

Mute and Moot: How Class Action Mootness Procedure Silences Inmates

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ABSTRACT

This Comment uses a recent prisoners' rights class action that challenges solitary confinement to demonstrate the way in which class action mootness procedure disadvantages inmates. With courts divided on how they should evaluate plaintiffs' claims that are mooted before the court reaches a class certification decision, this unsettled area leaves prisons with creative ways to moot named plaintiffs' claims. From moving inmates, to reclassifying them, to taking away their legal paperwork, prison officials exercise extreme levels of control over inmates' lives. Prison officials can utilize this gap in the procedural law on pre-class certification mootness, along with their power over the captive class members, to end prisoner class actions before they even reach the class certification stage. This ultimately blocks the court from reaching an enforceable judgment that protects inmates' constitutional rights. This Comment recommends extending the holding of the most forgiving case on pre-certification mootness and a recent Supreme Court decision to allow inmates protections from mootness even before they file their class certification motion. Given the racialized nature of mass incarceration and the harsh conditions of solitary confinement, current social movements that challenge racial inequality like Black Lives Matter could help to push through these recommended reforms and protect prisoners' rights.

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TABLE OF CONTENTS

INTRODUCTION.....	762
I. <i>ASHKER'S</i> ELUCIDATION OF PROBLEMATIC MOOTNESS PROCEDURES	766
A. Nature of the Claims	767
B. The Lead-Up to Class Certification	768
C. Class Certification	770
D. Mootness Issues.....	771
E. Defendants' Post-Certification Actions and Plaintiffs' Limited Supplementary Complaint	774
II. LEGAL STANDARDS FOR MOOTNESS.....	775
A. Rule 68.....	776
B. Precedent on Mootness After a Class Certification Decision: Four Supreme Court Cases.....	778
1. <i>Sosna v. Iowa</i>	778
2. <i>United States Parole Commission v. Geraghty</i>	779
3. <i>Deposit Guaranty National Bank v. Roper</i>	780
4. <i>County of Riverside v. McLaughlin</i>	781
C. Application of <i>Sosna</i> , <i>Geraghty</i> , <i>Roper</i> , and <i>McLaughlin</i> to Prison Class Actions	782
D. Confusion in Lower Courts on Mootness Before Class Certification: Three Approaches	784
1. First Approach: Strict, Narrow Interpretation	785
2. Second Approach: Focus on the Moment of Filing of the Motion for Class Certification.....	786
3. Third Approach: Forgiving <i>Weiss</i> and Its Progeny.....	786
E. The Supreme Court's Half-Measure in <i>Gomez</i>	789
III. LEGISLATIVE ATTENTION TO PRISONS AND SOCIAL IMPETUS FOR CHANGE....	791
A. The PRLA's Barriers and Advantages to Reforming Prisoner Class Action Mootness Doctrine.....	791
B. The PREA and Changing Congressional Perceptions Around Inmates.....	793
C. America's Current Moment of Intense Societal Frustration, Racial and Carceral Awareness, and the Potential for Energized Reformation...	794
IV. RECOMMENDED MOOTNESS STANDARD FOR PRISONERS' CLASS ACTIONS DERIVED FROM <i>WEISS</i> AND <i>GOMEZ</i>	800
A. A New Proposal: Looking to the Class Complaint and Other Extensions of Case Law	800
B. Potential Criticism of the New Approach	804
1. No End to Subclasses.....	804
2. Commonality Issues	805
CONCLUSION	806

INTRODUCTION

“I didn’t talk for 15 days. I couldn’t hear clearly. You can’t see—you’re blind—block everything out—disoriented, awareness is very bad. . . . I think I was drooling—a complete standstill.

I seem to see movements—real fast motions in front of me. Then seems like they’re doing things behind your back—can’t quite see them. Did someone just hit me? I dwell on it for hours.”¹

The above statement of a prisoner’s experience in solitary confinement only begins to describe the intense psychological disorder now termed “SHU Syndrome.”² SHU, which is an acronym for Special Handling Unit, describes solitary confinement in small cells with no natural light for twenty-three or twenty-four hours per day.³ Conservative estimates by the Bureau of Justice Statistics place the number of prisoners held in American SHUs at roughly 80,000.⁴ International criticism of this practice culminated in the United Nations Special Rapporteur on Torture’s assertion that solitary confinement violates the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵

The effects of these inhumane conditions for the thousands of inmates held in solitary are not surprising. Allegra McLeod, in the context of a revolutionary

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1. Lisa Guenther, *The Living Death of Solitary Confinement*, N.Y. TIMES (Aug. 26, 2012, 5:00 PM), <http://opinionator.blogs.nytimes.com/2012/08/26/the-living-death-of-solitary-confinement/> [<http://perma.cc/6RXT-XL2H>].
 2. Guenther, *supra* note 1; *see also* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1178–79 (2015).
 3. *Cf.* Sal Rodriguez, *Frequently Asked Questions*, SOLITARY WATCH (2012), <http://solitarywatch.com/facts/faq> [<http://perma.cc/GEG9-XC7V>].
 4. *Id.*
 5. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (“For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”); *see* Terri Judd, *UN Advisor Says Sending Muslim Cleric Abu Hamza to US Would Equal Torture*, INDEPENDENT (Oct. 3, 2012), <http://www.independent.co.uk/news/uk/home-news/un-advisor-says-sending-muslim-cleric-abu-hamza-to-us-would-equal-torture-8194857.html> [<http://perma.cc/56QQ-Y9F2>]; *see also* McLeod, *supra* note 2, at 1179.

article advocating prison abolition in the form of gradual decarceration with a variety of complementary measures, explains that “solitary confinement produces effects similar to physical torture. . . [namely,] a constellation of symptoms including overwhelming anxiety, confusion, hallucinations, and sudden violent and self-destructive outbursts.”⁶ Lorna A. Rhodes’ ethnography focused on inmates placed in maximum security prisons sheds light on the somewhat contradictory nature of these symptoms, elucidating that the harsh conditions of control in solitary confinement produce seemingly pathological behavior that is potentially logical within the madness of overwhelmingly controlled solitary units.⁷ For example, the throwing of human waste can be understood as a potentially rational act for a prisoner deprived of other means of expression and resistance.⁸ Furthermore, many inmates exhibit a range of extremely disturbing behaviors as a result of severe social isolation,⁹ clearly demonstrating the suffering caused by the practice of solitary confinement. Given such harsh conditions, one has to ask why prisoners have not asserted their constitutional rights¹⁰ to humane treatment within our court system.

In many cases, significant administrative exhaustion and financial barriers keep individual inmate litigation out of federal court.¹¹ The class action mechanism, which would entitle entire classes of prisoners to injunctive relief and bypass administrative exhaustion for all inmates other than the representative plaintiffs, would provide a useful solution for redressing such grievous harms.¹²

6. McLeod, *supra* note 2, at 1178.

7. See LORNA A. RHODES, *TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON* 21–60 (2004).

8. *Id.* at 43–49. Although throwing waste on another person initially may seem to indicate mental illness or erratic behavior, the context of the maximum security prison, or incarceration in general, should influence the interpretation of this behavior. When inmates in solitary or supermax conditions are deprived of virtually every other means of resistance, power, or protest, they may resort to throwing human waste at corrections officials. Called “gassing,” this resistive act has been common for decades. See, e.g., Mark Arax, *Inmates Use ‘Gassing’ to Strike Back at the System*, L.A. TIMES (June 1, 1999), <http://articles.latimes.com/1999/jun/01/news/mn-43122> [<https://perma.cc/LW2V-APFU>]. This practice also happens in jails, an indication that administrative controls and changes in that setting may also prompt backlash from upset inmates. Cf. Cindy Chang, *Jail Cracks Down on Inmates’ Pungent Assaults on Deputies*, L.A. TIMES (July 10, 2014), <http://www.latimes.com/local/crime/la-me-jail-gassing-20140711-story.html> [<https://web.archive.org/web/20150429210606/http://www.latimes.com/local/crime/la-me-jail-gassing-20140711-story.html>].

9. See *infra*, note 13.

10. Many constitutional claims for inmates arise from the Eighth Amendment’s prohibition on cruel and unusual punishments, along with due process clause guarantees.

11. See Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 (2012).

12. See, e.g., SpearIt, *Gender Violence in Prison & Hyper-Masculinities in the ‘Hood: Cycles of Destructive Masculinity*, 37 WASH. U. J.L. & POL’Y 89, 141–42 (2011) (describing the class action mechanism

Unfortunately, the unique realities of prison life, prisons' control over inmates, and a lack of accommodation in procedural mechanisms within class actions serve to keep such desperately needed suits from obtaining justice for inmates. Specifically, courts' struggles with the unsettled procedural question of how to respond to mootness issues before entering the class certification decision often result in an end to inmate litigation before it can even properly begin its life as a class action. Because current pre-class certification mootness procedures can disadvantage inmates, this Comment recommends the adoption of a more procedurally fair class action mootness approach to vindicate inmate rights. If courts look to the moment the class complaint is filed to determine mootness, along with the extension of several other legal principles like disallowing unilateral defendant actions from creating mootness, prisoner class actions will become more efficient, fair, and just.

A case in the Northern District of California, *Ashker v. Brown*,¹³ illustrates the pre-class certification mootness problems often present in inmate class actions. Thus, in Part I, *Ashker*¹⁴ provides a lens for evaluating the gaps and loopholes inherent in class action procedures for prisoners. From the ability to move inmates to new prisons or new areas within a prison on a whim, to the control over an inmate's possessions and social contacts, to the power to reclassify an

as better than individual litigation for resolving inmate complaints about sexual assault and overcrowding).

13. See *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Constitution, Civil Rights, and Human Rights of the Comm. on the Judiciary, 112th Cong.* 80–81, 86, 88 (2012) [hereinafter *Reassessing Solitary Confinement Hearing*] (statement of Craig Haney, Prof. of Psychology, Univ. of Calif., Santa Cruz) (“I recall a prisoner in New Mexico who was floridly psychotic and used a makeshift needle and thread from his pillowcase to sew his mouth completely shut. Prison authorities dutifully unstitched him, treated the wounds to his mouth, and then not only immediately returned him to the same isolation unit that had caused him such anguish but gave him a disciplinary infraction for destroying state property (i.e., the pillowcase), thus ensuring that his stay in the unit would be prolonged. A prisoner at the federal supermax prison—ADX—who had no pre-existing mental disorder before being placed in isolation, has suffered from severe mental illness for years now. While in solitary confinement he has amputated one of his pinkie fingers and chewed off the other, removed one of his testicles and scrotum, sliced off his ear lobes, and severed his Achilles tendon with a sharp piece of metal. . . . Another prisoner, housed long-term in a solitary confinement unit in Massachusetts, has several times disassembled the television in his cell and eaten the contents. Each time, his stomach is pumped and, after a brief stay in a psychiatric unit, he is returned to the same punitive isolation where this desperate and bizarre behavior occurred. Beyond these extreme examples, solitary confinement places all of the prisoners exposed to it at grave risk of harm. . . . Indeed, there is some recent, systematic evidence that time spent in solitary confinement contributes to elevated rates of recidivism. . . . [Further,] the bipartisan Commission on Safety and Abuse in America’s Prisons, chaired by former Attorney General Nicholas Katzenbach, called supermax prisons ‘expensive and soul destroying’ and recommended that prison systems ‘end conditions of isolation.’”).
14. See *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. filed Dec. 9, 2009).

inmate's internal categorization and associated housing situation, the *Ashker* defendants used procedural loopholes to try to moot the class action before it could gain traction.

Part II proceeds by explaining the law around class action mootness, both pre-class certification and post-class certification. While the Supreme Court clearly delineated the rules governing post-class certification mootness doctrine in four cases, its recent ruling on pre-class certification mootness leaves some issues unresolved, including the effect of a defendant's unilateral action to moot a plaintiff's claim. Confined to the facts of the specific case and the Federal Rule of Civil Procedure 68 context, the import of the decision for prisoner class actions remains to be seen. As a result, the lower courts' approaches to pre-class certification mootness may still carry weight in the prison context. Generally, lower courts take three different approaches to mootness issues that arise before class certification. Under the first approach, courts may strictly find the action moot if the named plaintiff's claim is rendered moot before the class certification decision. With the second approach, courts may allow the action to survive if the named plaintiff's claim is rendered moot after the moment the class certification motion is filed, regardless of when the court rules on the motion. Finally, under the third approach, which the Supreme Court backed in its recent ruling albeit in that factual context, courts may allow an action to survive even if the named plaintiff's claim is rendered moot before the motion for class certification is filed.

In Part III, this Comment turns to the legislative and sociopolitical backdrop of prison litigation. The Prison Litigation Reform Act (PLRA) and the Prison Rape Elimination Act (PREA) reveal Congressional attention and attitudes toward inmate issues and prison litigation. While the PLRA evidenced a Congress frustrated by the overwhelming number of inmate cases on the federal docket, the PREA revealed a Congress beginning to engage with and oppose the brutal realities of prison life, specifically the prevalence of sexual abuse. The current social backdrop further justifies attention to inmate rights class actions and mootness loopholes. Arising primarily from compelling reports of the deaths of African Americans at the hands of police officers, a social movement is underway.¹⁵ Our current, significantly heated societal moment includes America's

15. Advocates for racial equality and criminal justice have pushed for change for centuries. *See generally* NORVAL MORRIS & DAVID J. ROTHMAN, *THE OXFORD HISTORY OF THE PRISON* (1997). *But cf.* Marc Mauer & Nazgol Ghandnoosh, *Incorporating Racial Equity Into Criminal Justice Reform*, SENT'G PROJECT 1–2 (Oct. 2014), http://www.sentencingproject.org/doc/rd_Incorporating_Racial_Equity_into_Criminal_Justice_Reform.pdf. The current climate in America, however, has made such concerns more prevalent and publicized. *See infra* Section III.C; *see also* Judy Woodruff, *U.S. at a Unique Time in History for Justice Reform, Says Attorney General Lynch*, PBS (Oct. 8, 2015), <http://www.pbs.org/newshour/bb/u-s-unique-time-history-justice->

recent calls for large-scale reform to racialized structures of social control, including policing and prisons.

In light of the congressional history of inmate legislation and the trend toward more attention to inmate issues—including passing the PREA as an attempt to correct some of the worst abuses within prisons—and in light of the current invigorated social climate, Part IV discusses proposed reforms to pre-certification mootness doctrine, specifically for inmate class actions. In particular, Part IV recommends extending case law, but also cabining the unaddressed issues in the recent Supreme Court decision on pre-class certification mootness, while reframing approaches to prisoner class actions to afford inmates better protections. It also discusses some of the potential criticisms of this new approach and explains why these criticisms fail to undermine the recommended reforms. Finally, this Comment acknowledges several additional issues raised by the *Ashker* case and reflects on reform implementation.

I. *ASHKER'S* ELUCIDATION OF PROBLEMATIC MOOTNESS PROCEDURES

Scott Budnick, who is an executive producer of films like *The Hangover*, the founder and president of the Anti-Recidivism Coalition,¹⁶ as well as a legislative advocate for California Senate Bill 260¹⁷ on juvenile sentencing reform,¹⁸ recently visited Pelican Bay's solitary confinement unit to explain upcoming advocacy efforts. At the end of the talk, unable to shake hands, one of the incarcerated men

reform-says-attorney-general-lynch

[<https://web.archive.org/web/20160108180813/http://www.pbs.org/newshour/bb/u-s-unique-time-history-justice-reform-says-attorney-general-lynch/>].

