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Working on the Other Side of the Fence: Relief for Incarcerated Individuals After Employment Discrimination

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WORKING ON THE OTHER SIDE OF THE FENCE: RELIEF FOR INCARCERATED INDIVIDUALS AFTER EMPLOYMENT DISCRIMINATION

ABSTRACT

One of America's largest workforces, comprised of 1.5 million incarcerated workers, remains unprotected by employment discrimination statutes and vulnerable to abuse from a system designed to exploit their labor. This Note highlights the effects of the lack of protection against employment discrimination for incarcerated workers. This Note will analyze the circuit split regarding the application of employment discrimination statutes to prisoners based on varying understandings of the term "employee" and explain why both approaches fail incarcerated workers. Although one approach bars suit from incarcerated employees altogether, the other only allows suit when the incarcerated individual is working in an "optional" job opportunity. This Note will demonstrate that the distinction between forced and optional labor made by the circuit split is untenable today. Further, regardless of what test determines "employee" status, this Note proposes courts should find incarcerated workers to be employees and thus covered under employment discrimination statutes. All workers deserve to be, and should be, protected by the courts from discrimination in the workplace regardless of their incarceration status. To recognize the employee status of incarcerated workers would be to fulfill the purpose of the statutes by protecting vulnerable workers and creating a safer work environment.

INTRODUCTION

In 2019, the Manhattan Detention Complex detained Anibal Quinones for a simple parole violation.[1] During his detention, Quinones worked in the kitchen at the facility, where he regularly spoke Spanish to fellow detainees and officers who oversaw them.[2] When the prison assigned a new supervisor to the kitchen, the supervisor made the work environment a "nightmare" and unbearably "hostile."[3] Despite having no posted policy forbidding inmates from speaking Spanish, the new supervisor demanded the workers speak English without regard for the fact that many of them *only* spoke Spanish.[4] Some inmates were fired, and others quit, because of the hostile environment created by the supervisor's aggressive policing of language in the workplace.[5]

When Anibal Quinones asked one of the officers to pass him plastic bags for preparing utensils for meals in Spanish, the supervisor told him to pack his personal belongings and return to his housing unit for the day.[6] When Quinones returned to his unit, he filed a grievance.[7] The supervisor quickly retaliated by firing him and barring him from returning to work at the kitchen.[8] Quinones filed a federal district court action under Title VII, alleging national origin discrimination and retaliation.[9] The district court found that he was not an employee under Title VII due to his status as a prisoner, and

1. Quinones v. N.Y.C., No. 19-CV-05400, 2020 WL 5665142, at *1 (S.D.N.Y. Aug. 17, 2020).
2. *Id.*
3. *Id.*
4. *See id.*
5. *See id.*
6. *See id.* at 2.
7. *See Quinones*, 2020 WL 5665142, at *2.
8. *See id.*
9. *See id.*

he was left with no recourse against the prison for the discrimination and retaliation he endured.[10]

Anibal Quinones represents just one of the nearly 1.5 million incarcerated people working for prisons.[11] Approximately half of all inmates in federal and state prisons are required to perform to some sort of work assignment during their imprisonment.[12] The most common prison work involves "prison housework," including services such as food service or maintenance.[13] Other common assignments include public work assignments, producing products for the government like license plates, and work in the private sector.[14] Not only are many incarcerated people forced to work as part of their sentences, they do not enjoy the statutory "protections enjoyed by workers laboring in the exact same jobs on the other side of the . . . fence."[15]

Given the millions of individuals incarcerated in the United States[16] and the importance of anti-discrimination protection in the workplace, the lack of protections for prison workers poses a significant problem.[17] The lack of applicability of employment discrimination statutes to the prison workplace creates an environment ripe for abuse of power and discrimination beyond that already inherent in the prison.[18] This has left incarcerated individuals powerless to take action against the prisons that employ them.[19]

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10. *See id.* at *7.

11. The last full nationwide census of prisons was in 2005, where it was estimated that there were nearly 1.5 million incarcerated people working. *See* Cardiff Garcia & Darius Rafieyan, *The Uncounted Workforce*, NPR (June 29, 2020, 5:01 PM), https://www.npr.org/transcripts/884989263 [https://perma.cc/PU57-WJFA]. There is currently no central repository of information on prison labor, leaving it up to individual prisons and states to decide how they choose to count and regulate prison labor. *See* Quinones, 2020 WL 5665142, at *7.

12. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 57 (2015).

13. *Id.* (describing the prevalence of different prison work assignments).

14. *Id.*

15. Whitney Benns, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015), https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177 [https://perma.cc/35GA-CG75].

16. As of 2016, 2.3 million people were incarcerated in the United States. *How Many People Are Locked Up in the United States?*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/graphs/pie2020.html [https://perma.cc/DUH6-8CHA].

17. The importance of employment discrimination laws is difficult to overstate; anti-discrimination laws create the "means of educating workers about their rights and responsibilities and provide the means of taking action when violations are noted." David Sarokin, *The Importance of Employment Laws and Compliance with Intentions of the Laws*, CHRON (Aug. 21, 2020), https://smallbusiness.chron.com/importance-employment-laws-compliance-intentions-laws-12322.html [https://perma.cc/EP88-24NL]. Additionally, anti-discrimination laws work to make society overall "more decent and humane by . . . provid[ing] mechanisms for fair treatment of the . . . workforce." *Id.*

18. *See* Keith Armstrong, Comment, *"You May Be Down and Out, But You Ain't Beaten": Collective Bargaining for Incarcerated Workers*, 110 J. CRIM. L. & CRIMINOLOGY 593, 598 (2020).

19. *See id.* at 597–99.

Congress passed three general federal statutes to protect employees from discrimination by employers: Title VII of the Civil Rights Act (Title VII), the Age Discrimination and Employment Act (ADEA), and the Americans with Disabilities Act (ADA).[20] Title VII protects employees from discrimination by employers based on race, color, national origin, sex, sexual orientation, or religion.[21] The ADEA forbids employment discrimination against people aged forty or older.[22] Finally, the ADA prohibits employers from discriminating against a qualified individual on the basis of disability.[23]

Yet, most courts hold these statutes inapplicable to a massive group of employees in the United States[24]: incarcerated individuals.[25] This Note will demonstrate that, considering the realities of prison labor in the twentieth century and the context of the work performed by incarcerated workers, protections created by employment discrimination statutes should be expanded to cover all labor required of prisoners.[26] Protecting prisoners under these statutes is necessary to foster a safer work environment and prevent the prison system from further marginalizing and discriminating against incarcerated people.[27]

Part I examines the history of prison labor in America and the importance of employment discrimination protections for incarcerated individuals in the prison workplace. Part II will discuss the circuit

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20. *See Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM'N: YOUTH AT WORK, https://www.eeoc.gov/youth/timeline-important-eeoc-events [https://perma.cc/QBM6-GEM6].

21. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (1964).

22. Age Discrimination and Employment Act, 29 U.S.C. §§ 621–634 (1967).

23. Americans with Disabilities Act, 42 U.S.C. § 12112(a) (1990) (amended 2008).

24. *See* Garcia & Rafieyan, *supra* note 11 (explaining that "[i]t is hard to know exactly how big the prison labor industry is" because there has not "been a full nationwide census of prisons since 2005," when there were approximately 1.5 million incarcerated individuals working in prisons).

25. *See, e.g.*, Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991) (holding that the prisoner was not an employee as defined by Title VII or the ADEA because the inmate does not have an employment relationship with the prison as their relationship is one of imprisonment); McCaslin v. Cornhusker State Indus., 952 F. Supp. 652, 657 (D. Neb. 1996) (holding that Title VII does not apply to the prison setting when prisoners are mandated to work in prison-run industries); Wilkerson v. Samuels, 524 F. App'x 776, 779 (3d Cir. 2013) (holding that Title VII does not apply to prisoners because the relationship between the inmate and prison is not one of employment but arises out of the prisoner's status as an inmate).

26. *See* Jackson Taylor Kirklin, Note, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048, 1089 (2011).

27. *See, e.g.*, Spencer Woodman, *California Blames Incarcerated Workers for Unsafe Conditions and Amputations*, INTERCEPT (Dec. 28, 2016, 11:23 AM), https://theintercept.com/2016/12/28/california-blames-incarcerated-workers-for-unsafe-conditions-and-amputations [https://perma.cc/SZ6B-EA78].

split regarding the application of employment discrimination statutes to prisoners based on varying definitions of the term employee. Part III explores problems under both approaches in the circuit split and explains why both approaches fail incarcerated workers. Finally, Part IV argues that the out-of-date circuit split should be abandoned, and that, regardless of which test determines incarcerated workers' employee status, courts should determine that prison laborers are employees and thus covered by employment discrimination statutes. This change would fulfill the statutes' purposes of protecting workers and creating safer work environments for *all* workers.[28]

I. OVERVIEW OF PRISON LABOR

Before delving into the applicable law, the following sections chronicle the history of American prison labor and the heightened need for modern employment protections for incarcerated workers.

A. Early History of Prison Labor in the United States

Prison labor has been a global pandemic since the fourteenth and fifteenth centuries when Venetian and Florentine naval galleys used prison labor to run their ships.[29] The brutal use of prison labor played an instrumental role in the rise of empires across the globe,[30] and the United States was no exception.[31]

The use of prison labor was quickly revolutionized in the United States.[32] In the early nineteenth century, the rise of factory work and urbanization in Northern states along with worker rebellions led to a scarcity of labor, leaving many states unable to grow their new industrialized economies.[33] In the 1820s, New York turned to prisoners to fulfill its need for a labor force in an experiment at Auburn Prison.[34] Auburn Prison was the first prison to profit from the labor of its inmates in the United States.[35] The system Auburn developed

28. *See id.*

29. *See* Christian G. De Vito & Alex Lichtenstein, *Writing a Global History of Convict Labour*, 58 INTERNATIONAAL INSTITUUT VOOR SOCIALE GESCHINDENIS 285, 294 (2013).

30. *See id.* at 289.

31. *See* Kirklin, *supra* note 26, at 1052.

32. *Id.*

33. Genevieve LeBaron, *Slaves of the State: American Prison Labour Past and Present*, OPEN DEMOCRACY (Apr. 23, 2015), https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/slaves-of-state-american-prison-labour-past-and-present [https://perma.cc/TH3A-3CBM].

34. *See* REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941 17 (2009).

