SEX DISCRIMINATION IN PRISON: TITLE VII PROTECTIONS FOR AMERICA'S INCARCERATED WORKERS

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ABSTRACT

Approximately 1.6 million people are incarcerated in prisons across the United States, and roughly half of them work full-time jobs. For many of these workers, sexual assault, perpetrated by prison guards, work supervisors, and other inmates, is a pervasive element of life. This Note examines a previously overlooked and underutilized litigation strategy to redress sexual violence in prisons: Title VII sex discrimination claims. For those incarcerated people who are sexually harassed, assaulted, and discriminated against by their work supervisors, Title VII can offer some redress. Yet federal courts are divided on whether this significant segment of the American workforce is entitled to the protections of Title VII. The Note proceeds in four parts. Part I explains the development of the prison labor system and the types of work incarcerated people undertake within prisons. Part II examines the nature of sexual violence in prisons. Part III explores the circuit split over the applicability of Title VII in the prison context. In particular, it analyzes the different definitions of "employee" in the Ninth and Tenth Circuits and argues for an inclusive standard. Part IV proposes pathways for litigation under Title VII.

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INTRODUCTION

Approximately 1.6 million people are incarcerated in prisons across the United States, and roughly half—870,000—work full-time jobs.[1] Most of the full-time workers perform so-called "prison housework": maintenance,

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[1] Beth Schwartzapfel, *Taking Freedom: Modern-Day Slavery in America's Prison Workforce*, PAC. STANDARD (Apr. 12, 2018), https://psmag.com/social-justice/taking-freedom-modern-day-slavery [https://perma.cc/NFS2-ZAG5].

food service, cleaning, and other internal institutional upkeep.[2] Additionally, between 75,000 and 80,000 incarcerated people work in "prison industries," prison labor programs that produce goods and services for both government agencies and private corporations.[3] People incarcerated in prisons across the country make office furniture for state universities, assemble body armor for the U.S. military, stamp license plates for cars, and take hotel reservations at corporate call centers.[4]

For these same workers, sexual assault, perpetrated by prison guards, work supervisors, and other inmates, is a pervasive element of life. In prisons, rape is an unacknowledged element of criminal punishment. Justice Blackmun described the effects: "Although formally sentenced to a term of incarceration, many inmates discover that their punishment, even for nonviolent offenses . . . degenerates into a reign of terror unmitigated by the protection supposedly afforded by prison officials."[5] Indeed, over half of all reported incidents of sexual violence are perpetrated by correctional officers.[6] The constant threat of sexual violence is most acute for incarcerated people with marginalized sexual and gender identities. In male facilities, those most likely to be targeted for punishment are those who most obviously defy gender normative expressions of masculinity.[7] In addition, the current avenues for redressing sexual assault by prison guards are inadequate. According to a Human Rights Watch report on the sexual abuse of women in U.S. prisons: "If you are sexually abused, you cannot escape from your abuser. Grievance or investigatory procedures, where they exist, are often ineffectual, and correctional employees continue to engage in abuse because they believe they will rarely be held accountable, administratively or criminally."[8]

This Note argues that sexual assault and prison labor jointly contribute to the sexual politics of male dominance and the legacy of slavery. This occurs via the institutionalization of supervisor-on-prisoner sexual abuse

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[2] Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 870 (2008).

[3] Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 953 (2016).

[4] Zatz, *supra* note 2, at 868.

[5] Farmer v. Brennan, 511 U.S. 825, 853 (1994) (Blackmun, J., concurring).

[6] RAMONA R. RANTALA, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15, at 1 (July 2018), https://www.bjs.gov/content/pub/pdf/svraca1215.pdf [https://perma.cc/7PC7-RVD2].

[7] The Sylvia Rivera Law Project published a report in which they interviewed incarcerated people who identify as transgender, gender non-conforming, and intersex (TGNCI). Every single participant reported experiencing sexual harassment and/or assault while incarcerated. SYLVIA RIVERA LAW PROJECT, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 19 (2007), https://srlp.org/files/warinhere.pdf [https://perma.cc/DKA4-9ELG].

[8] HUMAN RIGHTS WATCH, WOMEN'S RIGHTS PROJECT, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 1 (1996).

along lines of race, gender, and sexuality in the prison workplace.[9] The Note proposes that Title VII sex discrimination claims offer a potentially powerful tool to undermine this system of structural injustice. In particular, sex discrimination claims may be useful to transgender and gender non-conforming incarcerated people, who disproportionately face harassment from corrections officers.

The Note proceeds in four parts. Part I explains the development of the prison labor system and the current forms of work incarcerated people undertake within prisons. Part II describes sexual violence in prisons and examines the way sexual violence reflects the sexualized hierarchies of power within the system of mass incarceration. These first two sections demonstrate how prison labor and sexual violence are interrelated structural injustices. Part III engages with the current literature on Title VII protections for working inmates. It analyzes the theoretical and applied divergence between definitions of "employee" in federal circuit courts and advocates for a definition of employee status that includes incarcerated workers, affording them protection under Title VII. Part IV proposes pathways for litigation under Title VII and examines the feasibility and limits of the proposal.

I. The Prison Labor System

Throughout the history of the prison system in North America, prisoners have been a source of profit.[10] In the post-Civil War South, emancipated black men and women were rapidly incarcerated and became a replacement source of free labor when industrialists could no longer rely on slavery.[11] The history of prison labor is thus intimately connected to the reconfiguration of the racial caste system following emancipation.[12] During the indus-

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[9] *See* Catharine MacKinnon, Towards a Feminist Theory of the State xiii (1989) (discussing sex's role in social hierarchy and power); Angela Y. Davis, Are Prisons Obsolete? 77–78 (2003), https://collectiveliberation.org/wp-content/uploads/2013/01/Are_Prisons_Obsolete_Angela_Davis.pdf [https://perma.cc/2CKS-FTAT] ("Although guard-on-prisoner sexual abuse is not sanctioned as such, the widespread leniency with which offending officers are treated suggests that for women, prison is a space in which the threat of sexualized violence that looms in the larger society is effectively sanctioned as a routine aspect of the landscape of punishment behind prison walls.").

[10] *See* Douglas Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II 56 (2008); Davis, *supra* note 9, at 89 (discussing nineteenth and twentieth century use of prisoners as test subjects for medical research).

[11] *See* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 28 (2010) ("[Southern] states enacted convict laws allowing for the hiring-out of county prisoners to plantation owners and private companies. Prisoners were forced to work for little or no pay . . . Clearly, the purpose of the black codes in general and the vagrancy laws in particular was to establish another system of forced labor."); Blackmon, *supra* note 10, at 53 ("With the southern economy in ruins . . . the concept of reintroducing the forced labor of blacks as a means of funding government services was viewed by whites as . . . inherently practical . . . .").

