the methods of prison industries' operations. The flaw in its approach was that there was no incentive for industries to adopt a Free Venture approach. It also had to overcome institutional disincentives for the correctional agency to accept modernization of prison industries since, initially at least, fewer inmates would be employed by industries.[12] This would increase the burden upon other correctional programs to keep inmates from being idle.

A parallel reform initiative that overcomes these problems is to encourage private businesses to operate industries programs. Legislative proposals to establish model projects for the privatization of prison industries were first introduced in Congress in 1973.[13] In 1979, Congress amended the federal bar on interstate transportation of prison-made goods to permit limited experimentation with privatization

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8 Marcia Freedman and Nick Pappas, *The Training and Employment of Offenders* (Report to the President's Commission on Law Enforcement and Administration of Justice, 1967), 10-11.

9 These programs began early in the Johnson administration under the Manpower Development and Training Act of 1962 and were initially limited to institutional training programs. See U.S. Department of Labor, *Training Needs in Correctional Institutions* (Manpower Research Bulletin No. 8, April 1966).

10 See Herbert S. Miller, Virginia McArthur & M. Robert Montilla, *The Role of Prison Industries Now and in the Future: A Planning Study* (Report to the Department of Labor, 1975); J. David Coldren and Lawrence Meyers, *Report: Stateville Private Industry Project* (Correctional Manpower Services Project funded under MDTA, 1974).

11 See Billy Wayson, Gail Funke and Neal Miller, *Assets and Liabilities of Correctional Industries* (Lexington, Massachusetts: Lexington Press, 1981).

12 See Grant Grissom, *Impact of Free Venture Prison Industries Upon Correctional Institutions* (Washington DC: Government Printing Office, 1981).

13 Neal Miller and Walter Jensen, "Reform of Federal Prison Industries" 1 *Justice System Journal* 1 (1974), describe the bill introduced by Senator Percy of Illinois to encourage private business involvement with the federal prison system.

of prison industries' operations or marketing.[14] The new statute, 18 U.S.C. § 1761(c), conditioned the relaxation of the federal bar upon

- Payment of prevailing wages to inmate workers
- Fringe benefits comparable to those paid other workers
- Consultation with organized labor

In the succeeding 15 years, Congress has expanded the number of authorized programs eligible for certification from the Department of Justice (DOJ) under subsection (c) from 15 to 50 projects. The number of projects actually certified has grown to 34, including two in jails and one in a state juvenile corrections agency.

Juvenile Correctional Industries

Correctional industries programs employing juveniles existed before the establishment of separate correctional facilities for juveniles.[15] Industries programs continued with the creation of separate administrative organizations for juvenile corrections. Insofar as juvenile corrections was a separate entity, its industries programs were also organized under the state-use system.[16] However, as the mission of juvenile corrections changed to a focus on treatment, so too juvenile correctional industries became primarily a training program.

Two different trends have affected juvenile correctional industries' role. First, the mission of juvenile corrections itself has changed in many jurisdictions from one of treatment to the quasi-criminal goals of punishment and protecting society.[17] Judicial dispositions in juvenile delinquency cases are increasingly based in part on objectives such as punishment or protecting the public. The "best interests of the child" standard for sentencing juveniles to a treatment regime is no longer the sole or even primary determinant. As sentencing rationales become more punitive, correctional programming within juvenile facilities may also give less weight to emphasis on treatment of the offender. That is, the change to more punitive juvenile justice objectives may move juvenile corrections to emulate adult correctional programming.

A number of societal trends converge to make adoption of juvenile correctional industries an important option for juvenile correctional administrators. First is the

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[14] Pub.L. 96-157, § 827(a); 93 Stat. 1215 (1979).

[15] Note that child labor legislation was not adopted until the 1920s.

[16] Among the reports of juvenile correctional industries in this period are National Commission on Law Observance and Enforcement, *Report on the Child Offender in the Federal System of Justice* (Report No. 6, 1931), 102-103; Karl Holton, "California Youth Authority: Eight Years of Action," 41 *Journal of Criminal Law and Criminology* 1, 3 (1950).

[17] See e.g., *Revised Code of Washington* § 13.40.010 (Juvenile Justice Act intent).

renewed interest in work and work experience for the poor, especially as a means of escaping the cycle of welfare.[18] Second is the budget constraints that limit the ability of juvenile corrections to fund new programs or provide continued services to expanded numbers of incarcerated youth. Third is the availability of a "success" model of prison industries with the DOJ certification program for adult prison industries.[19]

These several trends merged with the California Youth Authority's (CYA) development of juvenile correctional industries in the mid-1980s. Development of an industries program by the CYA was facilitated by the fact that the CYA legislation has a strong punitive element, and its jurisdictional authority over youth until age 25 provides an inmate population that can both staff and benefit from industries work.

NOSR Feasibility Study

The congruence of these trends also led the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to ask the National Office for Social Responsibility (NOSR) to undertake a feasibility study of the potential for correctional industries within juvenile corrections. The NOSR study was successful in at least one state in stimulating adoption of a prison industries program and found significant interest in several other states. In its final report, NOSR recommended that OJJDP continue with this initiative.[20]

Unanswered Legal Questions

The NOSR study was primarily a feasibility study examining political concerns and implementation issues such as the number of youth potentially available. It did not examine legal questions such as the applicability of 18 U.S.C. § 1761 or the need for authorizing laws. These legal questions are not insignificant concerns and are the focus of this study.

18 U.S.C. § 1761

The applicability of 18 U.S.C. § 1761 determines the availability of federal certification. Among the reasons for desiring application of federal certification to juvenile correctional industries is the desire for a minimum standard for program

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[18] Welfare reform proposals are virtually unanimous in requiring welfare recipients to obtain work. To achieve this, skills training must be provided to the welfare recipients.

[19] The trend since the 1970s to make government more business-like may have contributed to the zeitgeist favoring private sector involvement with juvenile prison industries, but this was also part of the stimulus for adoption of 18 U.S.C. § 1761(c).

[20] National Office for Social Responsibility, *Private Sector Juvenile Correction Industries: Final Report* (June 30, 1993).

features, such as payment of comparable wages or deductions for victim compensation fund payments. The conditions for certification, established by the 1979 amendment, represent a carefully drawn plan for balancing the need to eliminate unfair competition versus encouraging growth in inmate employment in industries.[21] Significant deviations from the certification conditions may result in an imbalance among the desired goals. In the long term, such an imbalance may result in program abolition from renewed business complaints of unfair competition or inadequate growth of inmate employment.

Conversely, non-application (or avoidance) of the federal certification rules may be desired insofar as the statutory requirements (e.g., prevailing wage) limit flexibility to develop industries projects that are responsive to local needs. The need for flexibility with respect to wage level may be especially important where the employee universe is composed of youth with little or no experience with work.[22]

Fair Labor Standards Act

A second series of questions relates to the applicability of other federal legislation directed at adult correctional inmates. By and large, adult prison inmates are not considered to be employees of prison industries except as state law explicitly or implicitly so provides.[23] Hence, laws predicated upon regulating the employer-employee relationship do not generally apply to adult prisoners. Regardless of whether juvenile inmates are distinct from adult inmates or their equivalent, the applicability of federal laws regulating the workplace to juvenile correctional industries must be reviewed.

State Law Authorizations

The primary question relating to state law authorizations is how state laws should be drawn to maximize the viability of juvenile industries programs. It may well be that laws that limit the applicability of federal regulation of correctional industries also have a positive or negative effect on the more general viability of these programs. Hence, from a policy perspective, the question of federal regulation is not easily

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[21] The fear of the drafters of the Percy Amendment establishing 18 U.S.C. § 1761(c) was that without federal guidelines states might adopt policies that would limit inmate interest in working for private industries. This included the possibility of excessive deductions for room and board charges or victims compensation. For this reason, the Amendment also included a provision requiring voluntary inmate participation. See Neal Miller and Walter Jensen, "Reform of Federal Prison Industries," 1 *Justice System Journal* 1 (1974).

[22] Compare the prevailing wage provision of 18 U.S.C. § 1761(c) with the wage requirement set by the Prison Industries Reorganization Administration that authorized a reduction in the prevailing wage based upon productivity differentials. "Compact of Fair Competition for the Prison Industries of the United States," approved by Executive Order, April 19, 1934.

[23] Cf. Harker v. State Use Industries, 990 F.2d 131 (4th Cir. 1993); Draper v. Rhay, 315 F.2d 193 (9th Cir.), *cert denied*, 375 U.S. 915 (1963).

separated from issues of state regulation. As these programs grow in number and scope, clashes with private businesses may be expected. Increased regulation of juvenile correctional industries can also be anticipated. New regulatory laws may be enacted, especially at the state level. Existing laws that are directed at adult correctional industries may be interpreted to apply to juvenile correctional industries.

To date, however, no analysis has been made of existing regulation of juvenile correctional industries. The need for such an analysis is both theoretically important and of practical significance in the light of anecdotal reports that indicate these programs may well violate existing legal regulations, especially in their formative stages where there are limited resources to pay "employee" wages. Such an analysis would be important both to OJJDP and to juvenile correctional agencies that are now unprepared to respond to new legislative proposals which may be needed to institutionalize juvenile correctional industries, but may also act to limit their scope or effectiveness.

ILJ and NOSR Study

To resolve these questions, OJJDP contracted with the Institute for Law and Justice and National Office for Social Responsibility to undertake both a legal analysis and a quick review of the degree to which juvenile correctional administrators are concerned about the issues raised by the legal review.

Methodology

The project's major tasks consisted of

- Conducting a legal analysis of federal law
- Reviewing state laws
- Determining state administrators' views of legal issues

Legal Analysis of Federal Law

The legal analysis of federal law applicability focused on two laws. These are the federal law prohibiting interstate transportation of prison-made goods, 18 U.S.C. § 1761, and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*.

The focus of the review was first to determine the applicability of the federal transportation bar to juvenile corrections. In the event that this law was found to be not applicable to juvenile correctional industries programs, the review would extend to the applicability of federal laws regulating workplace conditions, especially the Fair Labor Standards Act provisions establishing a minimum wage and regulating child labor.

The methodology employed in the legal review was largely traditional legal research. This entailed reviewing (1) the language of the relevant legislation, (2) legislative history to determine congressional intent, and (3) relevant case decisions.

The legislative history examination required extensive study to determine the historical context within which the relevant federal legislation was enacted. This review included examination of the professional literature describing the status of juvenile correctional industries and state legislation authorizing juvenile correctional industries in the relevant period.

Review of State Laws

The state law assessment included reviewing state laws that are used to

- Establish quasi-criminal goals for juvenile corrections
- Authorize juvenile correctional industries
- Authorize adult correctional industries

State legislative codes were reviewed to identify laws establishing quasi-criminal goals for juvenile corrections and establishing juvenile correctional industries. Determining what constitutes model legislation for juvenile correctional industries was not a straightforward task. The adult correctional industries provide a standard by which to evaluate laws authorizing juvenile correctional industries. For this purpose, we used the typology developed for the National Institute of Corrections' *Guidelines for Prison Industries*.[24]

State Administrators' Views of Legal Issues

To ensure that the legal analysis was grounded in reality, the views of juvenile correctional administrators were sought. This was done through a telephone survey of the administrators in the 21 states most likely to be interested in the concept of juvenile correctional industries. The survey asked about the administrators' perceptions of legal issues relating to juvenile correctional industries, as well as any interest in the program itself.

The responses to this survey were supplemented with findings from a focus group of juvenile corrections administrators from three states that have implemented, to varying degrees, industries programs.[25]

[24] Robert Greiser, Neal Miller and Gail Funke, *Guidelines for Prison Industries* (Washington DC: National Institute of Corrections, 1984).

[25] An administrator from a fourth state with juvenile correctional industries was not able to attend the focus group meeting, but he provided his views orally by phone.

Findings

This report brings together the study findings from each task. These include the review of federal legislation, the review of state laws, and juvenile corrections administrators' views on legislative issues. An extended report on the application of federal laws to juvenile corrections has been provided separately. Another report details the study survey of juvenile correctional administrators in 21 states.

Review of Federal Legislation

The legal analysis of federal legislation examined both the federal bar against interstate transportation of prison-made goods and the applicability of the Fair Labor Standards Act to juvenile inmates working in a juvenile correctional facility.

Applicability of 18 U.S.C. § 1761

The legal review found that Congress made no explicit reference to juvenile correctional industries in debating the scope of coverage of federal law criminalizing the transportation of prison-made goods in interstate commerce (18 U.S.C. § 1761). Neither the plain language of the statute, nor its legislative history, unambiguously show whether juvenile correctional industries is within its reach.

Congress did not even think about including juvenile corrections under 18 U.S.C. § 1761. This absence of intent was due to (1) the relatively novel status of juvenile corrections as a distinct administrative entity, (2) the low level of industrial activity in juvenile corrections at the time, and (3) the absence of competition between the limited juvenile correctional industries and the private sector.

Nonetheless, Congress would have included juvenile correctional industries under the statutory rubric of "prisoner-made" goods if it had **explicitly** considered the issue. This inclusion is consistent with the purpose of 18 U.S.C. § 1761 to protect private businesses and labor from unfair competition where there is forced inmate labor and the laborers are not fairly compensated. At the time 18 U.S.C. § 1761 was adopted, juvenile correctional facilities operated industrial programs similar to prison industries, including the use of involuntary and unpaid labor.