35. *Auburn Prison Ledgers: An Inventory of the Collection at Syracuse University*, SYRACUSE UNIV. LIBR., https://library.syr.edu/digital/guides/print/auburn_prison_prt.htm [https://perma.cc/3XAC-87BX] (last visited Nov. 4, 2021).

involved sentencing offenders to "fortress-like prisons . . . [selling] the convicts' labor power to private manufacturers, who set up shop in the prison and put their prisoner laborers to . . . 'congregate labor' by day; and locked their prisoner-workers down in great stone cell-houses by night."[36] The system was supported by stripping convicts of their rights and "the liberal infliction of corporal punishments."[37]

Despite the brutality of the New York system, it spread to become the main mode of punishment for incarcerated individuals in the majority of Northern states after 1830.[38] Essentially, these "[p]rison factories . . . were penal-social laboratories," where "[t]he whip made men living machines" and managers used "violent methods of discipline."[39] This new penal labor system continued to thrive in the North while at the same time, a concurrent system was designed in the South to maximize prison labor in a different yet equally brutal way.[40]

B. Post–Civil War Prison Labor and the Thirteenth Amendment

The Thirteenth Amendment abolished slavery but explicitly permitted the forced use of prisoners for labor.[41] Slavery was not abolished, but merely reformed and forced upon the incarcerated population.[42]

Emancipation of the enslaved population created a crisis for agricultural economies because they had relied on enslaved labor to drive its growth while keeping costs low.[43] Slave states passed laws,[44]

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36. MCLENNAN, *supra* note 34.

37. *Id.*

38. *See id.*

39. LeBaron, *supra* note 33.

40. *See* Morgan Jerkins, Opinion, *Bones That Revealed a Texas Town's Forgotten Racial Past Deserve Respect*, THE GUARDIAN (Mar. 7, 2019 02:00 AM), https://www.theguardian.com/commentisfree/2019/mar/07/sugar-land-imperial-prison-farm-cemetery-prisoners-remains [https://perma.cc/B8KH-WWAK].

41. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . . ." U.S. CONST. amend. XIII.

42. *See* U.S. CONST. amend. XIII. This continued despite the fact that United Nations guidelines on how to treat incarcerated individuals (also known as the Nelson Mandela Rules) says that prisoners should not be held in slavery and deserve fair wages as well as safe work conditions. G.A. Res. A/RES/70/175, The Nelson Mandela Rules, at 29 (Dec. 17, 2015).

43. The slave economy was the foundation of the Southern economy; once slavery was banned, the South had to devise a new system of labor to replace it. *See Sharecropping and Changes in the Southern Economy*, PBS, https://www.pbs.org/wgbh/americanexperience/features/reconstruction-sharecropping-and-changes-southern-economy [https://perma.cc/LQ47-T9F2] (last visited Nov. 4, 2021).

44. In late 1865, Mississippi and South Carolina were the first states to enact Black Codes. *See Black Codes*, HIST., https://www.history.com/topics/black-history/black-codes

otherwise known as Black Codes,[45] which selectively re-incarcerated freed slaves to continue forcibly using their labor[46] through the practice of convict leasing.[47] Black codes targeted Black people by having them arrested for minor violations, punished with major fines, and then imprisoned until they could pay their debts.[48] The convict leasing system explicitly operated to earn profit, not to rehabilitate.[49]

Southern states that used convict leasing would lease prisoners to railways, plantations, and other businesses in exchange for payment.[50] Convict leasing became "a functional replacement for slavery, a human bridge between the Old South and the New."[51] Incarcerated individuals worked in excruciating conditions and were often bought and sold like enslaved people.[52] Convicts faced "brutal beating, whipping, food deprivation, and sadistic torture" for their convictions.[53] Lessees often invested less in convicted individuals than they had in enslaved persons because it mattered even less to their economic bottom line if their leased labor lived or died.[54]

[https://perma.cc/PV92-7KCF] (last updated Jan. 21 2021). Alabama, Louisiana, Florida, Texas, Georgia, North Carolina, and Virginia quickly followed suit. *See, e.g.*, WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861–1915 31 (1991).

45. Black Codes collectively refer to statutes that criminalized a wide variety of behaviors, such as vagrancy and unauthorized breach of contract by a Black employee with a white employer, that were designed to incarcerate Black individuals and ensure their continued availability as a labor force. *See Black Codes*, *supra* note 44.

46. Of the nine states that adopted Black Codes during the period of 1865–1866, all except North Carolina allowed convict leasing. *See* COHEN, *supra* note 44, at 33.

47. *See* Stian Rice, *Farmers Turn to Prisons to Fill Labor Needs*, HIGH COUNTRY NEWS (June 12, 2019), https://www.hcn.org/articles/agriculture-farmers-turn-to-prisons-labor-to-fill-labor-needs [https://perma.cc/E5VK-SG32] (one of the main methods of prison labor was convict leasing); *see, e.g.*, *Convict Leasing*, EQUAL JUST. INITIATIVE (Nov. 1, 2013), https://eji.org/news/history-racial-injustice-convict-leasing [https://perma.cc/PL7J-GRA8].

48. *See* MICHELLE ALEXANDER, THE NEW JIM CROW 156 (2012).

49. Shane Bauer, *The True History of America's Private Prison Industry*, TIME (Sept. 25, 2018, 3:00 PM), https://time.com/5405158/the-true-history-of-americas-private-prison-industry [https://perma.cc/82E6-VWB7]; *see also* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1469 (2019) (explaining that convict leasing systems were operated for profit, not for any penological goals).

50. *Convict Leasing, supra* note 47.

51. Pope, *supra* note 49, at 1507 (quoting DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 57 (1996)).

52. Christopher Muller, *Freedom and Convict Leasing in the Postbellum South*, 124 AM. J. SOCIO. 367, 368 (2018).

53. Pope, *supra* note 49, at 1507.

54. *See* Mary Rose Whitehouse, Note, *Modern Prison Labor: A Reemergence of Convict Leasing under the Guise of Rehabilitation and Private Enterprises*, 18 LOY. J. PUB. INT. L. 89, 96 (2017); *see also* Alex Lichtenstein, *Chain Gangs: How Did We Get to This Point?*, SOUTHCOAST TODAY (Jan. 11, 2011, 10:30 PM), https://www.southcoasttoday.com

Despite the brutality of convict leasing, the system continued to operate until the 1930s.[55] Proponents of the leasing system argued that forced labor was "an essential element of an inmate's punishment," emphasizing "the rehabilitative value of a structured work environment" rather than the prison's pecuniary gain.[56] The system eventually met its demise because of economic concerns rather than humanitarian ones.[57] Unions complained that convict leasing allowed companies that used leasing to provide their goods at a far lower cost than companies that did not rely on leasing.[58] The system soon transitioned to utilizing chain gangs to ensure the continued availability of a labor force while lessening the impact on union workers.[59]

C. The Use of Chain Gangs

As states left convict leasing behind, prisoners were increasingly forced to work in chain gangs.[60] Although chain gangs existed as early as the nineteenth century, they did not become common until the 1920s and 1930s.[61]

The term chain gang evolved from the fact that prisoners had shackles attached to each ankle with a heavy chain connecting them.[62] To turn a profit and avoid some of the previous conflicts with unions in the private industry, chain gangs were leased to states, rather than private companies.[63] Chain gang systems were usually

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/article/20000804/OPINION/308049937 [https://perma.cc/V3KK-4E4X] (explaining that "[i]f a convict died, another one was always available from the 'penitentiary' for the same low price," discouraging the lessees from providing humane treatment).

55. *See Convict Leasing*, *supra* note 47.

56. *See* Kirklin, *supra* note 26, at 1054.

57. Whitehouse, *supra* note 54, at 96; *see also* Matthew J. Mancini, *Race, Economics, and the Abandonment of Convict Leasing*, 63 J. NEGRO HIST. 339, 349 (1978) (explaining that it was not until the system of convict leasing lost its profitability that it was abandoned).

58. *See* Whitehouse, *supra* note 54, at 96.

59. *See id.*

60. Jaron Browne, *Rooted in Slavery: Prison Labor Exploitation*, REIMAGINE RACE, POVERTY & THE ENV'T, https://www.reimaginerpe.org/node/856#:~:text=The%20chain%20gangs%20originated%20as,worked%2C%20ate%2C%20and%20slept [https://perma.cc/DVX3-QNYL] (last visited Nov. 4, 2021).

61. *See Chain Gangs*, ENCYCLOPEDIA, https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/chain-gangs [https://perma.cc/FU3R-P2WW] (last visited Nov. 4, 2021).

62. Wendy Imatani Peloso, Note, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishment Clause*, 70 S. CAL. L. REV. 1459, 1465 (1997).

63. *See* Whitehouse, *supra* note 54, at 96–97.

used in agricultural labor and road work.[64] Overseers generally divided incarcerated individuals by ability and "then pushed each gang to its limits."[65] Being in a chain gang was almost always a punishment reserved for Black people; ninety percent of people placed in the chain gangs were Black.[66]

Ironically, many people saw chain gangs as a more "humane alternative" to the convict leasing system.[67] However, the fact that "the iconic image of chain gangs comprised of shackled convicts tethered together and laboring in the hot sun is inseparable from American history" would imply otherwise.[68] One former member described the systematic exploitation and brutalization of the chain gangs as torture.[69] Prisoners in chain gangs were subjected to extreme overwork, beatings, poor living conditions, and poor diets.[70] Like convict leasing, it was economic concerns, not humanitarian ones, that ended it.[71]

Chain gangs largely fell out of practice during the Great Depression because jobs were scarce and people complained that chain gangs took "work that rightfully belonged to free labor[ers]."[72] Responding to the criticism and seeking to create jobs in an increasingly depressed economy, the federal government officially prohibited the use of prisoners in building federally financed roads.[73]

Moreover, race played a major role in the reduction of chain gangs.[74] When the number of white inmates increased, the gangs became less popular.[75] However, they did not disappear altogether.[76]

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64. N.E.H. Hull, *Book Review: Working on the Chain Gang: Alex Lichtenstein, Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South.*, 8 CRIM. L.F. 311, 313 (1997).

65. *Id.*

66. Lichtenstein, *supra* note 54.

67. *Id.*

68. Whitehouse, *supra* note 54, at 96.

69. Peloso, *supra* note 62, at 1466 (quoting ROBERT E. BURNS, I AM A FUGITIVE FROM A GEORGIA CHAIN GANG! 56 (1932)).

70. *See id.* at 1465–67. Some chain gangs had death rates as high as 45% from the brutality of the labor and poor conditions. *Id.*

71. *See* Christopher Angevine, *The Consociative Value of Work: What Homelessness-To-Work Programs Can Teach Us About Reforming and Expanding Prison Labor*, 4 CRIM. L. BRIEF 19, 22 (2009).

72. *Chain Gangs*, *supra* note 61.

73. *See* Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 365 (1998).

74. *See Chain Gangs*, *supra* note 61.

