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CHAPTER 7

PRISON TRANSFERS AND THE MOOTNESS DOCTRINE: DISAPPEARING THE RULE OF LAW IN PRISON

SpearIt

Access to the legal system does not come easily for people in prison. There are administrative procedures that must be exhausted; federal legislation like the Prison Litigation Reform Act disadvantages prisoner-petitioners in multiple ways, including by imposing significant limits on damages and creating financial disincentives for lawyers to take on cases.¹ Such onerous legislation and lack of legal aid ensure genuine issues evade redress. Sometimes, however, the law itself is the cause of evasion. Sometimes doctrine prevents the Rule of Law from functioning in prison, particularly when a prison-transfer moots a legal claim. In the most egregious situations, a transfer perverts justice by serving as a subterfuge for prison officials to avoid liability for abusive conduct, unethical prison policy, or the continued violation of constitutional rights.²

Even absent such obstacles to accessing the legal system, litigating a case from prison presents a unique set of difficulties beyond substantive law. Incarcerated people are a particularly vulnerable class, some of which is due to their social and class status, including the general lack of education, lack of legal resources, inability to afford an attorney, and limitations in accessing the internet, telephones, and printed media.³ Some of the vulnerability is due to the prison's sheer dominance over its subjects, which Erving Goffman classically described as "total" because it directs practically every aspect of a person's existence and routine.⁴ He found that the prison environment creates a lost sense of personal safety coupled with the very real fact that the environment does not guarantee physical integrity. The sentiment resounds loudly in the present as one scholar describes: "From moving inmates, to reclassifying them, to taking away their legal paperwork, prison officials exercise extreme levels of control over inmates' lives."⁵ In the most toxic situations, prisoner-petitioners are known to face retaliation and other unfavorable treatment at the hands of administration and staff for the act of filing a grievance or lawsuit.⁶

What follows considers how transfer and mootness partner together to perform a vanishing act; like a skillful magician and trusty assistant, transfer and mootness can make justice disappear right before our very eyes. As a historical matter, mootness has been conceived as a doctrine of fairness, but when triggered by a prison transfer, it is anything but. Transfer and mootness are a lethal combination that can kill a legal claim and reduce to

¹ Prison Litigation Reform Act (PLRA) of 1996, 42 U.S.C. § 1997e.

² See Tamika D. Temple, *Mooted and Booted: How The Mootness Doctrine Has Been Used to Silence Violations of Prisoners' Constitutional Rights*, 45 T. MARSHALL L. REV. 117, 131 (2020) (examining cases where transfers are strategically implemented by prisons to moot claims).

³ Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 278 (2010).

⁴ ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE CONDITION OF THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES*, xii (1961).

⁵ Michele C. Nielsen, *Mute and Moot: How Class Action Mootness Procedure Silences Inmates*, 63 UCLA L. REV. 760, 760 (2016).

⁶ See, e.g., *Howard v. Foster*, 208 F. Supp. 3d 1152 (D. Nev. 2016) (prisoner-petitioner alleged he had items confiscated in retaliation for filing a complaint against guard staff).

nothing all the time, effort, and sacrifice of an individual who, under the hardship of prison, has managed to crack through the judicial bureaucracy and get an audience in court.⁷

The Power to Transfer: Unfettered Authority

One of the greatest powers of a prison administration is the ability to transfer a ward to a different facility. The practice is nothing new, and was noted in the 1960s and 1970s, when Muslims in prison were spearheading the prisoners' rights movement.⁸ Prisons would break up Muslim organizing by transferring individuals out of the facility, sometimes as a form of religious repression, sometimes to disrupt litigation. In more recent usage, prisons use transfers to relocate alleged gang members or leaders. Courts have deferred to institutional decision-making when it comes to transfers, and there is no protected right to confinement in any particular prison or part of a prison.⁹ The situation is somewhat ironic since a transfer can lead to severe legal consequences for a prisoner-petitioner. It is a moment when stakes are at their highest, and an individual is fully invested in litigation, only to be blindsided by a forceful transfer to different living quarters, a move that dampens the chance that a court will ever rule on the merits of his claim.