The categorization of juvenile corrections as a civil law program has implications for ILJ's conclusion. The 13th Amendment authorizes involuntary servitude with prison inmates only where there has been a criminal conviction. Inmates who are institutionalized under civil law process are protected by the 13th Amendment. Court rulings have recognized the interrelatedness between the 13th Amendment and the scope of 18 U.S.C. § 1761. Application of the latter is justified only upon application of the former. Hence, 18 U.S.C. § 1761 applies to juvenile correctional industries in states that continue to emphasize quasi-criminal objectives.

Fair Labor Standards Act

The legal review found that juvenile industries programs that operate under laws stressing rehabilitative purposes are not covered by 18 U.S.C. § 1761. These programs may be covered by other workplace laws such as those establishing a minimum wage requirement. Examples of such programs include programs operated by private sector employers. However, programs that are intended to primarily provide training rather than serve production objectives are not covered by these other laws.

The question of whether juvenile corrections facilities today are penal institutions for purposes of 18 U.S.C. § 1761 or are covered by the Fair Labor Standards Act is a matter of state law. However, federal interpretation of the state laws' purposes will determine the federal law's applicability.

Review of State Laws

The review of state laws focused on three different issues. The first legal issue follows from the analysis of 18 U.S.C. § 1761 summarized above. This analysis determined that the federal bar to interstate transportation of prison-made goods applies to juvenile corrections programs that are established under a quasi-criminal juvenile justice law. The second analysis focused on laws establishing juvenile correctional industries. The third analysis reviewed adult prison industries legislation for applicability to the juvenile corrections setting.

Characterization of State Juvenile Justice Laws as Quasi-Criminal

The review of state juvenile justice legislation found that the laws of 17 states adopt quasi-criminal goals. This includes five states whose laws authorize punishment of juveniles as a factor in judicial dispositional sentencing;[26] four states whose laws use the

[26] These states are California, Florida, Hawaii, Maine, and Washington.

language "hold juveniles accountable,"[27] and eight states whose laws set "protection of public safety" as a goal of the juvenile justice system.[28]

In all of these states, the quasi-criminal nature of the juvenile justice laws provides the basis for the application of 18 U.S.C. § 1761 to a juvenile correctional industries program. In the remaining states, court decisions interpreting the juvenile justice laws of the state may provide for quasi-criminal sentencing to also require the application of the federal bar–notwithstanding facially neutral or even opposite language of the statutes. Again, however, state juvenile laws that do not have quasi-criminal elements result in nonapplication of 18 U.S.C. § 1761.

Enabling Legislation

Two states have enacted legislation to authorize juvenile correctional industries. These are California and Virginia. The California law authorizes the establishment of industries operations and for the sale of goods or services produced by the industries to state agencies and the public. Wages may be paid to the incarcerated youth and a revolving fund established to account for moneys received by the industries.[29] Separate legislation authorizes the establishment of privately operated industries on the grounds of facilities operated by the CYA.[30]

Virginia law authorizes the establishment of a juvenile correctional industries program subject to the approval of a committee appointed by the governor. The industries program may be operated by a public or private entity. Products and services of the industries may be sold to local government, non-profit agencies, and the public.

Model Legislation

The review of adult prison industries legislation identified several common themes among the 50 states' laws. The main categories of industries legislation are

- Industries establishment
- Industries marketing
- Industries fiscal operation
- Inmate compensation
- Private industries authority

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[27] These states are Alabama, Idaho, Minnesota, and Utah.

[28] These states are Arkansas, Illinois, Indiana, Kansas, Montana, New York, North Carolina, and Oklahoma.

[29] *California Welfare and Institutions Code* § 1124.

[30] *California Government Code* § 14672.16.

Within each category, several subcategories may exist. The types of laws within each category may be described as follows.

Industries Establishment

Industries establishment laws include legislation authorizing industrial programs providing goods and services, establishing a division of correctional industries within the department of corrections,[31] setting the goals of the industries program, and establishing a policy[32] or advisory board[33] with specified powers independent of the department of corrections. The industries' goals set by most states' laws include economic self-sufficiency, reduction of inmate idleness, and training of inmates.[34] A recent legislative goal innovation is to require that industries operate in a business-like manner.[35] In several states, the industries organization established by state law is a state chartered corporation.[36]

Other types of establishment laws also exist. In a few states, the establishment laws provide for civilian work force compensation outside normal civil service, for example, bonuses based upon the amount of goods or services sold to private sector buyers.[37] Another establishment law authorizes prison industries to purchase raw materials outside of the state purchasing procedures.[38] In one state, laws structure the employment relationship between inmates and industries, including detailing how inmates apply for work or are dismissed from work.[39]

Industries Marketing

Laws establishing an industries marketing structure include those requiring state agencies to purchase industries' products where the products are readily available and competitive in price (e.g., state-use law).[40] These laws exempt purchases from prison industries from application of laws otherwise requiring competitive bid.[41] In a few states, state law establishes a competitive preference for industries' products in lieu of

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[31] E.g., *Colorado Revised Statutes Annotated* § 17-24-104(1); *Connecticut General Statutes Annotated* § 18-88(d).

[32] E.g., *California Penal Code* § 2800 *et seq*.; *New Mexico Statutes Annotated* § 33-8-6.

[33] E.g., *Alaska Statutes* §§ .33.32.070, .080.

[34] E.g., *Nevada Revised Statutes* § 209.461.

[35] E.g., *Delaware Statutes Annotated Title* 11 § 6532(a); *Louisiana Revised Statutes* § 15:832(A).

[36] E.g., *Florida Revised Statutes Annotated* § 946.504; *Georgia Official Code* § 42-10-1 *et seq*.; *Mississippi Statutes* § 47-5-535.

[37] E.g., *New Mexico Statutes Annotated* § 33-8-12.2; *Annotated Code of Maryland* Article 27 § 681J.

[38] E.g., *Hawaii Statutes* § 354D-8(a).

[39] *Ohio Revised Code Annotated* § 5145.03(B). See also *Revised Code of Washington Annotated* § 72.09.120.

[40] E.g., *Florida Revised Statutes* § 946.515(2); *Arizona Revised Statutes* § 41-2636.

[41] E.g., *Alaska Statutes* 36.30.100(b)(2).

mandatory purchase.[42] In over half the states, adult prison industries are authorized to sell to open market buyers.[43] In the remaining states, separate market authorizations exist to sell to non-profits,[44] government contractors,[45] and out-of-state agency purchasers.[46]

Other laws reinforce the state-use legislation. These include requiring industries to issue a catalogue of goods and services it produces;[47] goods and services not listed in the catalogue may be purchased in the private sector by state agencies. The ancillary laws may also include a mechanism for resolving agency disputes over fair market price.[48]

Industries Fiscal Operations

The primary fiscal operation legislation is the establishment of a revolving fund in the state treasury for (1) the receipt of payments of goods and services produced by industries and (2) the payment of its bills.[49] In most states, revolving funds are not subject to yearly legislative appropriation requirements and have no limit on the amount of moneys that may be retained in the fund.[50] In a few states, industries may not expend moneys from the fund without a legislative appropriation[51] or must place funds in excess of a set amount in the state general fund.[52] In a few states, the revolving fund limits the purposes for which industries moneys may be expended to direct operational costs such as for raw materials and the payment of staff salaries.[53]

One other type of fiscal operation law is authorization for industries to borrow funds from private sector sources.[54] Laws that establish state corporations to operate the industries program may include borrowing authority among the powers granted to the corporation.[55]

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[42] E.g., *Nevada Revised Statutes* § 333.410.

[43] E.g., *Indiana Statutes Annotated* § 11-10-6-5.

[44] E.g., *Michigan Statutes Annotated* § 28.1540(6)(1). See also *Alabama Code* § 14-7-16.1 (authority to sell prison made goods to local volunteer fire departments).

[45] E.g., *Annotated Code of Maryland* Article 27 § 681D(5).

[46] E.g., *Missouri Statutes Annotated* § 217.570.

[47] E.g., *Illinois Compiled Laws*, 730 ILCS 5/3-12-9(a); *Iowa Code Annotated* § 904.807.

[48] E.g., *Illinois Compiled Laws* 730 ILCS 5/3-12-9(c).

[49] E.g., *Nevada Revised Statutes* § 209.189.

[50] E.g., *Iowa Code Annotated* § 904.813(4).

[51] E.g., *Annotated Code of Maryland* Article 27 § 681K.

[52] E.g., *West Virginia Code* § 28-5B-14.

[53] E.g., *New Mexico Statutes Annotated* § 33-8-7; See also *Oregon Revised Statutes* § 421.065.

[54] E.g., *California Penal Code* § 2810. See also *Minnesota Statutes Annotated* § 241.27(4) (limiting borrowing from state treasury to 50 percent of industries' net worth); *Indiana Statutes Annotated* § 11-10-6-9 (authorizing state agencies to advance funds to industries to purchase raw materials needed for order completion).

[55] E.g., *Georgia Official Code* § 42-10-4(8).

Inmate Compensation

Paying inmates for the work that they do is the primary type of inmate compensation law. Typically these laws either grant the commissioner discretion to pay inmates[56] or set a maximum payment that can be paid.[57] Parallel compensation laws provide for the award of good time credits that are applied to sentence reduction.[58]

Other compensation laws detail the types of fringe benefits that inmates may receive, including inclusion in the state workers compensation scheme.[59] Yet other laws authorize the taking of deductions from inmate wages for such purposes as room and board charges or victim compensation payments.[60]

Private Industries Authorization

Laws authorizing private companies to operate industries using inmate workers are relatively uniform in detail. These laws typically authorize the department of corrections to lease land within correctional facilities to private employers.[61] The laws permit sale of goods and services produced by these industries to the private sector.[62] They may also specify how wages and fringe benefits will be paid and which deductions from wages are authorized, including deductions for room and board.[63] Other laws may provide tax incentives to companies employing inmate labor.[64]

Juvenile Corrections Administrators' Views

Practitioner views on the significance of legal concerns vary from not important (e.g., state legislative authorities) to very important (e.g., federal restrictions). This is true for both survey respondents and participants in the focus group session.

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[56] E.g., *Montana Code Annotated* § 53-1-301(m). See also *Nebraska Revised Statutes Annotated* § 83-183(2) (authorizes shift differentials); *Wisconsin Statutes Annotated* § 303.01(4) (authorizes wages based on inmate productivity or piecework).

[57] E.g., *Arizona Revised Statutes* § 31-254 (50 cent maximum). See also *California Penal Code* § 2811 (limiting inmate wages to no more than one-half the state minimum wage). Compare *Iowa Code Annotated* § 904.701, authorizing inmate wages up to "the amount paid to free labor for like or equivalent sevice."

[58] E.g., *New Mexico Statutes Annotated* § 33-8-14; *Connecticut General Statutes Annotated* § 18-98a.

[59] E.g., *Revised Code of Washington Annotated* § 70.60.102; *Nevada Revised Code* § 616.252.

[60] E.g., *Revised Code of Washington Annotated* § 72.09.111; *Ohio Revised Code Annotated* § 5145.16(b)(6); *Nevada Revised Statutes* § 209.4841.

[61] E.g., *Missouri Statutes Annotated* § 217.567(3); *Arizona Revised Statutes* § 41-1671.

[62] E.g., *North Carolina General Statutes* §§ 148-70(3), 66-58(b)(17).

[63] E.g., *Iowa Code Annotated* § § 904.702, 904.801(2)(c).

[64] E.g., *Arizona Revised Statutes* § 43-1162.

Survey Summary

Of the 21 states surveyed, nine states have juvenile correctional agencies that operate industries programs or other vocational programs producing goods or services for sale. These states are California, Connecticut, Kansas, New Mexico, Ohio, South Carolina, Texas, Virginia, and Washington. The work programs in these nine states employed about 550 youth in 23 programs. Ten of the work programs were in three states (California, Kansas, and Virginia) where production is the primary industries' objective. The work programs in the remaining six states produced goods and services only as a by-product of training. Eight of the nine states with work programs sell to the private sector; Texas is the sole exception. Only one state (California) has private businesses operating juvenile correctional industries.

States With Inmate Work Programs

As noted, two of the states operating industries programs have statutory authorization for their programs. Of the remaining seven states with industries, the administrators in only two states say that they need such authorization. In one other state, the administrators believe that the relatively strict state laws regulating adult prison industries probably apply to juvenile corrections. In another state, the omission of any reference to the juvenile corrections agency in state law authorizing sale of prison-made goods is taken to mean such sale by juvenile corrections is barred. In contrast, in the remaining five states, the view was expressed that

- Authority for adult prison industries applies to juvenile corrections
- Agency does not need legislative authorization
- Federal certification guidelines are sole regulation in absence of any state law

States Without Inmate Work Programs

Of the 12 states without work programs, only three had previously considered their adoption. One other state presently operates a sheltered workshop for retarded youth, which is expected to stimulate broader interest in an industries program. In another state, prior class action litigation involving conditions of confinement is interpreted to foreclose establishment of youth work programs. Overall, eight of the twelve states may be interested in the near future in juvenile industries programs. Five of the eight state administrators interested in juvenile correctional industries (but without any at present) believe that they need specific legislative authority. Two other state administrators reporting potential interest in juvenile correctional industries said that the existing laws covering adult prison industries would also cover their programs. One

state administrator did not express any opinion whether new legislation is needed, nor if the existing prison industries laws applied to juvenile corrections.

Several of these state administrators felt that existing laws were a barrier to establishing juvenile correctional industries. By and large, however, these administrators were referencing child labor laws. One state administrator cited the restrictions on the adult prison industries as either being directly applicable or signifying a political climate that might restrict administrative efforts to unilaterally establish such a program.

