MOOTNESS ON APPEAL IN THE SUPREME COURT

In determining which cases it may properly adjudicate, the Supreme Court relies on the ill-defined concept of justiciability. In *Flast v. Cohen*,[1] Mr. Chief Justice Warren set out the imprecise structure of this concept, derived from interpretation of the article III limitation on federal judicial power to "cases" and "controversies." [2] The Chief Justice explained justiciability as a dual limitation designed to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and to "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." [3] This second limitation reflects the notion of separation of powers embodied in the "political question" subconcept of justiciability.[4] It concerns principally the substantive content of issues appropriate for judicial resolution, and is intimately related to the broader policy debate as to the propriety of an activist as against a restrained role for the Supreme Court.

Broadly viewed, justiciability of the first category frames the judicially perceived limits of the functional competence of the federal courts. Although the concept is based on constitutional strictures, article III is so generally worded that its invocation in order to foreclose review is in fact an exercise of self-restraint by the Court in appreciation of the absence of the prerequisites to the successful operation of the judicial process.[5] This functional aspect of justiciability seeks to satisfy three fundamental needs of a judicial tribunal: first, a full record of the facts of the dispute, the raw material of decisionmaking; [6] second, a presenta-

[1] 392 U.S. 83 (1968).

[2] U.S. CONST. art. III, § 2.

[3] 392 U.S. at 95.

[4] *See, e.g., The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 63–72 (1969). The political question doctrine, insofar as it demands the possibility of judicially manageable standards, also falls within the Chief Justice's first limitation. This requirement, however, relates not to the conditions necessary for the proper functioning of the judicial process, but to the types of issues that the judicial process, even when operating optimally, can resolve.

[5] *See* Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955); *cf.* Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1133 (1955).

[6] The presence of an adequate set of facts is indispensable both to the process of judicial lawmaking and to the interpretation of the product of the process. *See* H.M. HART & A. SACKS, THE LEGAL PROCESS 655 (tent. ed. 1958).

tion of opposing claims and defenses related to prior judicial settlements and social policies, yielding proffered impersonal criteria for judicial decision; [7] and third, the potential of effective resolution of the dispute, the *raison d'être* of the institution.

Separate treatment of these functional needs is only artificial, since in operation they are interdependent. Similarly, the several subconcepts of justiciability whose objectives are the satisfaction of these needs [8] do not represent discrete, sovereign territories within the ambit of justiciability, but instead promote values that overlap and interact. The ripeness notion,[9] which counsels against premature judicial decision, reflects both the need for a complete factual record, loosely termed "concreteness," and a sensitivity to giving protection at a time when the threat against a party has become so substantial that there is a likelihood of sufficient contentiousness between the parties. The adverseness and interest required for standing seek primarily to assure the effective presentation of opposing positions, but also to assure a well-grounded factual context. The prohibition against rendering advisory opinions may be stimulated by the total lack of a factual record, as when a coordinate branch of government makes a request for judicial advice.[10] When viewed as a guard against rendering decisions subject to revision or rejection by another body,[11] however, this restriction also relates to the issue of final judicial resolution.

The mootness doctrine in like manner cuts across these functions of justiciability, overlapping with the other subconcepts.[12] Thus, fixed definition, categorization, and differentiation are

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[7] This function is, of course, served by the adversary system. *See* Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 31–40 (H. Berman ed. 1961). The structure of the system, which is taken as given, should not be confused with the type of adverseness required for its proper functioning.

[8] Professor Bickel has asserted that these subconcepts of justiciability serve as devices for regulating the content of the issues the Court decides, rather than as mere safeguards of the process of decision. A. BICKEL, THE LEAST DANGEROUS BRANCH 169–70 (1962). Although Professor Bickel does not allude to mootness, he no doubt would include it in his theme. An analysis of the functions of the mootness doctrine demonstrates, however, that mootness can be limited to the role of a judicial safeguard without curbing the Court's discretionary power to decide which cases it will hear.

[9] *See generally* Davis, *supra* note 5.

[10] *See* H.M. HART & A. SACKS, *supra* note 6, at 652–69 (request by Secretary of State Jefferson in 1793).

[11] *See* Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

[12] The inclusion of mootness in article III theory is a relatively recent development. Mootness is a product of common law jurisprudence. *See* Note, *What Constitutes a Case or Controversy Within the Meaning of Article III of the Constitution*, 41 HARV. L. REV. 232 (1927). Early Supreme Court opinions treated mootness as a common law limitation on any court's duty, rather than power, to

fruitless endeavors.[13] Rather, this Note will explore a situation, labeled a mootness question, that has become a recurrent problem for the Supreme Court: where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal [14] — adverse interest and effective remedy — have arguably been compromised. The focus will be on confrontations between private parties and the government, involving both governmental law enforcement aimed at private activity and private challenges to the validity of governmental action. Allegations of the demise of once admittedly justiciable controversies of this kind have not evoked a consistent response from the Court. This Note will examine the congruence of the applications of the mootness doctrine with its objectives and will propose an approach that eliminates the present influence of the doctrine beyond the service of these purposes.

I. The Functions of the Mootness Doctrine

A. An Effective Order

Historically, the objection to deciding moot cases was that the judgment of the court could not be carried into effect, or that relief was impossible to grant; as the Supreme Court often repeated without elaboration, "there is no subject-matter on which the judgment of the court can operate." [15] This theory is the focus of all the early mootness cases and reflects elementary conceptions of judicial efficacy. By this analysis, mootness is a

decide cases. *See, e.g.*, Mills v. Green, 159 U.S. 651, 653–54 (1895); Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. Chi. L. Rev. 77, 78 n.5 (1955). That mootness is of constitutional dimension was hinted in dictum in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937), and seemingly settled in Sibron v. New York, 392 U.S. 40, 57 (1968).

[13] Attempts to categorize and define specifically the mootness concept have tended to produce catalogues. *See* Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946); Note, *supra* note 5; *cf.* Kates, *Memorandum of Law on Mootness — Part I*, 3 Clearinghouse Rev. 213 (1970). More general definitions are apt to be conclusory. *See* Note, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 Colum. L. Rev. 867, 871–72, 874 (1965).