16. *Mission & Work*, ANTI-RECIDIVISM COALITION, http://www.antirecidivism.org/our_work [https://web.archive.org/web/20150703174540/http://www.antirecidivism.org/our_work] (last visited Dec. 11, 2015) (“The mission of the Anti-Recidivism Coalition (ARC) is to change lives and create safe, healthy communities by providing a support and advocacy network for, and comprised of, formerly incarcerated men and women. To accomplish this mission, ARC provides services, support and opportunities to currently and formerly incarcerated individuals, and advocates for fair policies in the juvenile and criminal justice systems.”).
17. Keith Wattlely, *Frequently Asked Questions About Senate Bill 260*, UNCOMMON L., <http://uncommonlaw.org/wp-content/uploads/2013/10/13.10.15-Frequently-Asked-Questions-about-SB-260.pdf> [<https://web.archive.org/web/20160114023050/http://uncommonlaw.org/wp-content/uploads/2013/10/13.10.15-Frequently-Asked-Questions-about-SB-260.pdf>] (last visited Dec. 11, 2015).
18. *Scott Budnick, Founder and President*, ANTI-RECIDIVISM COALITION, http://www.antirecidivism.org/scott_budnick [<http://perma.cc/4SKJ-6NQD>]; *No Joke: Hollywood Comedy Producer Finds Career in Prison Reform*, NPR (Mar. 8, 2015, 4:57 PM), <http://www.npr.org/2015/03/08/388688502/hollywood-producer-finds-unlikely-second-career-prison-reform> [<http://perma.cc/PX3H-XF7T>].

held in a cage reached out to touch his fingertip to Scott's through tiny holes in the metal. The man said it was the most contact he had experienced outside of prison searches in decades.¹⁹ This Part takes a look at the litigation in *Asker v. Brown* and discusses the procedural hurdles many inmates face in order to secure relief from inhumane prison conditions like those at Pelican Bay.

A. Nature of the Claims

Stringent requirements under PLRA, like complex administrative exhaustion for example, can prevent inmates' access to the federal court system and ultimately limit their ability to vindicate basic constitutional rights—due process and freedom from cruel and unusual punishment to name a few; nevertheless inmate litigation does occur. Currently, the Northern District of California is hearing an inmate class action in *Asker v. Brown*.²⁰ In its pre-trial phase alone, the case clearly reveals gaps in class action procedure that allow prison systems to evade judicial power and deny inmates access to justice.²¹ The suit attempts to assert the rights of those locked in solitary confinement in California's Pelican Bay SHU for over ten years. The Defendants are the Governor of California, the Secretary of the California Department of Corrections and Rehabilitation (CDCR), the Chief of the CDCR's Office of Correctional Safety, and the Warden of Pelican Bay State Prison. The class alleges procedural due process violations under the Fourteenth Amendment's due process clause because the men were placed in SHU for indeterminate terms with no meaningful review of the classifications used to justify their perpetual SHU housing.²² Once the prison classified an inmate as "gang validated," he could be confined in SHU potentially for life without a substantive review of this classification.²³

19. Telephone Interview with Michael Mendoza, Legislative SB-260 Advocate (Apr. 17, 2015).

20. At current writing, on September 13, 2015, Judge Claudia Wilken has yet to rule on a joint motion for preliminary approval of a settlement agreement submitted to the court on September 1, 2015. *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. filed Sept. 1, 2015).

21. *Id.*

22. Plaintiffs' Second Amended Complaint at 36–37, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Sept. 10, 2012).

23. Gang validation is a term used to describe an inmate deemed to officially be a member of a prison gang. Gang validation standards are notoriously ambiguous, however, and insignificant circumstances can sometimes be the basis of gang validation. For example, one of the plaintiffs in *Ashker* became gang validated when prison officials found a copy of *The Art of War* by Sun Tsu in his cell. Additionally, inmates held in SHU are not eligible for probation or parole, even if they serve the full lengths of their original sentences or longer, simply because they are housed in SHU. See also *Reassessing Solitary Confinement Hearing*, *supra* note 13, at 7 (statement of Craig Haney, Professor of Psychology, University of California, Santa Cruz) (“[L]arge number[s] of prisoners] are housed [in solitary confinement] . . . because they are alleged to be prison gang members or associates, an

The class also alleges Eighth Amendment cruel and unusual punishment violations based on the conditions of Pelican Bay's SHU.²⁴ Because these men were left in limbo with no way out of solitary confinement for a decade or more, and no determined term length, the harshness of their punishments rises above even the cruelty inherent in the realities of everyday life in SHU conditions.

B. The Lead-Up to Class Certification

The Plaintiffs first tried to file the lawsuit before 2009, but it was dismissed without prejudice for failure to exhaust administrative remedies.²⁵ Then, several prisoners refiled the current lawsuit in 2009 by a handwritten complaint with the men acting as their own representation.²⁶ The men subsequently obtained counsel in 2012 after a hunger strike.²⁷ The district court's docket tells an outrageous tale of subsequent retaliation from prison officials against the men for attempting to regain their constitutional rights.

The Defendants' resistance to this action began in 2011 when several Plaintiffs received media attention for the hunger strike. The Defendants refused to allow the men access to photocopies important to the prisoners' self-representation.²⁸

offense that, in and of itself, can result in indefinite solitary confinement, even though the prisoners in question may not have engaged in any overt rule violations other than their alleged connection to the gang, and may remain entirely free of disciplinary write-ups during the many years of their indefinite isolation. Allegations of gang membership are inherently subjective and can be unreliable. Prisoners who are erroneously classified in this way are hard-pressed to establish facts"). Hopefully, California's *Ashker* settlement will begin to change gang validation procedures and indefinite solitary confinement.

24. Plaintiffs' Second Amended Complaint at 36, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Sept. 10, 2012).
25. Complaint at 4, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Dec. 9, 2009). Filing the complaint as *pro se* litigants, the men did not also file a simultaneous motion for class certification. Because inmate litigation is likely to begin on a *pro se* basis (without counsel), this common failure to simultaneously file the complaint and a motion for class certification opens the door to the mootness issues to be discussed in this Comment. See, e.g., Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 810 (2014) ("In federal courts in 2011, 93% of petitions brought by prisoners were *pro se*.").
26. *Id.*
27. See Letter from John R. Martinez, PBSP SHU Prisoner, to Edmund G. Brown, Governor of Cal., et al. (June 30, 2011), <http://www.pacovilla.com/pbsp-hunger-strike-to-end-perpetual-solitary-confinement/> [<http://perma.cc/QB3P-2EHH>]; *Ashker v. Governor of California*, CTR. FOR CONST. RTS., <https://ccjustice.org/home/what-we-do/our-cases/ashker-v-brown> (last modified Oct. 20, 2015) [<https://perma.cc/BYV6-WXPX>]; First Amended Complaint, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. May 21, 2010).
28. Plaintiffs' Notice & Motion for Relief From Defendants' Interference With Ability to Prosecute This Case, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Apr. 14, 2011); Order Denying Plaintiffs' Motion for Relief From Interference, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Oct. 11, 2011).

The court ordered that the Defendants must allow the Plaintiffs access to photocopies for “legal documents,” the definition of which was admittedly narrow.²⁹ The men subsequently faced searches of their cells and seizure of their legal documents and personal effects.³⁰ Because the correctional officers who conducted the searches were not named Defendants, however, the court had no jurisdiction to address this potential retaliation.³¹ In September 2012, the prison transferred Ashker³² from his cell of five years to a cell in a new pod³³ within Pelican Bay’s SHU in alleged retaliation and to hamper his interactions with other inmates involved in the litigation.³⁴

The other co-Plaintiffs in the action remained in Ashker’s original pod, including Troxell, a plaintiff who served as Ashker’s writing assistant due to a disability preventing Ashker from writing for long periods of time.³⁵ This prompted Ashker’s counsel to request a preliminary injunction to facilitate his ability to communicate with his attorneys and co-Plaintiffs, which the court denied.³⁶

The prison continued to block attempts to efficiently facilitate the litigation in a myriad of ways, such as refusing the Plaintiffs and their counsel adequate space in which to meet. Although the prison previously allowed the Plaintiffs and their counsel to meet in a room in the prison large enough to accommodate

29. *Id.*

30. Order for Further Briefing on Plaintiffs’ Motion for Protective Order Prohibiting Retaliatory Acts and for Return of Property at 1, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Oct. 12, 2011).

31. *Id.* at 2.

32. Todd Ashker is a white inmate with alleged Aryan Brotherhood, a white supremacist prison gang, validation. Alyssa Newcomb, *California Prison Hunger Strike Leader Is Convicted Murderer With Alleged Aryan Brotherhood Ties*, ABC NEWS (Jul 30, 2013), <http://abcnews.go.com/US/california-prison-hunger-strike-leader-convicted-murderer-alleged/story?id=19805895> [<http://web.archive.org/web/20150921041017/http://abcnews.go.com/US/california-prison-hunger-strike-leader-convicted-murderer-alleged/story?id=19805895>]. Despite his name being the primary referent for the case and his leadership within this particular class action suit, the case has the potential to dramatically improve the lives of inmates of color held in California SHUs. *See infra* section III.C.

33. A pod describes the spatial arrangement of cells within a prison. Pelican Bay’s SHU is made up of several smaller housing units, termed pods, with many cells in them. Usually, each pod is spatially separated from the others, most likely to allow for greater control of the environment. Inmates typically have no opportunity for interaction with others in different pods because of this spatial segregation. Moving an inmate to a new pod effectively denies the inmate access to those living in other pods.

34. Notice of Motion and Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 1–2, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Dec. 6, 2012).

35. Order Denying Motion for Preliminary Injunction at 2, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Apr. 18, 2013).

36. *Id.* at 1–2.

them all, the Defendants later withdrew access to this room.³⁷ When Judge Claudia Wilken ordered settlement conferences, Plaintiffs' counsel needed to request a court order granting them access to their clients to discuss the settlement because of the Defendants' denial of adequate meeting space.³⁸

C. Class Certification

Finally, on June 2, 2014, despite these unnecessary obstacles, the men obtained class certification.³⁹ The court certified a due process class of "all Pelican Bay inmates who are currently assigned to an indeterminate SHU term on the basis of gang validation," which included a majority of the 1100 inmates in Pelican Bay's SHU.⁴⁰ The court also certified an Eighth Amendment class of "all inmates who are now, or will be in the future, assigned to the Pelican Bay SHU for a period of more than ten continuous years,"⁴¹ which was estimated to encompass at least several hundred current inmates housed in Pelican Bay's SHU for a decade or longer.⁴² The classes were certified as both Federal Rule of Civil Procedure (FRCP) 23(b)(1)⁴³ class actions to protect against inconsistent judgments and demands on the Defendants' behaviors and FRCP 23(b)(2)⁴⁴ class actions, primarily for civil rights cases.

37. Order Regarding Access to Clients, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Nov. 19, 2013).

38. *Id.*

39. Order Granting in Part Motion for Class Certification; Denying Motion to Intervene, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. June 2, 2014).

40. *Id.* at 9.

41. *Id.* at 21.

42. *Id.* at 9.

43. FED. R. CIV. P. 23(b): "(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"

44. *Id.*

D. Mootness Issues

The class certification order explains additional, arguably pernicious attempts to render the Plaintiffs' claims moot before the certification decision could be entered. These efforts were largely successful and created an unnecessarily complex structure for the lawsuit as well as significant delays. First, the Defendants devised a new, impermanent, and calculated plan in October 2012 to review SHU placements based on gang validation—the criterion used to house the Plaintiffs indefinitely—in an attempt to moot the class's due process claims.⁴⁵ The new procedures, called the Security Threat Group (STG) pilot plan, were devised unilaterally by the Defendants and used to move for dismissal of the Plaintiffs' due process claims as moot.⁴⁶ The STG was not permanent, so it would have allowed the Defendants to discontinue the pilot program as soon as the court dismissed the due process claims.⁴⁷ Additionally, it did not yet apply to any of the named Plaintiffs.⁴⁸ The court therefore refused to dismiss the due process allegations, but the STG program did have a significant effect on class membership by providing cover for the Defendants to transfer class members out of Pelican Bay's SHU to other facilities.⁴⁹

All ten of the named Plaintiffs were housed in Pelican Bay's SHU at the time they filed the putative class action in September 2012. The Defendants, however, transferred half of them out of Pelican Bay's SHU prior to the decision on class certification.⁵⁰ These transferred, named Plaintiffs were universally excluded from class membership due to their involuntary transfers,⁵¹ which were unilaterally and potentially intentionally effected by the Defendants. Therefore, the transferred inmates, including unnamed transferred inmates, some of whom were moved under the new STG pilot program, no longer qualified as class members of either class. Instead of proceeding in a streamlined fashion as class members or named Plaintiffs, the five transferred, named Plaintiffs instead had to pursue individual claims on a parallel track alongside the litigation. This parallel track for these men's individual claims represents an ultimate

45. Order Granting in Part Motion for Class Certification; Denying Motion to Intervene at 3, Ashker v. Brown, No. 4:09-cv-05796-CW (N.D. Cal. June 2, 2014).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 2.

51. *Asquith v. Dep't of Corr.*, 186 F.3d 407, 411 (3d Cir. 1999) ("The Due Process Clause by its own force does not require hearings whenever prison authorities transfer a prisoner to another institution . . . as long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him . . .") (citation omitted).

inefficiency in the process of class certification, requiring additional individual trials for claims that were rendered different simply through the Defendants' quick, unilateral action.

The court pointed to the four FRCP 23(a) requirements for class certification, namely numerosity, commonality, typicality, and adequacy of representation,⁵² to justify this exclusion. Because the transferred inmates lacked commonality with the inmates remaining in Pelican Bay's SHU, due solely to locational differences, all transferred inmates were excluded from class certification.⁵³ While this may have been some form of relief for some inmates, as presumably at least a few were moved to other facilities and not placed in another SHU under the STG pilot program, many transferred inmates were merely shuffled to the next prison's SHU in an effort to evade judicial redress of their fundamental due process and Eighth Amendment concerns. Furthermore, even if an inmate was still held at Pelican Bay's SHU without transfer, but the Defendants placed him in the STG program, he no longer qualified as a member of the due process class.⁵⁴ The Defendants therefore devised a way to categorically exclude as many members of the class as they chose, simply by placing them into a new, questionable STG program, even if it resulted in no change or a continually inadequate review of the inmates' SHU terms. While the STG ploy failed to win the Defendants a dismissal of the due process claims entirely, it did allow them to exclude large swathes of the due process class members at their discretion.

These transfers also created an even more problematic result when the court evaluated the typicality requirement of the ten named Plaintiffs, or class representatives. The court determined that the five named Plaintiffs who were transferred from Pelican Bay's SHU were no longer typical of the class members because their changed location meant their interest no longer aligned with the Pelican Bay classes.⁵⁵ Accordingly, the court concluded that the five transferred,

52. FED. R. CIV. P. 23(a): "(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class."

53. Order Granting in Part Motion for Class Certification; Denying Motion to Intervene at 11, 14, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. June 2, 2014). Prison officials had already transferred over one hundred inmates to different prisons at the time of the class certification decision. *Id.* at 10.