Focus Group Discussion Points

The focus group discussion paralleled that of the survey questions. However, not all issues that were discussed reached any level of consensus about their importance. Only those that did are discussed here.

Federal Legislation

The state juvenile corrections administrators attending the meeting first focused on the federal certification program established by 18 U.S.C. § 1761(c). The California Youth Authority has its industries programs accredited as a means of ensuring that there is a standard of behavior set for local administrators. Having a federally set minimum standard may help the program limit inmate litigation or other types of embarrassment. The Virginia administrator indicated that his state is interested in certification, since this may help them gain access to private capital. None of the administrators was aware that certification may also permit their industries to sell goods and services to federal government purchasers.

Revolving Funds

The key state legislative issue is the issue of revolving funds. California has no revolving fund except for a reimbursement account that holds room and board charges. This fund has no carry-over provision. Ohio industries uses the benefit funds set up at each institution. A subaccount in the fund is for industries. This is a perpetual fund. Washington industries uses a resident welfare fund. The fund also receives moneys from inmate telephone calls.

Job Placement

Another issue discussed was the need for a job placement staff. California has a person assigned half-time by the state Employment Service. In addition, the CYA parole coordinator works with the Private Industry Councils (PICs) set up under the Job Training Partnership Act. Ohio has one staff person who works with the PICs.

Federal Role

Discussion about the role of the federal government included assistance with public relations and the image of industries vis-à-vis private sector competitors. Several of the administrators said that this meeting should be a model for future meetings on a larger scale that bring together juvenile corrections administrators from all 50 states. The possibility was noted of linking the Office of Juvenile Justice and Delinquency Prevention with the Employment and Training Administration of the Department of Labor for sponsorship of a joint conference.

Discussion

The specific legislative issues discussed here are those relating to federal regulation of prison industries and state legislative authorizations. The implications of the study findings for juvenile correctional administrators are dependent upon the specifics of each state's laws, especially in the goals set for juvenile correctional administrators. In some states, there is no need for action. In others, administrators may wish new legislative authorities, seek private business partners, or simply expand the scope of the existing industries program.

Implications of 18 U.S.C. § 1761 Application

Regardless of the extent of 18 U.S.C. § 1761's application to juvenile correctional industries, administrators must be aware of what activities the industries programs may engage in without violating the federal law. Where the federal bar applies, the question arises about what subsection (c) requires of states that wish to sell prison industries' goods in interstate commerce. Of course, where the federal bar is not applicable, other federal laws may be applicable; these are discussed below.

Authorized Activities Under 18 U.S.C. § 1761

ILJ's experience with adult prison industries programs shows that many administrators still are not fully aware of what they can and cannot do. For example, prison industries **under federal law** can [65]

- Sell goods within an intrastate market to any buyer authorized under state law.
- Sell goods across state lines to other governmental bodies, including local governments or school boards.[66]

[65] State law restrictions on juvenile correctional industries are not addressed here. These restrictions may be specifically directed at juvenile correctional industries or may derive from more general legislation. See, e.g., *Louisiana Revised Statutes* § 39:367 (excludes prison industries from law regulating state agency competition with private sector).

[66] 18 U.S.C. § 1761(b).

- Sell to federal governmental buyers where the products are sold from inventory, not specially produced for the federal government buyer.[67]
- Sell **services** to any buyer regardless of interstate or intrastate location (services are not covered by the federal prohibition against interstate transportation of goods, wares, or merchandise).

Barred Activities

Correctional industries administrators, under federal law, cannot

- Sell goods in interstate commerce, i.e., to nongovernmental buyers in other states.
- Sell to federal agencies goods that are produced pursuant to a contract (rather than sold from inventory).

Other Consequences of 18 U.S.C. § 1761(a)

Because application of 18 U.S.C. § 1761 assumes that correctional industries employ involuntary inmate labor, numerous federal laws have explicitly taken the unique status of inmate workers into account. Under these laws

- Federal income tax is not collected against wages paid to inmate workers where the wage is a gratuity.[68]
- The federal FICA is not collected from inmates.[69]
- Federal social security tax is not collected from inmates in penal institutions.[70]
- Federal Medicare deductions are not taken from inmates.[71]

The special status of inmate workers also has other results, including the categorization of civilian supervisors as line workers. This means that the Fair Labor Standards Act provisions for treatment of supervisory staff as exempt from overtime provisions is inapplicable to civilian supervisors of inmate workers.[72] Similarly, civilian

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[67] The federal statutory bar to the sale of prison-made goods to federal agencies is the Walsh-Healey Act, 41 U.S.C. §35d (applies to all sales over $10,000). The regulations implementing this aspect of the Act's requirements are set forth at 48 C.F.R. § 52.222-3(c). See also 28 Comp. Gen. 409 (1949); 32 Comp. Gen. 32 (1952). Executive Order 11755 (December 29, 1973) extends the rule of Walsh-Healey to all government contracts regardless of the amount in question.

[68] See IRS Ruling 75-325 (1975).

[69] See 26 U.S.C. § 3121(7)(F)(ii); (26 U.S.C. § 3121(b)(6)(A) (federal prison inmates).

[70] 42 U.S.C. § 410(a)(6)(D)(i). See also 42 U.S.C. § 410(H)(6)(A) (federal prisoners).

[71] 42 U.S.C. § 410(p)(2)(B).

[72] Wage and Hour Division Ruling of May 18, 1988 for Texas Department of Corrections interpreting 29 C.F.R. § 541.1 and 541.2.

supervisors are to be paid for meal times when they have a continuing responsibility for supervising the inmate workers during lunch.

18 U.S.C. § 1761(c)'s Exception

Certification under 18 U.S.C. § 1761(c) permits correctional industries to sell their goods in interstate commerce to private buyers and to the federal government. This marketing authority is conditioned upon the correctional industries program

- Paying the inmate workers wages that are comparable to those paid to private sector workers performing similar work.
- Providing fringe benefits to the inmate workers, within the range ordinarily provided free world workers.
- Limiting enforced deductions from inmate wages for authorized purposes to no more than 80 percent of the total wages.

One problem with the comparable wages requirement is that inmate workers do not have work experiences or skills that are comparable to those of competing private sector workers. Determination of the prevailing wage may require establishment of a training differential less than the prevailing wage in the relevant industry. Second, the fringe benefit requirement for certification means that industries workers must be covered by a workers compensation plan.[73] Third, the cap on the percent of wages that may be deducted is intended to assure that inmates receive more for working in certified industries than they would in traditional prison industries.

The exception established in 18 U.S.C. § 1761(c) to the federal bar on interstate transportation of prison-made goods applies to both state-run industries and those operated by private sector firms. This latter aspect of the federal law is, in part, responsible for statutory provisions in over half the states permitting the adult correctional agencies to authorize private sector employment of inmates in shops located on the prison grounds.[74]

Nonapplicability of 18 U.S.C. § 1761: Rehabilitative Juvenile Industries Work

Not all juvenile corrections agencies operate under laws establishing punishment as a goal for the agency. Thus, juvenile correctional industries established by these agencies are not covered by the 13th Amendment's exemption for inmate labor as

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[73] See discussion in "Court Actions and Standards Impacting Prison Industries," in Robert Greiser, Neal Miller, and Gail Funke, *Guidelines for Prison Industries* (Washington, DC: National Institute of Corrections, 1984), 93, 108-110.

[74] Neal Miller, "Prison Industries Legislation Review Chart," in Tom Crim and Neal Miller, *1990 Update: Prison Industries Guidelines* (Washington DC: National Institute of Corrections, 1990).

involuntary servitude. The result is that other federal laws such as the Fair Labor Standards Act (FLSA) provision for a minimum wage may apply to juvenile workers in these states, depending on whether the work in question can be termed to be pursuant to "performing tasks as a normal part of a program of treatment, rehabilitation, or vocational training."[75] Such tasks are not considered to be "work" under the regulations.[76] However, industrial work that emphasizes production rather than training would not seem to qualify for this exemption from the FLSA. This would include juvenile industries programs run by private sector companies or employers. The difficulty will be in drawing the line between work that emphasizes treatment-related goals and either cost-saving or production goals.

At the same time, the several federal tax laws that provide exemptions for inmate workers may also be applicable to the juvenile workers. This contradiction in application of federal laws directed at the workplace must be administratively reconciled. The simplest way to accomplish such reconciliation is for the juveniles to be employed by a private employer, who would not be questioned if they were simply to report juveniles as workers without showing their incarceration status. The Internal Revenue Service is unlikely to return taxes paid by employers who ignore potential exemptions from taxation.

Implementation Issues

Need for Legislative Authorities

Regardless of whether 18 U.S.C. § 1761 applies to any specific juvenile correctional industries program, the need for legal authority for the program remains. This need may arise from the requirements for federal certification under this federal law or, more commonly, from state law imperatives.

Federal Requirements

Federal law does not require states to adopt any juvenile justice legislation, much less laws regarding juvenile corrections or juvenile correctional industries. Of course, if a state wishes to have its industries program certified, federal law does require some minimal legislation.

Federal law will look to the state law establishing the juvenile corrections agency to determine if the law establishes quasi-criminal goals that justify potential

[75] Wage and Hour Division, Letter Ruling May 23, 1968, *Fair Labor Standards Handbook*, Appendix III, p. 14 (1990).
[76] Wage and Hour Division Opinion WH-245 (1973).

application of 18 U.S.C. § 1761. That is, the state juvenile justice and corrections laws must authorize involuntary inmate labor–even if that authority is not used to establish the juvenile correctional industries applying for certification. Second, federal law will look to see if state law authorizes payment of wages to inmate workers–or at least does not bar such payment. Third, federal law will look to see that state law authorizes inmate worker participation in the workers compensation program.

State Law Needs

The need for legislative authority under state law is independent of the federal bar. These needs arise from interest in either expanding the scope of existing industrial operations or in establishing them in the first instance. For example, juvenile corrections agencies do not need additional authority to establish skill training programs for their wards. They may need legislative authority to structure the training to match the reality of private business. They may also need authority to sell goods or services produced as a by-product of training. They will almost invariably need authority to permit private businesses to operate training programs that sell goods and services produced by trainees.

Small training programs with limited goals do not have the legal problems that larger and more ambitious programs have. In part this is because small industries programs are not as likely as larger programs to generate conflicts that require legal decision making. For example, an industries program that generates a small volume of sales is not likely to conflict with private businesses to any noticeable degree; questions are not likely to be asked about the industries' authority to sell its goods and services. Over time, however, even small industries may have their legitimacy questioned. Institutionalization of an industries program to resolve doubts over a program's legitimacy will require enactment of state legislation for this purpose.

In contrast, legislative authority is required for new industries that are intended to become a major innovation in juvenile corrections programming. This authority is needed both to resolve questions about the program's legitimacy and to provide mechanisms that are needed for efficient and effective operations.

Legislative Priorities

The experience of adult correctional industries shows that not all types of legislative authority are of equal importance. Based upon this experience, a typology of adult prison industries legislation has been developed. This typology includes laws relating to industries' establishment, marketing of its goods and services, fiscal operations, and inmate compensation. Within each category several types of laws were

identified. Applying this typology to the juvenile correctional industries in greatest need of legislation, potentially large-scale operations, we find a variety of state approaches to similar problems. These are described below.

Marketing Laws

Juvenile correctional industries programs of any significant scope require legislation that permits marketing of their goods and services to a large market. The state-use market system requiring agencies to buy the products of industries is not likely to be authorized for juvenile corrections unless adult corrections supports this authority. Since this would result in increased competition within the state-use market, such consent is problematic.

Marketing to the private sector is more likely to be authorized, especially in states that have already authorized the adult prison industries to sell to the private sector. Adult prison industries operate under varying types of private sector market authorizations. These include authorized sales to

- Private sector buyers without any limits
- Wholesalers
- Private buyers without resale permitted
- Private buyers if there is no competition with in-state manufacturers

The clear trend in prison industries legislation is for opening up the authorized market. Most states that have liberalized the industries market authority have eliminated all such barriers. In a few states where unions are powerful political actors, the expansion in authorized markets has been limited to non-profits (e.g., Michigan) and state contractors (e.g., Illinois). In a few other states where small business is a major political force, the open market authority has been written to minimize competition between industries and retail firms (e.g., South Carolina, to commercial dealers only).[77]

Where broad, open market sales are permitted, large-scale marketing of industries goods and services to the private sector may result in claims of unfair competition from private sector firms and unions. Obviously, meeting the requirements of the federal certification program is one way to limit such political attacks. As previously noted, the requirements for federal certification under 18 U.S.C. § 1761(c) may necessitate state legislation authorizing inclusion of inmate workers in the state

[77] See Neal Miller, "Prison Industries Legislation Review Chart," in Tom Crim and Neal Miller, *1990 Update: Prison Industries Guidelines* (Washington DC: National Institute of Corrections, 1990).

workers compensation program.[78] If the juvenile corrections agency anticipates operating industries programs under federal certification, then state law may also require legislation authorizing payment of inmate wages.