[12] *See* Alexander, *supra* note 11, at 21 ("Since the nation's founding, African Americans repeatedly have been controlled through institutions such as slavery and Jim

trial revolution, prison labor boomed as the prison population expanded.[13] Private companies were allowed to contract with state prisons to use inmate labor for production and manufacturing work, "transform[ing] . . . the nineteenth-century North American prison into a factory."[14] Other correctional facilities began to lease their inmates to private companies to perform unskilled labor on plantations, railroads, and mines.[15] Both of these systems allowed for the exploitation of recently freed slaves. Private contractors literally worked incarcerated people to death.[16] During the New Deal era, these systems of inmate labor "faced growing criticism from reformers concerned about abusive practices, and from business interests and labor groups concerned about unfair competition."[17] In response to these criticisms, Congress passed federal legislation—the Hawes-Cooper Act in 1929 and the Ashurst-Sumners Act in 1935—that banned the sale of inmate-produced goods on the open market and placed limitations on the use of prison labor.[18]

Recently, however, inmate labor in United States prisons and correctional centers has seen a resurgence.[19] In 1982, a Gallup poll showed high levels of support for the use of prison labor.[20] In 1979, Congress created an exception to the Ashurst-Sumners Act reauthorizing prison contract labor and the open-market sale of inmate-produced goods, following decades of

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Crow, which appear to die, but then are reborn in new form, tailored to the needs and constraints of the time.").

[13] *See* Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048, 1052 (2011).

[14] MICK RYAN & TONY WARD, PRIVATIZATION AND THE PENAL SYSTEM: THE AMERICAN EXPERIENCE AND THE DEBATE IN BRITAIN 18–19 (1989) (describing the "contract system" of penal labor following the civil war in which "the state still controlled the prison, fed, clothed and maintained the inmates, but negotiated with an outside contractor to run the prison workshops").

[15] *See* Kirklin, *supra* note 13, at 1053.

[16] *See* RYAN & WARD, *supra* note 14, at 18.

[17] Fink, *supra* note 3, at 958; *see also* John R. McDonald, Note, *Federal Prison Industry Reform: The Demise of Prison Factories?*, 35 PUB. CONT. L.J. 675, 676 (2006) ("The rise of organized labor in the early 1900s and opposition from private industry . . . forced legislative changes, first in the states and then at the federal level, to restrict the sale of prison-made goods.").

[18] Hawes-Cooper Act, ch. 79, 45 Stat. 1084 (codified as amended at 49 U.S.C. § 11507 (1994) (repealed 1995)); Ashurst-Sumners Act, Pub. L. No. 74-215, 49 Stat. 494 (1935) (codified at 18 U.S.C. §§ 1761–1762 (2012)); *see also* Kirklin, *supra* note 13, at 1055.

[19] *See* David Leonhardt, *As Prison Labor Grows, So Does the Debate*, N.Y. TIMES (Mar. 19, 2000), https://www.nytimes.com/2000/03/19/business/as-prison-labor-grows-so-does-the-debate.html [https://perma.cc/3FRZ-R6XK] ("Private sector [prisoner labor] programs . . . have doubled in size since 1995 after years of almost no growth. And the federal program that [grew] 14 percent in the last two years . . . is seeking to expand.")

[20] *See* Kirklin, *supra* note 13, at 1057 (citing 1982 Gallup poll that showed "94% of American citizens support requiring inmates learn a skill or trade, 83% support a policy of 'keeping prisoners busy' through public work projects, and 81% support requiring a portion of prisoner's wages to be paid as compensation to their victims").

prohibition.[21] Additionally, the dramatic rise in the prison population since the 1980s has motivated prisons and public sector prison industries, which have never been regulated by Congress, to increase their production of goods and services for other federal agencies.[22] This contemporary prison labor program is increasingly understood as modern day slavery. Just this summer, incarcerated workers across the country went on a month-long strike, demanding, among other things, to be paid the "prevailing wage" for their labor.[23]

Today, incarcerated people make up one of the largest workforces in the United States: approximately 1.6 million people are incarcerated in prisons across the country, and half of those people, roughly 870,000, work full-time jobs.[24] For comparison, the full-time workforce in the entire state of Idaho is 854,300.[25] Prison labor produces over two billion dollars in annual revenue.[26] And prison labor programs vary along multiple axes: incarcerated people are *housed* in federal, state, and private prisons. The *types* of labor performed by inmates range from prison upkeep to assembly lines. The *management* of the labor can be overseen by a government-owned agency, a private company, or the prison itself. Likewise, the *products* of prisoner's labor can be sold to government agencies, sold on the open market, or consumed by the correctional facility.[27]

Prison labor can, however, be generally categorized into two types: "prison housework" and "prison industry" labor.[28] Much like domestic labor, "prison housework" labor is characterized by its invisibility; the prison controls production and consumes output. Prisoners engage in the day-to-

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[21] *See* Fink, *supra* note 3, at 958–59 (noting that concern over abusive practices and unfair competition "led to enactment of federal legislation—the Hawes-Cooper Act in 1929, followed by the Ashurt-Sumners Act in 1935—aimed at curbing the practice [of inmate labor] by restricting the sale of inmate-produced goods").

[22] *See* U.S. Dep't of Justice, Nat'l Inst. of Corrections, A Study of Prison Industry: History, Components, and Goals, 9 (1986) ("[T]he gradual shift in public attitude during the 1970s toward a more punitive philosophy has . . . [led] in turn to overcrowding and volatile prison environments. At the same time, there has been a reduction in resources available to meet the rising costs . . . This has focused more attention on inmate work as a means to help offset some of these expenses. Thus, while offenders continue to be incarcerated at high rates, work provides an opportunity for prison managers to reduce idleness and simultaneously decrease . . . skyrocketing costs").

[23] *See* Ed Pilkington, *US Prisoners Stage Nationwide Prison Strike Over 'Modern Slavery,'* THE GUARDIAN (Aug. 21, 2018), https://www.theguardian.com/us-news/2018/aug/20/prison-labor-protest-america-jailhouse-lawyers-speak [https://perma.cc/ZCC4-MUK8]; Arthur Delaney, *The Modern Day Slavery of Prison Labor Really Does Have a Link to Slavery*, HUFFINGTON POST (Aug. 28, 2018), https://www.huffingtonpost.com/entry/prison-strike-modern-day-slavery_us_5b857777e4b0511db3d21da8 [https://perma.cc/WP5T-YYFG].

[24] *See* Schwartzapfel, *supra* note 1.

[25] W. INFO. OFFICE, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, https://www.bls.gov/regions/west/idaho.htm [https://perma.cc/U7YW-8AYQ].

[26] *See* Kirklin, *supra* note 13, at 1058 (citing CRIMINAL JUSTICE INST., THE 2002 CORRECTIONS YEARBOOK: ADULT CORRECTIONS 118, 124–25 (2002)).

[27] *See* Fink, *supra* note 3, at 953–54; *see also* Zatz, *supra* note 2, at 870.