75. *See id.*

76. Chain gangs came back into popular use in the 1990s, with Alabama, Arizona, Florida, Iowa, Oklahoma, Nevada, Tennessee, and Wisconsin allowing the use of chain gangs once again. *See* Peloso, *supra* note 62, at 1459. They lasted for a short time everywhere but Arizona; Arizona only recently rid itself of chain gangs when Sheriff Joe Arpaio was voted out in 2017. *See, e.g.*, Meg O'Connor, *'Nation's Only Female Chain Gang' Apparently Disbanded*, PHX. NEW TIMES (May 2, 2019, 7:30 AM), https://www

In fact, neither did convict leasing; there has been a reemergence of the convict-leasing system in the modern prison system that "serves to meet the ever-growing need of our capitalist society."[77] Mass incarceration replaced the convict leasing and chain gang systems to continue slavery under another name.[78]

D. The Rise of Mass Incarceration

The United States has a "long history of exploiting inmate labor to make prisons and penal farms highly productive and lucrative."[79] However, the prison population was not always as large, nor was the scope of prison labor as wide, as it currently is.[80] Today, the United States has the highest incarceration rate in the world with a shocking incarceration rate of approximately 655 people per 100,000 people, with nearly 2.2 million individuals currently incarcerated.[81] "Mass incarceration has, in effect, become an avenue for forced labor . . . with clear links to racial discrimination."[82]

The prison population surged in the 1970s when politicians used fearmongering to push increasingly punitive policies aimed at incarcerating and penalizing people of color.[83] Politicians linked race to crime and enacted harsh punitive measures purportedly to combat the rising crime rates.[84] As "[g]rowing disillusionment" with the rehabilitative goals of prisons emerged in society, conservative

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.phoenixnewtimes.com/news/nations-only-female-chain-gang-boasts-the-mcso-website-11279199.

77. Whitehouse, *supra* note 54, at 97.

78. *See, e.g.*, Aristotle Jones, *The Evolution: Slavery To Mass Incarceration*, HUFFPOST (Oct. 6, 2016), https://www.huffpost.com/entry/the-evolution-slavery-to-mass-incarceration_b_57f66820e4b087a29a54880f [https://perma.cc/4ECD-HPY3]. Like in the convict leasing system, mass incarceration has marked a time where "the criminal justice system was strategically employed to force African-Americans back into a system of extreme repression and control." ALEXANDER, *supra* note 48, at 32.

79. GOTTSCHALK, *supra* note 12, at 58.

80. *See* James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration [https://perma.cc/F4U7-G7G7].

81. *See* Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019), https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html [https://perma.cc/6YMM-LHZK].

82. *Prison Labor and Modern Slavery,* FREEDOM UNITED [hereinafter *Prison Labor*], https://www.freedomunited.org/prison-labor-and-modern-slavery [https://perma.cc/8JNF-AJ38] (last visited Nov. 4, 2021).

83. *See* Cullen, *supra* note 80.

84. Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *American History, Race, and Prison*, VERA (Sept. 2018), https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison [https://perma.cc/H22Y-JQQ5].

politicians were able to move penal policy in a more punitive direction.[85] Politicians exploited and capitalized on this disillusionment by adopting "tough on crime" policies and promising citizens a return to "law and order."[86]

"Tough on crime" candidates followed through on their promises.[87] With the election of Ronald Reagan in 1980, "[p]ractically overnight the budgets of federal law enforcement agencies soared"[88] along with the passing of more severe penalties for offenses[89] and a mandate to fight a War on Drugs.[90] During this time, the number of prisoners in federal and state prisons rapidly increased from approximately 196,000 people in 1970 to 2.3 million in 2013.[91]

Most of these prisoners are Black and Brown.[92] The War on Drugs enforced explicitly racist policies.[93] For example, the Anti-Drug Abuse Act central to the War on Drugs featured a "100-to-1 powder cocaine-to-crack disparity,"[94] despite no difference between the drugs, because Black people were more likely to be convicted of crack cocaine offenses and white people were more likely to be

85. GOTTSCHALK, *supra* note 12, at 16. Partly responsible for that growing disillusionment was the increasing crime rates in the 1960s from a growing population, which created an opening for politicians to push more punitive policies. *See* ALEXANDER, *supra* note 48, at 41.

86. *See, e.g.*, ALEXANDER, *supra* note 48, at 42. These terms continue to be used by politicians today as racial dog-whistles. *See also* Geoff Nunberg, *Is Trump's Call for 'Law and Order' A Coded Racial Message?*, NPR (July 28, 2016, 3:06 PM), https://www.npr.org/2016/07/28/487560886/is-trumps-call-for-law-and-order-a-coded-racial-message [https://perma.cc/H22Y-JQQ5].

87. *See, e.g.*, Ed Kilgore, *Trump Is Reviving the Disgraceful Legacy of 'Law-and-Order' Politics*, N.Y. MAG.: INTELLIGENCER: WHAT'S PAST IS PROLOGUE, June 3, 2020, https://nymag.com/intelligencer/2020/06/trump-law-and-order-politics-nixon-reagan.html [https://perma.cc/THQ2-DWWX].

88. ALEXANDER, *supra* note 48, at 49.

89. *See War on Drugs*, HIST., https://www.history.com/topics/crime/the-war-on-drugs [https://perma.cc/7JDT-Y3K2] (last visited Nov. 4, 2021).

90. *See, e.g.*, ALEXANDER, *supra* note 48, at 49. Although President Nixon introduced the concept of a War on Drugs, it did not truly take off until President Reagan took office. *Id.* The War on Drugs operated as a "New Jim Crow," with officials allowing the smuggling of drugs into communities of color and then disproportionately targeting those same communities for arrest and incarceration. *Id.*

91. *See Mass Incarceration: The Great American Folly*, BANGOR DAILY NEWS (Feb. 5, 2013), https://bangordailynews.com/2013/02/05/opinion/mass-incarceration-the-great-american-folly [https://perma.cc/KSF5-8JJJ].

92. *See, e.g.*, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie in 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/factsheets/pie2020_allimages.pdf [https://perma.cc/2JQ7-KAAD].

93. *See Racial Double Standard in Drug Laws Persists Today*, EQUAL JUST. INITIATIVE, https://eji.org/news/racial-double-standard-in-drug-laws-persists-today [https://perma.cc/4TYM-5SYC] (last visited Nov. 4, 2021).

94. *Id.*

convicted of powder cocaine offenses.[95] The racist policies and disparate enforcement of the War on Drugs and other tough on crime measures of the twentieth century has led to people of color representing a whopping 67% of the prison population despite making up only 37% of the country's population.[96] Notably, Black individuals make up 40% of the incarcerated population despite representing only 13% of the population.[97]

E. From Mass Incarceration to a Mass Labor Force

Mass incarceration dramatically increased the prison labor force.[98] Approximately half of all prisoners are forced to work as part of their sentence, and more voluntarily work, creating a prison labor force of 1.5 million people.[99] Roughly 870,000 incarcerated individuals work full-time jobs while in prison.[100] Some work to maintain the prison, often termed "prison housework,"[101] while others perform manual labor outside of the prison or work to produce goods.[102]

The broad range of work performed by the incarcerated has inextricably intertwined mass incarceration with the labor market.[103] A 2004 economic analysis of labor in state and federal prisons over the previous year found that incarcerated individuals produced more than 2 billion dollars' worth of commodities, including both goods and services.[104] Prison labor is cheap because prisoners are paid

95. *What Is The Difference Between Cocaine And Crack?*, DRUG POL'Y, https://drugpolicy.org/drug-facts/cocaine/difference-crack [https://perma.cc/KKE9-Z5ZL] (last visited Nov. 4, 2021).

96. *Who's in Prison in America?*, OPENINVEST, https://www.openinvest.com/articles-insights/statistics-prison-america [https://perma.cc/N8PW-LAPL] (last visited Nov. 4, 2021).

97. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), https://www.prisonpolicy.org/reports/rates.html [https://perma.cc/G3B6-L9AH].

98. *See Prison Labor*, *supra* note 82.

99. *See* GOTTSCHALK, *supra* note 12 and accompanying text.

100. *See* J.S. Welsh, Note, *Sex Discrimination in Prison: Title VII Protections for America's Incarcerated Workers*, 42 HARV. J.L. & GENDER 477, 477 (2019).

101. Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 868, 870 (2008) (describing "prison housework" as work incarcerated individuals do to contribute directly to internal operations of the prison, including cooking meals and doing laundry, and explaining that this work is extremely valuable to prisons. One Kentucky county estimated that prison housework saved it approximately three million dollars in one year).

102. *See id.* at 868.

103. *See* Alexia Fernández Campbell, *The Federal Government Markets Prison Labor to Businesses as the "Best-Kept Secret,"* VOX (Aug. 24, 2018, 10:00 AM), https://www.vox.com/2018/8/24/17768438/national-prison-strike-factory-labor [https://perma.cc/Y9LH-Z6J9].

104. Ruben J. Garcia, *Mass Incarceration, Forced Labor, and Your Morning Cup of Coffee*, UNIV. NEV., LAS VEGAS (Aug. 30, 2018), https://www.unlv.edu/news/article/mass-incarceration-forced-labor-and-your-morning-cup-coffee [https://perma.cc/M374-F3JD]; *see also*

significantly less than minimum wage,[105] which creates such a large profit that a "labor-market incentive [arises] for mass incarceration."[106]

Incarcerated individuals make office furniture for state universities and the federal government, hotel reservations at call centers, body armor for the military, license plates, and fashion accessories.[107] Work can range anywhere from fighting fires[108] to computer coding, farm work, video production, and shipping fulfillment services.[109] Private businesses have turned to prison labor as well, with well-known companies like Walmart,[110] Victoria's Secret, Starbucks, and Microsoft all using some form of prison labor.[111] Furthermore, prison labor is "overwhelmingly performed by minorities,"[112] paralleling the convict leasing and chain gang labor systems.[113]

Despite the United States' laws ban importing prison labor goods from other countries, "there is no parallel statutory provision prohibiting . . . [United States'] . . . exports" of prison labor goods.[114] Through this loophole, the United States has created a monopoly on the prison labor market domestically and a global market for their prison labor, leading to even more profit for those that employ them.[115]

Katherine E. Leung, Note, *Prison Labor as a Lawful Form of Race Discrimination*, 53 HARV. C.R.-C.L. L. REV. 681, 682 (2018) (explaining that "[p]risoners in the United States have historically been required to perform manual labor as a component of their punishment.").