Efficient Operations

A key distinction between (1) industrial operations and (2) training where goods and services are a by-product is the former's emulation of business-like operations. This goes beyond the mere use of modern machinery and replication of workplace procedures. It also includes the adoption of a profit-seeking objective and efficient administration to minimize overhead and other costs. Appropriate legislation can be a major contributor to effective and efficient industries. One obvious legislative model for this purpose is establishing legislation requiring industries' economic self-sufficiency. Among the adult correctional industries states with this type of law are Colorado[79] and Maryland.[80]

Other laws directly support efficient industries operation by cutting the costs of operation or better motivating industries' civilian workers. Thus, states such as Missouri have enacted laws permitting industries to purchase raw materials outside of the competitive bid process.[81] In some states (e.g., California) this exemption is almost total.[82] Other innovative legislation includes statutes in Louisiana authorizing purchase of equipment at public auction[83] and purchases of finished products to complete orders.[84]

Another type of efficiency-supporting law places industries civilian staff outside of the state civil service laws. One reason for doing this is to reward staff for outstanding production with bonuses–as private businesses do.[85] An alternative approach is to authorize the use of sales agents, rather than employees serving as sales representatives.[86]

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[78] A number of states still have legislation explicitly excluding adult inmates from the workers compensation program. Other states have court decisions achieving this same end. If juvenile inmates are covered by the federal certification program, they may have the same status as adult inmates under the workers compensation legislation.

[79] *Colorado Revised Statutes* § 17-24-102(1)(a).

[80] *Annotated Code of Maryland* Article 27 § 680(1)(I). See also *supra*, note 34.

[81] *Missouri Annotated Statutes* § 217.565(4). See also *supra*, note 38.

[82] See *California Penal Code* § 2808(g).

[83] *Louisiana Revised Statutes Annotated* § 39:1554(G)(2). This Louisiana law is unique in explicitly stating that the rationale for the exemption from state purchasing law requirements is that prison industries "operates under the constraints of an income statement."

[84] *Michigan Statutes Annotated* § 28.1540(9).

[85] See *Annotated Code of Maryland* Article 27 § 681J. See also *New Mexico Statutes Annotated* § 33-8-12.2.

[86] See *Missouri Annotated Statutes* § 217.565(5); *Massachusetts General Laws Annotated* chapter 127 § 68.

Private Operations

Private business operation of juvenile correctional industries will require legislation. Indeed, in some states, a constitutional amendment may be required to repeal provisions prohibiting the contracting of inmate labor. Legal authorizations for private businesses using institutional labor include authorization for them to supervise incarcerated youth workers and the sale of institutional made goods on the open market. These minimal legislative needs may be affected by the practicality that businesses that produce goods will require state participation in the federal certification program, since few businesses limit their market to in-state buyers. These businesses are not likely to make the financial commitments required for starting new operations without assurances of interstate sales, much less expose themselves to potential criminal liability. Although businesses that provide a service do not require certification, it is unlikely that the juvenile corrections agency could expect to meet its goals for employing youth with only service companies. Hence, legislation may be required that explicitly authorizes juveniles in industries programs to participate in the state workers compensation program. Alternatively, a state attorney general opinion may suffice.

Very few states' laws provide explicit authority for the administration of relations between the correctional agency and private firms operating industries programs. The Washington state law is the most comprehensive such effort, establishing an administrative tier of private industries that are linked operationally with state-run industries.[87] This law also provides that security and custody services be provided to the private firms free of charge. At one time, Oklahoma law provided for a commission of state officials to manage the recruitment and other aspects of private firm operations.[88]

Funding Industries

One approach to funding new industries is to rely, as the California Youth Authority industries initiative has, upon private sector operations to pay most of the costs of new industries operations. Shifting the capitalization costs to the private sector may not always be feasible, especially where long-term stability in operations is expected. Indeed, adult prison industries have typically relied on other sources of capital, such as legislative appropriations and retained earnings from existing industries.

Retained earnings require establishment of a rotating permanent fund in the state treasury. The rotating fund can also serve other purposes, for example, preventing

[87] *Revised Code of Washington* § 72.09.100. For example, inmates must work in state-run industries to be eligible for private industries employment.

[88] *Oklahoma Revised Statutes* Title 57 § 546 *et seq* (repealed 1990).

diversion of industries' "profits" to non-industries purposes by other correctional administrators.[89] Perhaps just as importantly, a revolving fund symbolizes the discipline that financial self-sufficiency places upon both the industries and juvenile facility administrators. Without the discipline from profit seeking, experience of adult corrections suggests that the real world training value of industries dissipates. For this reason, revolving fund legislation might consider inclusion of language requiring financial reporting pursuant to generally accepted accounting principles.[90] A related type of law specifies that the costs of security be allocated between industries and the correctional agency.[91]

[89] See *Oregon Revised Statutes* § 421.065(c)(2); *New Mexico Statutes Annotated* § 33-8-7.

[90] See *Annotated Code of Maryland* Article 27 § 681-I(a)(2).

[91] See *Michigan Statutes Annotated* § 28.1540(10)(3)(iv).

Summary and Recommendations

Federal law and state law issues are part of a larger mosaic of legal authorizations and restrictions upon correctional industries. While the juvenile corrections environment may possess some unique elements, the lessons learned from adult corrections are generally applicable to the juvenile corrections situations or environments. In both settings these two legal sources impinge upon each other. Depending upon the specifics of plans to implement juvenile correctional industries, both law sources must be consulted in planning a legislative strategy.

Federal Law Issues

The legal review of the applicability of 18 U.S.C. § 1761 to juvenile corrections found that agencies operating under quasi-criminal directives are affected by this law. The review also found that 17 states' juvenile corrections laws may be classified as quasi-criminal. Another 11 states have authorizing legislation that a state court may fairly interpret as quasi-criminal, but are not *prima facia* so. The remaining state laws seem to be solely civil law in nature.

Clarification and Guidance

These findings present a novel legal issue with respect to the varying application of both a federal criminal law and an administrative program defined by that law. Clearly clarification is required on both these points from the United States Department of Justice to provide guidance to juvenile corrections administrators who are implementing or considering implementation of industries programs. For states not subject to 18 U.S.C. § 1761, further clarification on the applicability of the Fair Labor Standards Act to inmate training programs that sell goods and services as an incident to training is required from the Department of Labor.

Technical Assistance

The NOSR survey of juvenile corrections administrators found considerable interest in establishing industries operations. The administrators' ability to implement innovative programs is jeopardized by increasing burdens from the number of

incarcerated youth, longer institutional stays, and evolving standards of care. Federal assistance can strengthen administrators' commitment to innovation and help build support for their efforts by publicizing reports of program success in other states. At the same time, technology transfer of "best practices" can reduce the problems that inevitably arise in implementation of new programs. That is, federal technical assistance should focus, in part, on "lessons learned" in states that have implemented juvenile correctional industries and help other states apply those lessons. Such assistance will inevitably lead to additional lessons learned that can be applied in yet other states.

State Legislative Priorities

The review of state legislation for adult prison industries identified five general areas of legislative enactment[92] and four specific legislative issues of great significance. These are

- Marketing authorities
- Revolving fund
- Operational authorizations
- Private sector operation authorities

Within each of the latter areas, alternative legislative approaches were presented. No single legislative model can serve all states. Rather, legislation must be based upon local economic and political realities. Nonetheless, some minimal level of legislative enactment is required if industrial programs are to become a significant component of the juvenile corrections agency. The key determinant of what legislation is needed will depend upon whether state-run industries or privatization is to be emphasized.

State-Run Industries Laws

State-run correctional industries of a significant size require legislation that establishes a defined market for its goods and services and laws providing for financial management, including a revolving fund for accruing capital from earned surpluses. It seems unlikely to expect juvenile correctional industries to grow to any appreciable size unless it has access to private sector purchasers. Given the legal and political history behind today's laws governing adult prison industries, courts are not likely to favor juvenile correctional industries' sales to private purchasers without legislative authority. Full access to the private market is desirable, of course, but may be unattainable as a

[92] See, e.g., Wharton Center for Applied Research, *A Guide to Private Sector Prison Industries: Identifying, Screening and Contacting Companies* (Report to the National Institute of Justice, 1988).

political matter. In such a case, access to non-profits and government contractors will provide a substantial and generally untapped market.

Modern correctional industries seek to mimic business-like operations. Because of the potential for pressure from corrections agency staff with security responsibilities to compromise production interests, legislation is required that promotes business-like operations. These include setting a goal of economic self-sufficiency and establishing a revolving fund from which only deductions for industries' business purposes can be made. Other legislation, such as an exemption from the state purchasing law, is desirable, but not as essential as these other two laws.

Private Industries

Placing program emphasis upon private business-operated industries reduces the legislative needs considerably. The only essential legislation is authority for the juvenile corrections agency to permit private business to operate industries that employ youth under the agency's authority. These need not be on the premises of a juvenile corrections facility. Comprehensive legislation authorizing private-run correctional industries for youth includes clear authority to sell in the private sector and sets parameters for the juvenile corrections agency to lease land or buildings for use as an industrial shop. Additional legislation can provide for the agency administration of recruiting and oversight of private firms.

Applicability of Federal Restrictions on Interstate Transportation of Prison-Made Goods (18 U.S.C. § 1761) to Juvenile Corrections

Presented to

Office of Juvenile Justice and Delinquency Prevention

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Prepared by

Neal Miller

Institute for Law and Justice

Alexandria, Virginia

SUMMARY

The Legal Question

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) contracted with the Institute for Law and Justice (ILJ) to provide a legal analysis of whether juvenile correctional agencies establishing industrial programs are regulated by federal law prohibiting the transportation of prison-made goods in interstate commerce (18 U.S.C. § 1761). This is a question of either explicit or inferred congressional intent. The implications of an answer to this question are twofold: (1) If juvenile corrections programs are covered by this law, they must, as a practical matter, seek federal certification if they want to enter into partnerships with private sector companies; (2) If they are not covered by this law, other federal and state laws may be applicable to juvenile industries programs.

Legal Conclusions

ILJ's analysis and conclusions are summarized as follows:

- Congress made no explicit reference to juvenile correctional industries in debating the scope of coverage of federal law criminalizing the transportation of prison-made goods in interstate commerce (18 U.S.C. § 1761). Neither the plain language of the statute, nor its legislative history, unambiguously show whether juvenile corrections industries is within its reach.

- Congress did not even think about including juvenile corrections under 18 U.S.C. § 1761. This absence of intent was due to (1) the relatively novel status of juvenile corrections as a distinct administrative entity, (2) the low level of industrial activity in juvenile corrections at the time, and (3) the absence of competition between the limited juvenile corrections industries and the private sector.

- Nonetheless, Congress would have included juvenile corrections industries under the statutory rubric of "prisoner-made" goods if it had **explicitly** considered the issue. This inclusion is consistent with the purpose of 18 U.S.C. § 1761 to protect private businesses and labor from unfair competition where there is forced inmate labor and the

laborers are not fairly compensated. At the time 18 U.S.C. § 1761 was adopted, juvenile correctional facilities operated industrial programs similar to prison industries, including the use of involuntary and unpaid labor.

- The categorization of juvenile corrections as a civil law program has implications for ILJ's conclusion. The 13th Amendment authorizes involuntary servitude with prison inmates only where there has been a criminal conviction. Court rulings have recognized the interrelatedness between the 13th Amendment and the scope of 18 U.S.C. § 1761. Hence, 18 U.S.C. § 1761 applies to juvenile correctional industries in states that continue to emphasize quasi-criminal objectives.

- Juvenile industries programs that operate under laws stressing rehabilitative purposes are not covered by 18 U.S.C. § 1761. These programs may be covered by other workplace laws such as those establishing a minimum wage requirement. Examples of such programs include programs operated by private sector employers. However, programs that are intended to primarily provide training rather than serve production objectives are not covered by these other laws.

- The question of whether juvenile correction facilities today are penal institutions for purposes of 18 U.S.C. § 1761 is a matter of state law. However, federal interpretation of the state laws' purposes will determine the federal law's applicability.

The legal analysis presenting the reasons for these conclusions follows.

ANALYSIS

Introduction

To put into context the issue of coverage of federal laws regulating prison industries in juvenile facilities, it is necessary to briefly review the development of these federal laws, the growth of a parallel correctional system for juveniles, and OJJDP's concerns about these issues.

Prison Industries in Adult Corrections

Prison industries in adult correctional facilities date back to the establishment of the prison system. One of the earliest prisons in the United States, the Auburn prison in New York state, was designed to rehabilitate inmates through work. The economic benefits to the state from reduced prison costs ensured adoption of the Auburn system over the competing prison approaches that emphasized isolation and repentance. By the close of the 19th century, however, complaints about unfair competition from prison industries had become a significant political factor in state policymakers limiting these programs.[1]

In 1929, federal legislation was enacted that permitted states to pass laws forbidding the sale of prison-made goods brought into the state from another state (Hawes-Cooper Act).[2] In 1935, federal law enforcement was authorized to enforce state law bans on prison-made goods by establishing a separate federal crime for violation of a state law ban (Ashurst-Sumners Act).[3] In 1940, the transportation of prison-made goods in interstate commerce was made a federal criminal offense under 18 U.S.C. § 1761.[4]

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1 See Neal Miller & Robert Grieser, "The Evolution of Prison Industries," in American Correctional Association, *A Study of Prison Industry: History, Components, and Goals* (Washington, D.C.:National Institute of Corrections, 1986).

2 Act of January 19, 1929, c. 79 § 1, 2, 45 Stat. 1084; codified at 49 U.S.C. § 11506.

3 Act of July 24, 1935, 49 Stat. 494.

4 Act of October 14, 1940, c. 872, 54 Stat. 1134.

In 1979, Congress reversed direction and began to encourage prison industries, provided that prison industries not engage in unfair competition with private business and labor. Thus, the Department of Justice (DOJ) was authorized to permit a limited number of states to sell prison-made goods to private sector purchasers provided that inmates were paid comparable wages and received worker benefits equal to those provided other workers.[5] This new provision, 18 U.S.C. § 1761(c), sought to encourage joint ventures between state-run industries and private businesses. Hence, the new law applied to both industries programs operated by the state correctional agency that sell to the private sector and those operated by a private firm authorized by the state.