[28] *See* Zatz, *supra* note 2, at 869–70.

day operation of the facilities in which they are incarcerated—they wash clothes, clean the bathrooms, cook in the kitchen, perform repairs, and do clerical work under supervision of the correctional officers.[29] Incarcerated people who engage in prison housework programs are often paid by the day or the hour, and the average wage rates range from $0.17 to $5.35 per hour.[30] Some estimate that prison housework labor could save states a combined seven billion dollars per year in labor costs.[31]

Prison industry labor occurs within both the public and private sectors. In the public sector, one dominant employer of prison labor is the Federal Prison Industries, also known as "UNICOR." UNICOR is a government-owned corporation that runs inmate-labor programs that produce goods and services sold at discount to government buyers.[32] According to their latest annual report, UNICOR runs about 60 factories that employed nearly 17,000 prisoners in 2017.[33] These prisoners sew textiles, repair electronics, build furniture, sort recycling, and answer phones at call centers.[34] Incarcerated people working in a Federal Prison Industries factory make between $0.23 and $1.15 per hour.[35] In the private sector, prison industry is regulated by the Private Sector Prison Industry Enhancement Certification Program.[36] Much like the old convict lease system, this program facilitates contracts between correctional facilities and private companies to use inmate labor to produce goods both for private companies and for sale on the open market.[37] The statute imposes specific requirements for inmate employment, including compensation at the local prevailing wage and government-provided benefits.[38]

Regardless of the particularities of inmate's working conditions, labor in prison *looks like employment*. As Jackson Taylor Kirklin explains:

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[29] *See id.*

[30] Zatz, *supra* note 2, at 870 (citing CRIMINAL JUSTICE INST., THE 2002 CORRECTIONS YEARBOOK: ADULT CORRECTIONS 118, 120–21 (2002)).

[31] *See id.*

[32] *See* FED. BUREAU OF PRISONS, UNICOR PROGRAM DETAILS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp [https://perma.cc/43GW-GQ5R].

[33] UNICOR, 2017 ANNUAL REPORT 26, 28 (2017), https://www.unicor.gov/publications/reports/FY2017_AnnualMgmtReport.pdf [https://perma.cc/Y8DJ-Z4EJ].

[34] *Id.* at 4, 28.

[35] Heather Boushey, *Economic Policy Institute, Bringing the Jobs Back Home to Prisons*, ECON. POLICY INST. (Aug. 28, 2002), https://www.epi.org/publication/webfeatures_snapshots_archive_08212002/ [https://perma.cc/XJ7J-46Y2] (noting, however, that inmates "keep only a fraction of their wages, as approximately 80% is withheld for restitution, to offset incarceration costs, and to support their families, among other things. Thus, the average 'take home' wage of a federal prisoner is around $.18 per hour.")

[36] *See* Fink, *supra* note 3, at 958–59.

[37] *See id.*; *see also* 18 U.S.C. § 1761(c) (2012).

[38] *See* Fink, *supra* note 3, at 959 ("They must be paid at least the local prevailing wage for their work, subject to deductions (capped at 80% of gross wages) for taxes, cost of room and board, family support, and victim compensation; [t]hey must be eligible for workers' compensation and similar government-provided benefits on the same terms as other employees; [t]heir participation must be voluntary." (citations omitted)).

> Today's prison work assignments commonly resemble traditional jobs in many respects. Inmates—particularly those who work for private corporations operating inside the prison—may have long-term jobs with regular shift schedules. Inmates work under the authority of supervisors, who are either prison staff or civilian employees of third-party corporations authorized to operate out of the corrections facility. Most importantly, the overwhelming majority of inmates receive compensation for their work. Payment in money is the common form of compensation, although inmates may also receive nonmonetary compensation (such as credits toward a reduction in sentence length) for their labor.[39]

Capitalist narratives about punishment attempt to obfuscate prisoner's labor. They would have us believe that prisoner labor is not work, but a natural and necessary aspect of rehabilitation.[40] As with other forms of hidden labor, such as housework, prison labor is framed as an unavoidable or even fulfilling activity.[41] In reality, prison labor is an integrated and essential component of the economy. Like the work of housewives, prisoners act as a "reserve labor pool" and "absorb the fluctuations in the capitalist market."[42] For example, during the recent wildfires in California, the state ran out of regular firefighters and paid inmates $1 an hour to fight the fires.[43] In the media, these laborers were referred to as "volunteers."[44] Prison labor is

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[39] Kirklin, *supra* note 13, at 1059–60 (citations omitted). *See also* UNICOR, *supra* note 33, at 4 (explaining that "UNICOR workers receive job training in factories, warehouses, call centers and offices that closely resemble community work environments, so that the skills learned are easily transferrable to the outside world.").

[40] *See* David Shichor, *Following the Penological Pendulum: The Survival of Rehabilitation*, 56 FED. PROBATION 19, 22 (1992) (explaining that nineteenth century prison reformers thought of hard labor as a "tool of rehabilitation"). *But see* ROBERT JOHNSON, HARD TIME: UNDERSTANDING AND REFORMING THE PRISON 54–55 (2d ed. 1996) (explaining that nineteenth century prison labor was "entirely without rehabilitative value" but rather "prisoners were leased to capitalists and treated like slaves"); George D. Bronson et al., *Barriers to Entry of Private-Sector Industry into a Prison Environment*, *in* PRIVATIZING THE UNITED STATES JUSTICE SYSTEM 325, 325–26 (Gary W. Bowman et al. eds., 1992) ("[T]he inmates receive positive gain [through labor] . . . . They are able to learn work skills [and] earn additional income. . . .").

[41] *See generally* SYLVIA FEDERICI, WAGES AGAINST HOUSEWORK 2 (1975) (discussing how unpaid housework is framed as an unavoidable and natural part of being female: "[Housework] has been transformed into a natural attribute of our female physique and personality, an internal need, an aspiration, supposedly coming from the depth of our female character . . . [in order] to make us accept our unwaged work").

[42] MACKINNON, *supra* note 9, at 66.

[43] Mihir Zaveri, *As Inmates, They Fight California's Fires. As Ex-Convicts, Their Firefighting Prospects Wilt*, N.Y. TIMES (Nov. 15, 2018), https://www.nytimes.com/2018/11/15/us/california-paying-inmates-fight-fires.html [https://perma.cc/Y5EZ-QMCZ].

