NOTES

VERMONT'S MOOTNESS DOCTRINE

INTRODUCTION

Courts generally will not adjudicate an issue that has become moot. There are, however, three widely recognized exceptions to this mootness doctrine which may apply when cases involve moot issues. These exceptions pertain to cases that: 1) are capable of repetition yet which evade review;[1] 2) involve "adverse collateral consequences";[2] and 3) involve questions of "great public importance."[3]

Although two recent Vermont cases, *State v. O'Connell*[4] and *In re M.A.C.*,[5] involved similar facts, the Vermont Supreme Court applied mootness exceptions[6] to *O'Connell* but not to *M.A.C.* The court's inconsistent application of these exceptions has left the law unsettled in this area. This note will first explore the inconsistencies in the Vermont Supreme Court's application of the mootness exceptions and, second, urge the court to adopt the "public importance" exception.

In Part I the facts of *O'Connell* and *M.A.C.* are reviewed and the inconsistencies in their results are identified. The general scope of the mootness doctrine and its policies are discussed in Part II. Part III examines the two exceptions to the mootness doctrine adopted by the Vermont Supreme Court—the "capable of repetition yet evading review" exception and the "collateral consequences" exception. Part IV discusses the "public importance" exception that has been adopted in other jurisdictions and argues that Vermont should also adopt it. Part V reviews the current state of Vermont's mootness doctrine.

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1. Weinstein v. Bradford, 423 U.S. 147, 148 (1975); Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

2. Sibron v. New York, 392 U.S. 40, 55 (1968); *In re* Ballay, 482 F.2d 648, 651 (D.C. Cir. 1973).

3. Grier v. Almeda-Contra Costa Transit Dist., 55 Cal. App. 3d 325, 330, 127 Cal. Rptr. 525, 528 (Ct. App. 1976) ("general public interest"); *In re* Geraghty, 68 N.J. 209, 212, 343 A.2d 737, 739 (1975); McCanless v. Klein, 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945).

4. 136 Vt. 143, 383 A.2d 624 (1978).

5. 134 Vt. 522, 365 A.2d 254 (1976).

6. *See* text accompanying notes 39-67 *infra*.

I. *State v. O'Connell* AND *In re M.A.C.*

In *State v. O'Connell*[7] the Vermont Supreme Court generated considerable confusion by applying the mootness doctrine in a manner inconsistent with its application of that doctrine in an earlier case, *In re M.A.C.*[8] O'Connell was charged with assaulting a police officer, and, after pleading not guilty by reason of insanity, he was involuntarily committed to a Vermont state hospital for treatment. On appeal to the Vermont Supreme Court, O'Connell contested the validity of the commitment order on due process grounds.[9]

Before it could deal with the issues of the validity of the commitment order, however, the supreme court first had to deal with the state's argument that the case was moot because O'Connell had been discharged from the hospital prior to the time of the appeal. The court ruled that, in order to avoid mootness, a petitioner's stake in the outcome of the litigation must continue to exist throughout all levels of appeal.[10]

The Vermont Supreme Court held that the case was not moot because the circumstances of O'Connell's commitment satisfied two of the three exceptions to the mootness doctrine. The court determined that "involuntary commitments are usually of such short duration that they are situations aptly termed 'capable of repetition yet evading review.' "[11] The court also held that, although he had been discharged at the time of the appeal, O'Connell continued to suffer from the "collateral consequences" of his commitment.[12] Those consequences were the myriad of "legal disabilities radiating from the label of mentally incompetent."[13] The court found that, even though O'Connell had been hospitalized once before, the collateral consequences of the contested commitment were not less severe.[14]

Only a year and a half before the *O'Connell* decision, the Ver-

7. 136 Vt. 143, 383 A.2d 624 (1978).
8. 134 Vt. 522, 365 A.2d 254 (1976).
9. 136 Vt. at 45, 383 A.2d at 625.
10. *Id.* (*quoting In re* M.A.C., 134 Vt. 522, 365 A.2d 254 (1976)).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

mont Supreme Court had dismissed a similar case, *In re M.A.C.*,[15] as moot. In *M.A.C.*, a thirty-one year old woman had been involuntarily committed to the Vermont state hospital on four separate occasions. The short duration of each commitment, however, had prevented her from appealing the commitment orders prior to her release.[16] After her fourth discharge from the hospital, M.A.C. appealed the district court's commitment order, claiming that Vermont's civil commitment procedures violated the due process clause of the fourteenth amendment of the United States Constitution.[17] In a per curiam opinion, the Vermont Supreme Court held that because M.A.C. had been released before the appeal could be heard, "any order made here would have no effect on her rights, and the cause is now moot."[18]

Urging the court to apply the exceptions to the mootness doctrine, M.A.C. argued that she had suffered "collateral consequences" from her being committed to a mental hospital.[19] She also argued that the matter was "capable of repetition yet evading review" because of the possibility that she could be committed again without having the opportunity to appeal.[20] Finally, she argued that the case raised an issue of "great public importance" because it involved a constitutional challenge to Vermont's civil commitment statutes.[21]

The court responded to these arguments by stating that "none of the exceptions as urged are met or apply. As a matter of fact, the great public importance exception has not been adopted in this jurisdiction."[22]

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15. 134 Vt. 522, 365 A.2d 254 (1976).