54. *Id.* at 11.

55. *Id.* at 16.

named Plaintiffs were “subject to a different set of housing assignment procedures than the putative class and now live under different conditions of confinement.”⁵⁶

The Defendants’ actions therefore caused Defendant-defined, much smaller, and strategically-chosen classes to be certified. Through these unilateral, involuntary transfers, often to other prisons’ SHUs that perpetuate the same inhumane conditions, the Defendants were able to handpick the inmates who could remain named Plaintiffs, perhaps significantly weakening or altogether destroying the representative Plaintiffs’ cases. Because the named Plaintiffs serve as the representatives for entire classes, any strategic changes to who is a named Plaintiff could spell disaster for even the most clearly valid claims.⁵⁷ Furthermore, the unnamed, transferred inmates simply lost their stake in the litigation and often were moved to similar, if not identical, conditions in other SHUs. The validity and policies of the STG pilot program remained beyond the scope of judicial review, and the class certification decision cut down the case’s potential significantly, as it placed many interested inmates beyond the reach of the litigation. Furthermore, the five named Plaintiffs, who were transferred prior to the class certification decision, must proceed on an inefficient, independent but parallel track with their individual claims.

The court did leave open the possibility of a supplemental complaint, however, to try to address the transferred and STG-categorized inmates and their sudden exclusion from relief, or mootness of their claims, based solely on the Defendants’ actions. The court explained that if the Plaintiffs “seek to challenge the conditions of confinement in any other housing unit or correctional facility, they must seek leave to amend their Eighth Amendment claim.”⁵⁸ Similarly, “if Plaintiffs seek to challenge the STG program procedures, they must seek leave to amend their due process claim.”⁵⁹

E. Defendants’ Post-Certification Actions and Plaintiffs’ Limited Supplementary Complaint

Following the certification decision, the Defendants officially made the STG program, now consisting of a five-step program, permanent in October

56. *Id.*

57. By removing plaintiffs with the strongest evidence, for example, defendants could significantly affect the subsequent litigation.

58. Order Granting in Part Motion for Class Certification; Denying Motion to Intervene at 14, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. filed June 2, 2014).

59. *Id.* at 11.

2014, further complicating challenges to class membership and adequacy of representation.⁶⁰ Now, the named Plaintiffs are all classified at various levels within the STG step-down program, and the Defendants have moved four named Plaintiffs, as well as about twenty unnamed Plaintiffs, to Tehachapi Prison's SHU.⁶¹

The Plaintiffs succeeded in supplementing their complaint to include the transferred and STG inmates who were moved to Tehachapi's SHU, but only with respect to the Eighth Amendment claim. Still, any Eighth Amendment-transferred inmates not currently housed at Tehachapi's SHU, but who were instead moved to another facility, are still excluded from the litigation. The Plaintiffs also did not amend their claims regarding the due process class and the implementation of the STG program.⁶² The pilot STG process affecting the inmates transferred before class certification will therefore not be reviewed by the court. This essentially allows the Defendants to design, implement, strategically utilize, and finally make permanent, a review process over the course of the litigation that renders the due process claims moot without any external evaluation of this new program.⁶³ Therefore, the due process class still consists of only those inmates housed at Pelican Bay's SHU due to gang validation who were not

60. See Order Granting Motion for Leave to File a Supplemental Complaint at 2, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Mar. 9, 2015).

61. *Id.* at 3–4.

62. The docket does not clarify why the Plaintiffs' counsel chose not to amend the due process claim. It is possible that the new, permanent STG program cures the prior due process defects of indeterminate and virtually unreviewable SHU terms and gang validation designations. It is also possible that, despite the weaknesses of the new STG program, its permanence made the due process claim too difficult to pursue. Conjecture on soft variables could indicate that the Plaintiffs' counsel may have also sensed the court's reticence to challenge the new STG program given that counsel already raised arguments concerning the STG program in briefing on the class certification motion and the motion for a supplemental complaint.

63. If the Plaintiffs chose to supplement their due process claim, voluntary cessation doctrine would apply here. In the Ninth Circuit, courts first assume changes in government policy are made in good faith. See, e.g., *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010). Then, challengers can rebut this presumption. *Hazle v. Crofoot*, 727 F.3d 983, 998–99 (9th Cir. 2013). The party who asserts mootness, even if that party is the government, bears a heavy burden of persuasion. *Rosemere Neighborhood Ass'n v. U.S. EPA*, 581 F.3d 1169, 1173–75 (9th Cir. 2009). Because the prison officials implemented the STG program presumably in good faith, the *Ashker* plaintiffs would have needed to prove that this change was actually made in bad faith to continue pursuing their now moot due process claims even after supplementing the complaint to include the excluded inmates who would have been part of the due process class. Such an effort may have included too many evidentiary problems. On the other side, however, it is possible that the defendants would not have been able to carry their heavy burden to establish mootness on the excluded due process claims due to the STG program. Because the plaintiffs chose not to supplement their complaint as to this group of due process claims for inmates placed in the STG steps, we do not know how voluntary cessation may have played a role in *Ashker's* due process allegations.

strategically placed in the STG program at the time of class certification. Through these procedural backflips, the Defendants managed to define, control, delay, and disadvantage the Plaintiffs' claims, classes, and overall case. The massive amounts of delay, discovery expansion, and procedural complexity caused by the Defendants' behavior serves only to draw out and potentially handicap the Plaintiffs' ability to obtain relief.⁶⁴

II. LEGAL STANDARDS FOR MOOTNESS

The Defendants used both the STG program and inmate location transfers, namely pre-certification, unilateral actions that were likely taken in response to the litigation, to moot the Plaintiffs' claims in the *Ashker* case. Typically, defendants lack the capacity to force a plaintiff to move, change to whom a plaintiff may speak, or control significant and intimate details of a plaintiff's daily life.⁶⁵ The prison context, however, renders inmates vulnerable to such unilateral, involuntary mootness. Inmate locations, treatment, and classifications exist at the whims of prisons. Thus, if prisons can simply re-shuffle inmates through transfers and reclassify prisoners through implementing measures like STG programs in order to avoid or strategically manipulate litigation, inmates are distinct kinds of plaintiffs who require additional protections from defendants who attempt to render their claims moot.

64. The *Ashker* parties reached a settlement that they submitted to the court on September 1, 2015. Notice of Joint Motion and Motion for: (1) Conditional Certification of Settlement Class; (2) Preliminary Approval of Settlement Agreement; (3) Stay of the Proceedings; (4) Notice to Class Members; and (5) Schedule Setting Fairness Hearing for Final Approval, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Sept. 1, 2015). Although the court has yet to approve the settlement, one hopeful projection estimates that 1800 inmates could be moved out of California SHUs. The new settlement should prevent corrections officials from placing inmates in SHU solely because of a validated gang status. Ian Lovett, *California Agrees to Overhaul Use of Solitary Confinement*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/us/solitary-confinement-california-prisons.html> [<http://perma.cc/2ZZ7-4SXS>]. At least one prisoner thinks that if high-ranking gang members are released from SHU, prison yards will experience a shift toward stricter rule-following. Seth Ferranti, *What California Inmates Are Saying About Prison Gang Leaders Getting Out of Solitary Confinement*, VICE (Sept. 10, 2015), http://www.vice.com/read/what-california-inmates-are-saying-about-prison-gang-leaders-getting-out-of-solitary-confinement-910?utm_source=vicebus [<http://perma.cc/9KNY-LANC>].

65. While defendants usually lack this level of control, defendants can sometimes unilaterally moot a claim. For example, a state's legislature can correct a challenged law through new legislation in response to a pending case. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001). This differs markedly from the extreme level of control exercised by unelected prison officials over inmates, without the same level of public involvement and oversight that legislatures face.

An actual “case or controversy” is required in order to confer jurisdiction on a federal court.⁶⁶ Mootness is the lack of a live controversy, as defined by the Constitution’s requirement of an actual “case or controversy” in Article III.⁶⁷ Mootness can be created in a myriad of ways, especially in the complicated world of class actions. The Supreme Court has weighed in on mootness after class certification,⁶⁸ but pre-certification mootness, like that arising in *Asbker*, remains a somewhat unsettled area of law, leaving vulnerable inmate populations open to abusive procedural rules.

A. Rule 68

First, a quick explanation of Rule 68 of the Federal Rules of Civil Procedure is necessary because the mootness doctrine includes cases involving this rule. While cases evaluate mootness created in many different ways, Rule 68 is a common cause of mootness. It allows a defendant to make a full offer of judgment to a plaintiff, which the plaintiff can then either accept or reject.⁶⁹ Rule 68 offers are

66. U.S. CONST. art. III, § 2, cl. 1.

67. Daniel A. Zariski et al., *Mootness in the Class Action Context: Court-Created Exceptions to the “Case or Controversy” Requirement of Article III*, 26 REV. LITIG. 77, 78–79 (“The mootness doctrine, like the standing doctrine, also arises from Article III’s case or controversy requirement. Because an actual ‘case or controversy’ must exist for a court to have jurisdiction, courts have required the existence of a live dispute between parties with a ‘personal stake’ in the outcome of the litigation as a prerequisite to justiciability. If at any time in a litigation these requirements are not met—whether because of a dismissal on the merits, a voluntary settlement between the parties, or an involuntary dismissal occasioned by a full and complete offer of judgment—a court must deem the case moot and dismiss it due to a lack of jurisdiction.”).

68. See *infra* Section II.B.

69. FED. R. CIV. P. 68: “Offer of Judgment

- (A) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
- (B) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
- (C) OFFER AFTER LIABILITY IS DETERMINED. When one party’s liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
- (D) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeror must pay the costs incurred after the offer was made.”

common in class action litigation because a defendant could moot an entire class action before class certification if the representative plaintiff(s) simply accepts the offer, rendering her claims satisfied and ending the case or controversy.⁷⁰

When a plaintiff does not accept⁷¹ a Rule 68 offer in the class action context, however, the result is slightly more complicated, as explained by the *Weiss* case below and the most recent Supreme Court decision on the issue, *Gomez*.⁷² Currently, however, several aspects of Rule 68 offers are important in the prison class action arena. First, the plaintiff chooses to accept or reject the offer and therefore asserts her own autonomy and control over the situation. Consequently, defendants cannot unilaterally act to moot the action with only an offer of judgment.⁷³ Second, Rule 68 offers can be analogous to other efforts by defendants to address a plaintiff's individual claims prior to class certification. For example, a Rule 68 offer is similar to the STG program in *Ashker*, which on its surface sought to remedy alleged due process violations by providing the opportunity for meaningful review of SHU terms and placements. Other aspects of Rule 68, however, are not analogous to the prison context. For example, the typical form of relief varies from Rule 68 to prisoner suits: one monetary and easily measured, and the other a more complicated change to policy and prison conditions through injunctions. While Rule 68 offers can include injunctive relief, they rarely do since Rule 68 is an ineffective tool for such an offer.⁷⁴

Because Rule 68 is prevalent within discussions of class action mootness, its similarities and differences to the inmate situation are essential to understanding, limiting, and generalizing the law on class action mootness to prisoners' class actions. That law consists of established standards for post-certification mootness, through which the Supreme Court adapted mootness doctrine to the class action context; divided lower court approaches; and the recent *Gomez* decision on pre-certification mootness.

70. M. Andrew Campanelli, Note, *You Can Pick Your Friends, but You Cannot Pick off the Named Plaintiff of a Class Action: Mootness and Offers of Judgment Before Class Certification*, 4 DREXEL L. REV. 523, 523 (2012).

71. Rejection and failure to accept the offer have the same effect. Plaintiffs often allow such offers to expire naturally under their own terms as a means of rejecting the offer.

72. See *infra* Part II.D.1 and Part II.E; *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004); *Campbell-Ewald v. Gomez*, 577 U.S. __ (2016).

73. Although the *Gomez* dicta leaves open the possibility of defendants mooting the action through actual payment, not just an offer, the holding focuses on plaintiffs' choices. *Gomez*, 577 U.S. __ (2016) (slip op. at 11).

74. Robert G. Bone, "To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, 102 NW. U. L. REV. 1561, 1621, nn. 14, 24, 26 (2008).

B. Precedent on Mootness After a Class Certification Decision: Four Supreme Court Cases

1. *Sosna v. Iowa*⁷⁵

The Supreme Court first weighed in on post-certification class action mootness in 1975. The plaintiff moved to Iowa and filed for divorce but was denied jurisdiction because she had not resided in Iowa for a year.⁷⁶ She then filed suit, asserting that Iowa's one-year residency requirement for invoking its divorce jurisdiction was unconstitutional.⁷⁷ The plaintiff obtained class certification, but then subsequently satisfied the one-year residency requirement and obtained a divorce in another state before the case was resolved.⁷⁸ Therefore, there was nothing left of her claim to pursue, rendering it presumptively moot.⁷⁹

The Supreme Court rejected this interpretation of mootness, however, instead holding that the case or controversy was still live for the unnamed class members. When the case became a class action, it "acquired a legal status separate from" the named plaintiff's individual interest, therefore altering the mootness analysis.⁸⁰ The Court went on to explain that this one-year residency requirement was so short that likely no challenger could see a suit through to judgment before the one year expired and that particular challenger's claim became moot.⁸¹ To allow for challenges of such temporally-limited laws, the Court adopted the "capable of repetition yet evading review" standard to side-step the problem of temporal mootness.⁸² In short, the Court concluded that the plaintiff's action was not moot, despite her individual claim's resolution, because (i) it was a certified class action, and (ii) the challenged law was capable of repetition

75. 419 U.S. 393 (1975).

76. *Id.* at 395.

77. *Id.*

78. *Id.* at 397–99.

79. *Id.* at 399 ("If appellant had sued only on her own behalf, both the fact that she now satisfies the one-year residency requirement and the fact that she has obtained a divorce elsewhere would make this case moot and require dismissal. But appellant brought this suit as a class action and sought to litigate the constitutionality of the durational residency requirement in a representative capacity.") (citations omitted).

80. *Id.* at 399.

81. *Id.* at 400.

82. *Id.* at 400 ("But even though appellees in this proceeding might not again enforce the Iowa durational residency requirement against appellant, it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified. In this sense the case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion.").

but evading review. *Sosna* thus began the process of adapting mootness to make sense within the more complex class action context.

2. *United States Parole Commission v. Geraghty*⁸³

In *Geraghty*, the Court took its *Sosna* analysis a step further. It held that the class claims were not moot upon the expiration of the named plaintiff's claim after the certification decision, even when class certification was denied.⁸⁴ This holding allowed named plaintiffs to appeal class certification decisions after the expiration of their individual claims.⁸⁵ In this case, Geraghty challenged his denial of parole.⁸⁶ He was later granted parole after class certification was denied, but before the appeal of the denial of class certification was complete.⁸⁷ The Court found that his individual grant of parole did not render his claim moot, allowing the representative plaintiff to finish the process of appealing the denial of class certification.⁸⁸ Furthermore, under *Sosna*, if the appeal results in a class certification order, then the case can proceed despite the named plaintiff's individual resolution.⁸⁹ *Geraghty*, therefore, represents the Court's attempts to allow a class action to see its claims through to completion of the class certification process, including appeals, without interference from mootness doctrine.⁹⁰

83. 445 U.S. 388 (1980).