[14] The avoidance of abstractness arising from the absence of an adequate record of facts has been posited as one of the policies underlying the mootness doctrine. *See* Sibron v. New York, 392 U.S. 40, 57 (1968); Parker v. Ellis, 362 U.S. 574, 592–93 (1960) (Warren, C.J., dissenting). This consideration would appear to have little relevance to the problem of cases becoming moot on appeal, after the facts have been presented and contested at the trial level. The practice has been to note the presence of a full record when holding a case not moot on appeal, rather than to note the sparseness of the record when holding a case moot. Thus this ground is merely a makeweight for finding a case not moot.

[15] *E.g.*, *Ex parte* Baez, 177 U.S. 378, 390 (1900).

remedial issue related to the ability to grant prospective relief such as injunction and mandamus.[16]

The rationale for this limitation is often stated in terms of judicial economy.[17] The business of the courts, it is said, is the resolution of disputes, a duty so time-consuming and pressing that courts should not "waste" their time passing on the merits of "nondisputes" — controversies for which there is no judicial remedy. This statement, of course, rests on implicit premises about the proper function of courts and tends to be circular. It does not advance the analysis of when a judicially cognizable dispute exists, but merely characterizes the result of that analysis. Even assuming a clear distinction between disputes and nondisputes, and that the sole function of courts is to resolve disputes, this rationale has little application to the Supreme Court. First, the Court does not need mootness to keep its caseload down, because it may take the expedient of discretionary denial of certiorari or dismissal of appeal.[18] Second, the inquiry into the possibility of future recurrence of a dispute [19] may conserve the judicial machinery by anticipating future litigation through the state and federal court systems. Under such circumstances, finding a case *not* moot may advance judicial economy.[20]

A more serious objection to the effective order rationale as a simple explanation of mootness is that the maxim that a court's order must be "effective," "conclusive," or "final" is more elusive than it appears. The question, after all, is what type and quantum

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[16] Retrospective remedies, such as damages, are rarely mooted by intervening events, unless by settlement. Thus, it is possible to save a cause from mootness by appending to the highly desired prospective request an incidental request for retrospective relief. Such was the case in Powell v. McCormack, 395 U.S. 486 (1969), in which a question of fundamental constitutional law was maintained over a dispute as to back pay. *See also* Richey v. Wilkins, 335 F.2d 1, 6 (2d Cir. 1964) (alternative holding) (court read into ambiguous complaint a damage request to save case from mootness); Brief of Plaintiff-Appellants in Opposition to Motion to Dismiss at 5–6, Moore v. Ogilvie, 394 U.S. 814 (1969) (eleventh hour damage request).

Legislatures conferring rights of public importance upon private persons may add retrospective relief such as back pay or counsel fees to the remedies available so that cases are not easily mooted by defendants. *See* Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) (Civil Rights Act of 1964 employment discrimination case).

[17] *See, e.g.*, Note, *supra* note 5, at 775; Note, *"Moot" Administrative Orders*, 53 HARV. L. REV. 628, 629 (1940).

[18] *See* Bickel, *Foreword: The Passive Virtues, The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 46 (1961) (use of discretion in Court's appellate jurisdiction).

[19] *See* pp. 1682–87 *infra*.

[20] *Cf.* Meyers v. Jay Street Connecting R.R., 288 F.2d 356, 358–59 (2d Cir.), *cert. denied*, 368 U.S. 828 (1961).

of effect a court's pronouncement on the issues must have,[21] and the requisite effect of an article III court's judgment is by no means immutably fixed.[22] As the theory of effective judicial remedy expands, the concept of a judicially cognizable dispute broadens, and the restrictive impact of the mootness doctrine correspondingly wanes. The most decisive development in the area of effective relief has been the judicial acceptance of the constitutionality of judgments that merely "declare the rights and other legal relations" [23] of the parties.[24] The Court based its holding that declaratory judgments are permissible on the premise that the case or controversy doctrine as a limitation on the disputes cognizable by the federal judiciary does not restrict the remedies that federal courts may grant:

> [T]he Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.[25]

The advent of the declaratory judgment as a recognized effective remedy and its near universal availability thus rob the effective order rationale of independent significance. Since a declaration is theoretically always possible, the only precondition to an effective order by a federal court is that the court be able to issue a declaratory judgment,[26] which depends on the existence of an "actual

[21] *See* A. BICKEL, *supra* note 8, at 117. Objections that an opinion may be advisory, *see* Powell v. McCormack, 395 U.S. 486, 573 (1969) (dissenting opinion), or will only influence future action, *see* Richardson, v. McChesney, 218 U.S. 487, 492 (1910), do not recognize that the Court deals in probabilities in mootness cases, and that it is a legitimate function of courts to resolve corrosive legal uncertainties. *See* Davis, *supra* note 5, at 1123, 1130–33.

[22] For instance, retrospective effect, long presumed indispensable to judicial decisions, is no longer required. *Compare* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting), *with* Great N. Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932), *and* Linkletter v. Walker, 381 U.S. 618, 622–29 (1965).

[23] 28 U.S.C. § 2201 (1964).

[24] *See* Nashville C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933) (state declaratory judgment act); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (federal declaratory judgment act). Thus, award of process and execution were eliminated as essential effects of a judgment.

[25] Nashville C. & St. L. Ry. v. Wallace, 288 U.S. 249, 264 (1933); *accord*, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

[26] Of course, not all litigants will have the foresight to request declaratory relief. Federal courts are expressly empowered to grant any form of relief appropriate, whether requested or not. FED. R. CIV. P. 54(c). This power may include granting

controversy." [27] Thus, an analysis of the Supreme Court's concern for deciding cases only when it can provide an effective resolution of a dispute directs scrutiny to the interests of the parties.[28]

B. Adverseness and "Personal Stake"

The prevailing assumption is that the adversary system works properly only when each litigant has an opposing personal interest in the questions being decided, or, as the Court has said, has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult . . . questions." [29] Although the maintenance of personal stake was generally ignored in early mootness cases,[30] it is now frequently invoked as a purpose of the mootness doctrine.[31]

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declaratory relief not requested. *See* Dann v. Studebaker-Packard Corp., 288 F.2d 201, 215–17 (6th Cir. 1961). When a case from a state court becomes allegedly moot after review is granted, however, the Court is not necessarily free to look to remedies not requested in finding the possibility of an effective order. *See* Brockington v. Rhodes, 396 U.S. 41 (1969).