16. Appellant's Brief in Reply at 2, *In re* M.A.C., 134 Vt. 522, 365 A.2d 254 (1976). M.A.C. had been hospitalized in 1965 for 93 days, in 1971 for 67 days, and in 1964 for 63 days. In regard to this appeal, her commitment hearing was held on April 29, 1976, *id.* at 1, and she was subsequently released on June 22, 1976, Brief for Appellee at 7, *In re* M.A.C., 134 Vt. 522, 365 A.2d 254 (1976).

17. 134 Vt. 522, 365 A.2d 254 (1976). Effective July 1, 1978, Vermont's mental health statutes underwent a number of changes. Applicable sections are VT. STAT. ANN. tit. 18, §§ 7101-7112, 7501-7507, 7601-7608, 7701-7711, 7801-7803, 8001-8005 (Cum. Supp. 1978).

18. 134 Vt. at 523, 365 A.2d at 255.

19. Appellant's Brief in Reply at 2, *In re* M.A.C., 134 Vt. 522, 365 A.2d 254 (1976).

20. *Id.* at 3-4.

21. *Id.* at 1, 4.

22. 134 Vt. 522, 523, 365 A.2d 254, 255.

As a result of these two decisions, Vermont's mootness doctrine is in a state of confusion. Although the Vermont court did apply two exceptions to the mootness doctrine in *O'Connell,* it is not clear under what circumstances the exceptions will apply in the future. *M.A.C.* and *O'Connell* have very similar facts but the court applied the exceptions only in *O'Connell.* Furthermore, *O'Connell* did not overrule *M.A.C.,* limit *M.A.C.* to its facts, or distinguish it in any meaningful way. A second source of confusion is the Vermont Supreme Court's statement that the public importance exception did not apply in *M.A.C.* On similar facts, courts in other jurisdictions have applied this exception.[23] To understand when the mootness exceptions should be applied, a familiarity with the concepts of the mootness doctrine is necessary.

II. The General Scope of the Mootness Doctrine

The term "moot" is used to describe cases or questions which courts refuse to hear because a judgment would not affect the rights of the parties.[24] Several types of situations give rise to a finding of mootness. A case will be moot if it seeks a determination of an abstract question which is not based upon existing facts or rights,[25] if it does not contain an actual controversy,[26] or, "when the rights . . . have expired by lapse of . . . time."[27] Thus a case becomes moot if a change in circumstances prior to appellate review eliminates the grievance that caused the litigation. For example, in *Kremens v. Bartley,*[28] the Supreme Court held that a constitutional challenge to a Pennsylvania civil commitment statute was moot because the statute had been changed by the time of the appeal.

In federal courts, the reluctance to hear moot issues has its origin in the "cases and controversies" clause of article III, section

23. Proctor v. Butler, 117 N.H. 927, 380 A.2d 673 (1977); *In re* Geraghty, 68 N.J. 209, 343 A.2d 737 (1975).

24. Hudson v. Hardy, 424 F.2d 854, 856 (D.C. Cir. 1970); *In re* M.A.C., 134 Vt. 522, 365 A.2d 254 (1976).

25. *E.g.,* Wisconsin Employment Relations Bd. v. Allis Chalmers Workers Union Local 248, 252 Wis. 436, 438, 32 N.W.2d 190, 192 (1948).

26. *Id.*

27. McCanless v. Klein, 182 Tenn. 631, ___, 188 S.W.2d 745, ___ (1945).

28. 431 U.S. 119 (1977).

2 of the United States Constitution.[29] That clause has been construed to "limit the business of the federal courts to questions presented . . . in a form historically viewed as capable of resolution through the judicial process."[30] An issue that has become moot "is neither a case nor a controversy in the constitutional sense and no federal court has the power to decide it."[31]

Typically, before a court will hear a case, it must be assured that there is nothing feigned, abstract or hypothetical about the controversy,[32] and that the contested issues have the "impact of actuality."[33] This requirement assures the court that it will be presented with real facts in a truly adversary context, and this helps the court define the scope of the inquiry and formulate the issues.

Practical concern with judicial economy is another basis for the mootness doctrine.[34] The courts are reluctant to recognize exceptions to the mootness doctrine when proceeding to the merits would either be unlikely to reduce future litigation or would restrict the policymaking function of the legislative or executive branches.[35] Moreover, the mootness doctrine supplements the rule against

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29. U.S. CONST., art. III, § 2, cl. 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, of the Citizens thereof, and foreign States, Citizens or Subjects.

30. Flast v. Cohen, 392 U.S. 83, 95 (1968); *see* WRIGHT, LAW OF FEDERAL COURTS 38 (3d ed. 1976); Kates, Jr. & Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 CAL. L. REV. 1385, 1402 (1974) [hereinafter cited as Kates & Barker].

31. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125 (1946). *See generally* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974); Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672 (1970); Note, *Judicial Determinations in Nonadversary Proceedings*, 72 HARV. L. REV. 723 (1959); Note, *Moot Administrative Orders*, 53 HARV. L. REV. 628 (1940); Note, *Cases Moot on Appeal: A Limit on Judicial Power*, 103 U. PA. L. REV. 772 (1955) [hereinafter cited as *Cases Moot on Appeal*].

32. Sibron v. New York, 392 U.S. 40, 57 (1968).

33. *Id.*

34. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 63 (1978) [hereinafter cited as TRIBE].

35. *Id.* at 68.

courts' issuing advisory opinions[36] by preventing "a court from making law unnecessarily."[37] On the other hand, courts are generally willing to decide a moot issue if judicial economy can be served by clearly settling the issue.[38]

All of these policies, which express a concern with the integrity and effectiveness of judicial decisions and with judicial economy, provide the foundation of the mootness doctrine.

III. Vermont's Exceptions to the Mootness Doctrine

The Vermont Supreme Court has adopted two exceptions to the mootness doctrine for cases which are "capable of repetition yet evading review" or which have "collateral consequences." These exceptions, which were applied by the court in *O'Connell,* have long been applied by the federal courts.[39] A review of the federal courts' use of these exceptions is helpful to an understanding of the inconsistencies in Vermont's use of the mootness exceptions.

A. *The "Capable of Repetition Yet Evading Review" Exception*

In *Weinstein v. Bradford*[40] the United States Supreme Court set out its test for applying the "capable of repetition yet evading review" exception to the mootness doctrine. In that case, Bradford sued the North Carolina Board of Parole, claiming that under the fourteenth amendment he was entitled to certain procedural rights during the consideration of his eligibility for parole. By the time the case reached the Supreme Court, however, Bradford had been paroled. Although the petitioner urged that his was an issue "capable of repetition yet evading review," the Court decided that the case was moot because there was no demonstrated probability that Bradford would again be involved in parole procedures.[41] Defining the test for this exception to the mootness doctrine, the Supreme Court

36. *Id.* at 63.
37. *Id.*
38. *Id.* at 68.
39. *See* cases cited notes 1 & 2 *supra.*
40. 423 U.S. 147 (1975).
41. *Id.* at 149.

held that, for other than class actions,[42] the "capable of repetition" exception is limited to situations where the following two elements are present. First, the challenged action must have been too short in duration to be fully litigated before its cessation or expiration; and, second, there must be a reasonable expectation that the same complaining party would be subjected to the same action again.[43]

The Vermont Supreme Court has not developed similar tests for applying the "capable of repetition" exception. Rather than using a consistent test for applying it, the court seems to apply the exception on an *ad hoc* basis each time it is faced with a moot issue that is capable of repetition. As a result, it is not possible to determine how the court will apply the exception in a given case. In *M.A.C.* the court said the "capable of repetition" exception did not apply, while it found that the exception did apply to *O'Connell.* It can be argued, however, that the facts of *M.A.C.* present a stronger case for applying the "capable of repetition" exception than do the facts in *O'Connell.*

The court applied the mootness exception to *O'Connell* because "involuntary civil commitments are usually of such short duration that they are aptly termed 'capable of repetition yet evading review.' "[44] *M.A.C.* also involved a "civil commitment" of "short duration," yet the court did not apply the exception.

O'Connell was hospitalized for six months from August 12, 1976, to February 21, 1977.[45] His commitment was of such short duration that he did not have time to perfect an appeal before his release. M.A.C., hospitalized only five months before O'Connell,

42. *Id.* For cases on mootness relating to class actions see Kremens v. Bartley, 431 U.S. 119 (1977) and Sosna v. Iowa, 419 U.S. 393 (1975). In *Sosna* the appellant sought a divorce in an Iowa court, but the case was dismissed because she had failed to meet the requirement that a petitioner for divorce be a resident of the state for one year preceding the filing of the petition. The appellant then brought a class action suit in federal district court against the state trial judge. Sosna asserted that Iowa's residency requirements violated the equal protection and the due process clauses of the federal constitution. By the time the case reached the Supreme Court, the appellant had satisfied the residency requirements, but the case was not moot because the controversy remained alive for the unnamed persons in the class she represented. See also Nichols v. Schubert, 71 F.R.D. 978 (E.D. Wis. 1976).

43. 423 U.S. at 149.

44. 136 Vt. 43, 45, 383 A.2d 624, 625 (1978).

45. *Id.*

was commited April 29, 1976, and subsequently released on June 22, 1976.[46] She, too, was unable to perfect an appeal prior to her release.

For an issue to be "capable of repetition," there must be a reasonable expectation that the same party will be subjected to the same action again. M.A.C. is a Vermont resident who had been hospitalized on three occasions prior to the challenged commitment.[47] Thus it seems likely that she may be subject to the same commitment procedures again.[48] O'Connell, on the other hand, had never been committed in Vermont before the contested commitment.[49] He had, however, been hospitalized in New York.[50] Since he has returned to New York City to reside,[51] it seems less likely that he will be again subject to Vermont's commitment procedures. The issues in M.A.C.'s case therefore seem to be more appropriate for the application of the "capable of repetition" exception than do those in O'Connell's case.