84. *Id.* at 404 (“[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative of the class retains a ‘personal stake’ in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal [of the class certification decision] results in reversal of the . . . denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna* [*v. Iowa*, 419 U.S. 393, that the class action is not rendered moot after a class is certified, even if the named plaintiff's claim is mooted.]”).

85. Federal Rule of Civil Procedure 23(f) allows interlocutory appeals of class certification decisions but not as appeals as of right. FED. R. CIV. P. 23(f): “APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”

86. *Geraghty*, 445 U.S. at 388.

87. *Id.*

88. *Id.* at 404.

89. *Id.* at 388.

90. Jonathan Lott, Note, *Moot Suit Riot: An Alternative View of Plaintiff Pick-off in Class Actions*, 2013 U. CHI. LEGAL F. 531, 539–40 (2013) (“The [*Geraghty*] Court declined to distinguish between a case becoming moot due to natural expiration [of a named plaintiff's claim] and one becoming moot due to the defendant's actions.”).

3. *Deposit Guaranty National Bank v. Roper*⁹¹

A companion case to *Geraghty*, *Roper* also extended the *Sosna* idea of adapting mootness to class action contexts. In this slightly more complicated case, the plaintiffs brought suit against a bank, the issuer of their credit cards, for allegedly unlawful finance charges.⁹² The district court denied the plaintiffs' motion for class certification, and the Fifth Circuit declined to grant mandamus to review the decision.⁹³ The bank then tendered full payment to each named plaintiff for the maximum they could recover in the suit but without any admission of liability.⁹⁴ The district court entered judgment in favor of the named plaintiffs despite their decision to reject the defendant's payment offer.⁹⁵ The plaintiffs objected to the entry of judgment in their favor, but the action was still dismissed.⁹⁶ They then attempted to appeal the denial of class certification again.⁹⁷ The defendants argued that the appeal was moot because of the entry of judgment for the plaintiffs below, but the Fifth Circuit disagreed and the Supreme Court affirmed this decision.⁹⁸

The Supreme Court held that the entry of judgment over the plaintiffs' objections did not moot the case because the plaintiffs retained an interest in the litigation.⁹⁹ That interest consisted of the ability to shift costs to other unnamed parties if certification were obtained.¹⁰⁰ Certification was ultimately granted after the plaintiffs successfully appealed the adverse certification decision.¹⁰¹ Therefore, even when a defendant offered to fully satisfy the plaintiffs' claims after a denial of class certification, and even when the district court entered judgment in favor of the named plaintiffs, the named plaintiffs could continue to pursue the certification decision to protect their interests in shifting costs to the class. Notably, the plaintiffs also objected to the entry of judgment in their favor. *Roper* often stands for the policy goal of preventing defendants from "picking off"

91. 445 U.S. 326 (1980).

92. *Id.* at 327–28.

93. *Id.* at 329. While in this case the plaintiffs petitioned the appellate court for mandamus on the question of class certification, parties can now file an interlocutory appeal under FED. R. CIV. P. 23(f), passed in 1998.

94. *Id.*

95. *Id.* at 329–30.

96. *Id.* at 330.

97. *Id.*

98. *Id.* at 326–27.

99. *Id.* at 326.

100. *Id.* at 327.

101. *Id.* at 331.

representative plaintiffs by paying off the named plaintiffs to halt the class action in its tracks.¹⁰²

4. *County of Riverside v. McLaughlin*¹⁰³

McLaughlin flirts with the line established by the Supreme Court earlier regarding post-certification loosening of mootness. It creates a narrow extension of relaxed mootness to pre-certification cases for claims that are “inherently transitory.”¹⁰⁴ Here, the plaintiffs were arrested in Riverside County and claimed they were held under unconstitutionally long waits for probable cause determinations while in detention.¹⁰⁵ Although all of the named plaintiffs were either released or provided with probable cause hearings by the time they moved for class certification, the court found no mootness issue.¹⁰⁶ The inherently transitory temporal nature of the claims was even more extreme than the *Sosna* one-year residency requirement, here ranging from only two to seven days of detention.¹⁰⁷ The extremely limited duration of the live claim follows the line of *Sosna* in allowing the judicial process to take place without mootness bars because any challenger’s claim would necessarily become moot before a case could conclude. The startling extension to this doctrine, however, comes in the timing of the class certification motion. Because of the inherently transitory nature of the claims, requiring that the plaintiffs move for class certification to preserve their claims from mootness within two to seven days would also prevent any judicial review. *McLaughlin* therefore allows the claims to remain an actual case or controversy even when

102. *Id.* at 339 (“Requiring multiple plaintiffs to bring separate actions, which effectively could be ‘picked off’ by a defendant’s tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.”).

103. 500 U.S. 44 (1991).

104. *Id.* at 52 (“That the class was not certified until after the named plaintiffs’ claims had become moot does not deprive us of jurisdiction. We recognized in *Gerstein* that ‘[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.’ In such cases, the ‘relation back’ doctrine is properly invoked to preserve the merits of the case for judicial resolution.” (quoting *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 399 (1980))).

105. *Id.* at 48–49.

106. *Id.* at 51–52.

107. *Id.* at 47 (“At issue is the County’s policy of combining probable cause determinations with its arraignment procedures. Under County policy, which tracks closely the provisions of Cal. Penal Code Ann. § 825 (West 1985), arraignments must be conducted without unnecessary delay and, in any event, within two days of arrest. This 2-day requirement excludes from computation weekends and holidays. Thus, an individual arrested without a warrant late in the week may in some cases be held for as long as five days before receiving a probable cause determination. Over the Thanksgiving holiday, a 7-day delay is possible.”).

they expire significantly before the plaintiffs can file their class certification motion.

C. Application of *Sosna*, *Geraghty*, *Roper*, and *McLaughlin* to Prison Class Actions

The application of these cases to the inmate class action context yields some definitive protections for inmates but still fails to account for prisoners' unique vulnerability to defendants' power and control over inmates and their claims. For example, even though the *Ashker* due process named plaintiffs are now classified as belonging to the permanent STG program, they could retain their live claims under *Sosna* because they were not part of the STG program at the time of class certification. This *Sosna* reasoning preserves a serious loophole for the Defendants, who could have effectively mooted the entire due process claim by placing every Pelican Bay SHU inmate into the STG pilot program, however superficially, before class certification. *Sosna* therefore freezes the mootness inquiry at the time class certification is granted, but in *Ashker* that freezing comes too late for many of the plaintiffs. By the time the *Ashker* court granted class certification, prison officials had already transferred or placed into the new STG program several of the named plaintiffs and many of the absent class members.

Similarly, *Geraghty* provides additional protections to inmates if their class certification is denied and their claims have become moot, so that they can continue to appeal the class certification decision. This procedural safeguard is important because, as evidenced in prior sections of this Comment, defendants can very easily destroy commonality and typicality in inmate class actions, requiring potential appeals to truly adjudicate a class certification decision. In *Ashker*, an appeal was not necessary because the court granted, in part, the Plaintiffs' class certification motion. If, however, the prison officials had successfully transferred or reclassified all of the named Plaintiffs into the STG program before the class certification decision, thereby destroying all typicality and commonality by causing the inmates to live at different prisons, the *Geraghty* holding would at least allow an appeal of the adverse certification decision. This appeal would likely be ineffective, however, because the changes took place before the class certification decision, the point at which the court examines mootness under *Sosna*.

Roper has a slightly more nuanced application to prison litigation contexts. Because these suits usually assert claims for declaratory and injunctive relief, the lack of a financial stake in shifting costs of litigation to class members may not keep a claim alive long enough to appeal any denial of class certification once a court enters judgment for a plaintiff. Financial interest can be found, however, in

fee shifting statutes for civil rights cases concerning costs and attorney's fees.¹⁰⁸ Unfortunately, an attorney's fee issue alone cannot be pursued if a court has entered a final decision on the merits.¹⁰⁹ Furthermore, even if an inmate's suit served as the catalyst for a change in a defendant's policies or behaviors, but those changes provided no benefit to the inmate, this is insufficient to sustain a plaintiff's standing to seek substantive relief, therefore eliminating any potential recovery for plaintiff's counsel for attorney's fees.¹¹⁰

Additionally, this may remain insufficient to evade mootness issues under *Roper*. If a prison were to offer the equivalent of full payment, in the form of permanent and meaningful reform measures, and a court were to order judgment in favor of the inmate class, then whether or not they accept the offer, the judgment would presumably carry with it the costs and attorney's fees as a matter of the court's discretion.¹¹¹ In this scenario, full and meaningful reform in the offer would often relate to a prison's overall practices and policies, which would likely cure all of the class members' claims as a whole—yet this relief is conditioned on the named plaintiffs accepting the offer.

If, however, some form of specialized relief was offered only to named plaintiffs, then an analogy can be drawn. Despite the lack of a continued interest tied to pecuniary relief, *Roper* can stand for the proposition that if named plaintiffs have a continued interest in class certification, even after judgment is entered for them over their objections, they can pursue that interest. This recognizes the power of the plaintiffs' voices in choosing to accept a defendant's proffered compensation and also in contesting subsequent judgments, even judgments in their favor. A *Roper* workaround could be helpful if named inmates could establish a continued, albeit nonmonetary, interest in class litigation after actions offering full redress to only named plaintiffs, in order to allow named plaintiffs to continue pursuing class certification for unnamed plaintiffs.

Finally, *McLaughlin* is perhaps the most compelling case to support inmate class actions, especially in conjunction with *Sosna*. Although the "inherently transitory" language of *McLaughlin* seemed to embrace a very limited timeframe of a few days, when coupled with the "capable of repetition yet evading review"

108. 42 U.S.C. § 1988 (2012).

109. See generally *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); see also *Marek v. Chesny*, 473 U.S. 1 (1985) (holding that after a defendant makes a FED. R. CIV. P. 68 offer that is more than a plaintiff's fees and costs, a defendant is no longer liable for the plaintiff's fees and costs; instead, the plaintiff is liable for the defendant's costs).

110. *Hewitt v. Helms*, 482 U.S. 755 (1987); see *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (ruling that a claim for attorney's fees alone cannot create standing when the plaintiff lacks standing to assert her substantive claim for relief).

111. 42 U.S.C. § 1988 (2012).

language of *Sosna*, the two present a strong argument for reframing how inmate class actions are understood. Because inmates can be transferred in a matter of only a few days, their commonality and typicality may be inherently transitory. Additionally, such transfers are always capable of repetition, yet evading review. The prisons can simply destroy class membership before certification to evade review and later move inmates back to their original positions to repeat abuses. Ultimately, reinterpreting inmate class actions this way could solve a host of injustices inherent in inmate class action procedures. These extensions would no doubt be somewhat controversial.¹¹² Furthermore, lower courts have developed their own understandings of mootness affecting claims before certification without this coupling of *McLaughlin* and *Sosna*, indicating an unwillingness to extend or reinterpret in this manner.

D. Confusion in Lower Courts on Mootness Before Class Certification: Three Approaches

Although the *Gomez* decision potentially resolved the Circuit split on mootness before class certification, that decision may be limited to the Rule 68 context and the specific facts in that case. Therefore, lower courts may continue to take different approaches depending on the contexts and facts of the cases before them. When a claim is rendered moot before the class certification decision, lower courts generally take three approaches to deciding if a case or controversy remains. These approaches either provide or eliminate opportunities for savvy defendants to game the system through efforts to create mootness early. The first approach strictly renders a class action moot if the named plaintiff's claim is mooted prior to class certification. The second approach allows a class action to survive if the named plaintiff's claim is not moot at the moment the class certification motion is filed, even if the claim subsequently becomes moot before the class certification decision. The third, loosest approach allows class actions to survive even if the named plaintiff's claim is rendered moot prior to the filing of the class certification motion by looking to the live controversy at the time of the class complaint. The *Gomez* decision effectively adopted this third approach. Furthermore, between circuits and within circuits, courts often take differing approaches.¹¹³

112. Critics make take issue with the loose interpretation of the Constitution's case or controversy requirement inherent in the suggested extensions. See, e.g., Zariski et al., *supra* note 67, at 108–16.

113. *Id.* at 85, 86 n.41, 88 n.51, 99–100 nn.104–05; Heaphy v. State Farm Mut. Auto. Ins. Co., 72 P.3d 220 (Wash. Ct. App. 2003) (utilizing an approach that distinguished facts from earlier cases on a

1. First Approach: Strict, Narrow Interpretation

Some courts interpret the above precedents on post-certification mootness narrowly to reach the conclusion that if a named plaintiff's claim is mooted before class certification, the entire class action is dead in the water, apart from an assumed very limited *McLaughlin* exception for inherently transitory claims.¹¹⁴ Many of these courts faced cases in which the named plaintiff's claim was mooted early, before the filing of the motion for class certification.¹¹⁵ These courts conclude that with the mooted of the named plaintiff's individual claim, comes the mooted of the entire nascent class action.¹¹⁶ This approach often further construes *Roper* and *Geraghty* narrowly, pointing out that both decisions involved appeals of adverse class certification rulings and involuntary mooted of plaintiffs' claims.¹¹⁷ The implication is therefore that if a named plaintiff chooses to voluntarily settle, her claim's mootness will extend to the putative class's claims. The settlement would therefore bar even an appeal of an adverse class certification decision unless the plaintiff retains a live interest in the litigation after the voluntary settlement.¹¹⁸

2. Second Approach: Focus on the Moment of Filing of the Motion for Class Certification

Other courts have looked to the moment the motion for class certification is filed as the definitive time to determine mootness.¹¹⁹ In this slightly more forgiving formulation, if the representative plaintiff's claims become moot after the moment the motion is filed but before the court issues its class certification decision, that mootness does not affect the putative class action which can proceed.¹²⁰ This approach, as explained in *Lusardi v. Xerox Corp.*, relies on *Sosna's* relation back approach for claims "capable of repetition yet evading review," but extends it

case-by-case basis, rather than focusing on legal approaches, to determine if the named plaintiff could continue to represent the class when her claim became moot before class certification).

114. Zariski et al., *supra* note 67, at 86 n.41 (noting how courts in the First, Second, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits apply the first approach).

115. *Id.* at 86–87.

116. *Potter v. Norwest Mortg., Inc.*, 329 F.3d 608, 611 (8th Cir. 2003) (“[A] federal court should normally dismiss an action as moot when the named plaintiff settles its individual claim, and the district court has not certified a class.”).

117. *Id.* at 612–13.

118. *Id.* at 612–15; *see also* *Walsh v. Ford Motor Co.*, 945 F.2d 1188, 1189 (D.C. Cir. 1991).

119. Zariski et al., *supra* note 67, at 88 n.51 (noting that courts in the Third, Fifth, Sixth, Seventh, and Tenth Circuits apply the second approach).