[44] *See, e.g.*, Nick Sibilla, *Inmates Who Volunteer to Fight California's Largest Fires Denied Access to Jobs on Release*, USA TODAY (Aug. 20, 2018), https://www.usatoday.com/story/opinion/2018/08/20/californias-volunteer-inmate-firefighters-denied-jobs-after-release-column/987677002/ [https://perma.cc/69WC-DG4L].

not rehabilitative. Rather, it is a source of profit for the government and private companies.[45]

II. Sexual Violence in Prisons

Sexual coercion is not simply *found* in the workplace, on college campuses, and in families. Rather, sexual coercion is a product of sexualized hierarchies of power within these institutions themselves. This is just as true in the prison context.[46] Sexual coercion is intrinsic to, and a particular product of, the carceral environment and the experience of imprisonment.[47] Prisons are characterized by extreme regulation of bodies and a total lack of privacy.[48] Rape, sexual harassment, and assault perpetrated by prison guards, work supervisors, or other inmates is pervasive.[49] Yet rape in prison is generally mischaracterized and under-theorized. The paradigmatic narrative of prison rape focuses on inmate-on-inmate sexual violence, with predatory individuals and their vulnerable prey.[50] When prison guards are discussed as the perpetrators of sexual violence, they are "bad apples." In reality, sexual violence is a problem of the prison itself: over half of all reported sexual abuse in prison is perpetrated by prison guards,[51] and the very design of prison life promotes sexual violence.

Sexual violence perpetrated against incarcerated women, men, transgender people, and gender nonconforming people in U.S. prisons is an expression of masculine power and the social hierarchy of male dominance. "[W]henever powerlessness and ascribed inferiority are sexually exploited or enjoyed—based on age, race, physical stature or appearance or ability, or

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[45] *See* Shichor, *supra* note 40, at 22.

[46] Theoretical interventions about non-prison rape, therefore, can be helpfully applied to the prison context. For example, many rapes in prison do not involve physical violence; submitting to sexual coercion is often the safest option, and reporting rape can make a survivor vulnerable to further abuse. *See, e.g.*, Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 Stan. L. & Pol'y Rev. 489, 498 (2011) (explaining a first-hand account of decisions to not fight a rape in order to minimize physical harm: "I've laid down without physical fight to be sodomized. To prevent so much damage in struggles, ripping and tearing. Though in not fighting, it caused my heart and spirit to be raped as well.").

[47] Alice Ristroph, *Sexual Punishments*, 15 Colum. J. Gender & L. 139, 140–41 (2006).?

[48] *See, e.g.*, Michel Foucault, Discipline and Punish: The Birth of the Prison, 235–36 (1977) ("In several respects, the prison must be an exhaustive disciplinary apparatus: it must assume responsibility for all aspects of the individual, his physical training, his aptitude to work, his everyday conduct, his moral attitude, his state of mind . . . . [I]t gives almost total power over the prisoners; it has its internal mechanisms of repression and punishment: a despotic discipline.").

[49] *See* Ristroph, *supra* note 47, at 144, 148–49.

[50] See Ristroph, supra note 47, at 141(explaining that the paradigmatic account of prison rape is one of predator and prey, "a cruel sadistic perpetrator who manipulates or violently overpowers a vulnerable victim.").

[51] Rantala, *supra* note 6, at 1.

socially reviled or stigmatized status—the system is at work."[52] In the corporal and coercive environment of the prison, those who suffer are overwhelmingly women, transgender, gender non-conforming, intersex, and non-heterosexual people.[53] According to a 2012 U.S. Department of Justice study, forty percent of transgender women in U.S. federal prisons have been sexually assaulted while incarcerated.[54]

Sexual violence takes different forms in men's and women's prisons. In women's prisons, sexual abuse acts as "yet another dimension of the privatized punishment of women."[55] Women's prison environments are violently sexualized, recapitulating the familiar violence that characterizes women's private lives. Human Rights Watch reported:

> We found that male correctional employees have vaginally, anally, and orally raped female prisoners and sexually assaulted and abused them. We found that in the course of committing such gross misconduct, male officers have not only used actual or threatened physical force, but have also used their near total authority to provide or deny goods and privileges to female prisoners to compel them to have sex . . .[56]

Male correctional employees abuse their authority within the prison context. They physically threaten, physically force, and psychologically compel incarcerated women to engage in sexual acts against their will through systematically withholding or rewarding benefits and privileges.[57]

In men's prisons, sexual violence is likewise a means of organizing inequality between fellow prisoners. Through rape, sexual roles are used to establish and enforce hierarchies of masculinity among (mostly) biologically similar people.[58] As Alice Ristroph describes: "In [men's] prison, masculinity is typically equated with domination." Accordingly, the aggressor in

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[52] MacKinnon, *supra* note 9, at 179.

[53] Allen J. Beck, Bureau of Justice Statistics, Sexual Victimization Reported by Inmates, 2011–12, 15–16, 18 (2013) (explaining data sets that show women report higher rates of inmate-on-inmate sexual assault than men, and that non-heterosexual people report higher rates of sexual assault than heterosexual people).

[54] Allen J. Beck & Marcus Berzofsky, Bureau of Justice Statistics, U.S. Dep't of Justice, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12, Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates 1–2 (2014).

[55] Davis, *supra* note 9, at 77.

[56] Human Rights Watch, *supra* note 8, at 1.

[57] Anthea Dinos, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. Sch. L. Rev. 281, 283–84 (2001).

[58] Catharine MacKinnon formulates the establishment and enforcement of such hierarchies through rape as follows:

> The larger issue raised by sexual aggression for the interpretation of the relation between sexuality and gender is: what is heterosexuality? If it is the erotization of dominance and submission, altering the participants' gender does not eliminate the sexual, or even gendered, content of aggression. If heterosexuality is males over females, gender matters independently. Arguably, heterosexuality is a fusion of

prison rape is viewed as a model of heterosexual masculinity, and the practice of prison rape 'reinforces heterosexual norms.'"[59] Naturally, the threat of sexual violence is most acute for incarcerated people with marginalized sexual and gender identities. In male facilities, those who obviously defy gender normative expressions of masculinity are targeted for punishment.[60] Transgender, gender non-conforming, and intersex people in men's prisons are frequently targets of sexual violence.[61] One transgender inmate describes her daily reality in a New York State men's prison:

> I'm not ashamed—it's war in here. The administration is against us. Something has to be done, and all they say is "Act like a man!" . . . [There is] lots of harassment from other prisoners, but they're sort of scared of me. The correctional officers are the ones who are the most violent. They're the ones to be scared of. . . . I'm raped on a daily basis, I've made complaint after complaint, but no response. No success. I'm scared to push forward with my complaints against officers for beating me up and raping me. I was in full restraints when the correctional officers assaulted me. Then after they said I assaulted them. All the officers say is "I didn't do it." The Inspector General said officers have a right to do that to me. That I'm just a man and shouldn't be dressing like this.[62]

Incarcerated people have limited avenues to redress sexual violence. In response to the national problem of prison rape, Congress passed the Prison Rape Elimination Act (PREA) in 2003. PREA was designed to detect, prevent, reduce, and punish sexual violence against incarcerated people,[63] whether perpetuated by fellow inmates or staff.[64] Since PREA's adoption and

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> the two, with gender a social outcome, such that the acted upon is feminized, is the 'girl' regardless of sex, the actor correspondingly masculinized.

MACKINNON, *supra* note 9, at 178–79.

[59] Ristroph, *supra* note 47, at 152.