105. The average federal prison worker earns $0.92 per hour. *See* David R. Henderson, *The Bottom One Percent*, HOOVER INST. (Sept. 27, 2012), https://www.hoover.org/research/bottom-one-percent [https://perma.cc/J7QE-WUJH]. The average state prison worker is paid anywhere between $0.14 to $0.63 per hour inside the institution, and between $0.33 and $1.41 per hour outside of the prison. *See* Alison Knezevich, *Thousands Of Maryland Inmates Work In Prison. A New Law Shows Us How Much They're Paid*, BALT. SUN (Jan. 2, 2020, 5:00 AM), https://www.baltimoresun.com/politics/bs-md-prison-wages-20200102-6kjx5nzhtzfw3fmin662lcqcqm-story.html [https://perma.cc/9GH7-4T2Q].

106. *See* Campbell, *supra* note 103.

107. *See* Zatz, *supra* note 101, at 868.

108. *See* German Lopez, *California Is Using Prison Labor to Fight its Record Wildfires*, VOX (Aug. 9, 2018, 12:20 PM), https://www.vox.com/2018/8/9/17670494/california-prison-labor-mendocino-carr-ferguson-wildfires [https://perma.cc/JD6J-GUCC]. California has recently been criticized for its use of prison labor to fight fires while paying inmates only a dollar every hour plus two dollars a day. *Id.*

109. *See* Campbell, *supra* note 103.

110. *See* Sophie Alexander, *Walmart Reviews Prison Labor Policy Amid Civil Unrest Over Race*, SEATTLE TIMES (June 24, 2020, 4:50 PM), https://www.seattletimes.com/business/walmart-reviews-prison-labor-policy-amid-civil-unrest-over-race [https://perma.cc/6D35-BEFE].

111. Garcia, *supra* note 104.

112. Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (2019).

113. *See Prison Labor*, *supra* note 82 (describing the labor exploitation of prisoners as "'prison slavery,' with those incarcerated being farmed out to local governments and companies to perform labor for just pennies a day").

114. Cao, *supra* note 112, at 7.

115. *See id.* at 6.

Employment discrimination runs rampant in the prison work setting,[116] yet courts routinely and incorrectly deny incarcerated individuals protection against discrimination.[117]

II. THE CIRCUIT SPLIT ON THE APPLICABILITY OF EMPLOYMENT DISCRIMINATION STATUTES TO INCARCERATED WORKERS

A circuit split arose in the late 1980s and 1990s on the issue of whether employment discrimination statutes apply to incarcerated individuals.[118] The split occurred because courts disagree over whether incarcerated individuals are "employees" with legal standing to bring suit under employment discrimination statutes.[119] In light of the history and modern realities of prison labor,[120] as well as the employment discrimination that prisoner-employees face,[121] the circuit split should be re-examined.

A. Essential Determination of "Employee" Status

In employment discrimination suits, the crucial issue is whether the plaintiff constitutes an employee under the relevant statute.[122] The answer determines whether the individual has standing to bring an employment discrimination claim.[123] Title VII, the ADA, and the ADEA vaguely define an employee as an "individual employed by an employer."[124] Because this definition is so vague, courts utilize a variety of tests to determine whether an individual is an employee and therefore entitled to protections.[125]

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116. *See, e.g.*, Welsh, *supra* note 100, at 478 (explaining that sexual harassment by supervisors is "a pervasive element of life" in prisons that could be reduced with the statutory protections from Title VII); *see also* Sessi Kuwabara Blanchard, *Labor Law Doesn't Apply if You're in Prison*, TRUTHOUT (Mar. 30, 2019), https://truthout.org/articles/labor-law-doesnt-apply-if-youre-in-prison [https://perma.cc/7RMC-ZFSJ] (describing the story of Kendall Charles Alexander, an African-American man whose work supervisor refused to increase Alexander's wages due to his racial bias).

117. *See* GOTTSCHALK, *supra* note 12 and accompanying text.

118. *See* discussion *infra* Section II.B.

119. *See* Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(f) (1991); Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2008); Age Discrimination and Employment Act, 29 U.S.C. 630(f) (1990). For a discussion on the importance of the classification of "employee," see, for example, Charles J. Muhl, *What Is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV. 3, 5 (2002), https://www.bls.gov/opub/mlr/2002/01/art1full.pdf [https://perma.cc/A4T4-RW46].

120. *See* discussion, *supra* Section I.A.

121. *See supra* note 96 and accompanying text.

122. *See, e.g.*, Kirklin, *supra* note 26, at 1061.

123. *See* Valerie L. Jacobson, *Bringing a Title VII Action: Which Test Regarding Standing to Sue Is the Most Applicable*, 18 FORDHAM URB. L.J. 95, 105 (1990).

124. *See* 42 U.S.C. § 2000e(f); 42 U.S.C. § 12111(4); 29 U.S.C. § 630(f).

125. *See* Kirklin, *supra* note 26, at 1063.

Some courts use the primary purpose test to examine the statutory purpose of Title VII and other laws to determine whether individuals are employees.[126] The primary purpose test analyzes the broad legislative intent rather than the reality of a plaintiff's employment.[127] Employment status is relative and changes on a case-by-case basis depending on the statute in question.[128] Courts often misapply the primary purpose test as its application is murky.[129] For example, in *Williams v. Meese*,[130] the Court utilized a version of the primary purpose test and found that an employment relationship did not exist because the primary purpose of the association was incarceration and not employment.[131] However, courts rarely use the primary purpose test alone because employment status requires some analysis of the relationship between the individuals rather than relying on the purpose of the statute alone.[132]

Another common test courts use, the economic realities test, asks whether the worker is an employee "as a matter of economic reality."[133] This is determined by examining whether a worker is "economically dependent" on the employer, using the following factors: the nature and degree of control; special skills needed; relative investment of the employee and opportunity for profit; the centrality of the work to the employer's business; and the permanence of the work.[134] Many courts use the economic realities test for Title VII and ADEA cases, but it has actually been applied by courts as more of a hybrid test because most courts still examine the right to control as emphasized in the common law test for employment.[135]

The Supreme Court has adopted the common law test to determine employee status under Title I of the ADA.[136] Despite taking

126. *See id.* at 1064.

127. *See id.*

128. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 300 (2001).

129. *See* Kirklin, *supra* note 26, at 1079–80.

130. *See* discussion of the *Williams* case, *infra* Section II.B.

131. *See* Kirklin, *supra* note 26, at 1070.

132. *See id.* at 1076.

133. *See id.* at 1064 (quoting United States v. Silk, 441 U.S. 704, 713 (1947)).

134. *See* Todd Lebowitz, *What Is the Economic Realities Test?*, WHO IS MY EMP. (Jan. 10, 2017), https://whoismyemployee.com/2017/01/10/what-is-the-economic-realities-test/#:~:text=The%20Economic%20Realities%20Test%20seeks,a%20contractor%20or%20an%20employee [http://perma.cc/N9T9-Y9NG].

135. *See, e.g.*, Orla O'Callaghan, Comment, *Independent Contractor Injustice: The Case for Amending Discriminatory Discrimination Laws*, 55 HOUS. L. REV. 1187, 1196 (2018) (explaining that cases like *Spirides* purport to use the economic realities test but in fact use a hybrid approach that also focuses on the right to control).

136. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448 (2003) (adopting the common law test for determining employee status for claims of disability employment discrimination under Title I of the ADA).

many considerations into account the common law test still emphasizes the "right to control."[137] These factors include:

> (1) the extent of control which it is agreed that the employer may exercise over the details of the work; (2) whether or not the worker is engaged in a distinct business or occupation; (3) the kind of occupation, and whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the worker supplies the instrumentalities, tools, and the workplace; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time worked or by the job; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating an employer-employee relationship; and (10) whether or not the worker does business with others.[138]

Despite taking many considerations into account, the common law test still focuses on the right to control.[139]

Finally, the hybrid test combines principles from the economic realities test and the common law test.[140] The hybrid test considers "the economic realities of the work relationship as a critical factor in [the] determination [of employee status] but focus[es] on the employer's right to control the work process as the determinative factor."[141]

The tests developed for employee status, although containing similarities, have key distinctions.[142] However, no matter what test is used by courts, incarcerated workers should be recognized as employees to create avenues of redressability for discrimination that occurs in the prison workplace.[143]

B. Initial Circuit Split on Employee Status

In 1988, the Ninth Circuit encountered the question of whether prisons could be protected by employment discrimination statutes in the prison workplace in *Baker v. McNeil Island Correctional*

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137. *See* O'Callaghan, *supra* note 135, at 1194–95.

138. *Id.* at 1195 (quoting Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 458 (1999)).

139. *See Independent Contractor (Self-Employed) or Employee?*, IRS (July 2, 2021), https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee [https://perma.cc/VC7F-ZE7T].

140. *See* Kirklin, *supra* note 26, at 1065.

141. *See* O'Callaghan, *supra* note 135, at 1195–96 (citing Muhl, *supra* note 119, at 3, 10).

142. *See* Muhl, *supra* note 119, at 9.

143. *See* discussion, *infra* Part IV.

Center.[144] In this case, Baker averred that, despite his qualifications, he was not chosen for a library aide position because he was Black.[145] The Ninth Circuit reversed the district court's holding that Title VII did not apply to prison work assignments, finding that Baker's complaint should not have been dismissed.[146] Using the *Spirides* factors, the Court held that the most important factor, the right to control, strongly indicated an employment relationship between the prisoner and the prison.[147] Even if that did not control, the Court found that Baker's pleadings sufficiently alleged that his work was more akin to that of work release than "regular" prison work because Baker would be working with the state's librarian.[148] In deciding the case, the Ninth Circuit essentially held that *optional* job opportunities for prisoners can render an incarcerated worker an employee, even though the statute does not state or imply that employment must be optional.[149]

Three years later in 1991, the Tenth Circuit faced a similar question in *Williams v. Meese*, which is the most cited prisoner employment discrimination case.[150] Williams alleged that the prison denied him work assignments he was qualified for on the basis of his race, age, or disability, and that the prison retaliated against him for filing administrative grievances.[151] Williams was a Black inmate who suffered from hypertension, circulatory problems, and other leg issues.[152] Despite these injuries, he was assigned to work in construction and was "passed over for other employment [opportunities] in favor of 'the [white] or young and non handicapped inmates.'"[153] He described being passed over for positions in the law library and chaplaincy despite his need for an accommodation.[154] The Tenth

144. *See* Baker v. McNeil Island Correctional Ctr., 859 F.2d 124, 125 (9th Cir. 1988).

145. *Id.* at 127 (explaining that Baker was not chosen for the position, despite the fact of the prison employee in charge of inmate assignments telling him he was "next in line" and he had the "capability to do the job," because the state librarian did not want to work with a Black man).

146. *See id.* at 126.

147. *Id.* at 128; *see* Spirides v. Reinhardt, 613 F.2d 826, 831–32 (D.C. Cir. 1979) (using twelve factors based on both the economic realities test and the common law test).