120. *Id.* at 88.

to other kinds of cases in line with *Geraghty* and *Roper*.¹²¹ These courts still insist that the case or controversy be live at the moment of filing, claiming that this protection is sufficient to prevent defendants from picking off representative plaintiffs.¹²²

3. Third Approach: Forgiving *Weiss*¹²³ and Its Progeny

A third approach involves following and extending the *Weiss* case. Out of the Third Circuit,¹²⁴ *Weiss* adopted a forgiving standard recognizing plaintiffs' voices and condemning unilateral defendant actions as the basis for mootness determinations.¹²⁵ In *Weiss*, the plaintiffs brought an action under the Fair Debt Collection Practices Act.¹²⁶ Before they could file for class certification, the defendants made a Rule 68 full offer of judgment to the named plaintiffs.¹²⁷ The named plaintiffs rejected this offer, so the defendants filed a motion to dismiss, claiming that the Rule 68 offer rendered the claims moot and deprived the court of jurisdiction.¹²⁸ The district court dismissed the action, and the plaintiffs appealed.¹²⁹

The *Weiss* court noted that, traditionally, a full offer of judgment moots the claim and destroys the controversy.¹³⁰ They proceeded to explain, however, that the plaintiffs' small monetary claims were of the sort that made these individuals susceptible to being picked off, and pointed to the policy concern motivating *Roper*.¹³¹ *Weiss* also rejected the second approach above, which focuses on the

121. *Lusardi v. Xerox Corp.*, 975 F.2d 964, 981–82 (3d Cir. 1992).

122. *Id.* at 982.

123. *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

124. The Ninth Circuit's Honorable Arthur L. Alarcón sat by designation on the case. *Id.* at 339.

125. *Id.* at 349–50.

126. *Id.* at 339.

127. *Id.* at 339–40.

128. *Id.*

129. *Id.* at 339 (“This appeal reflects the tension between two rules of civil procedure—FED. R. CIV. P. 23 and FED. R. CIV. P. 68—and whether they can be harmonized when the only individual relief requested by the representative plaintiff has been satisfied through an offer of judgment.”).

130. *Id.* at 340 (“An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.”); *see also* *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) (“Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under FED. R. CIV. P. 12(b)(1), because he has no remaining stake.”).

131. *Weiss*, 385 F.3d at 347 (“Although *Weiss*'s claims here are not ‘inherently transitory’ as a result of being time sensitive, they are ‘acutely susceptible to mootness,’ . . . in light of defendants’ tactic of ‘picking off’ lead plaintiffs with a Rule 68 offer to avoid a class action. As noted, this tactic may deprive a representative plaintiff the opportunity to timely bring a class certification motion, and also may deny the court a reasonable opportunity to rule on the motion.” (quoting *Comer v. Cisneros*, 37 F.3d 775, 797 (2d Cir. 1994))).

moment plaintiffs file the class certification motion, because class actions can proceed on different tracks, defeating the reliance on this single motion as definitive.¹³² With special attention to the Fair Debt Collection Practices Act and its differing damages for class suits as compared to individual suits, the court looked to the shared values in the statute and FRCP 23¹³³ of aggregating claims to make negative-value litigation¹³⁴ possible.¹³⁵

This evaluation of the ethos behind Rule 23 and its creation of class actions proved pivotal to the court's decision. Ultimately, the court concluded that in the absence of a class certification motion, the relation back doctrine could be used to defeat mootness by looking at the live controversy at the time the plaintiff filed the class complaint.¹³⁶ It also distinguished *Lusardi*, embodying the second approach, because in that case the plaintiffs voluntarily accepted settlement offers after two denied motions for class certification.¹³⁷

After *Weiss*, several cases in the Ninth Circuit, perhaps following Judge Alarcón's lead, adopted its central holding that a defendant's unilateral Rule 68 offer does not moot a class's claims.¹³⁸ In 2011 in the *Pitts* case, the Ninth Circuit looked at overtime and minimum wage claims, focusing again on the value

132. *Id.* at 347–48 (“Nonetheless, reference to the bright line event of the filing of the class certification motion may not always be well-founded. Representative actions vary according to the substantive claims and the courses of action. There are at least three distinct events on the path to a certified class: filing the class complaint, filing the motion for class certification, and a decision on the motion. Yet plaintiffs may file the class certification motion with the class complaint, and in some cases, include a motion for approval of an already negotiated settlement. Of course, the federal rules do not require certification motions to be filed with the class complaint, nor do they require or encourage premature certification determinations. It seems appropriate, therefore, that the class action process should be able to ‘play out’ according to the directives of Rule 23 and should permit due deliberation by the parties and the court on the class certification issues.”).

133. FED. R. CIV. P. 23 is the federal procedural class action rule.

134. Negative-value actions are too costly to litigate individually, but the cases yield meaningful results when plaintiffs' claims are aggregated through the class action mechanism. Linda Sandstrom Simard, *A View From Within the Fortune 500: An Empirical Study of Negative Value Class Actions and Deterrence*, 47 IND. L. REV. 739, 740 & n.5 (2014) (“By aggregating groups of small value claims together, the cost of litigation is shared by a class of similarly situated claimants, thus making litigation more feasible for claims that would otherwise never see the light of a courtroom.”).

135. *Weiss*, 385 F.3d at 344–45.

136. *Id.* at 348 (“Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint. Because in this case, no motion for class certification was made, we will direct the trial court to allow *Weiss* to file the appropriate motion.”); Zariski et al., *supra* note 67, at 95–96.

137. *Weiss*, 385 F.3d at 349.

138. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948 (9th Cir. 2013); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014).

of aggregation of small claims in class action litigation to support its backing of the *Weiss* approach.¹³⁹ Then, the Supreme Court issued a decision in 2013 that somewhat affected the *Weiss* approach.¹⁴⁰ *Genesis* dealt with the Fair Labor Standards Act (FLSA), which contains its own collective action provisions entirely separate from FRCP 23 class actions. The case represented a Rule 68 offer that successfully mooted the collective action claims. By the majority's terms, the Court declined to muddle FLSA collective action law with class action law.¹⁴¹ Despite this, the dissent briefly discussed class actions in order to understand the FLSA collective action results of the holding. Justice Kagan's dissent in *Genesis* backed the *Weiss* approach of refusing to moot class claims following a Rule 68 offer of judgment to a named plaintiff before class certification.¹⁴²

Following *Genesis*, the Ninth Circuit continued to pursue the *Weiss* approach in *Diaz*, a case in which the plaintiff rejected the defendant's pre-certification Rule 68 offer.¹⁴³ Mentioning *Genesis* by name, the *Diaz* court stated that it was "persuaded that Justice Kagan has articulated the correct approach," and held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot."¹⁴⁴ In short, lower courts have taken three overarching approaches to address class action mootness prior to class certification decisions. In the first approach, mootness problems before the class certification decision render the entire class action dead in the water.¹⁴⁵ In the second approach, the court looks to the moment plaintiffs file the motion for class certification to evaluate mootness issues.¹⁴⁶ In the third and most relaxed approach, adopted by the Third and Ninth Circuits, the court looks to the moment the plaintiffs file a class complaint to decide if an action is moot.

139. *Pitts*, 653 F.3d at 1091–92 (“Accordingly, we hold that an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff’s individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action.”).

140. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

141. *Id.* at 1525 (“[R]espondent relies on cases that arose in the context of Rule 23 class actions, but they are inapposite, both because Rule 23 actions are fundamentally different from FLSA collective actions and because the cases are inapplicable to the facts here.”); *Gomez*, 768 F.3d at 875 (“[C]ourts have universally concluded that the *Genesis* discussion does not apply to class actions.”).

142. *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (“No more in a collective action brought under the FLSA than in any other class action may a court, prior to certification, eliminate the entire suit by acceding to a defendant’s proposal to make only the named plaintiff whole.”).

143. *Diaz*, 732 F.3d at 949.

144. *Id.* at 954–55.

145. *See supra* Part II.D.1.

146. *See supra* Part II.D.2.

E. The Supreme Court's Half-Measure in *Gomez*

In response to this Circuit split on pre-certification mootness, the Supreme Court granted certiorari in *Campbell-Ewald Co. v. Gomez*.¹⁴⁷ The plaintiff sued over the improper receipt of navy recruitment text messages. The defendant offered a full recovery under Rule 68, which the plaintiff did not accept.¹⁴⁸ Below, the Ninth Circuit again backed the *Weiss* approach.¹⁴⁹ The Ninth Circuit panel refused to moot the plaintiff's claims, even though the defendant made the Rule 68 offer before the plaintiff filed the class certification motion.¹⁵⁰

On review, the Supreme Court affirmed the Ninth Circuit on the mootness issue.¹⁵¹ On January 20, 2016, the Court held that an unaccepted Rule 68 offer did not moot the named plaintiff's claim when he had filed the class complaint but not yet a class certification motion.¹⁵² The Court pointed to Justice Kagan's dissent in *Genesis* and basic contract law principles to support the holding.¹⁵³ The Rule 68 offer therefore did not moot the nascent class action, on these facts. The Court did not need to temporally relate the claim back to the filing of the class complaint because the case or controversy remained the same and remained live after the plaintiff allowed the Rule 68 offer to expire.¹⁵⁴ The ruling ultimately has the

147. Donald Falk & Archis A. Parasharami, *Supreme Court to Decide Whether an Offer of Judgment for Full Relief Moots a Named Plaintiff's Class-Action Claims*, MAYER BROWN CLASS DEF. BLOG (May 18, 2015), <http://www.classdefenseblog.com/2015/05/supreme-court-to-decide-whether-an-offer-of-judgment-for-full-relief-moots-a-named-plaintiffs-class-action-claims> [<https://perma.cc/5AJY-2N4Q>].

148. *Gomez*, 768 F.3d at 873–74.

149. *Id.* at 875–76 The *Gomez* court noted

[Defendant] correctly observes that *Genesis* undermined some of the reasoning employed in *Pitts* and *Diaz*. For example, the *Pitts* opinion referred to the risk that a defendant might 'pick off' named plaintiffs in order to evade class litigation. The *Genesis* Court distanced itself from such reasoning, pointing out that the argument had only been used once by the high Court, and only 'in dicta.' Nevertheless, courts have universally concluded that the *Genesis* discussion does not apply to class actions. In fact, *Genesis* itself emphasizes that 'Rule 23 [class] actions are fundamentally different from collective actions under the FLSA' and, therefore, the precedents established for one set of cases are 'inapplicable' to the other. Accordingly, because *Genesis* is not 'clearly irreconcilable' with *Pitts* or *Diaz*, this panel remains bound by circuit precedent, and Campbell-Ewald's mootness arguments must be rejected."

Id. (citations omitted).

150. *Id.* at 874.

151. *Campbell-Ewald v. Gomez*, 577 U.S. __ (2016) (slip op. at 1).

152. *Id.* at 1, 3–4.

153. *Id.* at 7–8.

154. *Id.* at 11.

same effect as relating the mootness inquiry back to the time of the class complaint, since the class action proceeds without a mootness bar to jurisdiction.

Unfortunately, the Court limited its holding to the facts of this case. It explicitly did not reach whether a plaintiff's claim would be moot if the defendant placed the total Rule 68 monetary settlement into "an account payable to the plaintiff, and the court then enter[ed] judgment for the plaintiff in that amount."¹⁵⁵ This dicta leaves open the possibility of a defendant's unilateral actions mooting a class action by picking off the named plaintiff. This is a dangerous tool that could be used to end countless class actions against the plaintiffs' wishes. It could force plaintiffs to always file class complaints and class certification motions together, in the earliest stages of litigation and before plaintiffs have a chance to properly prepare the pivotal class certification motion.

Despite this remaining, potentially dangerous loophole for unilateral defendant actions to create mootness, the Court's opinion included some language that indicates an unwillingness to allow such picking off of plaintiffs. Justice Ginsburg noted that "the Chief Justice's dissent asserts that our decision transfers authority from the federal courts and hands it to the plaintiff. Quite the contrary. The dissent's approach would place the defendant in the driver's seat."¹⁵⁶ The majority is therefore at least wary of unilateral defendant actions that could allow defendants too much control over class action litigation. In short, the Court rejected the defendant's attempt to escape monetary liability for the cheap price of paying off the named plaintiff, noting the defendant's strong economic incentives for such plays to create mootness¹⁵⁷ and thereby endorsing the same reasoning from *Roper*.

The Court effectively sided with the Ninth Circuit and the Third Circuit's *Weiss* approach as far as the temporal evaluation of mootness at the time of the class complaint, since it held that the rejected Rule 68 offer did not moot the plaintiff's claim. Unfortunately, the Court did so only in the Rule 68 context and only on limited facts when a defendant merely offered to completely satisfy the named plaintiff's claim. It remains to be seen if lower courts will extend this holding beyond the Rule 68 context, to cases where a defendant offers relief in a different way (e.g., through a change in policy). It is also unclear how lower courts will respond to actual satisfaction of a plaintiff's claims through depositing the settlement money into an account payable to the plaintiff or depositing it with the district court. In *Gomez*, the Court left the door open to potential unilateral

155. *Id.* at 11–12.

156. *Id.* at 11(citations omitted).

157. *Id.* ("Campbell sought to avoid a potentially adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept.").

defendant actions that could create mootness despite the plaintiff's desire to pursue the class action and obtain class-wide relief.

III. LEGISLATIVE ATTENTION TO PRISONS AND SOCIAL IMPETUS FOR CHANGE

Before these three approaches and the *Gomez* decision can be adequately applied to the prisoner class action context, background principles in prison legislation clarify both the potential barriers and support for their application. Specifically, both the Prison Litigation Reform Act (PLRA) and the Prison Rape Elimination Act (PREA) instructively reveal Congressional attitudes and legislative goals for prison litigation and inmates' rights. Furthermore, the current social environment supports application of a reformed mootness rule drawn from the above *Weiss* and *Gomez* approaches.

A. The PLRA's Barriers and Advantages to Reforming Prisoner Class Action Mootness Doctrine

In 1996, Congress passed the PLRA in an appropriations bill.¹⁵⁸ This legislation devastated inmates' access to justice in comprehensive ways, all in the name of supposed efficiency and "tough on crime" rhetoric.¹⁵⁹ The PLRA also derived support from largely unrelated tort reform movements.¹⁶⁰ From requiring difficult, tedious, and often futile administrative exhaustion, something admirably navigated by the plaintiffs in *Asbker*, in order to limit attorney's fees and damages,

158. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559 (2003).

159. *Id.* at 1558–60 ("Building on years of (noninmate) tort reform drives as well as law-and-order rhetoric, state officials got their proposed legislative solution into the Republican Congress's 1994 Contract with America. When it could not be passed as a freestanding bill, the initiative was eventually included as a rider to an appropriations bill, and was finally enacted in that form as the Prison Litigation Reform Act (PLRA). The statute drastically altered the corrections litigation environment, imposing filing fees on even indigent inmates, requiring them to exhaust administrative remedies prior to filing lawsuits, and limiting their damages and attorneys' fees. The PLRA's passage was aided by its connection to several longstanding political trends. In particular, it marked the overlap of conservatives' discontent with so-called 'imperial' judging, tort reformers' concern with the problem of frivolous lawsuits, and new congressional willingness to legislate federal court procedure. The PLRA has had an impact on inmate litigation that is hard to exaggerate; to set out just the most obvious effect, 2001 filings by inmates were down forty-three percent since their peak in 1995, notwithstanding a simultaneous twenty-three percent increase in the number of people incarcerated nationwide.").