Aside from the direct legal consequences that flow from a transfer are personal difficulties wrought by the experience. From the perspective of one incarcerated, a forced transfer can be a major disruption and hardship. At the most basic level, a transfer disrupts day-to-day living, often including the ability to continue receiving mail, medication, and services like counseling and therapy. In addition, for those with legal matters pending in court, a transfer may interfere with an array of matters, including communication between an individual and his lawyer, disrupting legal documents and correspondences that must follow the transfer, and creating the genuine possibility of delayed responses, lost possessions, and lost mail, any of which can weaken one's potential for success in court.

A transfer also interrupts key elements that contribute to rehabilitation. The move may end visitation from relatives, friends, or other existing support systems and force the transferee to become the new kid on the cellblock all over again. Whatever friendships have been forged, jobs held, or goodwill established is extinguished. The rupture in routine may include educational, vocational, or religious programming. An involuntary shift in living circumstances creates tremendous strain on an individual, and in some cases, the very individual who suffered at the hands of prison officials to the point of filing a claim. The situation lends the impression that the transfer is a de facto punishment for filing the lawsuit.

How Transfer Moots a Claim in Court

Of the many downsides to being transferred, perhaps the most unfortunate occurs when the transfer becomes the basis to moot an individual or class action claim pending in federal court.¹⁰ A transfer can cause a case to lose an element of justiciability, making a claim

⁷ The case, *Blake v. Ross*, 136 S. Ct. 1850 (2016), offers a poignant example of both. In this case, the prisoner-petitioner suffered injury including nerve damages at the hands of guards, however his civil claim was dismissed by the federal district court because the court found that he did not exhaust the prison protocol. The case eventually went to the Supreme Court, which remanded the case back to the district court. While waiting for his case to be decided, he was transferred to another prison, which subsequently mooted his case.

⁸ GARRETT FELBER, *THOSE WHO KNOW DON'T SAY* 62 (2020).

⁹ See Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1834 (2020).

¹⁰ See Nielsen, *supra* note 5, at 760 (examining how transfers and reclassification moots claims in the prison class-action context).

“moot” and essentially dismissing the action.¹¹ The Supreme Court has noted that mootness can be understood as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence.”¹² A court’s finding of mootness due to transfer has the dramatic and bizarre effect of preventing a prisoner-petitioner from maintaining a legal claim involving the facility that allegedly did the wrongdoing. A transfer typically means that whatever wrongdoing did occur, the state gets off free and is never held accountable for acts against individuals who are among the most powerless.

While some successful prison cases have challenged the doctrine’s applicability over a transfer, the act of transfer alone is usually enough to moot a claim.¹³ In these instances, the Rule of Law suffers a double violation: one for the initial wrong suffered at the hands of prison officials, and a second for the fact that no one is ever brought to justice for it. The fear of transfer is not imaginary, as noted by the plaintiff in *Holt v. Hobbs*, who voiced fears of this tactic being used against him:

As part of that injunction, it stated that in my petition—because this is something that’s become a real issue with me there at the penitentiary, at Cummins Unit, that—that the defendants be banned or barred from transferring me to another institution in retaliation for this litigation. It’s a common tactic ADC uses to disrupt litigation. You understand what I’m saying?¹⁴

The plaintiff knew that being transferred from the facility that was the locus of a claim can moot claims for declaratory or injunctive relief against officials.¹⁵ While exceptions are sometimes applied to the doctrine, they often come far and few between.¹⁶ If the prison happens to change or end the policy or practice that spawned the case, the claim will likely be rendered moot, regardless of how far the litigation has progressed. As a result of this practice, case after case shows courts ignoring what officials have done at a prison merely

¹¹ There are two types of mootness, described as Article III mootness and prudential mootness. Article III mootness derives from the U.S. Constitution, which limits federal court subject-matter jurisdiction to ongoing “cases” or “controversies”—a transfer is an intervening act that effectively dissolves the controversy; Prudential mootness is a residual power exercised by courts to decline to exercise jurisdiction over the case for “prudential” reasons. For a claim awaiting appellate review that becomes moot, federal appeals courts typically reverse or vacate the judgment below and remand the case to the district court with instruction for dismissal. Courts consider both types in prison-based claims.