Evidently, the circumstances in which the Vermont court will apply the "capable of repetition" exception are unclear. The facts of *O'Connell* and *M.A.C.* are so similar that one is not able to predict what will trigger the application of this exception. Furthermore, the language of the opinions does little to explain the difference in their results because the court in *O'Connell* neither distinguished nor overruled *M.A.C.* with respect to the "capable of repetition" exception.

B. *The "Adverse Collateral Consequences" Exception*

The Vermont Supreme Court applied a second exception to the mootness doctrine in *O'Connell* because the petitioner would otherwise suffer adverse collateral consequences if not afforded an opportunity to be heard. *Sibron v. New York*[52] is the leading United States Supreme Court case applying this exception. Sibron, who had been convicted and sentenced on a criminal charge, completed his six-

46. Brief for Appellant at 1, 7, *In re* M.A.C., 134 Vt. 522, 365 A.2d 254 (1976).
47. Appellant's Brief in Reply at 2, *In re* M.A.C., 134 Vt. 522, 365 A.2d 254 (1976).
48. *Id.* at 4.
49. Brief of the Appellee at 6, State v. O'Connell, 136 Vt. 43, 383 A.2d 624 (1978).
50. Brief of the Appellant at 4, State v. O'Connell, 136 Vt. 43, 383 A.2d 624 (1978).
51. Brief of the Appellee at 1, 3, State v. O'Connell, 136 Vt. 43, 383 A.2d 624 (1978).
52. 392 U.S. 40 (1968).

month sentence before his case reached the appeals court. The Supreme Court held that the completion of his sentence did not moot his appeal because "[t]he *possibility* of consequences collateral to the imposition of a sentence is sufficiently substantial to justify our dealing with the merits."[53] Acknowledging that most criminal convictions do, in fact, entail adverse collateral consequences, the Court also suggested that, at some point, the number of convictions on a person's record may render his reputation irredeemable.[54] And, even though a person's reputation has become irredeemable he may nevertheless continue to have an interest in having his convictions removed from his record.[55]

In *In re Ballay*,[56] which the Vermont Supreme Court cited as authority for the *O'Connell* decision, a federal court of appeals applied the "adverse collateral consequences" exception to a civil commitment proceeding. On three separate occasions, the petitioner in *Ballay* had presented himself to the White House, claiming that he was a Senator from Illinois. As a result of the incidents, he was, on all three occasions, committed to a mental hospital. Ballay appealed his third commitment on procedural due process grounds.

Referring to *Sibron*, the *Ballay* court said, "[T]he standard applied in criminal cases, that a 'case is moot only if it is shown that there is *no possibility* that any collateral legal consequence will be imposed on the basis of the challenged conviction' . . . is applicable to contested civil commitment adjudications."[57] The court then found that the case was not moot because "the collateral consequences of being adjudged mentally ill remain to plague appellant."[58] The consequences that concerned the court were the restric-

53. *Id.* at 55 (*quoting* Pollard v. United States, 352 U.S. 354, 358 (1957)) (emphasis added).

54. *Id.* at 56.

55. The Court stated:

> It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable. And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated.

Id. There seems to be some confusion as to whether a person's reputation is ever irredeemable.

56. 482 F.2d 648 (D.C. Cir. 1973).

57. *Id.* at 651.

58. *Id.* at 651-52. The court also said that "it is still commonly held that an adjudication of mental incompetency gives rise to a rebuttable presumption of continued incompetency"

tions imposed on the petitioner's voting rights, and on his rights to serve on a federal jury, to obtain a driver's license, to dispose of property, to execute contracts, and to "perform many similar and commonplace functions."[59]

The facts in *M.A.C.* clearly seem to satisfy the test applied in *Ballay*. Both M.A.C. and Ballay had been previously confined for short periods and both had been released by the time of the appeal. Both were subject to adverse legal consequences as long as the commitment was on their records. In Vermont, a person found to be mentally incompetent cannot make a will, practice certain occupations, drive, or vote.[60]

The Vermont Supreme Court said the collateral consequences exception did not apply to M.A.C. The court, however, did apply the exception to O'Connell who, like M.A.C., had been previously committed. In *O'Connell*, the court found that the collateral consequences were the myriad of "legal disabilities radiating from the label of mentally incompetent."[61] In extending the benefit of this exception to O'Connell the court distinguished *M.A.C.* on the basis of the "particular facts surrounding respondent O'Connell's commitment which generate collateral consequences sufficient to avoid mootness in this instance."[62] The court, however, did not say what specific facts caused O'Connell to come within the exceptions while M.A.C. did not.

Close scrutiny of the facts of the two cases reveals that they differ in only two ways. First, O'Connell had been committed under the *criminal* counterpart of the civil commitment statutes applied to M.A.C.[63] Although counsel for O'Connell emphasized that

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and that an adjudication of incompetency "while not always crippling, is certainly always an ominous presence in any interaction between the individual and the legal system." *Id.* at 652.

59. *Id.* at 652.