[27] 28 U.S.C. § 2201 (1964).

[28] The Court has at times been extremely lax in insisting that there be two parties before it who will be affected by its disposition on the merits. *See* Robinson v. California, 371 U.S. 905 (1962) (denial of rehearing despite fact that petitioner, unknown at the time, had died before case was decided); Walling v. James V. Reuter, Inc., 321 U.S. 671 (1944) (reversal of court of appeals on merits despite dissolution of corporate respondent pending appeal to Court). The requirement that a decision have a direct effect on the parties before the Court seems superfluous so long as the case is argued well, in view of the fact that the Court itself professes to be more interested in the effect of its judgment on "other litigants and in other situations." Address by Chief Justice Vinson, American Bar Ass'n, Sept. 7, 1949, in H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1403, 1405 (1953); *see* Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). *See also* Address by Chief Justice Hughes, American Law Institute, May 10, 1934, in H.M. HART & H. WECHSLER, *supra* at 1395, 1396; A BICKEL, *supra* note 8, at 173. Thus the requirement of an order effective as to the two parties before the Court makes sense only insofar as it assures a well litigated case.

[29] Baker v. Carr, 369 U.S. 186, 204 (1962). The retention of standing under the mootness doctrine assures that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 106 (1968).

[30] *See, e.g.*, Jones v. Montague, 194 U.S. 147 (1904); Mills v. Green, 159 U.S. 651 (1895).

[31] *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 496 (1969); Williams v. Shaffer, 385 U.S. 1037, 1039 (1967) (dissenting opinion); Parker v. Ellis, 362 U.S. 574, 592 (1960) (Warren, C.J., dissenting).

Claims most vulnerable to mootness are those that challenge the validity of certain action or inaction and seek to prescribe a particular course for the future. The possibility that such a claim has become moot may arise in several ways. There may be a change in applicable law. The conduct that the challenging party asks a court to command may be performed by the defending party, or the time for its performance may pass. Conduct sought to be enjoined may be discontinued by the defending party for any reason. Other events, irrespective of the continuance of the challenged activity, may arrest present effect on the challenging party. Whether these events destroy the parties' vigorous adverseness over the issues rests on further analysis — of the relation between the issues raised and the new law when old law is amended, and of probabilities of future adverse effects on a party or of recurrence of the dispute when the intervening event relates to the challenged conduct or the challenger.

1. *Change of law.* — When the intervening and possibly mooting event is a change in controlling law, a court must undertake an inquiry unlike the evaluation of future contingencies related to other changed circumstances. No absolute rule can be formulated to settle whether a change of law undermines a lawsuit. The process involves a reasoned examination of the points of contention and the new law to determine whether the issues raised in litigating the validity of activities under the old provision are still presented. The approach may be demonstrated by a claim challenging the validity, as a matter of statutory or constitutional authorization, of governmental activities pursuant to a law that is amended pending appeal. The relevant issue should be whether the principle contended for by the challenging party is satisfied by the new law. If it is, the case is moot; if not, the challenging party's present interest in the litigation is not destroyed simply by the amendment.

This process of dispute definition leaves the Court some leeway in determining the effect of a change of law. In *United States v. Alaska Steamship Co.*,[32] the result of the exercise of this reasoned discretion was questionable. A number of carriers sued the Interstate Commerce Commission to set aside an ICC order requiring them to use a specified form of bill of lading on the ground that the ICC lacked authority to prescribe the terms of carriers' bills. Pending appeal from the grant of an injunction, Congress passed a statute that would require changing the form of the bills of lading, but not otherwise affecting the power of the ICC. Although the carriers still hotly contested the ICC's prescriptive powers, the Court held the case moot on the ground

[32] 253 U.S. 113 (1920).

that the carriers sought an annulment of the particular bills of lading, thus ignoring the carriers' interest in establishing the validity of their contentions.[33] Similarly, in *Hall v. Beals*,[34] the Court's approach to the change of law issue seems inappropriate. There, Colorado's six-month residency requirement for voting in national elections was under constitutional attack from voters who would attain only five months' residency by the time of the election. Pending appeal the statutory requirement was reduced to two months. The proper inquiry should be whether the principles advanced by the voter-plaintiffs were satisfied by this change. If the contention were that state voter residency requirements for national elections are unconstitutional per se, the change should not of itself preclude review of the issues.[35] The hypothetical point advanced by the Court that the plaintiffs could not have brought their suit had the new law been in force at the time they filed their complaint [36] is unsatisfactory when the principle contended for may still be violated by the new law. The interest of such litigants may be assured on the basis of their continued efforts at resolution.[37]

[33] *But see* Fortson v. Toombs, 379 U.S. 621, 635–36 (1965) (Goldberg, J., dissenting) (different interpretation of *Alaska Steamship*). The notion that the mooting of one issue moots the entire case, a rationale for the decision in *Alaska Steamship*, was overruled sub silentio in Powell v. McCormack, 395 U.S. 486, 497 (1969).

[34] 396 U.S. 45 (1969).

[35] The appellants, while presenting alternative arguments, contended primarily that any discriminatory waiting period imposed on new residents served no legitimate state interest and was unconstitutional. Brief for Plaintiff-Appellants at 9–11, 17, Hall v. Beals, 396 U.S. 45 (1969). *See also* Brief for the United States as Amicus Curiae at 6–7, Hall v. Beals, 396 U.S. 45 (1969).

The decision in *Hall* was complicated by the additional facts that the election in which the plaintiffs had sought to vote had passed and that they had satisfied even the six-month residency requirement by the time their case was decided. Nevertheless, the Court rested its decision primarily on the change of law theory.

[36] 396 U.S. at 48. This test was also applied in Brockington v. Rhodes, 396 U.S. 41, 43 (1969). There the Court noted that the appellant, who challenged the constitutionality of any nominating petition signature requirement exceeding one percent of the relevant population, would have been adversely affected under the new four percent requirement as he was under the old seven percent requirement, since he had obtained only one percent of the signatures. Thus in *Brockington* the past interest and the principle advanced coincided. If the appellant had obtained three percent in an attempt to comply with the seven percent law while urging the unconstitutionality of any requirement, and on appeal the state had amended to two percent, the past interest test would require the dismissal of the appeal. The analysis should, however, proceed in two steps: first, that the state has not satisfied the appellant's principle with the two percent law, and, second, that the appellant has a present interest based on the future enforcement by the state of what he contends to be an unconstitutional requirement. *See* pp. 1688–92 *infra*.