[60] The Sylvia Rivera Law Project published a report, "It's War in Here," in which they interviewed twelve incarcerated people who identify as transgender, gender non-conforming, and intersex (TGNCI). Every single participant reported experiencing sexual harassment and/or assault while incarcerated. SYLVIA RIVERA LAW PROJECT, supra note 7, at 6, 19.

[61] *See* SYLVIA RIVERA LAW PROJECT, supra note 7, at 19; *see also* Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1248 (2004); ACLU NAT'L PRISON PROJECT, STOP PRISONER RAPE, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS 4–5 (2005), https://justdetention.org/wp-content/uploads/2015/10/Still-In-Danger-The-Ongoing-Threat-of-Sexual-Violence-against-Transgender-Prisoners.pdf [https://perma.cc/4TTH-E2S8].

[62] SYLVIA RIVERA LAW PROJECT, *supra* note 7, at 19.

[63] *See, e.g.*, Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 978 (explaining that the purpose of the PREA is "to provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape").

[64] Prison Rape Elimination Act, 34 U.S.C. § 30306 (2017); 28 C.F.R. § 115.76 (2014) (establishing disciplinary sanctions for staff); 28 C.F.R. § 115.78 (2014) (estab-

the subsequent promulgation of implementing regulations, the number of reported incidents of sexual victimization in prison has increased dramatically.[65] In 2015, correctional administrators reported nearly triple the number of allegations of sexual victimization than recorded in 2011.[66] More than half (58%) involved sexual victimization by correctional staff towards inmates.[67]

As a tool for institutional accountability, PREA is not working.[68] The corrections industry had an authoritative hand in defining PREA's requirements, and they accordingly are not designed to hold correctional institutions accountable.[69] Of the 24,661 allegations of sexual victimization, only 1,473 have been "substantiated" by completed investigations, and the rate of substantiation is even lower for allegations against staff members.[70] The resulting reported rate of false accusations—91.5%—is implausible.[71] There are substantial procedural and social barriers to reporting claims of sexual violence perpetrated by correctional officers. Prisoners gain little from filing sex abuse reports, and reporters often face retaliation from staff and fellow inmates.[72]

PREA has increased barriers for incarcerated plaintiffs who seek to bring constitutional claims regarding prison rape.[73] The Prison Litigation Reform Act (PLRA) requires incarcerated people to exhaust administrative remedies before bringing a case in federal court.[74] While the Department of

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lishing disciplinary sanctions for inmates); 28 C.F.R. § 115.11(a) (2014) (establishing zero tolerance as standard for sexual abuse).

[65] Alysia Santo, *Prison Rape Allegations are on the Rise*, THE MARSHALL PROJECT (July 25, 2018), https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise [https://perma.cc/69CE-WTDR].

[66] RANTALA, *supra* note 6, at 1.

[67] *Id.* at 6 (explaining that "[a]fter implementation of the national standards, allegations of staff-on-inmate sexual misconduct increased from 2,800 in 2011 to 8,151 in 2015 (up 191%)").

[68] Moreover, PREA is a theoretical failure; it is a prime example of the mischaracterization of rape in prisons as an inmate-on-inmate problem. The contemplated solutions to prison rape involve more surveillance and more punishment of prisoners and does not account for the pervasive role corrections officers and other agents of the state play in the problem.

[69] *See* Jenness & Smyth, *supra* note 46, at 489, 494 (explaining that "we empirically demonstrate that the corrections industry has, by and large, determined the final parameters of the PREA, the current content of national standards devised to regulate its implementation, and the failure of those standards to be embraced by the state as binding in any authoritative way").

[70] RANTALA, *supra* note 6, at 4, 7.

[71] *See* Santo, *supra* note 65 (noting that only about 8.5% of reports filed between 2012 and 2015 were found to be substantiated).

[72] Mira Ptacin, *Guards vs. Inmates: Mistreatment and Abuse in the US Prison System*, VICE, https://partners.vice.com/starz/starzpowers4/news/guards-vs-inmates-mistreatment-and-abuse-in-the-us-prison-system/ [https://perma.cc/N9MP-G3A9] ("Many inmates hesitate to file grievances in the first place because they're afraid of retaliation from prison staff and guards, who have a lot of discretion over their movement.").

[73] *See* Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 811 (2014) (detailing ways in which courts have interpreted PREA and its requirements in such a way as to "raise, not lower" barriers for inmates).

[74] 42 U.S.C. § 1997e(a) (2012).

Justice has acknowledged that this exhaustion requirement creates nearly insurmountable barriers for victims of sexual violence,[75] courts uniformly interpret PREA to *increase* the barrier of exhaustion of these administrative remedies.[76] In sum, PREA fails to "recognize the complicated forms of sexual coercion" in prisons, and to "address the underlying structural problems."[77] For some prisoners, PREA has made their conditions worse.[78] There is, so far, no adequate institutional solution to rampant sexual abuse perpetrated by correctional officers.

III. Title VII Protections in the Prison Context

Prison work and prison sexual harassment are intertwined structural injustices. First, on a theoretical level, sexual violence and labor are two tools toward the same end. Both contribute to the reproduction of capitalist hierarchies of power along the lines of race, gender, and sexuality. Both are rooted in the logic of state power and capitalist exploitation. Second, for individuals who are incarcerated, the connection is practical. Frequently, the same correctional officer who oversees a prisoner's labor also determines where the incarcerated person is housed, the resources they have access to, and the contact they have with their loved ones.[79] Thus, incarcerated people are wholly dependent on correctional staff for their wellbeing at "work" and at "home." Their labor cannot be isolated from their physical safety, and vice versa.

For those prisoners who are harassed, assaulted, and discriminated against by their work supervisors, Title VII can offer some redress. As I will argue in the following two sections, Title VII should be developed as a tool

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[75] Nat'l Prison Rape Elimination Comm'n, National Prison Rape Elimination Commission Report 10 (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf [https://perma.cc/5BAB-6LV8] [hereinafter NPREC Report] ("The Commission is convinced that the Prison Litigation Reform Act (PLRA) that Congress enacted in 1996 has compromised the regulatory role of the courts and the ability of incarcerated victims of sexual abuse to seek justice in court.").

[76] *See* Arkles, *supra* note 73, at 811.

[77] Ristroph, *supra* note 47, at 146.

[78] Attorney Gabriel Arkles provides a useful description of how PREA functions in practice:

> [F]or at least some prisoners, PREA has worsened conditions. It *has* provided a route for prison officials to trick prisoners into filing complaints about sexual abuse one way, then keep them from bringing a lawsuit because they didn't do it in another. It has provided an excuse for staff of facilities to force unwanted penetrative exams on prisoners and to place more prisoners in solitary confinement.

Arkles, *supra* note 73, at 830. *See also* Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law 91 (2011) ("It is unclear whether the new rules have reduced sexual violence, but it is clear they have increased punishment.").