60. VT. STAT. ANN. tit. 14, § 1 (1974) (make a will); *id.* tit. 18, § 7705 (1968) (vote); *id.* tit. 23, § 603 (1978) (drive); *id.* tit. 26, § 1559 (1975) (occupation). *See also* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW, 320 (Table 9.1), 325 (Table 9.2), 332 (Table 9.3), 339 (Table 9.4) (rev. ed. S. Brakel & R. Rock 1971).

61. 136 Vt. 43, 45, 383 A.2d 624, 625 (1978).

62. *Id.*, 383 A.2d at 626.

63. O'Connell was committed under VT. STAT. ANN. tit. 13, § 4820 (1974), and *id.* § 4822 (Cum. Supp. 1978), which the *O'Connell* court described as the criminal counterparts of the

O'Connell suffered a dual stigma, one part emanating from the criminal proceedings and the other from the civil commitment,[64] it is unclear whether this made a difference to the court.[65]

The second difference is that O'Connell had been committed only one time prior to the challenged hospitalization whereas M.A.C. had been committed three times prior to the challenged action. O'Connell's attorney made much of this distinction by arguing that with respect to M.A.C. any collateral consequences "that might flow from the present adjudication of mental illness were *de minimis*"[66] because of previous commitments. This argument suggests that a person who has already been committed on several occasions will not suffer collateral consequences from an additional

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civil commitment statutes, *id.* tit. 18, §§ 7601-7608 (1968) (repealed 1977 Vt. Acts No. 252 (Adj. Sess.)), State v. O'Connell, 136 Vt. 43, 45-46, 383 A.2d 624, 626 (1978). The *O'Connell* court specifically noted the parallel between section 7606 and section 4820, *id.* at 46, 383 A.2d at 625. M.A.C. was committed under the civil commitment statutes, VT. STAT. ANN. tit. 18, § 7601 (1968) (repealed 1977 Vt. Acts No. 252 (Adj. Sess.)), *In re* M.A.C., 134 Vt. 522, 365 A.2d 254 (1976).

VT. STAT. ANN. tit. 13, § 4822 (Cum. Supp. 1978) is set out below. Part (b) provides that an order for hospitalization under this provision shall have the same force and effect as an order issued under title 18, the civil commitment statutes.

> **[Section] 4822. Findings and order**
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> (a) If the court finds that such person is a person in need of treatment or a patient in need of further treatment as defined in section 7101 of Title 18, the court shall issue an order of hospitalization directed to the commissioner of mental health, which shall admit the person to the care and custody of the department of mental health for an indeterminate period. In any case involving personal injury or threat of personal injury, the committing court may issue an order requiring a court hearing before a person committed under this section may be discharged from custody.
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> (b) Such order of hospitalization shall have the same force and effect as an order issued under sections 7611-7622 of Title 18, and persons hospitalized under such an order shall have the same status, and the same rights, including the right to receive care and treatment, to be examined and discharged, and to apply for and obtain judicial review of their cases, as persons ordered hospitalized under sections 7611-7622 of Title 18.

Sections 7601-7608 were repealed, 1977 Vt. Acts No. 252 (Adj. Sess.), and replaced by VT. STAT. ANN. tit. 18, §§ 7611-7623 (Cum. Supp. 1978) (added 1977 Vt. Acts No. 252 (Adj. Sess.)).

64. Reply Brief of the Appellant at 4, State v. O'Connell, 136 Vt. 43, 383 A.2d 624 (1978).

65. The criminal charges against O'Connell were dismissed two months after he was committed, 136 Vt. 43, 44, 383 A.2d 624, 625 (1978). In addition, the Vermont court cited as authority for the collateral consequences exception, *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973), a case which was a civil commitment case with no criminal overtones at all.

66. Reply Brief of the Appellant at 4, State v. O'Connell, 136 Vt. 43, 383 A.2d 624 (1978).

commitment. As the court suggested in *Sibron,* however, it is possible that a person's character would never become irredeemable.[67] In the end, the Vermont court found that O'Connell, who had been committed only once before the challenged commitment, suffered collateral consequences while M.A.C., who had been committed three times before, suffered none.[68]

To summarize, the results in *M.A.C.* and *O'Connell* offer little help in furthering one's understanding of when the "collateral consequences" and "capable of repetition" exceptions to the mootness doctrine apply. The small differences in the facts of the cases do not seem to justify the differences in the court's application of the two mootness exceptions and the opinions themselves do not clarify the inconsistent results.

IV. The "Public Importance" Exception

In addition to the "collateral consequences" exception and the "capable of repetition" exception, some states have established the "public interest" or "public importance" exception to the mootness doctrine.[69] This exception allows a court to rule on questions which,

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67. 392 U.S. 40, 56 (1968). See discussion in note 55 *supra.*

68. *See* State v. O'Connell, 136 Vt. 43, 45, 383 A.2d 624, 625 (1978); *In re* M.A.C., 134 Vt. 522, 523, 365 A.2d 254, 255 (1976).