[37] *See* pp. 1688–92 *infra*. In fact, the interest of the *Hall* plaintiffs may have

2. Anticipating the future.—(a) Possibility of adverse effect.— Analogous to the discontinuance of activity sought to be enjoined is the expiration of an order whose validity is under attack by one subject to it. When the Court is confronted with a situation in which a lower court has issued or upheld the validity of an order which has since expired, it will not hold an appeal from the allegedly improper determination moot if the lower court's judgment may still have certain present or future adverse effects on the challenging party.[38] It may be said that the adverse effects give the challenger, who otherwise has nothing to gain, a sufficient interest in the litigation.

The primary example of this phenomenon is in the area of criminal law, where the "order" attacked as invalid is a sentence which has already been served.[39] The only adverse effects of a satisfied conviction that the Court recognizes are "collateral legal consequences," such as loss of the right to vote, imposed by law on certain convicted criminals. It is now settled that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." [40] The "mere possibility" of such a consequence, even a "remote one," is enough to find that the one who has served his sentence has retained the requisite personal stake, thus giving a case "an adversary cast and mak[ing] it justiciable." [41] Of course, as the probability of adverse effects decreases, the challenging party's stake in the litigation diminishes in intensity; yet in these cases even a conjectural stake is sufficient.

This so-called "exception" [42] to the mootness doctrine has uncertain application in noncriminal cases, where adverse judgments do not result in the civil disabilities imposed by law on convicted criminals. It was applied in a civil suit almost sixty years ago,[43] although the potential adverse effect there recog-

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been insufficiently assured, since the change of law occurred after the appeal was brought. *See* pp. 1689–90 & notes 80 & 81 *infra*. Nevertheless, the case perhaps should have been heard, since election cases are often inherently evasive of review. *See* pp. 1685–87 & note 64 *infra*.

[38] When an expired court order has been complied with by the challenging party, it would be especially unfortunate to rule his appeal moot, since appeal is the only allowable attack on such orders. *See, e.g.*, Carroll v. President & Comm'rs, 393 U.S. 175, 179 (1969).

[39] *See The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 296–301 (1968).

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

[41] Benton v. Maryland, 395 U.S. 784, 790–91 (1969).

[42] Sibron v. New York, 392 U.S. 40, 53 (1968). Since the adverse effects approach ensures personal stake, it is misleading to term it an exception. There are situations, however, in which there should be such an exception. *See* p. 1692 *infra*.

[43] Southern Pacific Co. v. ICC, 219 U.S. 433, 452 (1911).

nized, the use as res judicata of a finding of validity of an expired order as a basis for a future damage action, has since been eliminated as a possible consequence of refusing review.[44] The adverse effect notion has recently been applied, however, to a case involving an expired ten-day restraining order. In *Carroll v. President and Commissioners*,[45] a white supremacist faction challenged an order restraining their raucous racist rallies. The Court held the case not moot in part because of the continuing adverse effect that the upholding of the order by the state courts had on the response of officials to the petitioner's activities. The effect involved — difficulty in obtaining rally permits from county officials — parallels a potential effect that sustained a controversy in the criminal case of *Ginsberg v. New York* [46] — the possibility of a discretionary license revocation by a city official based on the conviction. These cases may indicate that the possibility of adverse governmental action, even if discretionary, based on [47] a court order no longer operative on the challenging party keeps a controversy alive,[48] at least where fundamental freedoms are in jeopardy.[49]

The requirement of adverseness limits this approach to cases in which a recurrent litigant, such as the state, is the party defending the expired order. While possible adverse effects are the foundation for the challenger's interest, there is no assurance

[44] *See* A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 328–30 (1961). The res judicata effect of a judgment, the appeal of which is foreclosed by mootness, is eliminated by the Court's practice of vacating the decision below. *See* note 47 *infra*.

[45] 393 U.S. 175 (1968).

[46] 390 U.S. 629, 633–34 n.2 (1968).

[47] In civil cases the governmental action is not based on the judgment's binding effect between the parties. This effect may be eradicated in federal cases by the Supreme Court's reversal and remand with directions to dismiss the complaint, *see* United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950), and in state cases by the Court's remand for appropriate action. *See generally* Comment, *supra* note 12. Rather, the merits of the finding below supply the premise for action by a governmental body, whether it was a party to the judgment or not. *See* Carroll v. President & Comm'rs, 393 U.S. 175, 178 (1968).

[48] *But see* Jacobs v. New York, 388 U.S. 431 (1967) (appeal held moot despite threat of license revocation under ordinance authorizing revocation for conduct offensive to public morals). The *Ginsberg* Court distinguished *Jacobs* on the basis of the absence of any direct statutory link in *Jacobs* between conviction and revocation. 390 U.S. at 634 n.2.

[49] In *Sibron*, *Ginsberg*, and *Carroll*, the adverse effects trenched upon fundamental liberties — those denied certain convicted criminals, such as the right to vote, and freedom of expression. It seems likely that the Court in its mootness inquiry is worried about adverse effects generally, and is not simply expressing a further concern over possible deterrence of the exercise of protected freedoms. The mootness finding in *Carroll* was not based on any chilling effect on the racist group; the Court relied on the fact that the group was not having success in obtaining permits, not that it was discouraged from trying.

without this limitation that the other party, having obtained what it sought, will have any interest in supporting the validity of the order merely to sustain potential adverse effects to his opponent. So long as the defending party on appeal is a recurrent litigant with respect to the issue at stake, however, this risk is slight, because the recurrent litigant will perceive the impact of an adverse judgment on the legality of its activities in the future.

(*b*) *Possibility of recurrence of dispute.* — When the immediate dispute ends because the challenged activity or inactivity terminates, thus arresting present effect on the challenging party, the possibility of mootness arises. Again, as in the adverse effect approach, the Court's attention then turns to probabilities — here, the risk of the recurrence of the dispute from which to infer a sufficient stake in a resolution of the issues.