[79] *See* Dinos, *supra* note 57, at 282–83 (explaining that correctional officers have virtually complete control over the lives of incarcerated people); Kirklin, *supra* note 13, at 1059 (explaining that correctional officers oversee some types of inmate work).

to combat persistent sexual violence in prison workplaces. But federal courts currently are split on whether the protections of the Civil Rights Act of 1964 apply to incarcerated workers.[80] The primary unsettled legal question at issue is: Are incarcerated people "employees" under the language of Title VII?[81]

Title VII protects "employees" of a qualified employer from workplace discrimination on the basis of "race, color, religion, sex, or national origin."[82] The statute itself does not define the term "employee," and courts have criticized the statute as "completely circular."[83] Linguistic ambiguity may be a factor in favor of broad interpretation. In *Nationwide Mutual Insurance. Co. v. Darden*, the Supreme Court held that federal employment statutes containing vague and circular definitions of employer and employee, like Title VII, should be interpreted broadly.[84] Title VII carefully delineates certain categories of employers who are clearly *not* subject to its requirements, such as Native American tribes and private clubs.[85] No explicit exemption exists for correctional facilities from the definition of "employer," nor for inmates within prisons from the definition of "employee." The absence of correctional facilities from this list bolsters the argument that Title VII itself calls for a broad definition of employment relationship.

Further, the Supreme Court has directed lower courts to interpret employee status broadly. In *NLRB v. Hearst Publications*, the Court explains that the term employee is not a rigid term of art: "Rather, 'it takes color from its surroundings . . . [in] the statute where it appears' . . . and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.'"[86] A broad defini-

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[80] *See* Kirklin, *supra* note 13, at 1048.

[81] MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 8:9 (4th ed. 2009) ("The decisive issue in determining whether prisoners who are working are protected by Title VII is whether a prisoner is an 'employee' within the meaning of the [Civil Rights] Act.").

[82] Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §§ 2000e-2(a)(1)–(2) (2012).

[83] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992); *see also* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) (describing the Title VII definition of "employee" as "a turn of phrase which chases its own tail").

[84] *Darden*, 503 U.S. at 322–23 (holding that, when interpreting "employee" in federal statutes using a circular definition of the term, federal courts should use the permissive common law agency test, as opposed to the more restrictive alternatives).

[85] *See* 42 U.S.C. § 2000e(b) (establishing exemptions).

[86] NLRB v. Hearst Publ'ns, 322 U.S. 111, 124 (1944) (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 545 (1940) and S. Chi. Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)).

tion of employee is faithful to the spirit of Title VII, which was designed to protect employment opportunities for vulnerable groups of workers.[87] Congress may not have envisioned the application of Title VII to harassment within prisons, but as the unanimous Supreme Court wrote in *Oncale v. Sundowner Offshore Services, Inc.*: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[88] Following this principle, many courts interpret employee broadly, recognizing that "a strict and narrow interpretation of the word 'employee' . . . would undercut the obvious remedial purposes of Title VII."[89] Likewise, in *County of Washington v. Gunther*, the Supreme Court emphasized that courts must "avoid interpretations of Title VII that deprive victims of discrimination of a remedy."[90]

Under this logic inmates are naturally covered, as discrimination is just as undesirable inside prison as it is in the free world. In cases concerning the applicability of the Fair Labor Standards Act to prisoners, the Seventh Circuit briefly discussed Title VII:

> Prison is in many ways a society separate from the outside world. Discrimination, however, maintains the same invidious character within the world of the prison and outside it. Given the broad policies behind Title VII, there would appear to be no reason to withhold Title VII's protection from extending inside the prison walls.[91]

Notwithstanding this text and the context of Title VII, federal courts diverge on whether incarcerated people may be considered employees under the Act. Depending on where a person is incarcerated, they "may or may not be subject to Title VII coverage."[92] The Sixth and Ninth Circuits permit Title VII claims by inmate workers under specific economic circumstances, while the Tenth Circuit prohibits Title VII suits by inmates altogether.[93] The Sixth, Seventh, and Eighth Circuits have conflicting case law,[94] and the First and

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[87] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate . . . discriminatory practices and devices.").

[88] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

[89] Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988); *see also* Cty. of Washington v. Gunther, 452 U.S. 161, 178 (1981) (explaining that "Congress itself has indicated a broad approach to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination"); Armbruster v. Quinn, 711 F.2d 1332, 1340–41 (6th Cir. 1983) ("Since this statute has been universally held to be broadly remedial in its purpose, such remedial effect can be given only upon a broad interpretation of the term employee.").

[90] *Gunther*, 452 U.S. 161 at 178.

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

[92] LEX K. LARSON, 1 EMPLOYMENT DISCRIMINATION § 4.05 4–30 (2d ed. 2010).

[93] *See* Kirklin, supra note 13, at 1068.

[94] *See id.*

Second Circuits have not addressed the question.[95] The EEOC has taken a strong position in opposition to prisoner workers: "[A] prison inmate who, while serving a sentence, is required to work by or who does work for the prison . . . is not an employee within the meaning of the Act."[96]

To reach these varying conclusions, the courts have relied on a number of different tests for determining employee status under Title VII. A recent note in the *Columbia Law Review* explained in detail these various theoretical approaches, and I will not reproduce them here.[97] To provide a sense of the divergence, however, I will briefly examine how the Tenth Circuit justified a per se ban, while the Ninth Circuit articulated an inclusive test.

The Tenth Circuit established a per se ban on Title VII suits by inmates based on the "primary purpose" of the inmate's incarceration.[98] For example, in *Williams v. Meese*, a prisoner in a federal correctional facility brought a Title VII suit alleging that the prison denied him job assignments solely on the basis of race.[99] The Tenth Circuit ruled that the inmate was not an "employee" under Title VII, reasoning that the plaintiff "does not have an employment relationship" with the prison facility because the "primary purpose" of the inmate's relationship with the prison facility is "incarceration, not employment."[100] The court went so far as to suggest that no genuine employment relationship can exist in a prison context since an incarcerated worker's relationship with the prison work supervisor "arises out of his status as an inmate, not an employee."[101]

The Tenth Circuit's analysis is incorrect on two fronts. First, the primary purpose test is simply an inappropriate test to determine employee status for the purpose of Title VII.[102] The formalistic test excludes workers arbitrarily on the basis of overly simplistic categories, and thereby pretermits a meaningful examination of the actual nature of the employer-employee relationship.[103] The Supreme Court rejected such a narrow test in *NLRB v. Hearst*

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[95] *See id.* at 1075.

[96] EEOC Decision No. 86-7, 40 Fair Empl. Prac. Cas. 1895 (1975).

[97] *See* Kirklin, *supra* note 13.

[98] *See* PEGGY R. SMITH ET AL., PRINCIPLES OF EMPLOYMENT LAW 4–11 (2009). (explaining that under the "common law agency" test, the courts apply traditional principles of agency and examine the level of control a purported employer exercises over a worker, accounting for both the manner and means of work).