State legislation to take advantage of this new law became a rapidly growing trend. By the mid-1980s, the federal conditional open market sales authority was available to all the states. By 1990, half the states permitted private sector firms to operate prison industries within the prisons and 37 states authorized sale of prison-made goods on the open market.[6] The DOJ has presently certified 32 prison industries programs. An additional four states have applications pending.

Development of Juvenile Corrections

Juvenile corrections, as a separate mode for handling youthful offenders, dates back to the New York City House of Refuge (1825) where juveniles were separated from adult offenders and provided treatment rather than punishment. According to the 1967 President's Commission, this was followed in the next few decades by the establishment of reform and industrial schools for juveniles. From the first, therefore, juvenile corrections emphasized work programs to teach youth an "honest trade."[7]

The subsequent development of juvenile corrections was affected by the establishment of the juvenile court under a *parens patriae* theory whereby court action is taken in the "best interests" of the child, rather than as punishment. The first state legislation institutionalizing separate courts for juveniles on a statewide basis was enacted in 1899 by the state of Illinois. By 1925, there were juvenile courts in all but two states.[8] The heart of the juvenile court reform, however, was the institution of probation where counselling and services could be employed to meet the child's needs.[9] With the establishment

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5 Pub. L. 96-157 § 827(a), 93 Stat. 1215 (1979).

6 See Tom Crim and Neal Miller, *1990 Update: Guidelines for Prison Industries* (Washington, D.C.: National Institute of Corrections, 1990). Since 1990, three additional states have authorized the establishment of private prison industries on the grounds of correctional facilities. Three other states have also broadened the authority of prison industries to sell on the open market.

7 President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* (1967), 2-3.

8 *Ibid*., 3.

9 See Monrad Paulson and Charles Whitebread, *Juvenile Law and Procedure* (Reno Nevada: National Council of Juvenile Court Judges, 1974), 2.

of the juvenile court, referrals to traditional correctional institutions was limited to children where other alternatives had failed.

Juvenile corrections continued for a considerable period of time to be an afterthought to juvenile probation. Thus, juvenile offenders continued for many years to be incarcerated with adult offenders in reformatories and even penitentiaries.[10] Most importantly, state administration of juvenile correctional facilities was subordinate to adult correctional administration.[11] It was not until 1940 that California became the first state to establish a separate youth correctional agency.[12]

Nonetheless, by the 1950s and 60s, juvenile corrections was generally wedded at a theoretical level to implementing the court's *parens patriae* civil law powers. But now the philisophical underpinnings supporting a civil law substitute for the criminal law process was under attack. Thus, the 1967 President's Commission contended that "delinquency is not so much an act of individual deviancy as a pattern of behavior produced by a multitude of pervasive societal influences well beyond the actions of any judge, probation officer, correctional counselor or psychiatrist."[13] In its seminal decision, *In re Gault*,[14] the U.S. Supreme Court recognized that the juvenile court promises of individualized treatment had not been successful, thereby undercutting much of the objections to the imposition of a due process requirement for juvenile court proceedings. Nonetheless, the Court refused to disavow the juvenile court rationale, instead placing increasing due process requirements upon the court.[15] The result today is that the juvenile court operates under mixed civil and criminal law-like mandates. The implications of this change in juvenile court theory for juvenile corrections is discussed below, since it is critical to the analysis.

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10 As of the 1870s, about 20 percent of all those entering state prisons were minors. See *Transactions of the National Prison Congress of St. Louis, 1874* (1875), 394. By 1928, however, the percentage of minors among all prison admissions was reduced to about 9 percent. National Commission on Law Observance and Enforcement (Wickersham Commission), *Report on Penal Institutions, Probation and Parole* (1931), 51. This report does not distinguish between admissions to penitentiaries and the 18 reformatories for juveniles and youthful offenders (up to age 25 or 30) then existing. Michael W. Sherraden and Susan Whitelaw Downs, "Institutions and Juvenile Delinquency in Historical Perspective," 6 *Children and Youth Services Review* 155, 165 (1984), cite Census data in estimating that nearly half of all incarcerated juveniles on any given day were incarcerated with adults in the period 1910 to 1970.

11 See, e.g., Steven Schlossman and Alexander Pisciotta, "Identifying and Treating Serious Juvenile Offenders: The View from California and New York in the 1920s," in *Intervention Strategies for Chronic Juvenile Offenders*, Peter Greenwood, ed. (New York: Greenwood Press, 1986), 7, 27, (primary juvenile institution in California under State Department of Institutions).

12 Comment, "Adolescent Delinquency and the Youth Correction Authority Act," 20 *Texas Law Review* 754 (1942). See also Note, "The Alabama Youthful Offender Act," 28 *Alabama Law Review* 481, 481-83 (1977).

13 *Report of the President's Commission on Law Enforcement and Administration of Justice* (Washington D.C.: Government Printing Office, 1967), 80.

14 In re Gault, 387 U.S. 1 (1967).

15 Compare In re Winship, 397 U.S. 358 (1970) (standard of proof beyond reasonable doubt applied in juvenile court) with McKeiver v. Pennsylvania, 403 U.S. 528 (1971 (no right to jury trial). See also Scholl v. Martin, 467 U.S. 253 (1984) (juvenile preventive detention law upheld).

The OJJDP Initiative

The OJJDP has observed the success of DOJ's industries certification program in expanding the training available to inmates and reducing the costs of corrections. Interest began to develop in whether this model could be applied to a juvenile corrections population. OJJDP's interest was enhanced by the California Youth Authority's (CYA) experiment, beginning in 1985, to work with private firms in employing youth aged 15 to 25 who were under the custody of the CYA.

The National Office for Social Responsibility (NOSR) was given a grant by OJJDP to develop models for juvenile corrections agencies and business joint ventures. The NOSR study had the following objectives:

- Assess the adaptability of private sector prison industries initiatives to juvenile corrections
- Develop prototype designs, including related policies and procedures
- Provide training and technical assistance to interested states
- Implement the prototype in four additional states

The NOSR final report synthesized the lessons learned from its collaboration with OJJDP. NOSR also strongly recommended that OJJDP continue with the private juvenile industries initiative.[16]

The Need for Legal Analysis

The NOSR project did not examine the question of whether the DOJ certification structure for interstate sale of prison-made goods by adult prison industries is applicable to juvenile prison industries. This legal issue has several important policy implications. Among the reasons for desiring application of federal certification to juvenile corrections industries is the desire for a minimum standard for program features, such as payment of comparable wages or deductions for victim compensation fund payments. The conditions for certification, established by the 1979 amendment, represent a carefully drawn plan for balancing the need to eliminate unfair competition versus encouraging growth in inmate employment in industries.[17] Significant deviations from the certification conditions may result in an imbalance among the desired goals. In the long term, such an imbalance may result in program abolition from renewed business complaints of unfair competition or inadequate growth of inmate employment.

Conversely, non-application of the federal certification rules may be desired insofar as the statutory requirements limit flexibility to develop industries projects that are responsive to local needs.

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16 National Office for Social Responsibility, *Private Sector Juvenile Correction Industries: Final Report* (June 30, 1993).

17 The fear of the drafters of the Percy Amendment establishing 18 U.S.C. § 1761(c) was that without federal guidelines states might adopt policies that would limit inmate interest in working for private industries. This included the possibility of excessive deductions for room and board charges or victims compensation. For this reason, the Amendment also included a provision requiring voluntary inmate participation. See Neal Miller and Walter Jensen, "Reform of Federal Prison Industries," 1 *Justice System Journal*. 1 (1974).

The need for flexibility may be especially important where the employee universe is composed of youth with little or no experience with work.[18]

A second series of questions relates to the applicability of other federal legislation directed at adult correctional inmates. By and large, adult prison inmates are not considered to be employees of prison industries except as state law explicitly or implicitly so provides.[19] Hence, laws predicated upon regulating the employer-employee relationship do not generally apply to adult prisoners. Regardless of whether juvenile inmates are distinct from adult inmates or their equivalent, the applicability of federal laws regulating the workplace to juvenile correctional industries must be reviewed.

Applicability of 18 U.S.C. § 1761 to Juvenile Inmate Labor

The legal question posed by OJJDP is whether juvenile correctional industries are covered by the federal criminal law bar against interstate transportation of prison-made goods. ILJ begins the legal analysis by examining the traditional indicia of explicit congressional intent. These include reviewing the statute's language, its legislative history, and contemporary writings that define the problem Congress addressed in the law. We also present (1) an analysis of what Congress would have intended had it then considered the issue of juvenile correctional industries and (2) the applicability of the inferred congressional intent to modern juvenile correctional industries.

I. Explicit Indicia of Congressional Intent

The question of the applicability of 18 U.S.C. § 1761 is a matter of statutory interpretation. The traditional approaches taken to determine the scope of a law's coverage include examinations of

- The plain meaning of the statute
- Congressional intent as shown in legislative history
- Inference of congressional intent from the written record of the time (i.e., indicia of general agreement about the meaning of "prison industries")

All three reviews provide no indication that Congress explicitly intended to include juvenile corrections under the prohibitions of 18 U.S.C. § 1761. This does not mean that Congress intended to

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18 Compare the prevailing wage provision of 18 U.S.C. § 1761(c) with the wage requirement set by the Prison Industries Reorganization Administration that authorized a reduction in the prevailing wage based upon productivity differentials. "Compact of Fair Competition for the Prison Industries of the United States," approved by Executive Order, April 19, 1934.

19 See *infra* notes 74-76 and accompanying text.

exclude juvenile correctional industries. Rather, it seems clear that in enacting the law, Congress paid no attention to the existence of juvenile corrections industrial operations.[20]

Plain Meaning

The starting point for determining a law's applicability is the language of the law itself. To the extent that the law is unambiguous on its face, courts will often take the law as it appears.[21] The federal law 18 U.S.C. § 1761 states in relevant part that "Whoever knowingly transports in interstate commerce . . . any goods, wares . . . manufactured . . . *by convicts or prisoners* . . . or in any penal or *reformatory* institution . . . shall be fined . . . ." [emphasis added]. The Act provides no statutory definition for the terms convicts, prisoners, or reformatory institution. Words not defined by statute will be given their ordinary meaning.[22]

One contemporary dictionary definition of convict is "a person serving a prison sentence."[23] Another, older dictionary defines convict as a person convicted of a crime.[24] Neither definition of "convict" explicitly includes juveniles held in juvenile correctional facilities. Further, these definitions are contrary to the terminology used in the field of juvenile corrections itself. That is, the reference to persons serving a *prison* sentence is inconsistent with juvenile corrections, where the term prison is not used.[25] Nor are juveniles normally thought of as being convicted of a crime.

A prisoner is defined as "a person who is confined in prison or kept in custody, especially as the result of legal process."[26] Prison is further defined as a building for the confinement of persons held for trial, persons sentenced after conviction, etc. . . . [or] any place of confinement or involuntary constraint."[27] These definitions may have changed over time, however. *Black's Law Dictionary*,

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20 Compare the statement of the court in Hale v. Arizona, 993 F.2d 1387, 1392 (9th Cir.), *cert. denied*, 114 S. Ct. 386 (1993), questioning whether Congress even gave consideration to the issue of prisoner coverage under the Fair Labor Standards Act, 29 U.S.C. § 202 *et seq*. ("While it may be difficult to believe that Congress actually gave thought to the problem . . . .")

21 See. e.g., Deal v. United States, 113 S. Ct. 1994 (1993); Griffin v. Oceanic Contractor, Inc., 458 U.S. 564, 570 (1982); United States v. Turkthe, 452 U.S. 576, 580 (1981). See also Caminetti v. United States, 242 U.S. 470 (1917) (leading authority for plain meaning doctrine in Mann Act case).

22 See Smith v. United States, 113 S. Ct. 1178, 1182 (1993); Chapman v. United States, 111 S. Ct. 1919, 1925-6 (1991); Perrin v. United states, 444 U.S. 37, 42 (1979). See also Martin v. Hunter's Leasee, 1 Wheat (14 U.S.) 304 (1816).

23 *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1989), 320.

24 *Webster's Second New International Dictionary* (1934), 584.

25 Even this conclusion is subject to potential dispute since the *Webster's Unabridged* (*supra* note 23) provides entries for both "prisons" and "state prisons." The latter is defined as "a prison maintained by the State for the confinement of felons." *Ibid*. at 1388. These dual entries suggest that there are other types of prisons besides those used in adult corrections.

26 *Ibid*. at 1145. *Webster's Second New International Dictionary* (1934), 1968, is even less useful, defining prisoner as a person under restraint, under arrest, or in prison. Prison is defined as a place for the safe custody or confinement of criminals and others (as formerly debtors).

27 *Ibid*.

published in 1910, defines prisoner as "[a] person restrained of his liberty upon any action, civil or criminal, or upon commandment."[28] The statute's alternative term "prisoner" is more susceptible to being read to include juvenile offender, but not without reservation. Juveniles held in juvenile correctional facilities are both "kept in custody" as a result of legal process, per a modern definition; and "restrained of liberty" per a court order, per an older definition.