148. *Baker*, 859 F.2d at 128 (explaining that the EEOC released guidance stating that Title VII applied to prisoners eligible for work release and that the library aide position in this case may be more akin to work release than forced labor).

149. *See id.*

150. *See* Williams v. Meese, 926 F.2d 994, 994 (1991); *see also* the 1,778 Citing References from KeyCite for Williams v. Meese.

151. *See Williams*, 926 F.2d at 996.

152. Williams v. Meese, 1990 U.S. Dist. LEXIS 4072, at *1 (D. Kan. Mar. 26, 1990).

153. *Id.* at *1–2.

154. *See id.* at *2. Outside of the prison context, construction and library positions generally are the basis of an employment relationship. *See, e.g.*, EEOC v. Boh Bros.

Circuit, using a version of the primary purpose test, held that because "his relationship with the Bureau of Prisons, and therefore, with the . . . [prison officials], arises out of his status as an inmate, not an employee," he could not be protected under neither Title VII nor the ADEA.[155] The Court recognized that the relationship contained common elements of an employment relationship, yet they still found that the relationship's "primary purpose" arose from Williams "having been convicted and sentenced to imprisonment in the [officials'] correctional institution."[156] The outcome of the *Williams* case is logically inconsistent with the primary purpose test.[157] Instead of looking at the primary purpose of the statute and its intent to protect employees, the Court focused on the primary purpose of the relationship between the incarcerated worker and the prison.[158] The Court unilaterally declared that because one aspect of their relationship arose out of incarceration, there could be no employment relationship.[159] The Court went as far as to cite to *Baker* to support the assertion that there was no employment relationship between incarcerated workers and prisons.[160] Even if one were to follow the Court's rationale to its logical end by accepting the premise that the Court was not incorrect in looking at the purpose of the relationship, their holding in *Williams* defies logic.[161] The primary purpose of the relationship, considering the history of prison labor, is clearly profit for the institution itself.[162] Because of the Court's unwillingness to recognize rights for incarcerated people and the brutal history of prison labor, the Court misinterpreted the primary purpose test and created a fundamentally unsound exception to employment discrimination statutes for incarcerated workers.[163] The holdings in both *Williams* and *Baker* have been extended to claims under the ADEA and ADA.[164]

Constr. Co., L.L.C., 731 F.3d 444, 451 (5th Cir. 2013) (implying that employee status as a construction worker was not in question in a Title VII inquiry); *see also* Johnson v. Mao, 174 F. Supp. 3d 500, 502–03 (D.D.C. 2016) (assuming that an employee at the Library of Congress was an employee for the purposes of Title VII).

155. *Williams*, 926 F.2d at 997.

156. *Id.*

157. *See* Kirklin, *supra* note 26, at 1064 (describing the primary purpose test as intending to examine the broad purpose of the statute to determine if individuals are employees).

158. *See Williams*, 926 F.2d at 997.

159. *Id.*

160. *See id.*

161. *See* Kirklin, *supra* note 26, at 1080 (explaining that the Court did not "take into account the developments in the modern prison workplace over the past thirty years.").

162. *See* discussion *supra* Section I.D.

163. *See* Kirklin, *supra* note 26, at 1081.

164. *See, e.g.*, Vernacchio v. Davis, No. 19-CV-07171, 2020 U.S. Dist. LEXIS 23639, at *3–4 (N.D. Cal. Feb. 11, 2020) (holding that prisoners can be employees under the

C. Application of the Circuit Split Today

A prisoner's ability to obtain relief from employment discrimination has been functionally narrowed by *Williams* and *Baker*, insulating prisons from liability for discriminating against prisoner-employees in the work setting.[165] The Second, Third, and Fifth Circuits followed the Tenth Circuit's *Williams* approach, barring all employment discrimination claims from incarcerated workers.[166] The Sixth, Seventh, and Eighth Circuits followed the Ninth Circuit's *Baker* approach and limited the availability of remedies to only optional job opportunities.[167] The Ninth Circuit further clarified *Baker* in *Moyo v. Gomez*, where the Court, in determining employee status, emphasized that the position at issue, "while not work release, paid a salary and included some training."[168] Under this approach, "inmates performing work assignments that include compensation or training, or that resemble work release rather than forced labor, may be employees entitled to protection."[169] This distinction is flawed.[170] Most forced prison labor, not just optional labor, requires some form of payment and training.[171] To further muddy the waters, the Equal Employment Opportunity Commission (EEOC) released multiple informal discussion letters following the circuit split, usually falling on the

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ADEA); Positano v. Commonwealth Dep't of Corr., No. 3:13-CV-01570, 2018 U.S. Dist. LEXIS 83351, at *1 (M.D. Penn. May 16, 2018) (holding that a prisoner's application to a position in dog-handling stated a cognizable claim under the ADA because it was an optional job opportunity).

165. *See* Kirklin, *supra* note 26, at 1070 (inferring that, under the *Williams* approach, it is difficult to hold prisons liable for discrimination against a prisoner in a work setting); *see also* Castle v. Eurofresh, Inc., 731 F.3d 901, 907 (9th Cir. 2013) (inferring that, under the *Baker* approach, there are only a few instances where a prisoner can be found to be an employee).

166. *See, e.g.*, Quinones v. N.Y.C., No. 19-CV-05400, 2020 WL 5665142, at *5 (S.D.N.Y. Aug. 17, 2020) (stating that while the Second Circuit has not directly concluded Title VII is inapplicable to prisoners, district courts in the circuit have); *see* Wilkerson v. Samuels, 524 F. App'x. 777, 779 (3d Cir. 2013); Smith v. Gonzales, No. I:17-CV-0093-BL, 2018 U.S. Dist. LEXIS 31836, at *11–12 (N.D. Tex. Feb. 2, 2018).

167. *See, e.g.*, Johnson v. Anderson, No. 2:07-CV-161, 2008 U.S. Dist. LEXIS 76633, at *13 (E.D. Tenn. Aug. 28, 2008); Vanskike v. Peters, 974 F.2d 806, 810 n.5 (7th Cir. 1992); Renda v. Iowa Civ. Rts. Comm'n, 784 N.W. 2d 8, 19 (Iowa 2010).

168. Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994).

169. Vernacchio v. Davis, No. 19-cv-07171 2020 U.S. Dist. LEXIS 23639, at *3 (N.D. Cal. Feb. 11, 2020).

170. *See* Charles Decker, *Time to Reckon with Prison Labor*, INST. SOC. & POL'Y STUD. (Oct. 2013), https://isps.yale.edu/news/blog/2013/10/time-to-reckon-with-prison-labor-0 [https://perma.cc/WQ63-P58B].

171. *See id.* The pay difference between forced labor and optional labor is not large: incarcerated workers forced into jobs serving the prison make approximately 12 cents to 40 cents per hour and can make between 23 cents to $1.15 per hour working for outside businesses. *See id.*

side of *Williams* rather than *Baker* despite the untenability of both approaches.[172]

III. PROBLEMS WITH THE CURRENT APPROACHES AND BARRIERS TO FINDING A SOLUTION

A. Issues with the Williams *and* Baker *Approaches*

The *Baker* and *Williams* frameworks are unworkable and fail to protect workers.[173] Both approaches prevent prisoners who act as *employees* from bringing claims regarding employment discrimination against the Department of Corrections simply due to the fact of their incarceration.[174]

The *Williams* approach ignores the fact that prisoners actually act as employees.[175] Given the historic and expansive nature of work that incarcerated individuals perform,[176] it is untenable to say that all incarcerated workers are not employees. The logical reasoning of *Williams* itself does not hold up under scrutiny because its application of the primary purpose test was incorrect and outdated.[177] Williams' situation is exactly what employment discrimination statutes were created to protect against outside of prison walls.[178] Despite its

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172. *See, e.g.*, *EEOC Informal Discussion Letter: Title VII/Conviction Policy/Prison Inmate/Religion/Work Program*, EEOC (Mar. 26, 2016), https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-315 [https://perma.cc/D9ZB-NEKK] (last visited Nov. 4, 2021) (stating that "if the work, or lack of work, is based on incarceration, it is not covered by Title VII"); EEOC Compl. Manual § 2(B)(3)(a)(III), EEOC (May 12, 2000), https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-3-a-iii [https://perma.cc/7TQR-DAZU] (stating that "[a] prison does not have an employment relationship with its own prisoners"). While EEOC guidance may be instructive, it is not a regulation that has the force of law. The plain language of the statute still controls. *See, e.g.*, Robert A. Marsico, *Guidance and Regulation—What's the Big Difference?*, SCARINCI HOLLENBACK (Oct. 16, 2018), https://scarincihollenbeck.com/law-firm-insights/business-law/guidance-and-regulation-difference [https://perma.cc/L7BH-MBAB].

173. *See* Kathleen K. Ross, Note, *Prisoners As Employees Under Title VII: Baker v. McNeil Island Corrections Center*, 31 B.C. L. REV 203, 211 (1989); Kirklin, *supra* note 26, at 1070, 1080.

174. *See* Castle v. Eurofresh, Inc., 731 F.3d 901, 907 (9th Cir. 2013) (explaining that a prisoner who performs forced labor is not considered an employee because, under *Baker*, prisoners are defined as employees in narrow circumstances); Kirklin, *supra* note 26, at 1081.

175. *See* Benns, *supra* note 15 (explaining that while "one could reasonably expect some degree of compliance with modern labor standards" by prisons as "prison labor has expanded in scope and reach," prisons are able to refuse compliance with modern day standards because "courts have ruled that the relationship between the penitentiary and the inmate worker is not primarily economic; thus, the worker is not protected under the statutes" and retain no protections from statutes designed to protect employees).

176. *See* discussion, *supra* Section I.E.

177. *See* Kirklin, *supra* note 26, at 1080–81.

178. *See* discussion, *supra* Section II.B.

problems, three circuits have adopted the *Williams* approach.[179] The *Williams* legacy continues to block incarcerated workers who act as employees from bringing claims of discrimination without any legitimate statutory foundation.[180]

In the last two years alone, in cases like *Starry v. Oshkosh*,[181] *Thomas v. Paul*,[182] and *Keran v. Chambers-Smith*,[183] incarcerated workers have been barred from relief for workplace discrimination under the *Williams* approach despite acting as employees.[184] In *Starry*, the plaintiff was hired by the prison as a truck worker.[185] During the course of his work, Starry suffered knee pain and needed a replacement, initially limiting him to light-duty work and later causing his termination.[186] The department failed to meet the minimum accommodation requirements under the ADA, yet Starry could not obtain relief because of his status as a prisoner.[187] The Court denied Starry's claim, undeterred by other cases presuming that truck drivers outside of the prison context are employees.[188] In *Thomas*, the plaintiff's supervisors in the laundry room paid him less than white inmates, demoted him, and eventually fired him due to his race.[189] Again, the Court denied Thomas relief under the *Williams* approach,[190] despite other cases presuming individuals working at laundry stores are employees.[191] Finally, in *Keran*, the plaintiff argued he was fired because of his age.[192] Keran worked in the metal shop at the prison for over twenty years and had received positive job evaluations from

179. *See, e.g.*, Simon v. Fed. Prison Indus., Inc., No. 03-10792-JLT, 2003 WL 26128191, at *2 n.7 (D. Mass. July 15, 2003) (noting that prisoners are not employees), *aff'd*, 91 F. App'x. 161 (4th Cir. 2004); Wilkerson v. Samuels, 524 F. App'x. 776, 779 (3d Cir. 2013); *see also* Smith v. Gonzales, 2018 U.S. Dist. LEXIS 31836, at *11–12 (N. D. Tex. Feb. 2, 2018) (noting that Fifth Circuit courts have followed the *Williams* approach).