[99] *See* Williams v. Meese, 926 F.2d 994, 996 (10th Cir. 1991).

[100] *See id.* at 997 (explaining that the plaintiff inmate has no employment relationship with the Federal Bureau of Prison).

[101] *Id.*

[102] *See, e.g.*, Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 86 (1984) (explaining that the primary purpose test fails to address the "concern which is at the heart of Title VII: whether the worker actually or potentially stands in a relationship in which the employer's control over employment opportunities permits the erection of artificial, unnecessary barriers to those opportunities based on the worker's race, sex, national origin, or religion").

[103] *See id.* at 84 (explaining that the primary purpose test unhelpfully "encourage[s] courts to focus on the formal structure of the employment relationship, rather than upon the reality of employer-employee interaction").

Publications. According to the Court, any definition of employee status necessarily includes an inquiry into the particular workers' economic reality. If "the economic facts of [a worker's labor] relation make it more nearly one of employment . . . those characteristics may outweigh technical legal classification."[104] The Tenth Circuit fails to take this directive when it applies the primary purpose test to prison labor. Second, even accepting the primary purpose test, the Tenth Circuit's application in a prison context is fundamentally flawed. Their conclusion—that the purpose of work in prisons is primarily carceral—rests on the debunked assumption that work during incarceration is an element of the prisoner's punishment or rehabilitation. Despite punitive or rehabilitative rhetoric justifying prison labor, the primary purpose of prison labor has always been profit.[105] No other Circuit has adopted the Tenth Circuit's blanket ban.

The Ninth Circuit has ruled that inmates can be considered employees for the purposes of Title VII under a fact-intensive economic realities test. The primary inquiry in the economic realities test is whether workers are employees "as a matter of economic reality."[106] In *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court established the relevant factors used to determine employee status in this economic realities test:

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[107]

In *Baker v. McNeil Island Corrections Center*, the Ninth Circuit held that a prisoner successfully stated a claim under Title VII.[108] In *Baker*, an incarcerated man applied for a job in the prison library for which he was qualified but was denied the position because the head librarian stated he did not want "to work with a black man."[109] The *Baker* court applied the economic realities test, focusing on the extent of the employer's control over the means and manner of the worker's performance.[110] The court rejected any per se exclusion of inmates from employment status based on their incarceration.[111] It

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[104] NLRB v. Hearst Publ'ns, 322 U.S. 111, 127–28 (1944).
[105] *See* U.S. Dep't of Justice, *supra* note 22, at 9 (citing offsetting of costs as the primary motivation for expansion of prison labor); ALEXANDER, *supra* note 11, at 28.
[106] United States v. Silk, 331 U.S. 704, 713 (1947).
[107] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992).
[108] Baker v. McNeil Island Corr. Ctr., 859 F.2d 124, 128 (9th Cir. 1988).
[109] *See id.*
[110] *Id.*
[111] *Id.*

instead applied a fact-based balancing test to determine whether a particular work relationship is "more in the nature of rehabilitation . . . [or] in the nature of commercial employment."[112] The court positively cited the district court, which reasoned that the high level of control prison guards held over the inmates' work "strongly suggests *because* of the prison context that the plaintiff was an employee under Title VII."[113] In a subsequent case, *Moyo v. Gomez*, the Ninth Circuit affirmed that "prison inmates can be 'employees' [for the purposes of Title VII] in certain circumstances,"[114] also utilizing the economic realities test.[115]

IV. Pathways for Litigation

Not every inmate will meet the criteria for "employee," but many will. It is important to develop a number of factors that will help courts conduct fact-specific inquiries to make this determination. Since incarcerated people are a particularly vulnerable group, the standard for an employee relationship should be relatively low.[116] Some traditional factors, such as the provision of employee benefits or whether the employer pays social security taxes,[117] should be overlooked to accommodate the special nature of the prison context. Incarcerated people should presumptively be considered employees when they engage in a consistent and ongoing economic relationship. This occurs, for example, when incarcerated people are contracted out to work for UNICOR or private third-party employers.[118] Likewise, an employment relationship should be presumptively recognized whenever workers apply for jobs, undertake work voluntarily, and are paid a regular wage in exchange for their labor.[119] Under this scheme, many (if not most) work placements within correctional facilities would be classified as employment relationships.[120]

Once an incarcerated worker passes this first legal hurdle—recognition of employee status—they must still establish a prima facie case for sexual

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[112] *Id.* (internal quotations omitted).

[113] *Id.* (emphasis added).

[114] Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994), *cert. denied* 513 U.S. 1081 (1995).

[115] The prison appealed the *Moyo* decision, asking the U.S. Supreme Court to decide "whether an employee-employer relationship can be found between a prison inmate and the prison in which the inmate is incarcerated under section 703(a)(1) of Title VII." Reply to Brief in Opposition at 1–2, Moyo v. Gomez, 40 F.3d 982, (1994) (No. 94-828), 1994 WL 161000945. The Supreme Court denied certiorari, declining to resolve the circuit split.

[116] *See* Baker, 859 F.2d at 128.

[117] *See* United States v. Silk, 331 U.S. 704, 713–14 (1947).

[118] *See* Kirklin, *supra* note 13, at 1080.

[119] *See id.* at 1080–81 (explaining key factors distinguishing genuine employment from volunteers or other exempted individuals).

[120] *See* Bagola v. Kindt, 131 F.3d 632, 634 (7th Cir. 1997) (explaining that incarcerated people must apply to work for UNICOR and applicants "ordinarily are placed on waiting lists and will not be hired" until UNICOR runs a background check).

harassment. Under Title VII, a prima facie case for an employee's action claiming sexual harassment by a supervisor requires establishing three factors: first, that an unlawful harassment occurred, second, that the harasser has supervisory status, and third, that the discrimination was based on sex. Conduct must alter the terms or conditions of an individual's employment through "quid pro quo" or "hostile work environment" harassment.[121]

Few incarcerated plaintiffs have attempted to bring a Title VII sexual harassment claim against a prison work supervisor. One notable exception is *Renda v. Iowa Civil Rights Commission*. This case offers a powerful example of the possible futures of Title VII litigation on behalf of incarcerated people. In *Renda*, an incarcerated woman named Melissa Renda was an inmate and "employee" at the Mt. Pleasant Correctional Facility in Henry County, Iowa.[122] She began working as a clerk in the Receiving and Discharge Department of the prison in 2005.[123] According to Ms. Renda, this was one of the highest paying and most desirable jobs in the prison.[124] The salary was $4.20 per day.[125] Soon after the start of her employment, her direct supervisor began sexually harassing her. He professed his love for her, gave her illicit gifts against prison policy, and threatened to have her transferred to another facility if she spoke to other male staff members.[126] Ms. Renda became subject to an internal investigation for the attention.[127] Out of fear, Ms. Renda refused to cooperate, and she was placed in solitary confinement for nine days as punishment.[128] When she finally told the investigator about her supervisor's harassing behavior, she lost her job.[129] Ms. Renda filed a complaint with the Iowa Civil Rights Commission (ICRC).