The Court directs its inquiry to these probabilities when, for example, the defending party ceases the activity being challenged and takes up the mootness doctrine as a shield to further litigation. The oft-cited standard for such cases derives from *United States v. W.T. Grant Co.*,[50] where the Court held that the resignation of the individual defendant from the boards of the three corporate defendants did not moot an interlocking directorate charge. The "mere possibility [of recurrent violation] . . . serves to keep the case alive." [51]

The "mere possibility" standard as applied to the repetition of the challenged conduct is qualified by the additional requirement that the recurrence bring the same two parties before the Court, so that both parties have a personal stake in the recurrence. Thus, to the probability of recurrence is added the dimension of the probability that, should recurrence take place, the pres-

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[50] 345 U.S. 629 (1953).

[51] *Id.* at 633. More recently, the standard has been applied to another antitrust case, but one not involving deliberate cessation. The Court held that new government regulations, which induced an export association to disband because they made business uneconomical, did not moot the case against the individual defendants, since there remained certain transactions unaffected by the new regulations which might provide incentive for further concerted activity in the future. United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 202–04 (1968). The *Grant* standard was reworded to apply to cases in which cessation occurred for reasons beyond a defendant's control: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 203.

Suggestions that the mere possibility test be applied only to parties whose abandonment of challenged conduct was voluntary, *see* Powell v. McCormack, 395 U.S. 486, 562 (1969) (dissenting opinion), thus are unfounded. Not only is this contention contrary to *Concentrated Phosphate, see* Kates, *supra* note 13, at 219, but it may lead to an obscure analysis of a defendant's motives. *Cf.* United States v. Uniroyal, Inc., 300 F. Supp. 84, 88 (S.D.N.Y. 1969).

ent challenger will be affected.[52] This requirement brings to the fore an important variable in these cases: whether private activity is attacked by the government, or the legality of governmental activity is contested by a private party. If a governmental body is enforcing public law entrusted to its administration, its future interest in any return to the allegedly unlawful private conduct is assured. On the other hand, if the governmental litigant is the one who engaged in challenged activity, even a certainty that it will "return to [its] old ways" [53] does not assure the Court that the present private challenger will be affected by the future controversy. However, rather than allude to this lack of assurance that the challenger would be affected by a repetition, or indicate how much assurance is necessary, the Court has at times applied a wholly inconsistent test for the probability of recurrence of challenged activity when the state is the plaintiff and when it is the defendant.[54]

Two instances of private attacks against governmental activity, when compared with the mere possibility test applied to private defendants in *Grant*, will expose this disparity. An action against the Postmaster General, who had seized the cables of appellants during World War I but returned them with full compensation, was held moot by the Court,[55] despite the cable companies' allegations of "ground to fear" a repetition and "no certitude" that next time the government would be so generous. The Court held that "these anticipations of possible danger afford no basis for the suggestion that the cases now present any possible subject for judicial action . . . ." [56] More recently, in *Oil Workers Local 8–6 v. Missouri*,[57] the plain possibility that the state could again invoke its seizure act against striking public employees did not keep alive the controversy between the union and

[52] Events other than the termination of challenged activity or inactivity may arrest present effect on the challenging party and make future effect speculative. *See, e.g.*, Golden v. Zwickler, 394 U.S. 103 (1969) (claim that prohibition against anonymous handbilling was unconstitutional was mooted when candidate against whom challenger intended to campaign assumed fourteen year judicial post). *See also* Atherton Mills v. Johnston, 259 U.S. 13 (1922) (minor challenging child labor act "outgrew" act pending appeal). *Atherton Mills* represents a clear case of impossibility of future effect.

[53] United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

[54] The terms "plaintiff" and "defendant" are here used broadly to mean the challenger and defender of conduct. Thus, the government may be enforcing a statute — and in that respect be a challenger — but be forced to defend its activity if the defendant contends that enforcement as to him is unauthorized by the statute or the Constitution.

[55] Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919).

[56] *Id.* at 362. Although the probability of recurrence was indeed small at that time, the language of the Court is inconsistent with a mere possibility test.

[57] 361 U.S. 363, 368–69 (1960).

the state when the particular seizure had been terminated and the labor dispute ended; in a later case, the Court dismissed the possibility of recurrence in *Oil Workers* as "merely . . . speculative." [58]

These cases may be explained by the fact that the Court was not certain that the private litigant challenging governmental action would have a personal stake in the possible repetition of the action in the future. The real concern was the influence of both variables in conjunction; in cases such as *Grant* a possibility of recurrence joins a certainty of "effect" on the enforcing body, whereas in private suits against the government a possibility of recurrence attends only a shifting possibility of future effect on the particular private litigant. The one case in which the Court has expressly applied the *Grant* test to governmental activity supports the likelihood that the Court is, perhaps intuitively, applying this two dimensional standard. That case, *Gray v. Sanders*,[59] was a voter class action to enjoin enforcement of a state statute governing primary elections, in which election officials agreed not to follow the statutory plan for the primary in question. The Court, in holding the case not moot, relied on *Grant*, perhaps because it felt confident that any future return

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[58] Street Employees Div. 1287 v. Missouri, 374 U.S. 74, 78 (1963).

This double standard was stretched to unreal proportions in A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961), where an ICC order was attacked because it was made without a supporting hearing or findings. The Commission promised the Court it would make findings in the future, but insisted it was not required to hold hearings. The Court held the case moot because the new practice of giving findings "may lead the Commission to provide for a hearing — at least under some circumstances." *Id.* at 331. Therefore, a challenge to activity which continues but may possibly stop is moot — surely a perversion of mootness standards. The decision is made even more difficult to justify in view of the alleged history of evasion of review by the ICC. *Id.* at 330 n.13. The Court thus evaded the "possibly difficult questions whether appellants' challenge to the Commission's 'continuing practice' gives rise to an actual controversy." *Id.* at 331.

[59] 372 U.S. 368 (1963). *See also* Moore v. Ogilvie, 394 U.S. 814 (1969). *Gray* alone cited *Grant*, but both cases were based on the fact that the statutes in question remained in force possibly to govern future elections. *Moore* may be explained by the Court's concern over evasion of review. *See* pp. 1686–87 *infra*.