Reformatory is defined today as a "penal institution for reforming young offenders, especially minors."[29] The 1910 *Black's Law Dictionary*, however, states that "This term is of too wide and uncertain signification . . .". Further definition describes institutions for improving the character, mind, or conduct of their residents–who may be either voluntary or forcibly restrained.[30] This definition does not even reference youth as the target population. Given the somewhat differing meaning historically given by the field of corrections to the term reformatory,[31] this term also lacks specificity as a juvenile-only facility.

In sum, the plain meaning of the statute is sufficiently ambiguous that we cannot conclude that a youth held in a juvenile correctional facility is a prisoner under the statute. The plain meaning of the statute's language suggests that juvenile corrections is covered, but it is insufficient by itself to exclude any reservations based upon contemporary usage.

Legislative History of Congressional Intent

The principal determinant of the meaning of facially ambiguous language in legislation is that of congressional intent. Congressional intent may be determined by reference to the legislative record, including committee reports and the records of congressional debate.[32]

A review of the *Congressional Record* of the debate over passage of the several laws criminalizing sale of prison-made goods in interstate commerce found no explicit distinction made between adult and juvenile offenders during the floor debate by the members of Congress. However, a few statements suggest that Congress was concerned with adult offenders only. For example, Congressman Pierce stated that "one of the biggest problems we have in America is how to take care of

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28 *Black's Law Dictionary* (1910), 941. The newest edition of *Black* defines prisoner as one who is deprived of his liberty or one who is kept against his will in confinement in prison, penitentiary, jail, or other correctional institution as a result of conviction of a crime or awaiting trial. *Black's Law Dictionary* (1990), 1194. Correctional institution is defined as a generic term describing prisons, jails reformatories and other places of correction and detention. *Ibid*. at 344.

29 *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1989), 1206. *Webster's Second New International Dictionary* (1939), 2094, similarly defines reformatory as "a penal institution to which young or first offenders or women are committed and in which repressive and punitive measures are subordinated to training in industry and exercise of the physical, mental and moral facilities."

30 *Black's Law Dictionary* (1910), 1006.

31 See *infra* note 49 and accompanying text.

32 See, e.g., Reves v. Ernst and Young, 113 S. Ct. 1163 (1993).

the prison labor and what to do with the *men*" [emphasis added].[33] Similarly, Senator Norris said that ". . . *men* in prisons must have something to do" [emphasis added].[34]

These references to "men" prisoners cannot be taken alone to mean more than Congress simply did not consider juvenile inmates. It is illogical to infer from this that juveniles were intended to be excluded from the law. If "men" means simply male prisoners, female prisoners convicted of felonies would be excluded from the law's coverage, as well as juveniles. This *reductio ad absurdum* approach, cannot be stretched to positively include juveniles under the law. Thus the legislative record also does not clarify the statutory ambiguity found in the plain meaning analysis.

Inferences of Congressional Intent from Other Contemporaneous Sources

Congressional intent may also be inferred by reference to the general understanding at the time, as signified by government reports and other writings.[35] Congressional failure to define either convict or prisoner resulted from the general consensus about what the problem was at the time. The issue of prison labor had been under continuous debate in Congress since the turn of the century. This public debate may be seen in contemporaneous documents that show public perceptions of the scope of the prison labor problem. These documents include government reports, lobbying writings, and other publications. None of these sources discuss juvenile correctional industries.

Governmental Reports on Prison Industries

A 1929 Department of Commerce report on prison industries and the problem of unfair competition from prison industries also included a bibliography of recent writings on prison industries.[36] A review of the bibliography shows only one reference to the distinction between prisoners and delinquents wards: that of female offenders.[37] In contrast, numerous state reports are cited that indicate considerable interest in prison industries in penitentiaries, farms, and road gangs, but none in juvenile facilities.

A recurring series of reports by the Bureau of Labor Statistics (BLS) surveyed prison industries in the states. The 1932 report surveyed 12 federal and 116 state prisons, and 1 county prison and 1

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33 *Congressional Record* at 11935 (Sept. 22, 1940).

34 *Ibid*. at 12395.

35 See, e.g., Evans v. United States, 112 S. Ct. 1881 (1992).

36 U.S. Department of Commerce, Bureau of Foreign and Domestic Commerce, *Prison Industries*. (Domestic Commerce Series, No. 27, 1929).

37 Committee for the Care and Treatment of Delinquent Women and Girls, *Industries for Correctional Institutions for Women: Report of a Survey* (1927).

city prison where state prisoners were housed.[38] The BLS also surveyed all city and county jails in jurisdictions with populations over 100,000 and 88.6 percent of the remaining counties. The 1940 report surveyed 125 state and 25 federal prisons, including 3 county and 1 city prison that housed state prisoners.[39] There are no reports of industries operations in juvenile facilities in any of these surveys.

Other governmental reports in this period, such as the Wickersham Commission report,[40] similarly discuss prison industries only in the context of adult penal institutions. The Prison Industries Reorganization Administration, established under the National Industrial Recovery Act (NRA) of the Roosevelt New Deal, explicitly limited membership under a voluntary compact with the NRA to industrial programs in prisons.[41]

Lobbying References

One of the principal advocates of the state use system of prison industries was the National Committee on Prisons and Prison Labor. Following the enactment of the Hawes-Cooper Act of 1929, the National Committee hosted a series of regional conferences to discuss the Act's implementation. A review of the proceedings of these reports indicates that the representatives from government agencies who attended the conferences were limited to those responsible for adult corrections.[42] This contemporaneous record, which shows what those affected by the law considered to be the scope of its application, clearly suggests that juvenile corrections was not considered affected by the federal prison industries law. Of course, this may simply reflect the possibility that there were no industrial activities in juvenile facilities at the time. More likely, however, is the possibility that juvenile industrial activity was limited and, in any case, had adopted the "state-use" system[43] for marketing its goods–thus it would not be affected by the new law.

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38 U.S. Bureau of Labor Statistics, *Bulletin: Prison Labor in the United States, 1932*. (No. 595, Aug. 1933).

39 Bureau of Labor Statistics, *Prison Labor in the United States 1940*. (Serial No. R. 1365, 1941).

40 National Commission on Law Observance and Enforcement (Wickersham Commission), *Report on Penal Institutions, Probation and Parole* (1931) (Report No. 9).

41 Vernon Clarke, *The Prison Labor Problem Under the NRA Administration and the Prison Compact* (Office of the National Recovery Administration, Division of Review, Work Materials No. 40, N.R.A. Organization Studies Section, February 1936). See also *Attorney General's Survey of Release Procedures, Prisons* (1940), 27-34 (discussion of "the "industrial prison").

42 See, e.g., National Committee on Prisons and Prison Labor, *New England Conference on State Institutional Labor* (1930); *Eastern-Southern Conference on State Institutional Labor* (1930).

43 The state-use system involves state correctional agency inmates who produce goods that are sold only to state governmental buyers. Other industries "systems" include inmates who worked for private employers who paid the state for their labor (the contract system). Goods produced by these correctional agency inmates are sold on the open market. See Miller and Jensen, *supra* note 17; Miller and Grieser, *supra* note 1; Robinson, *infra* note 44.

Other Prison-Labor Writings

Further confirmation that consideration of juvenile corrections was omitted in discussions of prison industries comes from the leading academic treatise of this time on prison industries, Louis Robinson's *Should Prisoners Work*, published in 1931. Dr. Robinson's book reviews the available, federally gathered data on prison industries and includes additional information that he received from 18 states pursuant to a national survey asking about jail industrial operations. Dr. Robinson does not discuss juvenile corrections industries and, apparently, made no effort to determine if juvenile corrections agencies had established industrial operations.[44]

Juvenile Corrections Literature

The juvenile corrections literature indicates there was no clear definition of a separate juvenile correctional system that was distinguished from the adult system. To the extent that there was a state apparatus over the individual juvenile institutions,[45] it was likely to be subordinate to the adult correctional authority.[46] It was not until 1940, for example, that California adopted the Youth Corrections Act based on the model act issued by the American Law Institute.[47] The conclusion that adult and juvenile corrections were not perceived as differing entities is further bolstered by examination of the *Index to Legal Periodicals*. For example, the *Index* for 1940-1943, under the heading "Prisons," includes several articles on the English borstal system. The 1943-1946 *Index* listing under this heading also contains several articles on the borstal system and one article on "The Boys Home at Reading, Pennsylvania." These inferences from the literature are supported by a review of a sample of six states' legislation from the period in question. In this review, ILJ found three states with a central agency responsible for policy direction of both adult and juvenile corrections.[48]

The absence of a clear administrative distinction between adult and juvenile corrections during this time period helps explain in large part why Congress made no reference to juvenile correctional industries. This blurring of distinctions between the two types of correctional systems means that

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44 Louis Robinson, *Should Prisoners Work?* (1931), 5-39.

45 See *The American Law Institute Proceedings: July 1, 1939 to June 30, 1940* (1941), 187 ("We have very few states [where there is a central authority] to manage and extend, if need be, the whole correctional system of institutions.").

46 See Ellingston, *infra* note 49 at 669, who discusses the New Jersey Department of Institutions and Agencies which "is believed to have more complete control over the individual after conviction than any other state-wide agency in the country." The domination of the adult prison authorities over the juvenile institutions is one reason for the failure of their inclusion in the congressional debate. See *Congressional Record*, December 15, 1928, 674-677, (signatures to letter from correctional leaders opposed to passage of Hawes-Cooper Act include no juvenile facility administrators). Another reason is, of course, the seeming adoption of the state-use system by juvenile industries, thereby eliminating any impact from the proposed federal legislation.

47 Comment, "Adolescent Delinquency and the Youth Correction Authority Act," 20 *Texas Law Review* 754 (1942).

48 These states were Illinois, New Jersey, and Oklahoma. The other three states whose statutes were reviewed were California, New York, and Virginia.

Congress probably assumed that the statutory term "prisoner" also included *youth* held in adult correctional facilities.

This interpretation is supported by other reports showing that many states held youth age 16 to 30 in reformatories.[49] The Wickersham Commission, for example, described as illustrative of the types of facilities holding federal juvenile offenders, the Washington State Reformatory for youthful (not juvenile) offenders, which even had a limited industrial program. The industries' products were consumed by either the institution or the state.[50]

ILJ's review of a sample of states' laws found that juvenile court often terminated jurisdiction of cases for persons 16 or younger. Of the six states' laws reviewed, in only two states did the juvenile court exert jurisdiction past this age.[51] These findings also support the inference from the literature that the age of those persons held in adult reformatories included those aged 16 to 18. Indeed, one state's laws authorized holding in a training school female prisoners aged 12 to 30, who were convicted of misdemeanors.[52]

Summary

This **examination** of the statute's language explains why the congressional debate itself did not discuss juvenile corrections industries. Juvenile corrections was not considered, even by corrections professionals, to be administratively distinguishable from adult corrections. There is no reason, however, to assume that Congress intended to include the two fields of corrections under the rubric of "prisoners" in the statutory language. The failure to consider the distinction, such as it was then, is not the same as an affirmative intent to subsume juveniles into the prison or reformatory system of the 1930s.

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49 "The Compact of Fair Competition for the Prison Industries of the United States of America," approved by Executive Order, April 19, 1934, contained a provision, Article IV, prohibiting the employment of prisoners under the age of 16 in any prison industry. This provision may suggest that there had been a problem with industries employing such youth. The reformatory model, mixing juveniles and adults, continued until at least the 1940s. See MacCormick, *infra* note 69, listing reformatories for youth in Ohio, New York, Michigan, and California. See also John R. Ellingston, "Youth Correction: Institutional Facilities for Treatment," 9 *Law & Contemporary Problems* 667, 669 (1942), who describes the New Jersey reformatory for youth.

50 National Commission, *Child Report*, *infra* note 64, at 102-103.

51 The age at which juvenile corrections' jurisdiction was terminated ranged between 18 and 21 in all these states.

52 *Virginia Code of 1936* § 1961c. Conversely, Illinois law seemed to authorize the juvenile court to sentence chidren to adult penal institutions with the sole proviso that they not be housed or otherwise in contact with adult offenders. *Illinois Statutes Annotated* § 19.096 (Jones 1934). See also *Illinois Statutes Annotated* § 19.129 (Jones 1934) ("Any male person between the ages of ten and sixteen years may be sentenced . . . to the St. Charles School for Boys . . . instead of the penitentiary or county jail . . . .")

II. Interpreting Congressional Intent

The failure to find any explicit expression or other indicator of congressional intent does not necessarily conclude the analysis. The ambiguities in the statutory language and legislative debate can also be cited as support for the contention that juveniles are *not excluded* from the statute. Of course, as a general rule, criminal laws are meant to be strictly interpreted.[53] However, this canon of statutory construction follows examination of the policies promoted by the law.[54] It is occasionally ignored where "fair notice" of congressional intent is otherwise available.[55] Thus, the question remains what would Congress have done if it had considered juvenile correctional industries.[56] The "extrapolation" of congressional intent requires (1) determining at what purpose the law is directed and (2) examining how juvenile correctional industries in 1940 and today relate to that purpose.

Purpose of 18 U.S.C. § 1761

The legislative history is clear that Congress enacted 18 U.S.C. § 1761 to protect businesses from competition using unpaid inmate labor.[57] This conclusion is derived from the long history of lobbying efforts to limit the sale of prison-made goods in interstate commerce, the several governmental reports detailed above studying the effects of prison labor competition on the private sector, and the congressional debate itself.