180. *See* Kirklin, *supra* note 26, at 1070.

181. *See* Starry v. Oshkosh Corr. Inst., 731 F. App'x. 517, 517 (7th Cir. 2018).

182. *See* Thomas v. Paul, No. 16-CV-12-SM, 2019 U.S. Dist. LEXIS 158086, at *1 (D.N.H. Sept. 12, 2019).

183. *See* Keran v. Chambers-Smith, No. 2:20-CV-2002, 2020 U.S. Dist. LEXIS 133954, at *1 (S.D. Ohio July 29, 2020).

184. *See id.* at *8–9; *Starry*, 731 F. App'x. at *519; *Thomas*, 2019 U.S. Dist. LEXIS 158086, at *13–14, 17.

185. *Starry*, 731 F. App'x. at *518.

186. *Id.*

187. *Id.* at *517–18.

188. *Id. See, e.g.*, Parkins v. Civil Constructors, 163 F.3d 1027, 1033–34 (7th Cir. 1998) (assuming the employee status of the plaintiff truck driver).

189. *See Thomas*, 2019 U.S. Dist. LEXIS 158086, at *1–2.

190. *See id.* at *13–14 n.4.

191. *See, e.g.*, Odima v. Westin Tuscon Hotel, 53 F.3d 1484, 1492 (9th Cir. 1995) (assuming that the plaintiff, who worked in a hotel laundry room, was an employee for the purposes of Title VII).

192. *See* Keran v. Chambers-Smith, No. 2:20-CV-2002, 2020 U.S. Dis. LEXIS 133954, at *1 (S.D. Ohio July 29, 2020).

his previous manager.[193] A new manager took over and wanted to purge older workers, thus firing Keran and several other older inmates.[194] The ADEA denied a remedy for Keran and his co-workers based on the Court's adoption of *Williams*.[195]

Although less draconian than *Williams*, the *Baker* approach is not an adequate solution.[196] The *Baker* standard creates an arbitrary distinction between forced labor and optional job opportunities[197] that deprives incarcerated workers who are forced to work from litigating claims of employment discrimination.[198]

In cases like *Castle v. Eurofresh*, incarcerated workers were prevented from suing because of the *Baker* approaches' distinction between forced labor and optional job opportunities for prisoners.[199] In *Castle*, the plaintiff picked tomatoes for Eurofresh at a greenhouse near his prison.[200] A pre-existing ankle injury was aggravated by his work, and Castle asked for breaks during the day to accommodate his disability.[201] He eventually requested job reassignment, but was demoted to a lesser-paying position.[202] Castle lacked recourse because he was "obligated to work at some job pursuant to a prison work program," and thus did not meet the *Baker* requirements.[203] The *Baker* analysis emphasized the fact that the position was paid, and the claim in *Castle* involved pay discrimination based on disability, yet the holdings differed.[204]

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193. *Id.* at *6.

194. *See id.*

195. *See id.* at *7–9. Job positions in metal shops are typically given the label of employee. *See, e.g.*, Kalu v. Unitrack Industrial, Inc., No.92-1574 1992 U.S. Dist. LEXIS 7738, at *1–4 (D. Pa. June 4, 1992) (assuming that a former metal shop employee was an employee under Title VII).

196. *See* Baker v. McNeil Island Correctional Ctr., 859 F.2d 124, 126 (9th Cir. 1988).

197. *See id.* The supposed distinction is based on being akin to a work release program, where jobs that pay a salary and include some training may be considered employment but not others. *See* Moyo v. Gomez, 40 F.3d 982, 984–85 (9th Cir. 1994). The forced labor incarcerated workers are required to provide resembles regular jobs, yet it "is not checked by many of the protections enjoyed by workers laboring in the exact same jobs on the other side of the 20-foot barbed-wire electric fence." *See* Benns, *supra* note 15. Furthermore, most prison jobs do include a salary and include some sort of training whether they are forced or optional. *See, e.g.*, Williams v. Meese, 926 F.2d 994, 996 (10th Cir. 1991).

198. *See, e.g.*, *Baker*, 859 F.2d at 124.

199. *See, e.g.*, Castle v. Eurofresh, Inc., 731 F.3d 901, 903 (9th Cir. 2013).

200. *Id.* at 904. Workers for fruit growers have previously been held to be employees under Title VII. *See, e.g.*, United States EEOC v. Global Horizons, Inc., 915 F.3d 631, 634 (9th Cir. 2019).

201. *See Castle*, 731 F.3d at 904.

202. *See id.*

203. *Id.* at 907 (quoting Coupar v. Dep't of Lab., 105 F.3d 1263, 1265 (9th Cir. 1997)).

204. *See id.* at 904; *see also* Baker v. McNeil Island Correctional Ctr., 859 F.2d 124, 124 (9th Cir. 1988).

These outcomes frustrate the purpose of Title VII, the ADA, and the ADEA.[205] The legislative histories of all three statutes reflect a broad intent to implement a policy of equal opportunity in employment and create an environment free of wrongful discrimination for all.[206] It is established that employment discrimination statutes, "as remedial legislation, [are to be] construed broadly."[207] Courts view the purpose and language of the statutes expansively,[208] but they refuse to do so in the context of incarcerated workers.[209] Discrimination "maintains the same invidious character within the world of the prison and outside it," and "[g]iven the broad policies behind Title VII [and other employment discrimination protections], there would appear to be no reason to withhold Title VII's protections from extending inside the prison walls."[210]

This reasoning is especially true when considering the history of prison labor and the fact that today, prison work assignments closely resemble traditional jobs.[211] Inmates consistently hold long-term jobs with regular shift schedules, and the type of work assignments performed strikingly resemble ordinary, out-of-prison jobs.[212] Incarcerated employees work under the authority of supervisors, who are either prison staff or employees for third-party corporations.[213] Though not given the dignity of minimum wage, the vast majority of inmates receive compensation for the jobs they perform.[214] While the compensation is paltry, the money offers incarcerated individuals a slice of freedom by giving them the ability to purchase items such as food, clothing, and personal hygiene products from

205. *See* discussion, *supra* Section II.B.

206. The Supreme Court, as well as various courts of appeals and district courts, have repeatedly stated that Title VII should be interpreted broadly. *See, e.g.*, Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1131 n.15 and accompanying text (2007).

207. *See* Moyo v. Gomez, 40 F.3d 982, 982 (9th Cir. 1994).

208. *See, e.g.*, Bostock v. Clayton Cty., 140 S. Ct. 1731, 1747 (2020) (stating that "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII."); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (holding that when interpreting employee status from the ADA, federal courts should use the broader common law agency test as opposed to more restrictive alternatives).

209. *See supra* note 25 and accompanying text.

210. Vanskike v. Peters, 974 F.2d 806, 810 (7th Cir. 1992).

211. *See* discussion, *supra* Section I.D; *see also* discussion, *supra* Section I.E.

212. For a discussion of inmate work assignments that represent traditional jobs, *see, e.g.*, Christopher Zoukis, *Inmate Work Assignments in Federal Prison*, ZOUKIS CONSULTING GROUP (Sept. 20, 2017), https://www.prisonerresource.com/work-assignment/inmate-work-assignments-federal-prison [https://perma.cc/CW4S-NYPC].

213. *See, e.g.*, Quinones v. N.Y.C., No. 19-CV-05400, 2020 WL 5665142, at *1 (S.D.N.Y. Aug. 17, 2020).

214. *See, e.g.*, Welsh, *supra* note 100, at 483.

commissary.[215] Incarcerated workers may also receive nonmonetary compensation for their labor, like good time credit that will allow them an earlier release.[216] Prisoners can spend up to "half of their waking hours engaged in some form of employment[,]" which means that for "at least half of the [time] . . . a prisoner consciously interacts with the prison, he or she is doing so in the context of a quasi-employment relationship."[217] Although incarcerated workers may not be recognized by the courts as employees, the actual labor that they perform paints a different picture.[218] Incarcerated workers work just as those outside of prison do.[219] The main difference between incarcerated workers and non-incarcerated "employees" are the voluntariness of the work and the rate of compensation.[220] The character of the work performed largely retains elements of traditional jobs outside of prison.[221]

Additionally, inmate labor provides vast economic benefits to the companies involved.[222] Prison labor saves counties, and makes companies, millions of dollars.[223] Without the recognition of an employment relationship, inmate labor cannot be regulated to prevent workplace discrimination.[224] Why then do the courts continue to refuse to recognize incarcerated individuals as employees under employment discrimination statutes?[225]

B. Court-Created Obstacles to Recognizing Incarcerated Workers' Rights and Why They Should Not Act as Barriers

Courts share a few major reasons why they are unwilling to recognize incarcerated workers as employees.[226] At the forefront is prejudice against incarcerated individuals.[227] One judge argued that

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215. *See FAQ: The Prison Commissary*, PRISON FELLOWSHIP, https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-prison-commissary [https://perma.cc/AMK6-V4MB] (last visited Nov. 4, 2021).

216. *See* Welsh, *supra* note 100, at 483.

217. Leung, *supra* note 104, at 696.

218. *See* Zoukis, *supra* note 212.

219. *See id.*

220. *See id.*

221. *See id.*

222. *See* Katherine Stevenson, *Profiting off of Prison Labor*, BUS. REV. BERKELEY (July 6, 2020), https://businessreview.berkeley.edu/profiting-off-of-prison-labor [https://perma.cc/7HSE-FMXU].

223. For example, one Kentucky county estimated that inmate labor saved it approximately three million dollars during the year of 2006 alone. *See* Zatz, *supra* note 101, at 870. At the same time, prison labor makes counties large profits. *See* discussion, *supra* Part II.

224. *See, e.g.*, Baker v. McNeil Island Correctional Ctr., 859 F.2d 124, 125 (9th Cir. 1988).