A third case, Fortson v. Toombs, 379 U.S. 621 (1965) (voter class action to enjoin proposal of new state constitution by malapportioned legislature), appears to proceed on the same theory. Despite the fact that the legislature originally enjoined had been altered pursuant to an intervening election, and despite the fact that the voter-appellees urged that the case was thereby mooted, the Court did not hold the case moot, but remanded to the district court to reconsider the continuing need for the injunction that had been granted. Concurring, Mr. Justice Harlan noted that "[a]ny alleged 'speculativeness' as to whether a new state constitution may be proposed to the electorate before a 'constitutional' legislature comes into being, goes not to mootness but only to the question whether the District Court . . . should have granted any relief on this score." *Id.* at 624–25.

to the statutory plan would surely affect the voters. In sum, private personal stake may be interpreted as the product of two probabilities — of recurrence and of effect — and the possibility of the former makes for sufficient stake only if there is a certainty of the latter.[60]

(*c*) *Disputes "Capable of Repetition, Yet Evading Review."* — This frequently quoted phrase was coined in *Southern Pacific Terminal Co. v. ICC*,[61] a case involving the legality of a short-term ICC order that had expired before the case reached the Court. After noting possible adverse effects on the plaintiffs from the order, but not deciding on that ground, the Court proceeded to the "broader consideration" that [62]

> [t]he questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.

The Court has never elaborated the significance of this concept. A possibility of repetition and evasion of review are the two concerns underlying the mootness standard in recurrence cases like *Grant*. If *Southern Pacific* has any independent significance, it can be only as a special type of recurrence case. The importance of *Southern Pacific* lies in two facts. It was a suit by private persons challenging governmental action. And the language of the Court emphasized the importance to all carriers of Supreme Court review of such orders, rather than the probability that the carriers before it would be affected by future short-term orders. Thus, the case may be authority for relaxation of the two-pronged test in recurrence cases by giving private plaintiffs sufficient stake to challenge governmental activity that may recur without requiring proof of a certainty that they will then be affected, so long as the activity is likely otherwise to evade Supreme Court review.

Southern Pacific has not, however, been so liberally construed throughout its almost sixty year history. It has at times been

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[60] Mr. Justice Stewart, dissenting in Powell v. McCormack, 395 U.S. 486 (1969), characterized the test in recurrence cases as reflecting special considerations involved in law enforcement against private individuals. *Id.* at 562 n.5. He admitted, however, that his position does not explain *Gray*. Furthermore, it is as important that public law be enforced against the government as it is that it be enforced against the governed. *See* p. 1691 *infra*.

[61] 219 U.S. 498 (1911).

[62] *Id.* at 515.

cited to support findings that governmental law enforcement suits were not moot.[63] When it has been used to aid private plaintiffs challenging governmental action, the Court has been scrupulous to point out the high probability of recurrence and the near certainty that the particular plaintiff would then be affected.[64] This cautious application of *Southern Pacific* was perhaps overturned in *Sibron v. New York* [65] and *Moore v. Ogilvie*.[66] In *Sibron*, the Court relied indirectly [67] on *Southern Pacific* in holding, in the alternative,[68] that the fact that the petitioner had served his six-month sentence before the case reached the Court did not moot his case, because the state otherwise could cut off final federal review in "whole classes of such cases" [69] by imposing short sentences and denying bail pending appeal. The Court's interest was in the remedy of all people against "repetitions of unconstitutional conduct" at this level of " 'low visibility' in the criminal process." [70] There was no suggestion that unreasonable police searches, the challenged activity, would certainly or even probably affect Sibron again. *Moore* involved a claim brought by independent candidates for presidential elector against an Illinois statute governing the method of obtaining petition signatures required to secure a position on the state ballot in the 1968 national election. The election had passed, but the Court held the case not moot because the problem was " 'capable of repetition, yet evading review,' . . . . The need for its resolution thus reflects a continuing controversy in the federal-state area . . . ." [71] "Controversy" here was used in a generalized sense, as the Court did not inquire into the probability that the appellants would again seek candidacy and thus be affected by future enforcement of the statute.[72] Nor did the appellants allege such an

[63] *See, e.g.*, FTC v. Goodyear Tire & Rubber Co., 304 U.S. 257, 260 (1938).

[64] *See, e.g.*, Carroll v. President & Comm'rs, 393 U.S. 175, 178–79 (1968); Ford Motor Co. v. United States, 335 U.S. 303, 313 (1948); Leonard & Leonard v. Earle, 279 U.S. 392, 398 (1929).

Furthermore, there are cases in which the evasion of review theory could have been applied, but was not. *See* Street Employees Div. 998 v. Wisconsin Employment Relations Bd., 340 U.S. 416 (1951) (one year arbitration award authorized by challenged statute); *cf.* Hall v. Beals, 396 U.S. 45 (1969) (short-term residency requirement).

[65] 392 U.S. 40 (1968) (alternative holding).

[66] 394 U.S. 814 (1969).

[67] The Court relied on language in St. Pierre v. United States, 319 U.S. 41, 43 (1943), that distinguished *Southern Pacific*.

[68] The Court also noted the possibility of future adverse effects on the appellant. *See* p. 1680 *supra*.

[69] 392 U.S. at 53.

[70] *Id.* at 52–53.

[71] 394 U.S. at 816.

[72] In later distinguishing *Moore*, however, the Court noted the possibility that

intention. Indeed, in their brief they baldly advanced the "compelling public interest" in their cause.[73] *Sibron* and *Moore* thus establish the evasion of review concept as a means of facilitating review of governmental action which is otherwise inherently elusive of review because of the time required for the judicial machinery to produce a final resolution. In neither case did the Court require a certainty that the particular private litigant would be affected by a recurrence of the governmental action, although in both cases such effect was conceivable.

The Court thus has evolved several approaches for determining whether the adverseness and personal stake thought essential to full litigation remains intact despite intervening events. The structure and implications of these approaches are as yet unsettled. Personal stake may rest on a mere possibility of adverse governmental action premised on an expired court order, or on a mere possibility that challenged action will recur, so long as it is certain that the challenging party will have standing to sue on recurrence. If it is likely that the activity inherently evades review, certainty of effect on recurrence is evidently not required, but the Court in such cases has not specifically rejected the requirement of some interest on the part of the challenger in a recurrence.