Correctional industries was able to sell its products at prices below those of the free market because of the 13th Amendment to the Constitution. The 13th Amendment prohibits involuntary servitude except as "a punishment for crime whereof the party shall have been duly convicted . . . ." The penal exception to the 13th Amendment was intended to authorize states to maintain prison work programs that had been in existence since at least the 1820s.[58] This unique correctional authority has been interpreted to mean that the labor of prison inmates "belongs" to the state–not to the inmate. Hence, an employer-employee relationship cannot exist when an inmate performs work for the correctional agency.[59] It is this theory of the ownership of inmate labor that is cited as justifying the

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53 The rule of lenity has been most recently applied in United States v. Thompson, 112 S. Ct. 2102 (1991). See also Hughey v. United States, 495 U.S. 411 (1990).

54 See Moskal v. United States, 498 U.S. 103 (1990) (court examination of statute's "motivating policies" can preclude application of rule of lenity). See also United States v. R.L.C., 112 S. Ct. 1329 (1992).

55 United States v. Kozminski, 487 U.S. 931 (1988) (purpose of rule of lenity to "promote fair notice"); Liparota v. United States, 471 U.S. 419 (1985); United States v. Bramblett, 348 U.S. 503 (1955).

56 Numerous examples of a "what if" approach to legislative intent may be found. See, e.g., Smith v. United States, 113 S. Ct. 1178, 1183 (1993) ("had Congress explicitly considered the question we must now decide . . . .").

57 Harker v. State Use Industries, 990 F.2d 131 (4th Cir. 1993); Wentworth v. Salem, 548 F.2d 773 (8th Cir. 1977).

58 See *Attorney General's Survey of Release Procedures, Prisons* (Vol. 5 1940), 1-21.

59 Draper v. Rhay, 315 F.2d 193, 197 (9th Cir.), *cert. denied*, 375 U.S. 915 (1963).

nonpayment of wages to inmate workers.[60] This same theory supports the nonpayment of income taxes by inmates who are given "gratuity" payments in lieu of wages for performing work.[61]

An unpaid work force provides a distinct advantage to manufacturers. Correctional industries used this advantage in two ways. In some states, the correctional industries program was operated by the state and sold its products to distributors, retailers, and the public. In other states, corrections would contract with private manufacturers for the use of inmate labor. The private firms would supervise the inmates and sell their products like any other manufacturer.[62]

Juvenile Corrections Industries

A review of the legal and correctional literature published in the period 1930-1940 does not provide any explicit descriptions of juvenile correctional industries. This literature shows that the scope of the juvenile correction system was itself quite limited. Many states continued to incarcerate juveniles with adult offenders, albeit the latter were usually under age 30. Thus, the numbers of youth in juvenile institutions available for productive work was small.

The only direct reference to juvenile correctional industries programs is a passing reference to war production in the early 1940s under the California Youth Corrections Authority.[63] Other writings, however, allow an inference that juvenile correctional industries were present even earlier. For example, the 1931 Wickersham Commission report on the federal juvenile justice system describes the Idaho Industrial Training School for youth under the age of 18, with which the federal government contracted for the care of juvenile offenders.[64] The Commission noted that this facility illustrated vocational programs found in similar juvenile institutions. This facility's program offered "industries [that] include blacksmithing, auto mechanics, plumbing, steam heating, and electrical installation." Several other industries provided materials used in facility construction and repair, including the mason and carpenter departments. The print shop provided all forms used by the facility. Other shops included the tailor, laundry, and shoe shops. It is unclear what products were sold outside the facility, although the report states that "everything is consumed by the state."[65]

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60 Alexander v. SARA, Inc., 559 F. Supp. 42 (M.D. La.), *aff'd*, 721 F.2d 149 (5th Cir. 1983).

61 See IRS Revenue Ruling 75-325 (1975); Private Rulings 7707282130A (1977), 8520111 (1985), 8717028 (1987), 8827044 (1988).

62 See *supra* note 43.

63 Karl Holton, "California Youth Authority: Eight Years of Action," 41 *Journal of Criminal Law & Criminology* 1, 3 (1950).

64 National Commission on Law Observance and Enforcement (Wickersham Commission), *Report on the Child Offender in the Federal System of Justice* (1931) (Report No. 6).

65 *Ibid*. at 91.

ILJ's review of state laws supports the conclusion that juvenile correctional industries were common, but not in competition with the private sector. California, for example, provided explicit authority for juvenile correctional industries which were authorized to sell goods to state government purchasers.[66] Oklahoma law required the superintendent of the state training school to provide a fiscal report to include an account of moneys received from sale of goods manufactured in the institution.[67] New Jersey law, however, simply authorized the establishment of industrial operations using "inmates of all correctional and charitable, hospital, relief and *training* institutions" [emphasis added], without more.[68] Other writings indicate that similar institutions and programs for juveniles existed in many other states, including New York.[69] Most of these programs were defined as "training" programs rather than industrial operations.[70] However, vocational training programs then often used "training by absorption" rather than formal training per se.[71] In practice then, training was probably accomplished through participation in productive work.

This limited literature suggests that juvenile correctional industries was not perceived as a threat to the private sector. Its "success" with the state-use system made it irrelevant to efforts to prevent enactment of laws providing federal enforcement of the state-use system approach. At the same time, juvenile corrections industries was using unpaid workers in productive settings. The capacity to compete with the private sector was clearly present. Had there been significant competition with the private sector, Congress would have explicitly discussed including the juvenile corrections industries under 18 U.S.C. § 1761.

Modern Juvenile Corrections: Relevant Differences Between Adult and Juvenile Corrections

The juvenile corrections comparisons to adult corrections that existed in 1940 may not be true today. For example, state laws authorizing juvenile corrections to hold youth until the age of 18 or 21

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66 *Cal. Code* § 1124 (Deering 1938).

67 *Okl. Stat*. Tit 10 § 249 (1941).

68 *N.J. Rev. Stat*. § 30:4-92.

69 Austin MacCormick, "Existing Provisions for the Correction of Youthful Offenders," 9 *Law & Contemporary Problems,* 591, 593 (1942), cites the New York State Vocational Institution at West Coxsackie.

70 See, e.g., *NewYork Corrections Law* § 300 (1937), providing for "the employment of such women...for the purpose of teaching such women a useful trade or profession" and authorizing "reasonable compensation" for their work.

71 See, e.g., Maurice C. McCann, "Training of Delinquents in Certain Middle Western Industrial Schools," 31 *Journal of Criminal Law* 589, 592 (1941).

may not have been as widely adopted then as they are today.[72] One may infer this from the multiple reports at that time on adult reformatories holding youth age 16 to 30.[73]

The most important difference today is the distinction between adult corrections as part of the state criminal law process and juvenile corrections under the state's civil law authority.[74] This has important implications since the 13th Amendment's penal servitude exception may not apply to juvenile corrections. The implication of nonapplicabililty of the 13th Amendment is clear: juvenile corrections cannot use unpaid inmate labor, thereby eliminating the problem at which 18 U.S.C. § 1761 is directed.

The argument for the nonapplicability of the penal servitude exception is that juvenile offenders are found to have committed delinquent acts under a civil law theory of law. They are not "convicted of [a] crime" for which punishment may be imposed. The district court opinion in *King v. Carey*, holding that the Fair Labor Standards Act applies to youth in a New York juvenile facility,[75] implicitly accepts this contention.[76]

The counter argument is that juvenile law has been changing in the past decade so that criminal law principles now apply in juvenile correctional law. For example, the Washington state Juvenile Justice Act of 1977 authorizes punishment of juvenile offenders.[77] Similar provisions are found in the Illinois Juvenile Court Act.[78] Thus, the argument is that simply labeling a cause of action as civil or criminal ignores the realities that underlie the action. This argument was accepted in *Santiago v. City of Philadelphia*, where the federal district court, in dismissing a defense motion for summary judgment, held that it required a full record to determine whether the justification for detaining the juvenile plaintiffs was civil or criminal in nature, irrespective of the civil law label for juvenile court proceedings.[79] A

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72 See Linda Szymanski, "Extended Age of Juvenile Court Jurisdiction Statutes Analysis (1992 Update)" (National Center for Juvenile Justice, 1993) (26 states and the District of Columbia authorize detention as a juvenile until age 21; two states authorize detention until age 25; 15 states authorize detention to ages 18 to 20).

73 See *supra* note 49 and accompanying text.

74 Whatever theoretical differences were recognized in 1940 between a civil or criminal law basis for juvenile court proceedings, such differences were much less significant for correctional programming.

75 King v. Carey, 405 F. Supp. 41 (W.D.N.Y. 1975), is the sole reported decision applying the Fair Labor Standards Act to youth in juvenile correctional facilities. The *King* decision has been favorably cited by courts in other types of litigation in explaining the scope of the 13th Amendment. See, e.g., United States v. Lewis, 649 F. Supp. 1109 (W.D. Mich. 1986) (criminal prosecution). The crux of the *King* decision lies in its analogy to persons civilly committed to mental institutions, citing Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973); Weidenfeller v. Kidulis, 380 F. Supp. 445 (E.D. Wisc. 1974); Wyatt v. Stickney, 344 F. Supp. 373 (N.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderhalt, 503 F.2d 1305 (5th Cir, 1975).

76 Numerous federal courts reviewing the applicability of the Fair Labor Standards Act to inmate labor have explicitly contrasted it with 18 U.S.C. § 1761. See, e.g., Harker v. State Use Industries, 990 F.2d 131 (4th Cir 1993); Wentworth v. Salem, 548 F.2d 773 (8th Cir. 1977).

77 *Washington Revised Code* § 13.40.010. See *In re* Erickson, 604 P.2d 513 (Wash. Ct. App. 1979).

78 705 *ILLS* 405/5-33 ("necessary to ensure the protection of the public from the consequences of criminal activity of the defendant.") See also Appendix II.

79 435 F. Supp. 136 (E.D. Pa. 1977).

number of state courts have agreed with the *Santiago* decision that quasi-criminal juvenile proceedings are *potentially* within the scope of the 13th Amendment's penal exception.[80]

None of these decisions provide an extended discussion of the several issues presented here. The *King* court's simplistic labeling of juvenile delinquency proceedings as a civil law action assumes its legal conclusion.[81] On the other hand, the courts rejecting the *King* approach also fail to adequately explain their rulings. For example, the *Santiago* ruling does not explain its basis for ruling that "the justification for confining juveniles should determine the appropriateness of work assignments.'[82] No opinion discusses congressional intent in adopting the 13th Amendment. For example, rulings that probation orders requiring juveniles to provide community service[83] may be explained as analogies to traditional court powers, such as those in equity, to order actions that could be categorized as forced labor.

One recent student note reviewing these cases contends that the test for whether the 13th Amendment exception applies should be whether the state juvenile court process provides due process guarantees available in adult court proceedings.[84] This position is not altogether appropriate. Due process guarantees differ considerably between lesser misdemeanants and serious felons; the only constant being where conviction results in a sentence of imprisonment.[85]

An alternative approach is to focus on the *results* of a juvenile offender's disposition. If the results are singularly of a civil nature, such as incarceration for purposes of treatment,[86] then the 13th Amendment exception for penal involuntary servitude is not applicable. But if the results are quasi-criminal, in part or whole, such as for punishment or incapacitation, then the 13th Amendment exception

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80 In the matter of S.C., 790 S.W.2d 766 (Tex. Ct. App. 1990); *In re* Erickson, 604 P.2d 513 (Wash. Ct. App. 1979). See also M.J.W. v. State, 210 S.E.2d 842 (Ga. Ct. App. 1974).

81 The simple labeling approach of the *King* court ignores the rather complex statutory scheme lying underneath. For example, compare the numerous state laws stating that a juvenile disposition is not to be considered a criminal conviction, e.g., *Alabama Code* § 15-19-7; *Connecticut General Statutes Annotated* § 54-76k, with other state laws mandating consideration of an offender's juvenile record in setting sentence in adult court. See Neal Miller, "Review of State Sentencing Laws' Use of Juvenile Records" (unpublished 1994) (at least 23 states require such use and an additional 20 states authorize discretionary use).

82 Santiago, at 157.

83 M.J.W. v. State, 210 S.E.2d 842 (Ga. Ct. App. 1974).

84 Comment, "The Thirteenth Amendment and the Juvenile Justice System," 83 *Journal of Criminal Law & Criminology* 614 , 634 (1992) (emphasizing the availability of jury trial).

85 The only due process guarantee that relies upon the possibility of incarceration is that of the right to counsel. See Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanor conviction that results in jail term must have appointed counsel).

86 *Compare* Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (incarcerated juveniles have right to rehabilitative treatment under Indiana law); Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977) (right to treatment) *with* Santana v. Collazo, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984) (no right to rehabilitative treatment).

applies. A focus on the results of the juvenile law process seems consistent with the purposes behind the 13th Amendment's exception for penal labor.

Summary

The examination of the policies underlying 18 U.S.C. § 1761 show that in 1940 they theoretically were applicable to juvenile corrections industries. However, these programs were not so numerous, or in direct competition with the private sector, for Congress to explicitly note them in its floor debate. These policies are relevant today in states where the 13th Amendment permits juvenile corrections to employ its inmates in industries work without pay. However, in states where non-punitive or rehabilitative goals are the basis of the juvenile corrections system, juvenile corrections may not establish industries subject to the purposes and reach of 18 U.S.C. § 1761.