160. *Id.*

the PLRA ensured that inmates faced reduced incentives and significant new barriers to filing lawsuits. With requirements like proving physical harm before one could recover for emotional or psychological harm, the PLRA further dehumanized and marginalized incarcerated individuals.¹⁶¹ Because of such restrictions, access to efficient class actions to enable inmate litigation is vital.

The provisions of the PLRA significantly failed to effectuate its stated efficiency goals. This is perhaps no clearer than in group litigation, particularly with respect to its provisions regarding permissive joinder. Multiple circuits interpret the PLRA as preventing permissive joinder in inmate lawsuits.¹⁶² Given that the statute trumpets judicial efficiency, this implied prohibition is directly contradictory of the PLRA's stated goals.¹⁶³ Under this interpretation, litigants must bring individual suits rather than joining ongoing litigation through joinder, leading to a lack of streamlined and efficient adjudication. The denial of joinder does, however, potentially limit prisoners' abilities to skip administrative exhaustion by joining a fellow inmate who has already weathered the difficult and time-consuming course required by the PLRA. Since the potentially pernicious goals of the PLRA were likely tied to simply keeping prisoners out of federal courts,¹⁶⁴ this denial of joinder serves to perpetuate the alleged underlying Congressional motivation, while flying in the face of Congress's perhaps pretextual assertions about efficiency.

Like joinder, class actions represent the joining together of inmates to address their claims in court on a larger scale. Additionally, FRCP 23(b)(2) class actions were specifically designed to accommodate civil rights claims and allow for their efficient adjudication through the class representative mechanism. Although the PLRA is silent on class actions, class actions likely run afoul of the alleged underlying Congressional animus toward inmate litigation. If the current Congress, however, chose to follow the stated goals of efficiency claimed to be effected by the PLRA, then recommended reforms to inmate class action mootness doctrine may very well align with the interests of the statute. The time for this

161. *Id.* at 1630.

162. See Caitlin Overland, *Permissive Joinder Under the Prison Litigation Reform Act: More Than Just a Procedural Tool*, 15 LEWIS & CLARK L. REV. 289, 304-05 (2011).

163. *Id.* at 289 ("Several Circuits have interpreted the Act as prohibiting inmates from utilizing permissive joinder under the Federal Rules of Civil Procedure. This interpretation not only undercuts the aim towards judicial economy that Congress sought to further in passing the PLRA, but also stymies reforms that inmates seek to attain through joined litigation. Correct interpretation of the PLRA serves not only to further congressional intent, but also properly maintains litigation as a viable tool for prison oversight.")

164. Schlanger, *supra* note 158, at 1563 ("[T]he PLRA shut the courthouse doors to many inmates.")

kind of shift toward stated goals and away from the any potential underlying motivation is riper at this moment in American history than ever before.¹⁶⁵

B. The PREA and Changing Congressional Perceptions Around Inmates

More recently, Congress addressed inmate issues when it unanimously passed the PREA in 2003 to curb rampant sexual abuse in American prisons. The PREA included several Congressional findings that revealed a more humane approach to inmate issues. For example, Congress acknowledged some of the mental health issues in prisons, albeit to a very limited extent with only conservative statistical estimates. The findings of the Act state that “America’s jails and prisons house more mentally ill individuals than all of the Nation’s psychiatric hospitals combined,” and “as many as 16 percent of inmates in State prisons and jails, and 7 percent of Federal inmates, suffer from mental illness.”¹⁶⁶ Focused on prison rape specifically, the PREA also made findings acknowledging Supreme Court precedent holding that prison officials’ deliberate indifference to the risk of rape constituted cruel and unusual punishment under the Eighth Amendment.¹⁶⁷

The PREA even stated as one of its purposes the goal of “protect[ing] the Eighth Amendment rights of Federal, State, and local prisoners,” explicitly demonstrating Congress’s concern with inmate treatment. Unfortunately, the Act narrowly confined itself to sexual violence, failed to acknowledge the systemic violence and harsh conditions of prison practices like SHUs, and may have created unintended negative consequences for inmates.¹⁶⁸ Nevertheless, this legislation shows willingness by Congress to protect inmate rights and perhaps to facilitate Eighth Amendment litigation in particular. Therefore, reforms to class action mootness for inmate rights cases could be more warmly received by the national

165. See *infra* Part III.C.

166. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(3) (2012).

167. *Id.* § 15601; see *Estelle v. Gamble*, 429 U.S. 97 (1976) (establishing the deliberate indifference standard for some Eighth Amendment violations); see also *Farmer v. Brennan*, 511 U.S. 825 (1994) (applying the deliberate indifference standard to a failure to protect a transsexual inmate from rape).

168. In fact, some critics of the PREA argue that its effect of increasing surveillance, along with its use in courts, may have inadvertently made prison conditions worse for inmates. See, e.g., Arkles, *supra* note 25; Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 176 (2006) (“[The PREA] proposes we police this form of sexual violence in the ways we police most crime: more punishment and more surveillance Indeed, much of the literature on prison rape takes the same approach: build more, and better, panopticons.”); see also David W. Frank, *Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration*, 29 BERKELEY J. GENDER L. & JUST. 1, 13 (2014) (“PREA is not only unlikely to abate sexual abuse in female prisons, but could also compound the problem by simultaneously expanding the penal system while teeing up hopes for relief in a bureaucracy unable to effectively respond to the problem.”).

legislature now than in the 1990s. Beyond the PLRA and the PREA, the current social movements within America could prove instrumental in pushing for much needed pre-certification mootness reform for inmates, either judicially or legislatively.

C. America's Current Moment of Intense Societal Frustration, Racial and Carceral Awareness, and the Potential for Energized Reformation

The racialized nature of the criminal justice system is becoming more apparent to Americans of the current day, who are increasingly calling for reform throughout the country.¹⁶⁹ Sparked by recent, highly publicized injustices surrounding Trayvon Martin, Michael Brown, Tamir Rice, Eric Garner, Walter Scott, Freddie Gray, Sandra Bland, Samuel DuBose, Christian Taylor, Jamar Clark, and Laquan McDonald's deaths, the call for change to promote racial equality is reverberating. With the unjust deaths of African Americans being discussed on a national stage like never before,¹⁷⁰ prison reform, so tied to racialized incarceration practices, and the associated laws that will allow for such reform, are begging for revision. While the dominant media narrative centers on African American male names, others have rightly called attention to police brutality faced by women of color and trans individuals.¹⁷¹

The dominant media narrative began with Trayvon Martin's death at the hands of George Zimmerman.¹⁷² The first in a series of highly publicized unarmed Black men's murders at the hands of primarily white police officers and, in

169. See, e.g., Paula Mejia, *'March 2 Justice' Launches Nine-Day Pilgrimage From New York*, NEWSWEEK (Apr. 13, 2015, 1:33 PM), <http://www.newsweek.com/march-2-justice-launches-nine-day-pilgrimage-new-york-321891> [<http://perma.cc/RT6X-Y48X>] (describing an organized march protesting police militarization and brutality, racial profiling, and juvenile justice policies).

170. See, e.g., Raha Jorjani, *Could Black People in the U.S. Qualify as Refugees?*, WASH. POST (Aug. 14, 2015), https://www.washingtonpost.com/opinions/could-black-people-in-the-us-qualify-as-refugees/2015/08/14/b97a628a-406c-11e5-bfc3-ff1d8549bfd2_story.html [<http://perma.cc/K9HT-JLYA>].

171. See, e.g., Derrick Clifton, *Black Women Are Getting Killed by Police Too—So Why Aren't More People Discussing It?*, MIC (May 11, 2015), <http://mic.com/articles/117228/black-women-continue-getting-killed-by-police-why-aren-t-more-people-discussing-it> [<http://perma.cc/2Q3D-BLTX>]; Anita Little, *Kimberlé Crenshaw on Sandra Bland & Why We Need to #SayHerName*, MS. BLOG MAGAZINE (July 30, 2015), <http://msmagazine.com/blog/2015/07/30/kimberle-crenshaw-on-sandra-bland-why-we-need-to-sayhername> [<http://perma.cc/J5NZ-3JW7>]; Richard Fausset, Richard Pérez-Peña & Alan Blinder, *Race and Discipline in Spotlight After South Carolina Officer Drags Student*, N.Y. TIMES (Oct. 27, 2015), <http://www.nytimes.com/2015/10/28/us/spring-valley-high-school-sc-officer-arrest.html> [<http://perma.cc/E4KE-WCMP>].

172. See, e.g., *George Zimmerman Trial & Trayvon Martin Case*, CBS NEWS, <http://www.cbsnews.com/feature/george-zimmerman-trial-trayvon-martin-case> [<http://perma.cc/5BQY-RGA2>] (last visited Aug. 14, 2015).

Zimmerman's case, a Latino¹⁷³ neighborhood watch member, Trayvon's death awakened the spark of America's anger at racial injustice. Later, Tamir Rice was shot and killed on videotape by two police officers who allegedly thought the twelve year old child held a pistol, rather than the actual pellet gun in his hands.¹⁷⁴ In Ferguson, Missouri, which subsequently became the epicenter of demonstrations to expose racist policing and incarceration practices,¹⁷⁵ Michael Brown, an African American teen, was shot and killed by a white police officer, Darren Wilson.¹⁷⁶ Media alleged that witnesses reported that Michael Brown put his hands up and said, "Don't shoot."¹⁷⁷ This powerful image gave rise to the mantra chanted across America, "Hands up, don't shoot."¹⁷⁸ Subsequently, Darren Wilson was not indicted, sparking protests in many major cities.¹⁷⁹

Following the events in Ferguson, Eric Garner, an unarmed African American man allegedly selling illegal single cigarettes in Staten Island, was forcibly restrained and choked, leading to injuries that caused his death when compounded

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173. See generally Suzanne Gamboa, *Trayvon Martin Case: George Zimmerman's Race Is a Complicated Matter*, HUFFINGTON POST (Mar. 29, 2012, 10:03 AM), http://www.huffingtonpost.com/2012/03/29/trayvon-martin-case-georg_n_1387711.html [https://web.archive.org/web/20151019142829/http://www.huffingtonpost.com/2012/03/29/trayvon-martin-case-georg_n_1387711.html].
174. See Elliott C. McLaughlin, *171 Days After Tamir Rice Shooting, Sheriff Says Investigation Almost Done*, CNN (May 14, 2015, 8:21 AM), <http://www.cnn.com/2015/05/12/us/cleveland-tamir-ricce-investigation-update> [http://perma.cc/9DF8-5NTM].
175. See, e.g., Nathan Robinson & Oren Nimni, *The Shocking Finding From the DOJ's Ferguson Report That Nobody Has Noticed*, HUFFINGTON POST (Mar. 13, 2015, 2:42 PM), http://www.huffingtonpost.com/nathan-robinson/the-shocking-finding-from-the-doj-ferguson_b_6858388.html [http://perma.cc/3KJD-UZEH].
176. See, e.g., Catherine E. Shoichet, *Missouri Teen Shot by Police Was Two Days Away From Starting College*, CNN (Aug. 13, 2014, 7:56 AM) <http://www.cnn.com/2014/08/11/justice/michael-brown-missouri-teen-shot> [http://perma.cc/3KK3-7Q8X].
177. See, e.g., Rachel Clarke & Christopher Lett, *What Happened When Michael Brown Met Officer Darren Wilson*, CNN (Nov. 11, 2014, 5:22 PM), <http://www.cnn.com/interactive/2014/08/us/ferguson-brown-timeline> [http://perma.cc/Q5T6-N7EN]; Jeremy Diamond, *What the Department of Justice Ferguson Report Says About 'Hands up, Don't Shoot'*, CNN (Mar. 5, 2015, 5:02 PM), <http://www.cnn.com/2015/03/05/politics/ferguson-report-hands-up-michael-brown-darren-wilson> [http://perma.cc/97A8-TFLK]; Cheryl Corley, *Whether History or Hype, 'Hands up, Don't Shoot' Endures*, NPR (Aug. 9, 2015, 11:16 PM), <http://www.npr.org/2015/08/08/430411141/whether-history-or-hype-hands-up-dont-shoot-endures> [http://perma.cc/NDN7-VVLK].
178. See, e.g., Michelle Ye Hee Lee, *'Hands up, Don't Shoot' Did Not Happen in Ferguson*, WASH. POST (Mar. 19, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson> [http://perma.cc/4F4U-674A].
179. See, e.g., Ryan J. Reilly, *Ferguson Officer Darren Wilson Not Indicted in Michael Brown Shooting*, HUFFINGTON POST (Nov. 24, 2014, 9:25 PM), http://www.huffingtonpost.com/2014/11/24/michael-brown-grand-jury_n_6159070.html [http://perma.cc/HTL2-5VPA].

with preexisting health conditions.¹⁸⁰ The chokehold was caught on tape by a witness,¹⁸¹ but again, no indictment resulted.¹⁸² Subsequently, the case of Walter Scott surfaced, in which police pulled Scott, an African American man, over for a routine broken tail light. A witness began filming when Scott ran from the police officer, at which time the officer shot Scott eight times in the back, all on tape. The officer then appeared to drop an object next to the body, which some have alleged was the officer's attempt to plant a weapon on Scott.¹⁸³ For the first time, an officer was indicted in this string of publicly recognized police brutality and racialized violence.¹⁸⁴

More recently, Freddie Gray was taken into police custody in Baltimore and subsequently died of spinal cord injuries, implicating potential police abuse.¹⁸⁵ His death sparked weeks of unrest in Baltimore, including peaceful demonstrations and riots, with a curfew imposed on the city and enforced by the National Guard, like in Ferguson. Indictments were issued in Freddie Gray's case.¹⁸⁶ Nevertheless, public outrage to yet another case of potential police brutality serves

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180. See, e.g., Rebecca Kaplan, *Marc Morial: Michael Brown, Eric Garner Protesters Want Accountability*, CBS NEWS (Dec. 14, 2014, 1:04 PM) <http://www.cbsnews.com/news/marc-morial-michael-brown-eric-garner-protesters-want-accountability> [<http://perma.cc/97TC-ZYYB>]; *Timeline: Eric Garner Death*, NBC N.Y. (Dec. 3, 2014, 4:12 PM), <http://www.nbcnewyork.com/news/local/Timeline-Eric-Garner-Chokehold-Death-Arrest-NYPD-Grand-Jury-No-Indictment-284657081.html> [<http://perma.cc/2Y6A-AHBB>].
181. *Timeline: Eric Garner Death*, *supra* note 180.
182. See, e.g., Josh Saul, *NAACP Suit Seeks Probe of Staten Island DA in Eric Garner Case*, N.Y. POST (Mar. 21, 2015, 2:00 AM), <http://nypost.com/2015/03/21/naacp-suit-seeks-probe-of-staten-island-da-in-eric-garner-case> [<http://perma.cc/2ENT-FPFL>].
183. See, e.g., Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [<http://perma.cc/B9UV-VWV8>]; see also Ben Mathis-Lilley, *Officer Michael Slager Charged With Murder in Death of Walter Scott*, SLATE (Apr. 7, 2015, 6:22 PM), http://www.slate.com/blogs/the_slatest/2015/04/07/walter_scott_michael_slager_murder_charge_south_carolina_shooting_of_black.html [<http://perma.cc/CRB5-ARJL>].
184. Schmidt & Apuzzo, *supra* note 183.
185. Sheryl Gay Stolberg & Ron Nixon, *Freddie Gray in Baltimore: Another City, Another Death in the Public Eye*, N.Y. TIMES (Apr. 21, 2015), <http://www.nytimes.com/2015/04/22/us/another-mans-death-another-round-of-questions-for-the-police-in-baltimore.html> [<http://perma.cc/W4A5-PE7L>].
186. See, e.g., Justin Fenton, *Lawyers for Officers in Freddie Gray Case Anticipate Indictments Soon*, BALTIMORE SUN (May 12, 2015, 6:33 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-freddie-gray-grand-jury-20150512-story.html> [<http://perma.cc/3XZW-2PFK>]; Catherine E. Shoichet, *Freddie Gray Death: Grand Jury Indicts Police Officers*, CNN (May 21, 2015, 9:15 PM), <http://www.cnn.com/2015/05/21/us/baltimore-freddie-gray-death-officers-indicted/> [<http://perma.cc/7TSX-DSUB>].