69. Willis v. Buchman, 240 Ala. 386, 199 So. 892 (1940); Miller v. North Pole City Council, 532 P.2d 1013 (Alaska 1975); Etheredge v. Gradley, 502 P.2d 146 (Alaska 1972); Glaktionoff v. State, 486 P.2d 919 (Alaska 1971); Grier v. Alameda-Contra Costa Transit Dist., 55 Cal. App. 3d 325, 127 Cal. Rptr. 525 (Ct. App. 1976); Green v. Layton, 14 Cal. 3d 922, 538 P.2d 225, 123 Cal. Rptr. 97 (1975); Bestway Disposal v. Public Utilities Comm., 184 Colo. 428, 520 P.2d 1039 (1974); State *ex rel.* Traub v. Brown, 39 Del. 187, 197 A. 478 (1938); *In re* Q.J., 302 So. 2d 161 (Fla. Dist. Ct. App. 1974); Ballew v. Edelman, 34 Ill. App. 3d 490, 340 N.E.2d 155 (App. Ct. 1975); People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); King Resources Co. v. Environmental Improvement Comm., 270 A.2d (Me. 1970); Sartin v. Barlow, 196 Miss. 159, 16 So. 2d 372 (1944); Proctor v. Butler, 117 N.H. 927, 380 A.2d 673 (1977); Doe v. Bridgeton Hosp. Ass'n, 71 N.J. 478, 366 A.2d 641 (1976); *In re* Geraghty, 68 N.J. 209, 343 A.2d 737 (1975); Rosenthal v. Harwood, 35 N.Y.2d 469, 323 N.E.2d 179, 363 N.Y.S.2d 937 (1974); Anderson v. Sieg, 63 N.D. 724, 249 N.W. 714 (1933); *In re* Popp, 33 Ohio App. 2d 22, 292 N.E.2d 330 (Ct. App. 1972); School Dist. No.1, Multnomah County v. Nilsen, 271 Or. 461, 534 P.2d 1135 (1975); Mello v. Superior Court, 117 R.I. 578, 370 A.2d 1262 (1977); DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973); City of Racine v. J-T Enterprises of America, Inc., 64 Wis. 2d 691, 221 N.W.2d 869 (1974).

In addition to the elements of the public importance doctrine, discussed in text accompanying notes 70-75 *infra,* some states have also included within the broad reach of the public

although technically moot and unable to satisfy either of the other two exceptions, present important public issues. Typically courts will consider a case to be in the public interest if it deals with constitutional interpretation,[70] if the validity of a statute is involved,[71] or if it involves the propriety of an administrative ruling.[72] In addition, the issue must arise in a factual situation that will recur often,[73] though not necessarily between the same parties.[74] This element distinguishes the public importance exception from the "capable of repetition" exception which does require identity of parties in subsequent actions. And, finally, the issue of public importance must be likely to recur in a context that will also be moot.[75]

For example, in *Proctor v. Butler*[76] the New Hampshire Supreme Court held that even though a constitutional challenge to a civil commitment statute was moot, it was appropriate to proceed to the merits of the case because issues of public importance were involved. In *Proctor* the petitioners had challenged the constitutionality of their involuntary commitment to a New Hampshire mental hospital, but their release before appeal technically mooted the case. The constitutional dimension of the challenge seemed to raise

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importance doctrine elements of the "capable of repetition" and "adverse collateral consequences" exceptions discussed earlier. For example, in Galaktionoff v. State, 486 P.2d 919 (Alaska 1971), the appellant had been sentenced to 365 days in jail for petty larceny. By the time his appeal reached the Alaska Supreme Court, the appellant had been released. The court held that the case was not moot because the

> court may, under the public interest exception to the mootness doctrine, decide important public questions which are capable of repetition while continually evading review. . . . The exception is applicable in this case since the relatively short sentences imposed by district courts will normally expire before review may be had in this court.

Id. at 921 n.3. For state court treatment of the "collateral consequences" exception, *see In re* Sciara, 21 Ill. App. 3d 889, 316 N.E.2d 153 (App. Ct. 1974); Village of New Hope v. Duplessie, 304 Minn. 417, 425, 231 N.W.2d 548, 553 (1975).

70. *In re* Geraghty, 68 N.J. 209, 343 A.2d 737 (1975).

71. *E.g.*, McCanless v. Klein, 182 Tenn. 631, 188 S.W.2d 745 (1945).

72. *E.g.*, Payne v. Jones, 193 Okla. 609, 146 P.2d 113 (1944).

73. *Cases Moot on Appeal, supra* note 31, at 791.

74. *See, e.g.*, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952). That case involved a blood transfusion to save a child's life. It seemed unlikely that the issue would be raised again by the same parties.

75. *Cases Moot on Appeal, supra* note 31, at 792.