¹² *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 *YALE L.J.* 1363, 1384 (1973)).

¹³ See, e.g., *Abdulhaseeb v. Clabone*, 600 F.3d 1301 (10th Cir. 2010) (claim for injunctive relief not moot in part because the transferred prisoner-petitioner named the director of the department of corrections as a defendant, who has final policymaking authority over that prison system); *Chapman v. Fed. Bureau of Prisons*, 285 F. Supp. 3d 1204 (D. Colo. 2016) (relying on the reasoning in *Abdulhaseeb* to hold a claim by a federal prisoner-petitioner not moot because he sued the Bureau of Prisons, an entity capable of altering its conduct).

¹⁴ *Holt v. Hobbs*, 574 U.S. 352 (2015); Joint appendix On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit, *Holt v. Hobbs* No. 13-6827 (filed Apr. 23, 2014), <https://www.supremecourt.gov/docketfiles/13-6827.htm>.

¹⁵ 28 U.S.C. §§ 2201-2202. Sec. 2201 allows declaratory judgments in “a case of actual controversy”; 18 U.S.C. § 3626(a) restricts injunctive relief to a “particular plaintiff or plaintiffs.”

¹⁶ Among the limited exceptions that courts make in the prison context are “voluntary cessation,” when a defendant voluntarily ceases the allegedly unlawful conduct but is free to resume the conduct, see *Heyer v. U.S. Bureau of Prisons*, 849 F.3d at 212; conduct deemed “capable of repetition, yet evading review,” when the conduct occurs in the short term and has potential for recurrence but does not last long enough for judicial review, for a positive example, see *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir. 1980); This exception applies in “exceptional situations” only where the plaintiff “can make a reasonable showing that he will again be subjected to the alleged illegality.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

because the institution has stopped the violative conduct or because the prisoner-petitioner has been shifted to another facility.

The injustices that result from transfer and mootness are multiple since an individual may be forced to pay the draconian price of a transfer, which was done with the intent of shielding prison officials from wrongdoing that is now compounded by having one's life turned upside down—all for trying to play by the rules. The outcomes are particularly heinous because they nullify the many investments that go into filing a claim in the first place.

Reclaiming the Rule of Law

In the United States, prisons stand as an exception to ideals enshrined in the Rule of Law, literally an exception to the Rule. Behind bars, the Rule exists in a diminished capacity, and sometimes in suspension altogether. Whether it be the cherished ideal of “getting one's day in court” or that nobody “is above the law,” these and related principles are sorely lacking in the prison context, where people are at their most vulnerable and the state holds a near-monopoly of power.

Perhaps most obviously, there is a need to reform transfer practices and reform judicial norms about the unique harm that ensues when prisons transfer a ward. Transfer practices have recently come under public scrutiny due to their facilitating the spread of Covid-19. Still, as this chapter has shown, that issue is just the tip of the proverbial iceberg.

Courts have a transformative role to play in reforming this situation, but they have been largely unwilling to close this loophole. The situation is unfortunate because doing so would strengthen their commitment to the Rule of Law and because courts have helped perpetuate the problem in many ways.¹⁷ Steps forward might include courts working to ensure no individual has to give up a legal claim due to a forced transfer. We have already seen how the naming of defendants can make the difference between whether a suit is allowed to continue despite a transfer. Courts might do well to follow the lead of Chief Justice Rehnquist in this regard, who suggested “while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.”¹⁸ One scholar has continued this line of reasoning by arguing for the de-constitutionalizing of mootness from Article III altogether because, as he writes, “neither the text, the history, nor the structure of Article III forbids federal courts from entertaining moot cases.”¹⁹ Under a bolder judicial approach, courts have been called on to abolish mootness doctrine from its application in the prison context.²⁰ One wonders how the Supreme Court might exert influence through its supervisory powers to address these miscarriages of justice occurring on Court watch.