225. *See, e.g.*, McCaslin v. Cornhusker State Indus., 952 F. Supp. 652, 656 (D. Neb. 1996).

226. *See, e.g.*, *id.* at 658.

227. *See id.*

an employment relationship is inapplicable in the context of prison because the relationship between the incarcerated individual and prison is based on the need "to control individuals who have been unable or unwilling to control themselves."[228] But as Justice Gorsuch wrote for the majority in *Bostock v. Clayton County* on the topic of Title VII's application to sexual orientation,

> to refuse enforcement just . . . because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.[229]

Courts also continually emphasize that the relationship between prisoners and prisons is not one of employer-employee but is one of "jailor-jailed."[230] This reflects a fundamental misunderstanding of employment relationships.[231] Employment discrimination statutes apply when there "is some connection with an employment relationship."[232] The relationship between incarcerated workers and prisons is not automatically excluded from an employment relationship simply because it initially arises out of incarceration.[233] The argument that incarceration excludes the formation of all other relationships is simplistic.[234] It fails to account for "all of the racial, social, and economic dynamics that shape a person's experiences" and the "experience of being employed in prison."[235] The relationships between prisoner and prison are multifaceted and complex, and just because the relationship arises out of incarceration does not preclude other relationships from developing.[236]

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228. *Id.*

229. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1751 (2020).

230. *McCaslin*, 952 F. Supp. at 657; *see also* Smith v. Gonzales, No. I:17-CV-0093-BL, 2018 U.S. Dist. LEXIS 31836, at *7 (N.D. Tex. Feb. 2, 2018) (noting that "the primary purpose of their association [is] incarceration, not employment"); Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991) (arguing that the relationship between the prisoner and prison "arises out of his status as an inmate, not an employee"); Wilkerson v. Samuels, 524 F. App'x. 776, 779 (3d Cir. 2013) (explaining that similarly to the fact that inmates are not considered employees under the Fair Labor Standards Act, "Wilkerson's relationship with UNICOR is one of a prisoner, not an employee.").

231. *See* discussion, *supra* Section II.B.

232. Baker v. McNeil Island Correctional Ctr., 859 F.2d 124, 127 (9th Cir. 1988).

233. *See* Leung, *supra* note 104, at 693–96.

234. *See id.*

235. *Id.* at 696.

236. *See* Annie McGrew & Angela Hanks, *It's Time to Stop Using Inmates for Free Labor*, TALK POVERTY (Oct. 20, 2017), https://talkpoverty.org/2017/10/20/want-prison-feel-less-likeslaverypay-inmates-work [https://perma.cc/SWM2-Q9Q8].

Though it is true that the relationship arises primarily out of incarceration, the individual is still forced to enter into an employment relationship with the prison—the existence of one relationship does not preclude the existence of the other.[237] Incarcerated workers in the private industry make billions of dollars for companies at extremely low costs, and incarcerated workers save counties and governments millions every year.[238] Prison labor is an inherently economic activity, with enormous profits made off the backs of incarcerated workers.[239] Prison populations were driven higher to meet the high demand for incarcerated workers.[240] These facts strongly cut against the argument that the primary purpose of the relationship is incarceration.

The inextricable linking of prison labor, racism, and mass incarceration further blurs the distinction between an employment relationship and incarceration relationship.[241] Considering the history of prison labor, it is untenable to argue that the existence of an incarceration relationship automatically precludes the existence of an employment relationship because incarceration relationships were built on employment relationships.[242]

Another concern identified by courts is that deeming incarcerated individuals as employees under employment discrimination statutes would entitle them to benefits such as minimum wage requirements under the Fair Labor Standards Act (FLSA).[243] Legislation such as the FLSA and the Employment Retirement Income Security Act (ERISA) also define employees as "individual[s] employed by an employer."[244] Courts hesitate to define incarcerated workers as employees under employment discrimination statutes for fear that this will extend rights to incarcerated workers under other statues like the FLSA or ERISA.[245] This concern fails to be persuasive for three separate reasons. First, as a matter of civil and labor rights, incarcerated workers should be paid minimum wage and offered employee benefits for their labor, especially if the goal of incarceration is rehabilitation.[246] These wages and benefits would help prepare

237. *Id.*
238. *See, e.g.*, Stevenson, *supra* note 222.
239. *Id.*
240. *Id.*
241. *See* discussion, *supra* Part II.
242. *See* McGrew & Hanks, *supra* note 236.
243. *See* Fair Labor Standards Act, 29 U.S.C. § 203(1) (2018).
244. 29 U.S.C. § 203(e)(1); Employment Retirement Income Security Act, 29 U.S.C. § 1002(6) (2019).
245. *See* 29 U.S.C. § 203(e)(1); 29 U.S.C. § 1002(6).
246. *See* Josh Kovensky, *It's Time to Pay Prisoners the Minimum Wage*, NEW REPUBLIC (Aug. 15, 2014), https://newrepublic.com/article/119083/prison-labor-equal-rights-wages-incarcerated-help-economy [https://perma.cc/TGA3-E7ZB] (paying prisoners minimum

incarcerated workers for a smooth transition back into their communities and provide them a sense of security, as well as allowing them to provide for their families during their incarceration.[247] Second, even if incarcerated workers became employees under statutes like the FLSA, Congress could impose a lowered minimum wage on incarcerated employees through legislation.[248] For example, restaurant services and certain seasonal entertainment workers are exempt from minimum wage requirements and make less than minimum wage on an hourly basis.[249] Third, defining incarcerated workers as employees under employment discrimination statutes would not automatically make them employees under other employment statutes like FLSA or ERISA.[250] In employment discrimination statutes, the term employee is intended to be defined broadly.[251] That broad intention is unique to employment discrimination statutes because they are remedial in nature.[252]

The realities of prison labor require an analytical framework that accounts for the employment relationship that forms between the prison and prisoner.[253] An approach that fails to do so ignores the tangibility and profitability of the work that incarcerated individuals

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wage serves rehabilitative interests by helping prisoners pay off debt and support their families); *see also* McGrew & Hanks, *supra* note 236 (paying inmates minimum wage assists with their transition to the community).

247. *See, e.g.*, McGrew & Hanks, *supra* note 236 (explaining that paying inmates minimum wage assists with their transition to the community); Noah Smith, *Paying Minimum Wage to Inmates Helps the Working Class*, CHI. TRIB. (June 7, 2017, 8:47 AM), https://www.chicagotribune.com/opinion/commentary/ct-prison-inmates-minimum-wage-20170607-story.html (describing the payment of minimum wage to incarcerated workers as helpful to the community at large); David C. Fathi, *It's Time to Give Prisoners a Big Raise*, WASH. POST (Sept. 3, 2018, 4:02 PM), https://www.washingtonpost.com/opinions/its-time-to-give-prisoners-a-big-raise/2018/09/03/6be40364-ad5b-11e8-8a0c-70b618c98d3c_story.html [https://perma.cc/8HYE-59RZ] (explaining the need for worker's compensation and other protections for incarcerated employees).

248. *See* Decker, *supra* note 170 (explaining that the Federal Government has power to dictate prison labor policy).

249. *See* 29 U.S.C. § 203(I)(2)(m)(1)–(2); 29 U.S.C. § 213(a)(3)(A).

250. *See* 29 U.S.C. § 203(I)(2)(m)(1)–(2); 29 U.S.C. § 213(a)(3)(A); 42 U.S.C. § 2000e(f).

251. *See* Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994).

252. The remedial purposes of and broad policies behind employment discrimination statutes have led to a uniquely broad interpretation of the definition of employee as compared to other employment statutes. *See, e.g.*, NLRB v. Hearst Pub'ns, 322 U.S. 111, 124 (1944) (explaining that the term employee is not a rigid term of art but "it takes color from its surroundings . . . [in] the statute where it appears . . . and derives meaning from the context . . . which 'must be read in the light of the mischief to be corrected and the end to be attained'") (quoting U.S. v. Am. Truck. Ass'ns, 310 U.S. 534, 545 (1940); S. Chi. Coal & Dock Co. v. Bassett, 309 U.S. 251, 259–60 (1940)); Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) (explaining that a strict and narrow interpretation of the term employee is inappropriate because of the remedial purpose of employment discrimination statutes).

253. *See* Leung, *supra* note 104, at 696.

perform, as well as the employment relationship forced upon them.[254] Prison labor "increasingly resembles civilian employment" and deserves to be recognized as such.[255] The current framework fails to account for the realities of prison labor and leaves incarcerated individuals without any form of recourse for the discrimination faced in the prison workplace.[256]

IV. THE SOLUTION: REVISITING THE UNNECESSARY DISTINCTION BETWEEN FORCED AND OPTIONAL LABOR AND THE STATUS OF INCARCERATED WORKERS UNDER EXISTING FRAMEWORKS

The distinction between forced and optional labor is unworkable.[257] The distinction inappropriately "exclude[s] those incarcerated [from coverage by employment statutes] by classifying their working relationship as penal, not economic[,]" in spite of the fact that prison labor is quite similar to traditional employment.[258] Incarcerated workers typically receive compensation training, direct supervision, and perform work similar to work done in traditional jobs.[259] As discussed earlier, prison labor takes two main forms: prison housework and goods production.[260] Optional job opportunities tend to consist of goods production and labor outside of the prison that prisoners apply for.[261] Courts tend to consider prison housework and other mandatory employment as forced labor and thus incapable of employment discrimination protection.[262] By choosing to center employment protection on whether the labor was forced or optional, the courts intentionally deprive the vast majority of incarcerated workers of their right to a workplace free of discrimination.[263]

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254. *See* Becky Campbell, *JCPD Women's Prison Unique in Tennessee*, JOHNSON CITY PRESS (Sept. 12, 2014), https://www.johnsoncitypress.com/jcpd-womens-prison-unique-in-tennessee/article_ef71145c-5793-541c-8d5a-464f03179916.html [https://perma.cc/A7NG-N3CD]; *see also* Garcia, *supra* note 104.

255. Kirklin, *supra* note 26, at 1061.

256. *See* Quinones v. N.Y.C., No. 19-CV-05400, 2020 WL 5665142, at *7 (S.D.N.Y. Aug. 17, 2020); Castle v. Eurofresh, Inc., 731 F.3d 901, 907 (9th Cir. 2013).

257. *See* Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991).

258. *Prison Labor*, *supra* note 82; *see also* Kirklin, *supra* note 26, at 1061.

259. *See* discussion, *supra* Section III.A.

260. *See FAQ: Prison Jobs*, PRISON FELLOWSHIP, https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-prison-jobs [https://perma.cc/74RL-XWN6] (last visited Nov. 4, 2021).