76. 117 N.H. 927, 380 A.2d 673 (1977).

the issues to a level that justified the court's application of the public importance exception.[77]

The facts of *Proctor* and *M.A.C.* are nearly identical. Both cases were technically moot at the time of appeal and both involved constitutional challenges to involuntary civil commitment statutes. Since civil commitments are usually of a short duration,[78] it is likely that both of these cases would recur only in a context that would also be moot. The *Proctor* court held that the constitutional challenges were of sufficient public importance to bring the case within the public importance exception to the mootness doctrine.[79] In contrast, the Vermont Supreme Court held in *M.A.C.* that the exception was not met and did not apply.[80] In fact, the *M.A.C.* court stated that Vermont has yet to adopt the "public importance" exception.[81]

There are, however, compelling reasons why Vermont should adopt the exception. First, there are issues of public interest that should be resolved through litigation but which do not satisfy the requirements of the other two mootness exceptions. In this category are issues that are not capable of repetition between the same parties or issues that do not involve adverse collateral consequences. Nevertheless, they should be adjudicated because they are of public importance.

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77. A case with similar facts occurred in New Jersey, *In re* Geraghty, 68 N.J. 209, 343 A.2d 737 (1975). In *Geraghty* the petitioner was involuntarily committed to a New Jersey mental hospital. Following his release, Geraghty's attorney moved to vacate the commitment order. The New Jersey Supreme Court observed that "[i]nsofar as the respondent himself is concerned, the case is obviously moot. He has been discharged, is presently at liberty, and suffers no collateral consequences from the issuance of the original commitment order." *Id.* at 209, 343 A.2d at 738. The court recognized that cases may be heard which are technically moot if they involve issues of great public importance. The New Jersey civil commitment procedures were revised while the case was pending in the New Jersey Supreme Court. The case, therefore, was deemed moot and dismissed.

78. Reply Brief of the Appellant at 10, State v. O'Connell, 136 Vt. 43, 383 A.2d 624 (1978), which stated that in 1971 the average length of confinement in mental institutions was 41 days.

79. 117 N.H. 927, 931, 380 A.2d 673, 675 (1977).

80. 134 Vt. 522, 523, 365 A.2d 254, 255 (1976).

81. *Id.* In a telephone interview held on September 6, 1978, Chief Justice Barney of the Vermont Supreme Court indicated that he felt the Vermont Supreme Court had not rejected this exception to the mootness doctrine, but rather that the court has not spoken on the issue.

For example, in *People ex rel. Wallace v. Labrenz,*[82] a lower state court had ordered a blood transfusion, despite the parents' religious objections, for an infant whose life was in danger. After the transfusion had been given, the Illinois Supreme Court held that the case was not moot because the issues presented were of substantial public interest.[83] The case would not have satisfied the "capable of repetition" exception because it is doubtful that the same child would need another lifesaving blood transfusion. In addition, the child seemingly had not suffered adverse collateral consequences from the court order for the blood transfusion. Nevertheless, the issue of a court's ordering a blood transfusion over a family's religious objections was one of public importance that seemed to require resolution.

A second reason why Vermont should adopt the "public importance" exception is that it promotes the interests of judicial economy. Ordinarily, when an issue is resolved before a judgment can be entered, judicial economy requires the court to abstain from adjudication. But, when an issue is likely to recur often, judicial economy is best served by settling the issue in order to forestall further litigation.[84] For example, M.A.C. challenged the constitutionality of Vermont's civil commitment statutes.[85] Since it is likely that M.A.C. and others similarly situated may raise this same challenge in the future, the interests of judicial economy would be best served by settling the matter promptly.[86]

A third reason for adopting the exception is that deciding an issue which is likely to recur will prevent "substantial social costs stemming from uncertainty in the law."[87] A decision on the merits would prevent others who are similarly situated from being harmed unnecessarily. If the *M.A.C.* court had determined the constitutionality of the commitment statutes, other persons would not have been subject to commitment under statutes of questionable legality.

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82. 411 Ill. 618, 104 N.E.2d 769 (1952).

83. *Id.* at 622, 104 N.E.2d at 772.

84. Kates & Barker, *supra* note 30, at 1413.

85. 134 Vt. 522, 365 A.2d 254 (1976).

86. *See* Note, *Mootness on Appeal in the Supreme Court*, 82 HARV. L. REV. 1672, 1675 (1970).

87. Proctor v. Butler, 117 N.H. 927, 380 A.2d 673 (1977).

Although the "public importance" exception offers real advantages, Vermont has not adopted it.[88] The court, however, has not stated why it has not done so.[89] With respect to *M.A.C.* the Vermont court may have failed to apply the exception because of a reluctance to reach constitutional issues unnecessarily.[90] But a decision on the validity of a statute is of such importance that it should not be delayed if future challenges are likely to recur frequently and in a context that will also be moot. Resolving the issue will provide lower courts with guidance[91] and will serve the interests of those affected by the statute.

In addition to the court's possible reluctance to deal with constitutional issues, the court may also have been reluctant to adopt the exception because of concerns related to justiciability. "Justiciability is the term of art employed to give expression to the . . . limitation placed upon the federal courts by the case and controversy doctrine."[92] The federal courts have not adopted the "public importance" exception[93] because they are limited by the "cases and controversies" clause of the United States Constitution.[94] Vermont's constitution does not contain a comparable clause.[95] One could nevertheless argue that the Vermont court

88. *In re* M.A.C., 134 Vt. 522, 523, 365 A.2d 254, 255 (1976).