Assuming courts are reluctant to decouple mootness from its Article III heritage, courts might reimagine the scope for excepting the rule. For example, a recent case held that the prisoner-petitioner's claims for equitable relief were not moot despite being transferred around the Federal Bureau of Prisons.²¹ In that case, the court found that the petitioner,

¹⁷ Aside from granting mootness, *Sandin v. Conner*, 515 U.S. 480 (1995) (“The due process clause of the Federal Constitution's Fourth Amendment, standing alone, confers on a state prison inmate no liberty interested in freedom from state action taken within the sentence imposed.”).

¹⁸ *Honig v. Doe*, 484 U.S. 305, 331 (1988).

¹⁹ Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 655 (1992).

²⁰ Temple, *supra* note 2, at 142.

²¹ *Reid v. Hurwitz*, 920 F.3d 828 (D.C. Cir. 2019).

housed in various Security Housing Units (“SHUs”), was subject to mistreatment by prison staff in violation of BOP policy. The court found that since he had already been mistreated at several SHUs, the transfer was irrelevant because he was in the SHU in different facilities, suffered the same harms in different SHUs, and because prison officials claimed they were following policy. Together, these facts set conditions for prison conduct capable of repetition but evading review. Under a more common-sense approach, this exception could be used more expansively. Moreover, the stringent nature of the exception requires that the repetition be capable against the same person who experienced the initial wrongdoing. The problem is, however, this does nothing for those left behind, and just because there may be no likelihood of repetition against that very individual, it hardly allays fear that the same conduct is not capable of repetition against another. Courts would do well to recognize how harms are perpetuated by a stringent read of this exception.

Despite being an unlikely avenue for reform, legislation is another obvious way to address these issues. Recent legislative developments have benefitted people in prison, showing that legislation is not out of the question.²² In addition to these new laws that advance education and reentry, lawmakers could continue the trend by restricting a prison’s ability to transfer any individual who has a live case in court. At a bare minimum, legislation should delay any transfer until the end of litigation. Such a move by legislators would guarantee more just outcomes and remove the suspicion that the transfer process was abused to shield officials from litigation.

The most ideal solution would be for the executive branch to self-regulate on these unfair and unseemly practices. However, the idea that prisons might crack down on themselves may be wishful thinking given the dual nature of the task, which involves actually accounting the misconduct of their employees and ensuring that transfer is never used to circumvent attempts to redress the harm. At present, hardly one or the other is checked, which makes the likelihood of achieving both even less so. When it comes to lawsuits against prison personnel, prisons should be trying to uphold the Rule of Law and set an example for the rehabilitation of their wards. People serving a sentence are supposed to be in the process of learning respect for the law but instead see prisons using their powers to subvert it by mastering existing loopholes and allowing oppression to fester. For one who has had a case mooted by a transfer—it offers every incentive to reconsider whether following the law is worth the pain.

By now, this chapter hopes to have shown the mistake it is to think everyone gets that day in court. For people in prison, it is simply not true, and as a result, justice is ignored and unlawfulness is propagated. Transfer and mootness bring this point into sharp relief and underscore the law’s violence against those with the least means of defending themselves. While opponents of mass incarceration have documented an array of maladies that spring from this power imbalance, this piece seeks to remind that, at the bottom of it all, the system of redress is largely broken. People in prison are constantly taught they will not get their day in court and that prison officials are above the law. The legal breakdown that occurs in the face of one who has followed the law is the ultimate slap in the face. The injustice guarantees the perpetuation of others that will never be brought to light and guarantees fewer individuals will bother with the perilous work of filing a claim.

²² One example is recent action by Congress to reinstate Pell Grant funding for people in prison as well as the First Step Act, which provides for programs to help reduce recidivism among other purposes.