261. *See id.*; *see also* Johnson v. Anderson, No. 2:07-CV-161, 2008 U.S. Dist. LEXIS 76633, at *3–4 (E.D. Tenn. Aug. 28, 2008) (describing the labor opportunities at the jail that housed Johnson).

262. *See, e.g.*, Quinones v. N.Y.C., No. 19-CV-05400, 2020 WL 5665142, at *7 (S.D.N.Y. Aug. 17, 2020); *Castle*, 731 F.3d at 907.

263. *See, e.g.*, *Quinones*, 2020 WL 5665142, at *7; *Castle*, 731 F.3d at 907.

When examining the history of prison labor, it is clear that the government intended to, and does, benefit greatly from the carceral state, creating an entire economy off the backs of the incarcerated for their own profit.[264] In this context, it makes little sense to draw a distinction between the work being performed and its optionality when all labor performed is intended to benefit the carceral state. The Supreme Court has never, and should never, endorse the Circuit Court's view that different standards apply to forced and optional labor.[265] Instead, courts should focus on obtaining protection for *all* workers.

Furthermore, whether labor is forced or not, incarcerated work should be recognized as an employment relationship. As discussed earlier, four tests currently exist to determine employee status in the employment discrimination context: the common law approach, the primary purpose approach, the economic realities approach, and the hybrid approach.[266] Under all four tests, incarcerated workers should be considered employees, regardless of whether their labor is forced or optional, although this has not been the case.[267]

For example, take the case of Alfretta Johnson.[268] Ms. Johnson is a white woman who was incarcerated in Tennessee.[269] The Sullivan County Jail operated an inmate work program at a different jail from where Johnson was held.[270] To participate in the Johnson City Jail–Women's Work Camp program, an inmate has to apply for "trusty" status.[271] Only inmates who meet certain criteria can apply to participate in the program.[272] Johnson applied to the program, as she met the criteria and worked in the program during her previous stays.[273] Johnson's application was denied, and she was told not to reapply.[274] Johnson continued to follow up on her application, but

264. *See* Campbell, *supra* note 254.

265. The Supreme Court has instead adopted the common law "right to control" test to define employee status. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448 (2003).

266. The primary purpose approach has been criticized for its ambiguity and courts' inability to apply the test consistently. *See* Carlson, *supra* note 128, at 300.

267. *See, e.g.*, Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991); *Castle*, 731 F.3d at 910.

268. *See* Johnson v. Anderson, No. 2:07-CV-161, 2008 U.S. Dist. LEXIS 76633, at *1 (E.D. Tenn. Aug. 28, 2008).

269. *See id.* at *2.

270. *See id.* at *3.

271. *Id.* at *3–4.

272. *Id.* Additionally, inmates can request a transfer to where the program is being held. *Id.*

273. *See Johnson*, 2008 U.S. Dist. LEXIS 76633, at *4.

274. *Id.*

had extreme difficulty obtaining a response.[275] She never transferred to work at the program.[276] Johnson finally discovered that the supervising officer denied her "trusty" status because she was dating a Black man.[277] Johnson filed suit as the victim of associational discrimination under Title VII.[278] Johnson was ultimately barred from any recovery due to her lack of employee status and, even if her employee status was assumed, the Court determined that she was never engaged in any activity that would be protected by Title VII.[279]

Women at the work camp Johnson applied for usually work on a work crew outside the jail or at a job assignment inside the facility.[280] Job assignments inside the jail "include laundry and kitchen duty while jobs outside the jail include custodial work in city buildings, mowing city property, litter pick-up and washing or detailing city vehicles."[281] The type of work performed by the prisoner is dictated by the nature of their crime.[282] Incarcerated workers at the camp receive three days of good-time credit for each day of work performed.[283] The jail benefits from free labor and Johnson City makes money "as long as the beds remain full."[284]

Under the primary purpose approach, Johnson's potential employment should establish employee status.[285] The primary purpose test looks to the legislative intent of the statute to determine employment status.[286] Under the broad goals of employment discrimination statutes and examining the labor performed by the women's work camps, the women would surely qualify as employees.[287] Even when applying the primary purpose approach like that in *Williams*, although the primary purpose of the relationship may be incarceration, an employment relationship still exists as well.[288] Under the common law approach, again, Johnson should come out as an employee.[289] The common law approach, as discussed earlier, emphasizes the right

275. *Id.*
276. *Id.*
277. *Id.* at *4–5.
278. *See id.* at *9.
279. *See Johnson*, 2008 U.S. Dist. LEXIS 76633, at *13–14.
280. *See* Campbell, *supra* note 254.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *See* discussion of legislative intent, *supra* Section III.A.
286. *See* Kirklin, *supra* note 26, at 1064.
287. *See* discussion of legislative intent, *supra* Section III.A.
288. *See* Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991).
289. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448 (2003).

to control.[290] Here, the work program would have the absolute right to control Johnson.[291] The program gets to select inmates for the program and then assign them to the position that the program chooses.[292] If inmates are assigned to work outside of the jail, the program trains a direct supervisor and defines the scope of their work.[293] The jail sets the hours of work for all work.[294] All of this points to a traditional employment relationship.[295] Other factors in the common law analysis point towards an employment relationship as well: the employer provides all supplies in the workplace, there is a form of payment through the good time credit earned, the work is part of the regular business of the prison, and the prisoner solely works for the program.[296] Taken together, Johnson should be seen as an employee under employment discrimination statutes using the common law approach.[297]

The economic reality is also that Johnson should be an employee under employment discrimination statutes.[298] The economic reality approach inquires whether, as a matter of economic reality, the individual is economically dependent on the employer or is in business for themself.[299] In this inquiry, financial considerations of the employer and employee are "paramount."[300] Here, Johnson is completely dependent on the employer.[301] Although the work program does not offer Johnson a salary, it offers her compensation in the form of good time credit.[302] She has no other alternative avenue to earn any form of compensation.[303] Additionally, the economic reality is that the inmate workforce makes the work camp an exorbitant amount of money.[304] Not only does the city save immense labor costs both inside and outside the jail from prison labor; the jail brought in over $200,000.00

290. *See* discussion of common law factors, *supra* Section II.A.

291. *See* Johnson v. Anderson, No. 2:07-CV-161, 2008 U.S. Dist. LEXIS 76633, at *4–8 (E.D. Tenn. Aug. 28, 2008).

292. *See id.*

293. *See* Campbell, *supra* note 254.

294. *See id.*

295. *See* O'Callaghan, *supra* note 135, at 1194–95.

296. *See id.*; Campbell, *supra* note 254.

297. *See* O'Callaghan, *supra* note 135, at 1194–95; Campbell, *supra* note 254; Johnson v. Anderson, No. 2:07-CV-161, 2008 U.S. Dist. LEXIS 76633, at *4–5 (E.D. Tenn. Aug. 28, 2008).

298. *See* Lebowitz, *supra* note 134.

299. *See* discussion of economic reality test, *supra* Section II.A.

300. *See* Griffin Toronjo Pivateau, *The Prism of Entrepreneurship: Creating a New Lens for Worker Classification*, 70 BAYLOR L. REV. 596, 611 (2018).

301. *See Johnson*, 2008 U.S. Dist. LEXIS 76633, at *4–8; *see also* Campbell, *supra* note 254 (describing the relationship between incarcerated persons and the jail).

302. *See* Campbell, *supra* note 254.

303. *See Johnson*, 2008 U.S. Dist. LEXIS 76633, at *4–6.

304. *See* Campbell, *supra* note 254.

in profit per year.[305] Based on Johnson's lack of other employment opportunities and the financial relationship created with prison institution, Johnson should be considered an employee as a matter of economic reality.[306]

Finally, Johnson would also have been considered an employee under the hybrid approach.[307] The hybrid approach, as discussed earlier, examines both the economic reality of the relationship as well as the right to control.[308] The right to control, as in the common law test, surely weighs in favor of Johnson and other incarcerated workers being considered employees; the prison has total control over the work and the way it is performed.[309] Additionally, the economic reality is that the incarcerated worker is dependent on the prison employer to make a living while incarcerated.[310] Johnson should be granted employee status under the hybrid approach as well.

Johnson is just one of the millions of incarcerated workers at risk of employment discrimination.[311] Her story serves as an example of how courts have improperly interpreted employment discrimination statutes to leave incarcerated workers at the mercy of the prisons incarcerating them despite the statutes' true applicability to the situation.[312]

CONCLUSION

Incarcerated workers play a significant, but largely invisible and silent, role in our economy today. Yet courts have consistently held that incarcerated workers lack standing as employees to bring suit under employment discrimination statutes like Title VII, the ADA, and the ADEA. Considering the realities of prison labor and the context of the work performed by incarcerated individuals, including the power and profit generated by prisons and private companies, employment discrimination statutes should be expanded to encapsulate all labor required of prisoners. This expansion would protect incarcerated workers from further marginalization and

305. *See id.*

306. *See Johnson*, 2008 U.S. Dist. LEXIS 76633, at *4–8; Campbell, *supra* note 254; *see, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 322, 323–24 (1992) (holding that when interpreting employee status from the ADA, federal courts should use the broader common law agency test as opposed to more restrictive alternatives).

307. *See* Kirklin, *supra* note 26, at 1065–67.

308. *See* discussion of the hybrid test, *supra* Section II.A.

309. *See Johnson*, 2008 U.S. Dist. LEXIS 76633, at *4–5.

310. *See id.* at *4–6.

311. *See* Benns, *supra* note 15.

312. *See Johnson*, 2008 U.S. Dist. LEXIS 76633, at *14; *see, e.g.*, Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994).

discrimination at the hands of the prisons. Incarcerated workers like Anibal Quinones and Alfretta Johnson, at the very least, deserve to be protected by the courts from discrimination in the workplace as millions of other Americans, doing the same job on the other side of the fence, are every day.

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* Hannah Merrill is a 2022 JD Candidate at William & Mary Law School and a Notes Editor for Volume 28 of the *Journal of Race, Gender & Social Justice*. She has a Bachelor of Arts in International Studies & in History and a minor in African & African Diaspora Studies from Boston College. The author would like to dedicate this piece to her parents, sisters, and friends for their endless love and support. She would also like to thank Professor Laura Windsor, Buffy Lord, and Ashton Scott for their extremely helpful advice and assistance in this endeavor, as well as the staff of the *Journal for Race, Gender, and Social Justice* for the countless hours spent preparing this Note for publication. Finally, she would like to thank Ms. Robitille, whose story of resilience in spite of workplace discrimination while in a prison facility inspired this Note. This Note attempts to bring to the surface the stories of so many incarcerated people in the United States who have been marginalized and abused by a system that stacks all odds against them: to support incarcerated workers in their attempts to resist forced labor in prisons, please consider donating to the Incarcerated Workers Organizing Committee at https://incarceratedworkers.org/get-involved.