The district court found that Ms. Renda was not an "employee" for purposes of Title VII and the Iowa Civil Rights Act[130] and therefore failed to properly state a claim.[131] Ms. Renda, on appeal, argued that she met the criteria for "employee" under Title VII: She was not forced to work, she

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[121] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (explaining that sexual harassment occurs when it is "linked to the grant or denial of an economic quid pro quo," or when the harassing conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment").

[122] Appellant's Brief and Request for Oral Argument at 7, Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d (Iowa 2010) (No. 08-0428), 2008 WL 8715456, at *7 [hereinafter Appellant's Brief].

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8, 9 (Iowa 2010).

[129] Appellant's Brief, *supra* note 122, at 7.

[130] The definitions of "employer" and "employee" are functionally identical between the ICRA and Title VII. *See, e.g.,* Gustafson v. Genesco, Inc., 320 F. Supp. 3d 1032, 1044 n. 4 (S.D. Iowa 2018) ("Generally, claims under Title VII and the ICRA are analyzed similarly and without distinction.").

[131] *See* Appellant's Brief, *supra* note 122, at *6–7.

went through an application process to obtain her position, the job required professional development and skill-building, and she understood that the job resembled work outside of the prison context.[132] The Iowa Supreme Court ruled in Ms. Renda's favor, determining that an inmate could qualify as an employee and thus state a claim under Title VII and the Iowa Civil Rights Act; the court reversed the lower court's decision in part and remanded for further remand to the ICRC.[133]

Ms. Renda's case provides a roadmap for future litigation. Without a Title VII sexual harassment claim, Ms. Renda would have had little opportunity for relief. Internal grievances systems are notoriously ineffective and, as such, are not an adequate substitute for traditional courts in adjudicating inmate legal disputes.[134] Title VII claims can act as an outside pressure to maintain some minimal structure of accountability within the prisons.

Title VII can be a particularly useful protective tool for women prisoners and for those in men's prisons with marginalized sexual and gender identities. As previously discussed, sexual violence is used as a tool in prisons to enforce hierarchies of masculine dominance, and those with non-normative sexual and gender expressions are frequently targeted.[135] For example, the Sylvia Rivera Law Project (SRLP) released a report detailing the particularized harassment transgender and gender non-conforming people experience in men's prisons. One SRLP member, Vicki, described facing constant harassment on account of her gender identity. On one occasion, her work supervisor took a love letter she had received from another prisoner, photocopied it, and posted it around the correctional facility, including in the infirmary where she worked.[136] On another occasion, a corrections officer hung up all of her women's undergarments throughout the facility, inviting ridicule from other inmates.[137] She describes the incident: "It was horrifying and humiliating. All[ ] I [wanted] was to be left alone."[138] She describes the inadequate recourse: "One month after, I filed my complaint, no response. It's a lot of work to write someone up. Finally he was sent on vacation. That's it. But I'm still living with his friends . . . I feel like I'm being held hostage."[139] Title VII sexual harassment claims could provide Vicki legal recourse. Developments

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[132] *Id.* at 17.

[133] Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8, 21 (Iowa 2010).

[134] *See* Van Swearingen, *Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process*, 96 CAL. L. REV. 1353, 1354 (2008) (explaining that internal grievance procedures within prisons are often inadequate, as "prisons and correctional departments have a set of priorities that is so at odds with prisoners' interests").

[135] *See* SYLVIA RIVERA LAW PROJECT, *supra* note 7, at 19.

[136] *Id.* at 21.

[137] *Id.* at 20.

[138] *Id.*

[139] *Id.*

in Title VII jurisprudence allow transgender people to bring sexual harassment claims,[140] opening up a potential pathway for much needed relief.

There are significant barriers to legal success in seeking Title VII protections for incarcerated workers. Despite the positive progress in the Ninth Circuit, the federal judiciary is increasingly unlikely to be sympathetic to incarcerated people. Even if fully realized, Title VII will only ever be a limited tool to combat sexual harassment and assault in prison workplaces. Bringing a Title VII claim can only ever be a possible avenue of redress for a narrow subset of incarcerated people sexually victimized by their work supervisors. Moreover, those who report will continue to face retaliation.

There are also theoretical challenges to consider. For example, maintaining a focus on individual bad actors through Title VII claims is limiting; it can obscure institutional and systemic injustices at work in the prison system. Another downside is the potential effect the success of a fight for Title VII recognition could have on other areas of legal activism. For example, the legal movement trying to abolish prison labor based on the Thirteenth Amendment may not be amenable to case law stating that workers paid $0.40 cents an hour are bona fide employees.[141] Despite these considerations, I think employee status recognition for incarcerated workers would ultimately contribute to, not undermine, efforts to create systemic change in the prison system. If prison labor is recognized as employment, incarcerated workers will be entitled to the benefits and protections of a score of federal and state labor laws. With these constraints, correctional facilities could not maintain the current regime of hyper-exploitative labor practices.

Conclusion

This Note examines the applicability of Title VII sex discrimination claims in prison workplaces. First, this Note shows how prison labor and sexual violence are interrelated structural injustices. Labor and sexual violence within prisons jointly contribute to the reproduction of capitalist state power along lines of race, gender, and sexuality. Further, incarcerated people experience sexual violence in the context of their prison workplaces. Second, this Note argues that incarcerated people can and should utilize Title

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[140] Baldwin v. Foxx, EEOC Decision No. 0120133080 at 9 (July 16, 2015), https://www.eeoc.gov/decisions/0120133080.pdf [https://perma.cc/3LW4-ZXAN] (explaining that sex discrimination can be based on gender stereotypes if plaintiffs can show they were treated adversely based on being viewed as "insufficiently masculine or feminine"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (stating that plaintiffs may show sexual harassment if harassment was framed in sex-specific and derogatory terms that makes it clear the harasser was motivated by the presence of a particular gender).

[141] *See, e.g.*, Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case against State Private Prison Contracts*, 18 Wm. & Mary Bill Rts. J. 213, 215 (2009) (arguing that prison labor "too closely resembles the slave system that the Thirteenth Amendment sought to abolish").

VII to seek redress against correctional officers and work supervisors who perpetrate harassment and assault. This Note explains theoretical and applied divergence between federal circuit courts. It advocates for a definition of employee status that includes incarcerated workers, affording them protection under Title VII. Finally, this Note explores potential pathways for litigation. In particular, sex discrimination claims are a particularly promising tool for transgender and gender non-conforming people in prisons, who disproportionately face harassment from corrections officers.

Title VII is not a panacea. Yet for those prisoners who are harassed, assaulted, and discriminated against by their work supervisors, Title VII can offer some redress. I believe thoughtful and dedicated representation of incarcerated people who suffer daily at the hands of the powerful can bring accountability to the violence of prisons and remedy for individuals.