II. A Proposal

Analysis of mootness law leads to the conclusion that it is unnecessarily confused and restrictive in light of justiciability philosophy.[74] The mootness doctrine is presently in a state of

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Moore could be adversely affected by the statute in future national elections. Hall v. Beals, 396 U.S. 45, 49 (1969).

[73] Brief of Plaintiff-Appellants in Opposition to Motion to Dismiss at 4, Moore v. Ogilvie, 394 U.S. 814 (1969). *Southern Pacific* is often cited by lower federal courts, as it is in this brief, as establishing a "public interest exception" to mootness, based on the importance to the public of the issues involved without regard to evasion of review. *See, e.g.*, Friend v. United States, 388 F.2d 579, 581 & n.1 (D.C. Cir. 1967). There is, in fact, language in *Southern Pacific* referring to the "public character" of the interests involved. 219 U.S. at 516. At other times, however, the public interest that creates an "exception" is said to be in obtaining a "final decision," thus suggesting the interest in full appellate review protected by the evasion concept of *Southern Pacific*. *See* Drs. Hill & Thomas Co. v. United States, 392 F.2d 204, 205 (6th Cir. 1968). The public interest exception as generally understood is based on the importance of the questions raised by the litigation. *See* note 92 *infra*.

[74] The abolition of the mootness doctrine has recently been advocated. *See* Singer, *Justiciability and Recent Supreme Court Cases*, 21 Ala. L. Rev. 229, 262, 268 (1968); Note, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 Colum. L. Rev. 867, 875, 879 (1965). *But see* 66 Colum. L. Rev. 1364, 1370 (1966).

flux as it frees itself from the effective order rationale of its common law heritage. Two policies should guide the development of mootness into a more functional concept: the first seeks to preserve the quality of review, and the second to guarantee the opportunity for review.

The chief purpose of mootness on appeal is to assure that the adversary system, once set in operation, remains properly fueled. Judicial recognition of the personal stake supplied by the possibility of adverse effect is an example of liberalization of mootness law.[75] Such an approach serves in certain cases to remove obstacles, unwarranted by the need for interested parties, to private challenges against unlawful governmental action and its possible ramifications. Two broad approaches to recurrence cases may be advanced to achieve more widely the same beneficial objective.

The first approach would be to recognize the stake of a private appellant who presses his appeal challenging governmental action after events have terminated any present effect on him and have thus raised the possibility that the particular appellant will not be affected by a repetition of the activity in issue. Such an appeal should assure the Court, without the necessity of inquiry into other indicia of interest, that the appellant perceives a stake in the resolution of the issues. His stake may be based either upon his own appraisal as to the probability that he will be affected by a recurrence or future adverse effects, or upon an ideological interest. If the appeal is not motivated by an appreciation of potential personal effect, the appellant displays the exceptional interest of pursuing litigation without prospect of personal gain. This interest has been recognized by Professor Jaffe in his argument that "ideological" plaintiffs, who challenge governmental action merely as concerned citizens, should be accorded standing.[76] The parallel between such appellants who press their actions after supposedly mooting events and ideological plaintiffs is not complete. The only litigants accorded standing to challenge on appeal allegedly improper governmental activity would be those who at some recent time have been personally affected by it. These appellants have a personal connection with relevant historical facts and present a complete record from the decision in the trial court, thus providing a concrete framework for adjudica-

[75] The adverse effects theory in criminal cases could, consistently with the personal stake foundation of mootness, be broadened further to include nonlegal consequences of conviction, such as loss of reputation. Of course, this expansion would entail the end of criminal mootness. *See The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 300 (1968).

[76] Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

tion. They are also experienced litigators of the issues.[77] Furthermore, recognition of this ideological interest reflects the realities of much present-day litigation challenging the government. Group interests — advanced on behalf of a class or by an organization, such as the NAACP or ACLU, with more broadly conceived interests than those of the individual plaintiff — are often the driving force in such actions.[78] Courts holding that the mooting out of the representative of a class in a class action does not bar his litigating the issues, despite his lack of remaining personal stake, may presage such a revolution in mootness.[79]

Whether the appeal results from an individual assessment of self-interest derived from perceived potential effect or results from an ideological interest of a "once-burnt" appellant, judicial deference to the interest demonstrated by the bringing of an appeal may substitute for a court's further investigation into the possibility of effect on the party. Such deference involves no greater risk to the adverseness principle than the Court is already assuming under the *Grant* standard when the private defendant is appellee. The mere possibility that the private appellee will again engage in the challenged conduct affords no more and often less assurance of his "fighting spirit" than that afforded by the affirmative act of appeal under circumstances raising the possibility of mootness. And the government as appellee will have a continuing interest in upholding the validity of its actions, just as it does when it challenges private conduct.

When the Court cannot rely on a private appeal as an indication of sufficient interest in the litigation,[80] a second approach, based on a reformulation of the conventional recurrence test for

[77] If a change of law satisfies the contentions of such an appellant, thus terminating the issues as he raised them, his appeal should be moot, even though there are other contentions that could be advanced for those who were similarly situated. *See* pp. 1678–79 *supra*.

[78] *Cf.* Henkin, *Foreword: On Drawing Lines, The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 74 (1968).

[79] *See* Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967). In Hall v. Beals, 396 U.S. 45, 48, 49 (1969), the Court held a class action moot after a change of law because the individual plaintiffs would not have had standing to bring the action originally under the new law. The Court found it determinative that these plaintiffs thus never had been members of a class adversely affected by the new law — a distinction limited, however, to changes of law.

[80] This may be the case when the possibility of mootness arises after the private litigant takes his appeal or when the private litigant is victorious below. If a case allegedly becomes moot after a private litigant has appealed, it is possible that further affirmative actions may be taken and thus give some assurance as to the appellant's continuing interest. But in many cases, the additional effort required may be only marginal, so that difficult questions would arise as to the degree of vigor with which the appeal is pursued. If the private litigant was

probabilities of repetition and effect, is necessary. Such disputes should be justiciable if there is a possibility that the challenged activity will recur and if it is possible that the challenging party will be affected should recurrence take place, since the proper inquiry is whether each party possesses sufficient interest to present a well-argued case — a determination not requiring that they will necessarily be brought together in a future suit.[81] The same encompassing standard for recurrence of activity should be applied to both governmental and private activity. As yet, a mere possibility test has been applied to a governmental body only when the challenged activity, enforcement of a statute on its books, was quite high.[82] The lower federal courts, however, have already applied the *Grant* test to more speculative governmental conduct,[83] such as prison discipline and police raids, and this practice should be followed.[84]

This reformulation goes beyond present law in that it requires only a possibility of effect on the challenger should a recurrence

successful below and the government appeals, again there is no clearly affirmative act to assure the party's interest under circumstances lacking any present effect upon him. Instead, the degree of vigor of the appellee's response is less easily evaluated.