to highlight that this movement against racial inequality in the criminal justice system is only gaining traction and intensifying.¹⁸⁷

Then, in mid-July 2015, officers arrested Sandra Bland following a routine traffic stop after she failed to use a turn signal. She was found dead in her jail cell three days later, sparking allegations of murder despite the explanation of suicide given by authorities.¹⁸⁸ Anonymous, a vigilante hacking group, even claimed to release evidence of the alleged murder's cover up along with a call for a day of rage.¹⁸⁹ In the same month, the case of Samuel DuBose's death surfaced. Pulled over for an alleged missing license tag, DuBose was fatally shot by an officer while the officer's body camera recorded the incident.¹⁹⁰ Officer Ray Tensing was indicted on charges of murder and manslaughter, to which he pled not guilty.¹⁹¹ The very next month, in August 2015, Christian Taylor was shot and killed by police officers after crashing his car into a Buick dealership.¹⁹² Heartbreakingly, the unarmed nineteen-year old previously tweeted, "I don't wanna die too young," and "Police taking black lives as easy as flippin['] a coin, with no consequences [so much hate]."¹⁹³

Just a few weeks later in mid-November, Jamar Clark was shot by police officers, with some alleging that he was shot while handcuffed.¹⁹⁴ His death sparked protests that shut down a major freeway and led to the arrests of at least

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187. See, e.g., Luke Broadwater, *Baltimore Officials Say 61 Buildings Caught Fire During Riot*, BALT. SUN (May 13, 2015, 3:31 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-fire-count-20150513-story.html> [<http://perma.cc/8C8F-ZNWX>]; see also Allie Conti, *Baltimore Is Expected to Pay Freddie Gray's Family \$6.4 Million*, VICE (Sept. 8, 2015), <http://www.vice.com/read/baltimore-is-expected-to-pay-freddie-grays-family-64-million-for-his-death-908> [<http://perma.cc/ZA48-J45F>].
188. See, e.g., Dana Ford, *Video of Sandra Bland at Texas Jail Is Released*, CNN (July 28, 2015, 5:37 PM), <http://www.cnn.com/2015/07/28/us/sandra-bland-jail-video-texas/> [<http://perma.cc/N7Z7-WNUU>].
189. See, e.g., Christine Hauser, *Jail Video of Sandra Bland Aims to Dispel Rumors About Her Death*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/jail-video-of-sandra-bland-aims-to-dispel-rumors-about-her-death.html> [<http://perma.cc/RN5H-EHH9>].
190. Dana Ford & Ed Payne, *Ex-University Cop in Samuel DuBose Shooting Death Pleads Not Guilty*, CNN (July 31, 2015, 12:39 AM), <http://www.cnn.com/2015/07/30/us/ohio-sam-DuBose-tening> [<http://perma.cc/F2YC-UH5B>].
191. *Id.*
192. Elizabeth Chuck & Emmanuelle Saliba, *Christian Taylor, Texas Teen Killed by Cop, Tweeted: 'I Don't Wanna Die Too Young'*, NBC NEWS (Aug. 8, 2015, 7:12 PM), <http://www.nbcnews.com/news/us-news/christian-taylor-teen-killed-police-tweeted-i-dont-wanna-die-n406461> [<http://perma.cc/X9RD-NVSH>].
193. *Id.*
194. Mark Berman, *Unarmed Man Shot by Minneapolis Police Over the Weekend Has Died*, WASH. POST (Nov. 17, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/11/17/unarmed-man-shot-by-minneapolis-police-over-the-weekend-has-died> [<https://perma.cc/C3EQ-GVL5>].

50 protestors in Minneapolis.¹⁹⁵ Around the same time, the police shooting of Laquan McDonald made headlines.¹⁹⁶ While Laquan was killed on October 20, 2014, the video of his death was only made public thirteen months later.¹⁹⁷ The video was released several hours after the white police officer involved was charged with first degree murder.¹⁹⁸ Chicago protestors called for the city's mayor to step down, and the Justice Department decided to launch an investigation into the Chicago Police Department.¹⁹⁹

The Black Lives Matter organization has emerged as an organizing force to address the recently publicized incidents of police brutality, along with other issues of racial justice including incarceration.²⁰⁰ As the Black Lives Matter movement has gained momentum, persisting for years, media attention has expanded to include abuses against other people of color.²⁰¹ For example, non-mainstream media outlets picked up the story of Sarah Lee Circle Bear's death in police custody.²⁰² Reports claim that the Native American woman begged for medical attention before her death, but officers told her to "quit faking."²⁰³ While the Black Lives Matter advocates focus on African Americans, other people of color share similar experiences with the criminal justice system.

195. *Id.*

196. Christy Gutowski & Jeremy Gomer, *The Complicated and Short Life of Laquan McDonald*, CHI. TRIB. (Dec. 11, 2015, 9:38 PM), <http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-trouble-met-20151211-story.html>.

197. *Id.*; *Chicago Dashcam Video Shows Police Killing of Laquan McDonald*, GUARDIAN (Nov. 21, 2015, 7:52 PM), <http://www.theguardian.com/us-news/video/2015/nov/24/chicago-officials-release-video-showing-police-killing-of-laquan-mcdonald-video> [<https://perma.cc/BZ7F-WG89>].

198. Jim Young, *Chicago Protests Over Police Shooting of Laquan McDonald*, CBS NEWS, <http://www.cbsnews.com/pictures/chicago-protests-over-police-shooting-of-laquan-mcdonald> [<https://perma.cc/2JV2-S9KE>] (last visited Dec. 11, 2015).

199. *Id.*

200. *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about> [<https://perma.cc/A33Z-M4ZK>] (last visited Dec. 11, 2015) ("This is Not a Moment, but a Movement. . . . How 2.8 million Black people are locked in cages in this country is state violence.").

201. See, e.g., Matt Agorist, *Police Are Killing Native Americans at Higher Rate Than Any Race, and Nobody Is Talking About It*, FREE THOUGHT PROJECT (Aug. 2, 2015), <http://thefreethoughtproject.com/police-killing-native-americans-higher-rate-race-talking/#kO7dltETcukxAFkU.01> [<http://perma.cc/L2D6-XL76>].

202. See, e.g., Shaun King, *American Indian Mother of Two Dies in Police Custody After Her Repeated Pleas for Help Ignored*, DAILY KOS (July 29, 2015, 5:09 AM), <http://www.dailykos.com/story/2015/07/29/1406774/-Native-American-mother-of-infants-dies-in-police-custody-after-her-repeated-pleas-for-help-ignored> [<http://perma.cc/UF6P-FVTX>].

203. M. David, *Police Ignored Native American Woman, Telling Her to 'Quit Faking' as She Died in Jail Cell*, COUNTER CURRENT NEWS (July 28, 2015, 9:16 PM), <http://countercurrentnews.com/2015/07/justice-for-sarah-lee-circle-bear> [<http://perma.cc/86Y9-LC6U>].

All of these cases brought race and justice to the forefront of American consciousness.²⁰⁴ Even President Barack Obama recently visited a federal prison, becoming the first sitting president ever to do so.²⁰⁵ He subsequently commuted sentences, allowing some federal prisoners to leave prison earlier.²⁰⁶

Because the criminal justice system is so heavily racialized, inmate class actions represent a tool for reform that will help to address harsh conditions within prisons that disproportionately affect African Americans and racial minorities more generally. Especially where SHU is concerned, as in *Ashker*, the heightened level of security may often be linked to racialized processes of sentencing and policing, which bring people of color into prisons more often and for longer time periods. Furthermore, gang validation procedures tied to racial gang identities can also cause prison administrators to place inmates in SHU once they are incarcerated.²⁰⁷ Nationwide statistics about racial disparities amongst those in solitary confinement are limited, but state data shows that African Americans in New York, for instance, account for 14.4 percent of the state population yet make up 59 percent of the population in supermax units, another term for SHUs, and nearly 50 percent of the overall prison population in the state.²⁰⁸ In California,

204. This sentiment coalesced, in just one instance, in opposition to the Confederate flag and its removal from South Carolina's seat of government. *Confederate Flag Removed From South Carolina Capitol Grounds*, HUFFINGTON POST (July 10, 2015, 8:59 AM), http://www.huffingtonpost.com/2015/07/10/confederate-flag-removal_n_7769300.html [<http://perma.cc/Y4S5-PAJB>]. The social mobilization has also made its mark on the 2016 presidential campaign season, with Black Lives Matter leaders speaking at a Bernie Sanders rally and publicizing a filmed interaction with Hillary Clinton after an event. Matthew Speiser, *Black Lives Matter: 'We Will Continue to Engage the Candidates'*, BUS. INSIDER (Aug. 28, 2015, 6:22 PM), <http://www.businessinsider.com/black-lives-matter-role-in-2016-election-2015-8> [<http://perma.cc/L7AS-CVNK>]. Democratic candidates were even asked, "Do Black lives matter or do all lives matter?" at a presidential debate. Reena Flores, *Democratic Debate: Do Black Lives Matter?*, CBS NEWS (Oct. 13, 2015, 11:50 PM), <http://www.cbsnews.com/news/democratic-debate-do-black-lives-matter> [<http://perma.cc/M5XQ-7PYP>].

205. Liz Fields, *President Obama Heads to Prison in Pursuit of Criminal Justice Reform*, VICE (Jul. 17, 2015, 1:50 AM), <https://news.vice.com/article/president-obama-heads-to-prison-in-pursuit-of-criminal-justice-reform> [<http://perma.cc/H9JV-KAPT>]; Tom LoBianco, *President Barack Obama Makes Historic Trip to Prison, Pushes Reform*, CNN (July 17, 2015, 12:24 AM), <http://www.cnn.com/2015/07/16/politics/obama-oklahoma-federal-prison-visit> [<http://perma.cc/RJQ2-ZRG2>].

206. *Id.*

207. See generally DAVID SKARBK, *THE SOCIAL ORDER OF THE UNDERWORLD: HOW PRISON GANGS GOVERN THE AMERICAN PENAL SYSTEM* (2014) (exploring how racialized gang social organization and segregation work within American prisons).

208. See, e.g., Margo Schlanger, *Prison Segregation and Racial Disparities*, SOLITARY WATCH (Nov. 2, 2013), <http://solitarywatch.com/2013/11/02/prison-segregation-racial-disparities> [<http://perma.cc/7R3G-RPEB>]. This will hopefully change soon, however, due to recent judicial action in New York to limit the use of SHUs. See Brian Mann, *N.Y. Becomes Largest Prison System to Curb Solitary Confinement*, NPR (Feb. 23, 2014, 11:57 AM), <http://>

one study found that “90% of the prisoners housed [in a Security Housing Unit] were of color (i.e., Latino or African American).”²⁰⁹ This is the moment for the American people, especially those advocates who have already organized in their communities, perhaps as part of the Black Lives Matter movement, to push legislators and courts to close the loopholes present in inmate rights class actions. This step would help to address one aspect of how the criminal justice system disproportionately affects people of color by improving prison conditions generally, and SHU conditions specifically.

IV. RECOMMENDED MOOTNESS STANDARD FOR PRISONERS’ CLASS ACTIONS DERIVED FROM *WEISS* AND *GOMEZ*

Class action mootness doctrine does too little to protect vulnerable inmates from prison officials’ abilities to moot cases. Given the current historical moment in our society, many Americans are ready and calling for protective reform to address racial inequality and the criminal justice system. Such reform should include bringing justice to inmate rights class actions. By allowing plaintiffs to see their suits through and obtain much needed relief, with plaintiffs’ voices playing an essential part in crafting that relief, courts can respond to the unequal realities of prison litigation. Reform measures should extend case law and reframe approaches to inmate rights class actions.

A. A New Proposal: Looking to the Class Complaint and Other Extensions of Case Law

Borrowing from *Weiss* and *Gomez*, courts should evaluate pre-certification mootness at the time plaintiffs file the class complaint. To make this work in the prison context, the *Weiss* and *Gomez* holdings must be extended beyond the realm of Rule 68 offers to apply to the less monetary world of prison litigation remedies. In so doing, courts should follow the reasoning in *Weiss* by looking to the articulated goals of class action litigation and FRCP 23. With the primary goal of efficiency in mind, interpreted more broadly than just allowing for the aggregation of

www.npr.org/2014/02/23/281373188/n-y-becomes-largest-prison-system-to-curb-solitary-confinement [<http://perma.cc/39YQ-RBHG>].

209. *Reassessing Solitary Confinement Hearing*, *supra* note 13, at 8 (statement of Craig Haney, Prof. of Psychology, Univ. of Cal., Santa Cruz) (“The other very troublesome but rarely acknowledged fact about solitary confinement is that in many jurisdictions it appears to be reserved disproportionately for prisoners of color. That is, the racial and ethnic overrepresentation that occurs in our nation’s prisons generally is, in my personal experience, even more drastic inside solitary confinement units.”).

small claims, it is clear that class action purposes would be served by avoiding unfair mootness determinations blocking class actions from fully coming to fruition. Courts should also look to the Supreme Court's guidance in *Gomez*, especially its suspicion of defendants who try to take the driver's seat to moot class actions that threaten their economic interests.

Rather than to punish, exclude, and marginalize plaintiffs suffering at the whims of prison officials, courts should take a broad view of mootness in prison contexts to allow for a relation back doctrine to the filing of the class complaint or to allow the equivalent logic used in *Gomez* to treat the action as still live. This focus on efficiency would speak directly to the parallel individual claims of *Ashker*'s named plaintiffs, who the defendants successfully excluded from class certification through strategic moves to other facilities and new classifications. It makes no sense, in the eyes of pure efficiency, to litigate multiple separate, individual lawsuits on a parallel track to a class action. Rather, the efficient resolution the *Ashker* court should have reached would have involved this extension of *Weiss* and *Gomez* to accommodate these defendant-altered claims into the class action within the two certified classes. This earlier class complaint moment spells the beginning of the onslaught of abusive measures prison officials may undertake against plaintiffs to stifle potentially powerful class litigation. Instead of allowing defendants to moot a suit by creating temporary or insufficient offers of relief that plaintiffs reject or find themselves powerless to reject, courts should treat such failed settlement attempts as having no effect on the live controversy of the case or its class definition.