89. *Id.* *See* note 81 *supra*.

90. *See, e.g.*, Donato v. Board of Barber Examiners, 56 Cal. App. 2d 916, 133 P.2d 490 (1943); State *ex rel.* Traub v. Brown, 39 Del. 187, 197 A. 478 (1938).

91. *See* City of Racine v. J-T Enterprises of America, Inc., 64 Wis. 2d 691, 701, 221 N.W.2d 869, 875 (1974).

92. Flast v. Cohen, 392 U.S. 83, 95 (1968). Until as recently as 1964, the mootness doctrine was treated as a rule of economy and good-sense judicial administration rather than as an article III requirement. TRIBE, *supra* note 34, at 62.

93. *See* DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Street, Electric R.R. and Motor Coach Employees Div. 998 v. Wisconsin Emp. Rel. Bd., 340 U.S. 416, 418 (1951).

94. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

95. VT. CONST. ch. II, § 28 provides: "The Courts of Justice shall be open for the trial of all causes proper for their cognizance; and justice shall be therein impartially administered, without corruption or unnecessary delay."

Id. § 5 provides: "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither [*sic*] exercise the powers properly belonging to the others."

In *In re* M.A.C., 134 Vt. 522, 365 A.2d 254 (1976), the court said, "[T]he cause is now moot. An appellant's stake in the litigation must continue throughout its entirety. This Court will not indulge in advisory opinions." The court cited *In re* Constitutionality of House Bill 88, 115 Vt. 524, 64 A.2d 169 (1949), as its authority. In that opinion, however, the court was responding to a request from the Governor of Vermont to the Vermont Supreme Court for a

should strictly adhere to the policies of article III and refuse to adopt the exception.

The policies underlying article III reflect a concern with the integrity of judicial decisions.[96] A case must be susceptible to resolution by the judicial process and the parties must have truly adverse interests. Cases to which the "public importance" exception applies do not seem to undermine the integrity of judicial decisions. The parties' willingness to incur considerable expense in order to adjudicate the issue is a strong indication that their "conduct *will* be affected at least to the extent of foreclosing options"[97] they desire to preserve. The parties also have the required adversity. The plaintiff is willing to incur the expenses of litigation to resolve the issue.[98] The defendant desires to protect his ability to pursue in the future a course of action like that contested in the current litigation.[99] In *M.A.C.* for example, the petitioner had a strong interest in having her commitment removed from her record while the state had an equally strong interest in defending the constitutionality of the commitment statutes.[100]

In summation, Vermont should adopt the public importance exception to the mootness doctrine. This exception brings with it the opportunity to rule on important issues which would otherwise

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ruling as to the constitutionality of a bill pending in the General Assembly. *House Bill 88* dealt with a purely advisory opinion while *M.A.C.*, on the other hand, involved adverse parties who were seeking resolution of their rights under a statute. *House Bill 88*, therefore, should not be controlling in situations similar to *M.A.C.*

96. *See* Kates & Barker, *supra* note 30, at 1403-04.

97. *Id.* at 1403.

98. *Id.* at 1410.

99. *Id.*

100. *See* Proctor v. Butler, 117 N.H. 927, 380 A.2d 673 (1977), which involved a constitutional challenge to New Hampshire's civil commitment procedures, brought by an individual who had been committed three times prior to the challenged action. The court found the case, although moot, came within the public importance exception to the mootness doctrine. *Id.* at 931, 380 A.2d at 674-75. It also found that the parties' interests were sufficiently adverse to warrant proceeding to the merits. *Id.*, 380 A.2d at 675. "The state has an interest in preserving the contested commitment orders of the court. The respondents' genuine interest in reversing those orders offers compelling evidence of the adversity of the parties." *Id.* The court also found that the respondents' interest in freeing themselves from the stigma of commitment provided sufficient adversity to ensure that the arguments presented would be adequate. "Finally, we note that our functional competence to proceed to the merits of these appeals is ensured by the parties' thorough briefing and arguing of the issues." *Id.*

remain unresolved because they do not come within one of the other mootness exceptions. Also, adoption of the exception would not undermine the policies associated with the doctrine of justiciability.

Conclusion

The Vermont Supreme Court currently recognizes two exceptions to the mootness doctrine which it applies in cases where an issue is "capable of repetition yet evading review" and where a party may suffer "adverse collateral consequences" if the issue is not adjudicated. As the decisions in *M.A.C.* and *O'Connell* indicate, however, the court's use of these exceptions is inconsistent. The inconsistency causes the mootness doctrine to be applied unequally and, therefore, unfairly. The Vermont Supreme Court should establish criteria for applying these exceptions to provide guidance to the lower courts and to prospective litigants. The court could either adopt its own standards or, possibly, use the federal court standards. Either approach would satisfy the need for predictability in this area of the law.

In addition, the Vermont court should also adopt the "public importance" exception. This exception would enable the court to rule on important issues which have become moot and which do not qualify for either of the two other exceptions. Most importantly, the court should establish guidelines to assist lower courts and prospective litigants.

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