Appendix II details which states' juvenile justice laws may be categorized for purposes of 18 U.S.C. § 1761 as quasi-criminal. These include state laws that provide for quasi-criminal goals of the juvenile justice system, laws requiring use of quasi-criminal criteria in setting dispositions (sentences), and those providing quasi-criminal sanctions for serious juvenile offenders given institutional dispositions.

III. Consequences of 18 U.S.C. § 1761 Coverage or Non-Coverage

The conclusion that coverage under 18 U.S.C. § 1761 depends upon whether there are quasi-criminal aspects to juvenile corrections incarceration means that some juvenile corrections industries may be covered by this law, while others will not be. States that are covered by 18 U.S.C. § 1761 will then have to determine whether they wish to participate in the certification program authorized by subsection (c). If they are not covered by the federal law, their industries programs may be covered by other federal laws regulating workplaces.

18 U.S.C. § 1761 Applies

If 18 U.S.C. § 1761 potentially applies to juvenile corrections industries, two questions arise. First, what activities may these industries programs engage in without violating the federal law? Second, what does subsection (c) require of states that wish to sell inmate-made goods in interstate commerce?

Authorized Activities Under 18 U.S.C. § 1761

ILJ's experience with adult prison industries programs shows that many administrators still are not fully aware of what they can and cannot do. For example, prison industries **under federal law** can [87]

- Sell goods within an intrastate market to any buyer authorized under state law.
- Sell goods across state lines to other governmental bodies, including local governments or school boards.[88]
- Sell to federal governmental buyers where the products are sold from inventory, not specially produced for the federal government buyer.[89]
- Sell **services** to any buyer regardless of interstate or intrastate location (services are not covered by the federal prohibition against interstate transportation of goods, wares, or merchandise).

Barred Activities

Correctional industries administrators are barred by federal law from

- Selling goods in interstate commerce, i.e., to buyers in other states.
- Selling to federal agencies goods that are produced pursuant to a contract.

Other Consequences of 18 U.S.C. § 1761(a)

Because application of 18 U.S.C. § 1761 is congruent with involuntary inmate labor, numerous federal laws have explicitly taken the unique status of inmate workers into account. Under these laws

- Federal income tax is not collected against wages paid to inmate workers where the wage is a gratuity.[90]
- The federal FICA is not collected from inmates.[91]
- Federal social security tax is not collected from inmates in penal institutions.[92]
- Federal Medicare deductions are not taken from inmates.[93]

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87 State law restrictions on juvenile correctional industries are not addressed here. These restrictions may be specifically directed at juvenile correctional industries or may derive from more general legislation. See, e.g., *Louisiana Revised Statutes* § 39:370.1 (regulation of state agency competition with private sector).

88 18 U.S.C. § 1761(b).

89 48 C.F.R. § 52.222-3(c).

90 See IRS Ruling 75-325 (1975).

91 See 26 U.S.C.§ 3121(7)(F)(ii); (26 U.S.C. § 3121(b)(6)(A) (federal prison inmates).

92 42 U.S.C. § 410(a)(6)(D)(i). See also 42 U.S.C. § 410(H)(6)(A) (federal prisoners).

93 42 U.S.C. § 410(p)(2)(B).

The special status of inmate workers also has other results, including the categorization of civilian supervisors as line workers. This means that the Fair Labor Standards Act provisions for treatment of supervisory staff as exempt from overtime provisions is inapplicable to civilian supervisors of inmate workers.[94] Similarly, civilian supervisors are to be paid for meal times when they have a continuing responsibility for supervising the inmate workers during lunch.

18 U.S.C. § 1761(c)'s Exception

Certification under 18 U.S.C. § 1761(c) permits correctional industries to sell their goods in interstate commerce to private buyers. This authority is conditioned upon paying the inmate workers wages that are comparable to those paid to private sector workers performing similar work. One problem with this requirement is that inmate workers do not have work experiences or skills that are comparable to those of competing private sector workers. Hence, a training differential is required that is less than the prevailing wage in the relevant industry. A second condition of certification is providing fringe benefits to the inmate workers, within the range ordinarily provided free world workers. The most important implication of this requirement is that industries workers must be covered by a workers compensation plan.[95] A third condition of certification is that enforced deductions from inmate wages for authorized purposes shall not exceed 80 percent of the total wages.

Nonapplicability of 18 U.S.C. § 1761: Rehabilitative Juvenile Industries Work

Not all juvenile corrections agencies operate under laws establishing punishment as a goal for the agency. Thus, juvenile correctional industries established by these agencies are not covered by the 13th Amendment's exemption for inmate labor as involuntary servitude. The result is that other federal laws such as the Fair Labor Standards Act (FLSA) provision for a minimum wage may apply to juvenile workers in these states, depending upon whether the work in question can be termed to be pursuant to "performing tasks as a normal part of a program of treatment, rehabilitation, or vocational training."[96] Such tasks are not considered to be "work" under the regulations.[97] However, industrial work that emphasizes production rather than training would not seem to qualify for this exemption from the FLSA. This would include juvenile industries programs run by private sector companies or employers. The

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94 Wage and Hour Division Ruling of May 18, 1988 for Texas Department of Corrections interpreting 29 CFR § 541.1 and 541.2.

95 See discussion in “Court Actions and Standards Impacting Prison Industries,” in Robert Grieser, Neal Miller, and Gail Funke, *Guidelines for Prison Industries* (Washington, D.C.: National Institute of Corrections, 1984), 93, 108-110.

96 Wage and Hour Division, Letter Ruling May 23, 1968, *Fair Labor Standards Handbook*, Appendix III, p. 14 (1990).

97 Wage and Hour Division Opinion WH-245 (1973).

difficulty will be in drawing the line between work that emphasizes treatment-related goals and either cost-saving or production goals.[98]

At the same time, the several federal tax laws that provide exemptions for inmate workers will also be applicable to the juvenile workers. This contradiction in application of federal laws directed at the workplace must be administratively reconciled. The simplest way to accomplish such reconciliation is for the juveniles to be employed by a private employer, who would not be questioned if they were simply to report juvenile inmates as workers without showing their inmate status.

Other Work Site Regulations

Both certified and non-certified industries are subject to other federal and state laws regulating work sites. These include laws such as Occupational Safety and Health Act[99] or laws regulating the use of hazardous materials in the workplace.[100]

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98 See cases cited *supra* note 75.

99 29 U.S.C. § 651 *et seq*. Comparable state laws have been held applicable to prison work programs. See, e.g., Brewington v. Department of Corrections, 447 S.W.2d 1184 (La. Ct. App. 1984 (duty to provide safe workplace). But see Michigan Attorney General Opinion No. 6485 (December 23, 1987) (prison inmate workers not covered by state OSHA).

100 E.g., Toxic Substance Control Act, 15 U.S.C. § 2601 *et seq*.; Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*.; Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq*. See generally, Neal Miller, "The Handling of Hazardous Materials by Correctional Industries: Worker Safety, Environmental Protection, and Product liability Legal Issues," in Tom Crim and Neal Miller, *1990 Update: Guidelines for Prison Industries* (Washington, D.C.: National Institute of Corrections, 1990), 161.

Appendix I: 18 U.S.C. § 1761

Appendix II: Exhibit of State Laws Establishing Quasi-Criminal Goals for Juvenile Corrections

Statutory Goals And Related Laws

STATE	Punish	Hold Accountable	Protect Public Safety	Other* Goals	Crime Seriousness/ Disposition
Alabama		X		X[1]	
Arkansas			X	X[2]	
California	X	X	X		
Colorado					X
Delaware					X
Florida	X		X		
Georgia					X
Hawaii	X				
Idaho		X	X		
Illinois			X	X[3]	
Indiana			X	X[4]	
Iowa					X
Kansas			X		
Louisiana					X
Maine	X				
Minnesota		X	X	X[5]	

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* States that have statutory provisions emphasizing rehabilitation goals for juvenile corrections that might, nonetheless, be interpreted by a court to also provide quasi-criminal purposes (based on references to public safety) include Maryland, Nebraska, New Hampshire, North Dakota, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin. .

1 Preserve public peace.

2 Sanctions consistent with seriousness of offense.

3 Juveniles who are adjudicated habitual juvenile offenders are required to be sentenced to a period of incarceration.

4 Enforce legal obligations children have to society.

5 Maintain integrity of substantive law prohibiting certain behavior.

STATE	Punish	Hold Accountable	Protect Public Safety	Other* Goals	Crime Seriousness/ Disposition
Montana			X		
New Jersey					X
New York				X[6]	
North Carolina			X	X[7]	
Ohio					X
Oklahoma			X		
Texas					X
Utah		X	X		
Washington	X	X	X		

* States that have statutory provisions emphasizing rehabilitation goals for juvenile corrections that might, nonetheless, be interpreted by a court to also provide quasi-criminal purposes (based on references to public safety) include Maryland, Nebraska, New Hampshire, North Dakota, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin. .

6 Protection of the community.

7 Dispositions to reflect seriousness of offense, degree of culpability, and prior record.

Appendix III: Federal Child Labor Laws

The Fair Labor Standards Act establishes standards for the working conditions of minors who are either ages 14 to 16 years old or 16 to 18 years old.

Ages 14 to 16

Minors age 14 to 16 are allowed to work in nonagricultural occupations that are not deemed hazardous and do not interfere with schooling or health. The Department of Labor (DOL) regulations, 29 C.F.R. § 570.34(a), specify the types of jobs that are not deemed hazardous. These include:

- Office and clerical work
- Clean up work, including use of vacuum cleaners and floor waxers
- Kitchen and other work involved in preparing and serving hot food
- Automobile servicing, including dispensing gasoline, car cleaning; but not work involving use of machinery

Minors may not work at employment that involves (29 C.F.R. § 570.33(a-e) - 34(b))

- Manufacturing in locations where goods are manufactured
- Operation of any power driven machinery other than office machines
- Operation of motor vehicles
- Outside window washing
- Use of power driven food slicers and grinders and battery type mixers
- Work in freezers and meat coolers
- Work in warehouses except office and clerical work
- Loading and unloading goods from trucks
- Maintenance and repair of machinery

The hours of work are restricted for minors (29 C.F.R. § 570.35(a)). Within the limitation that they may work only outside school hours, the total number of hours worked may not exceed

- 40 hours when school not in session
- 18 hours in any one week when school in session.
- 8 hours in one day when school not in session
- 3 hours in one day when school in session

Minors may not work during the hours between 7 p.m. and 7 a.m., except in summertime when they may work up to 9 p.m.

The restrictions have one exception. Work training programs may employ minors during the school day when the employer certifies that the employment will not interfere with the minor's health and

well being. The statement must be countersigned by the minor's school principal that the work will not interfere with the minor's schooling (29 C.F.R. § 570.35(b)).

Ages 16 to 18

Minors age 16 to 18 cannot work at

- Motor vehicle driver or outside helper, except if the vehicle weight does not exceed 6000 pounds and the driving is restricted to daylight hours
- Work that involves operation of power driven woodworking machines, except for machines where the work involves placing of materials on a moving chain, or a hopper or slide for automatic feeding
- Operator of moving equipment, including high lift truck
- Riding on a manlift or freight elevator, except for freight elevators operated by an operator
- Operating or assisting to operate power driven paper products machines
- Operator or helper on power driven fixed or portable machines except those with automatic feed and ejection
- Work involving roofing operations
- Work involving rolling machines, pressing or punching machines, and bending machines

Certain occupations have exceptions tied to participation in apprenticeship programs (29 C.F.R. § 570.50(b)(c)). Student-learners may also be exempted from certain exclusions where they are enrolled in a course of study and training in a cooperative vocational program operated by a state or local educational authority and other requirements (29 C.F.R. § 570.70(c)).

Certificates of Age

Employers must provide proof of age for all minors they employ. Certificates of age are issued by the U.S. Department of Labor and state counterparts. These certificates must be kept on file and be returned to the issuing agency when the employment ends (29 C.F.R. § 570.7). The certificate lists (29 C.F.R. § 570.6):

- Name and address
- Place and date of birth
- Sex
- Signature of minor
- Parent or guardian information

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Arkansas			X	X[2]	
California	X	X	X		
Colorado					X
Delaware					X
Florida	X		X		
Georgia					X
Hawaii	X				
Idaho		X	X		
Illinois			X	X[3]	
Indiana			X	X[4]	
Iowa					X
Kansas			X		
Louisiana					X
Maine	X				
Minnesota		X	X	X[5]	
STATE	Punish	Hold Accountable	Protect Public Safety	Other* Goals	Crime Seriousness/ Disposition

* States that have statutory provisions emphasizing rehabilitation goals for juvenile corrections that might, nonetheless, be interpreted by a court to also provide quasi-criminal purposes (based on references to public safety) include Maryland, Nebraska, New Hampshire, North Dakota, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin. .

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2 Sanctions consistent with seriousness of offense.

3 Juveniles who are adjudicated habitual juvenile offenders are required to be sentenced to a period of incarceration.

4 Enforce legal obligations children have to society.

5 Maintain integrity of substantive law prohibiting certain behavior.

Montana			**X**		
New Jersey					**X**
New York				**X**[6]	
North Carolina			**X**	**X**[7]	
Ohio					**X**
Oklahoma			**X**		
Texas					**X**
Utah		**X**	**X**		
Washington	**X**	**X**	**X**		

* States that have statutory provisions emphasizing rehabilitation goals for juvenile corrections that might, nonetheless, be interpreted by a court to also provide quasi-criminal purposes (based on references to public safety) include Maryland, Nebraska, New Hampshire, North Dakota, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin. .

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7 Dispositions to reflect seriousness of offense, degree of culpability, and prior record.