Alternatively, as a weaker but possible solution, joining the individual, parallel track of claims in *Ashker* together with a new subclass would incorporate them neatly into the class action structure. Subclasses for each new facility in which inmates are housed would serve to eliminate the redundant parallel track for individual claims and bring transferred absent class members back within the scope of the class action. The court would then require the subclass to satisfy FRCP 23's requirements independently, however, which could again defeat the plaintiffs' efforts to achieve efficiency.

Specifically, numerosity could become a problem for a new subclass, entirely dependent upon how many inmates the defendant chooses to transfer or reclassify. Savvy defendants could therefore transfer small groups of inmates to different facilities, ensuring that each facility's transferred inmates are too few to constitute a subclass. Defendants could take this to an extreme and transfer all of the named plaintiffs, splintered into small groups, to different facilities to defeat numerosity for any class before certification. Liberal joinder rules could defeat this inherent unfairness by allowing parallel track claims to be tried together, even if separate

from the class litigation. This would require a change to some courts' interpretation of the PLRA, however, and so may entail legislative action.

Furthermore, inmate plaintiff claims are even more susceptible to picking off than the plaintiffs' claims in *Weiss*, *Roper*, and *Gomez*, albeit in a different way. Whereas the picking off in those cases involved paying off named plaintiffs, here prisons have the power to cause plaintiffs to drop their claims with even more concerning methods, including moving plaintiffs to different housing areas within or between facilities to deprive them of the few human connections they may have within a pod or unit, seizing inmates' scarce property, effectively denying inmates access to needed materials or access to counsel, and generally depriving them of the few privileges they may retain within the harsh realities of the prison system. All of these negative defendant behaviors make the picking off of plaintiffs through payment in *Weiss*, *Roper*, and *Gomez* seem almost innocuous.

Additionally, the Ninth Circuit's, and now the Supreme Court's, articulation that a rejected Rule 68 offer does not render a class action moot should be analogized to defendants' efforts to address allegations made by inmates. Given the rampant sexual, physical, and structural abuses in American prisons, any effort proposed unilaterally by prison officials will likely fail to capture adequate relief for the class. In this way, the *Ashker* Defendants' devised STG program, commenced only after the litigation matured, provided a potential means for the Defendants to unilaterally moot the entire due process claim, had they acted quickly enough to move all of the SHU inmates, or at least all of the named plaintiffs, into the STG steps and out of Pelican Bay's SHU to other SHUs. This would stand no matter how useless the STG classification review and procedure might be, and it would stand even if the STG program was only a temporary measure revoked after the court dismissed the class's due process claims.²¹⁰

By leaving the door open to some defendant unilateral actions to moot a class action after the class complaint, the *Gomez* Court failed to close a loophole that could allow prison officials to exploit inmate populations. While the Court's willingness to preserve the live controversy and adversity present at the class com-

210. The caveat to these assertions is that a voluntary cessation analysis would follow if the *Ashker* plaintiffs had chosen to continue to pursue their due process claims for the inmates placed in the STG program before class certification. *See supra* note 63. As mentioned earlier, however, the burden on plaintiffs to rebut the presumption of good faith governmental action might defeat even pursued due process claims. Because of the evidentiary problems in prison litigation, where so much is obscured from the public eye and media attention, and because so much deference is granted to prison officials to maintain order and properly control the inmate population, it would likely be very difficult for plaintiffs to prove a bad faith decision by prison officials to transfer and reclassify inmates in order to defeat a class action before it can reach the class certification stage. Voluntary cessation may therefore fail to resolve these mootness issues even when inmates attempt to pursue them.

plaint even after a rejected or ignored Rule 68 offer can protect inmate plaintiffs who have not yet filed their class certification motion, perhaps the application of *Gomez* to prison class actions should stop there. The unilateral loophole from a forced deposit of money is less analogous to a change in defendants' policy, like the STG program, which may only take an effective form, a form that truly gives relief, with plaintiff input. Unlike the simple transfer of money, crafting solutions and relief to constitutional violations in prison is a more complex and nuanced process. Given the decades of prison abuses in this country, defendants' unilateral solutions or proposed relief to constitutional violations in this context will likely fall short of complete relief, unlike the typical, easily evaluated Rule 68 dollar figure.

Furthermore, these unilateral and subject-to-change policy moves by defendants may also become ineffective if *Sosna* is extended to apply before class certification. Because inmates in the STG program can be transferred back to Pelican Bay's SHU at any time, this may be another example of an injury that is "capable of repetition yet evading review." By altering the timeline to look at the complaint or to emphasize closing loopholes for evasive defendants in line with the goals of *Weiss* and *Gomez*, an extension of *Sosna* to this new timeframe and outlook would also serve to stave off unfair mootness determinations for inmates.

One could also argue that, like in *McLaughlin* and as mentioned above, any inmate's claims are inherently transitory. This would require an extension of precedent because there is no fixed temporal limitation on inmate claims, per se. Because inmates are subject to location changes and reclassifications at any moment, however, their claims are definitively transitory, and perhaps inherently so. The obvious counterexample to this would be the inmate who, likely serving life without parole, is placed on a pod in SHU and never moved again. Even in *Ashker*, the named Plaintiffs were housed in Pelican Bay's SHU for at least ten years, often longer. Still, prison officials have the power to change such an arrangement at the drop of a hat. Given the shifting nature of the prison context and the utter control by prison officials of essential elements necessary for class certification, specifically in terms of the FRCP 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, perhaps courts should extend *McLaughlin* to this unique type of class action.

Ashker already demonstrates a record replete with the Defendants' attempts to moot or halt the litigation, through illegitimate means ranging from denying access to photocopies to devising the dubious STG pilot program. These concerns and the policy rationale behind them trump any hesitancy out of respect for more traditional interpretations of the Constitution's Article III "case or controversy" requirement, at least within the limited realm of prisoner class actions.

Because courts have already implicitly recognized in *Weiss* and its progeny that looking to the moment of the class complaint, rather than the time of the class certification motion or decision, does not violate the Constitution's case or controversy requirement, the modest extension of this doctrine to inmate class actions should not present constitutional issues. Similarly, as the Supreme Court found in *Gomez* that a rejected Rule 68 offer does not moot a class action, it also does not present any mootness issue. Rather, the case or controversy requirement must simply be interpreted more broadly and slightly less stringently in the interests of justice.

This recommended approach entails extending *Gomez* but remaining wary of any unilateral defendant actions, along with extending *Weiss*, *Roper*, *Sosna*, and *McLaughlin*. It also includes challenging the Congressional neglect of prison-context Eighth Amendment issues beyond sexual assault, all in order to embrace efficiency and recognize the humanity and constitutional rights of incarcerated populations. A few weaknesses of this recommended approach require further discussion, namely on the topics of endless subclasses and commonality issues.

B. Potential Criticism of the New Approach

1. No End to Subclasses

Critics could point to the potential for the creation of endless loops of subclasses based on transfer orders, leading to unmanageable cases with discovery constantly expanding to encompass new locations, conditions, and potentially unnamed subclass members. Although the ultimate solution is to relate even transferred inmates' claims back to the complaint so as to include them within the broader class definitions, the creation of subclasses, with protections against defendant attempts to defeat FRCP 23(a) requirements, could greatly expand the scope of a class action. These criticisms are unpersuasive because state prisons are limited animals in that they only possess a relatively fixed number of facilities equipped with various housing styles tied to security level. In California, for example, only four state prisons include SHU facilities, thereby limiting the potential scope of SHU litigation to those four facilities. Additionally, any expansion in discovery or scope is fair to defendants who, by transferring inmates, choose to cause the litigation's expansion in the first place through their unilateral actions.

Furthermore, inmates held in SHU will likely be transferred to other SHUs or to slightly less restrictive, but still high security level, housing styles. It is unlikely that an inmate held in SHU for ten years would be released instantly into a prison's general population units, given that they are often terribly overcrowded,

dormitory-style housing for lower level offenders. These security concerns can also help to hold the prison's hand back from endless efforts to block trial through never-ending discovery and shifting class definitions.

Finally, at some point, courts must be willing to issue preliminary injunctions to halt such rampantly evasive tactics. The role of courts in prison and jail litigation should be that of protecting constitutional rights within a system that so often violates them. For example, a federal court in the Central District of California recently stepped in to halt similar evasive moves on the part of Los Angeles County sheriff officers, fulfilling this watchdog role.²¹¹ When the officers learned of an FBI investigation on the harsh conditions in Los Angeles County jails, the officers took matters into their own hands. They essentially engineered a way to hide a known FBI-informant inmate from the FBI by utilizing holes and tricks within their internal software, changing the informant-inmate's name in records, not fingerprinting the informant during intake at new facilities, and constantly transferring the inmate throughout their system. When the FBI required the informant-inmate for grand jury testimony, the informant could not be found. Courts have now convicted all of the officers of obstruction of justice.²¹² As in that case, other clearly cagey tactics on the part of the carceral system should not be tolerated.

2. Commonality Issues

Critics may also argue that commonality challenges following transfer are compelling, despite the defendants' complete control giving rise to such challenges. Apart from the obvious concerns about unilateral behavior of defendants in attempting to moot class actions which courts have repeatedly raised, this commonality argument holds little water. Classifications of inmates are statewide in California and already consist of a tiered system of security levels. Gang validation procedures are also likely somewhat uniform across facilities so that authorities can track where validated gang members are located in order to monitor security flare ups. SHU conditions are fairly similar, in that they all present some of the same core inhumane practices, not only within the state of California, but also nationally. Therefore, prison litigation involves a common core of facts, although it does require additional discovery for each facility. Furthermore, prison litigation shares common substantive law issues. Because of the commonality of

211. See, e.g., Rina Palta, *LA Jail Scandal: All 6 Sheriff's Department Officials Found Guilty on All Counts*, S. CAL. PUB. RADIO (July 1, 2014), <http://www.scpr.org/news/2014/07/01/45088/la-jail-scandal-all-6-deputies-found-guilty-on-all> [<http://perma.cc/VEM8-R847>].

212. *Id.*

facts and law in this context, transferred inmates should survive commonality challenges, contrary to the holdings in the *Ashker* certification order.

To counter the generally similar questions of law and fact, critics could point to the increasingly high standards for class certification.²¹³ In *Dukes*,²¹⁴ the Supreme Court greatly narrowed the interpretation of FRCP 23(a)'s commonality requirement. The *Dukes* Court refused to certify a class suing over sex discrimination in the massive Wal-Mart company because of a lack of a clearly discriminatory policy. Rather, the plaintiffs in *Dukes* pointed only to the lack of a clear policy, namely a policy that allowed individual managers discretion in selecting employees for promotion. This concept of discretion was the mechanism perpetuating sexism in Wal-Mart promotions, but the court chose to characterize this discretion as the lack of a policy. The claims lacked commonality because no policy glued all of the differing claims together.

In the prison context, such a concern will rarely arise. While some policies may in fact be unwritten or discretionary, most policies are uniform across the state and explicit. Especially in the context of SHU litigation, every aspect of plaintiffs' lives is minutely controlled, regulated, and subjected to detailed policies and practices. Such challenges will fail to defeat the overriding policy reasons for such expansions and updates to pre-certification mootness doctrine in inmate class actions.

CONCLUSION

This Comment used the *Ashker* case to reveal the startling procedural gaps in mootness law available to prison official defendants in inmate rights class actions. The recommended reforms would cause unfair procedural loopholes to come crashing down around the ears of prison officials by helping to reform SHUs and general prison procedures surrounding the categorization of inmates. Such reforms would empower inmates to litigate over their constitutional rights, moving us closer to fairness and constitutionally adequate prisons.

Even so, much more can be done. Perhaps beyond the scope of the *Ashker* litigation and this Comment, the concept of gang validation in California prisons in general is concerning. Because of tough prison conditions, inmates organize into gang structures in order to survive, meaning that almost all inmates in any prison could be validated gang members. The official classification of validation, which landed all of the *Ashker* plaintiffs in Pelican Bay's SHU to begin with, is an

213. Robert G. Bone, *Sorting Through the Certification Muddle*, 63 VAND. L. REV. EN BANC 105, 108–12 (2010).

214. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

additional punishment imposed without regard to the virtual omnipresence of gangs within our carceral system. Such a categorization is meaningless, especially when the institution itself forces inmates into gang structures for basic needs like protection from bodily and sexual harm, which the facilities themselves so often fail to provide.²¹⁵ The system therefore actively promotes gang affiliation through its deficient supervision. This process of gang entrenchment, coupled with lack of access to healthcare, mental health professionals and services, education, and other restorative and rehabilitative justice initiatives within prisons, only leads to cycles of continued violence.

Some barriers to implementation include potential Congressional responses to such an inmate-friendly extension of mootness doctrine. With the passage of PREA over a decade ago, however, congressional representatives may be receptive to legislative proposals closing the mootness loophole for inmate class actions, especially in light of recent events and potential constituent pressure. Further, courts may still interpret current precedents to encompass the aforementioned reforms in light of the stated goals of the PLRA to streamline prison litigation toward ultimate efficiency. These reforms are also less controversial because the most contested form of the class action, namely FRCP 23(b)(3) actions, are not implicated in prison litigation, which primarily includes FRCP 23(b)(1) and (2) types of class actions. These reforms will therefore sidestep many of the most strident criticisms of class actions in general, which usually refer to FRCP 23(b)(3) actions.

Finally, despite these barriers, segments of the American public have demonstrated their willingness to take to the streets to address the issues of racialized policing and incarceration that are so intimately tied to any inmate class action. Popular support among these activists would likely back these initiatives, especially at this historic moment on the heels of the tragic deaths of Trayvon Martin, Michael Brown, Tamir Rice, Eric Garner, Walter Scott, Freddie Gray, Sandra Bland, Samuel DuBose, Christian Taylor, Jamar Clark, and Laquan McDonald. Those who value Black lives taken by police officers will likely also value Black lives behind bars that are lost or destroyed by harsh conditions and prison officials. Many Americans are ready to challenge our racially unequal prison system, along with all of its associate structures, including inhumane SHU practices.

Ultimately, prison litigation represents a unique arena in which plaintiffs are more vulnerable to defendants' unilateral actions than in other kinds of class actions. The distinctive subordination of plaintiffs to defendants, in virtually every

215. See *supra* Part III.B.

aspect of plaintiffs' lives, renders the need for additional protections from mootness paramount in prison litigation, even before the motion for class certification is filed. Because defendant control begins long before the class certification motion, so too must the plaintiffs' protections, making prison class actions even more compelling than Rule 68 cases like *Gomez*.

In a powerful social moment calling for justice for minorities and reform of the criminal justice system as well as the carceral apparatus of our society, reforms protecting inmates from unjust pre- class certification mootness determinations are ripe for implementation. Such protective and responsive measures would serve to preserve inmates' constitutional rights in a more streamlined and efficient manner than the current procedural landscape. By resolving these issues, protecting constitutional rights for members of society subjected to harsh prison conditions, and closing the loopholes that allow prisons to continue committing constitutional violations unchecked, courts would embrace the voices of the Americans insistently calling for much-needed reforms to the criminal justice system.