[81] The requisite possibility should be quite low, in line with the low probability of future adverse effects required in *Sibron*. However, mere physical possibility should alone not be sufficient. Thus, repeal of a law should foreclose inquiry into whether the governmental body will again enforce it, save in perhaps exceptional circumstances. *See* Anderson v. City of Albany, 321 F.2d 649, 657 (5th Cir. 1963) (case not mooted by repeal of segregation ordinances). Similarly, the possibility that the challengers will be affected on recurrence should be more than merely physically possible. Hall v. Beals, 396 U.S. 45, 49 (1969), where plaintiffs would have to move out of Colorado, and then move back in within two months before another presidential election, presents an almost negligible possibility.

[82] The likelihood that the test in such cases would be restricted in terms of probability is implied in Hall v. Beals, 396 U.S. 45, 49 (1969). *Hall* explained the not-moot finding in Moore v. Ogilvie, 394 U.S. 814 (1969), in part on the ground that there the state had "adhered for over 30 years to the same electoral policy with no indication of change," presumably alluding to the future probability that the statute would be in force and applied. *But see* Fortson v. Toombs, 379 U.S. 621 (1965) (per curiam) (possibility test apparently applied to legislative discretion).

[83] *See* Jackson v. Bishop, 404 F.2d 571, 575–76 n.5 (8th Cir. 1968) (prison discipline); Lankford v. Gelston, 364 F.2d 197, 202–03 (4th Cir. 1966) (police raid). *See also* City of Montgomery v. Gilmore, 277 F.2d 364, 368 (5th Cir. 1960) (operation of racially segregated parks).

[84] The lower federal courts have also been less restrictive in their application of mootness to cases where events other than the termination of challenged activity abated a present effect on the challenging party. The possibility that the challenger will in the future be affected by the challenged conduct has been held sufficient to sustain the controversy. *Compare* Pierce v. La Vallee, 293 F.2d 233, 234 (2d Cir. 1961) (possibility of transfer back to prison that engages in challenged conduct), *with* Golden v. Zwickler, 394 U.S. 103 (1969) (claim that prohibition against anonymous handbilling was unconstitutional was mooted when candidate against whom challenger intended to campaign assumed fourteen year judicial post).

take place, rather than a certainty. But the Court has already sustained this apparent dilution of personal stake requirements in recurrence cases having the additional but unarticulated factor of inherent evasion of review, without displaying concern over the inadequacy of personal stake.[85] Thus, the dilution cannot be said to result in an unacceptable level of adverseness. Furthermore, present law, by requiring a certainty of effect should recurrence take place, operates to favor governmental challenges to private conduct over private challenges to governmental conduct where such certainty of effect can rarely be shown. This result has been justified by the suggested existence of unexplained special "considerations of public enforcement of a statutory or regulatory scheme." [86] But the policy of vindicating beneficial public law is furthered by private suits challenging the bases and application of the law as well as by law enforcement itself. There should be equal concern for the manner in which the government applies the law as well as for its ability to effect enforcement.[87]

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[85] *See* Moore v. Ogilvie, 394 U.S. 814 (1969); Hall v. Beals, 396 U.S. 45, 49 (1969) (distinguishing *Moore* on basis of recurrence but not mentioning inherent evasion present in both election cases).

[86] Powell v. McCormack, 395 U.S. 486, 562–63 n.5 (1969) (Stewart, J., dissenting).

[87] *See* Jaffe, *supra* note 76, at 1044–46; *cf.* Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1282–83 (1961).

The necessity, for example, of frustrating repeated attempts by governmental bodies to elude judicial review is well illustrated in the welfare law area. Some welfare agencies in the past have made a practice of terminating benefits without a prior hearing and, when faced with a suit by a recipient claiming denial of due process, granting that recipient a hearing and retroactive benefits, thus mooting the case. *See* Jackson v. Department of Public Welfare, 2 CCH POV. L. REP. ¶ 10,170 (S.D. Fla. April 23, 1969); Sprayberry v. Dulaney, 2 CCH POV. L. REP. ¶ 10,101 (N.D. Ga. April 17, 1968). The potential challengers of unlawful terminations, the recipients, are not a cohesive group, and individual recipients are in no position to resist the agency's offer of reinstatement of benefits as "settlement." Such cases could usually be held not moot on the grounds that the agency might again terminate benefits without a hearing and that the plaintiff is a member of a class of persons who could be affected by this practice in the future.

The Supreme Court has recently held that terminations of public assistance benefits without prior evidentiary hearings violate the due process clause. Goldberg v. Kelly, 38 U.S.L.W. 4223 (U.S. March 23, 1970). The Court noted that during the course of the litigation, "most, though not all, of the plaintiffs either received a 'fair hearing' . . . or were restored to the rolls . . . ." *Id.* at 4223 n.2. But it said that the "underlying questions of eligibility" that resulted in litigation had not been resolved. Thus, the Court apparently avoided mootness by finding continuing, unmooted issues, though it did not discuss the question of continuing adverseness over the issues on the part of the plaintiffs. It seems likely that the Court was influenced by the evasion of the agency, by the fact that "not all" plaintiffs had since been given a hearing or restored to the rolls, and by the possibility that the agency might later terminate payments against these plaintiffs on the basis of the same issues that would be left unresolved by a holding of moot-

Therefore, since adverseness and personal stake standards are not violated so as to undermine the workings of the process, the Court should not adhere to an unnecessarily restrictive standard which cuts off review of important cases attacking the legitimacy of governmental activity. Furthermore, there is good reason to apply a less demanding standard of personal stake and adverseness to parties on appeal than that which litigants must meet at trial. Much of the issue definition and all of the fact marshalling, the chief functions of the adversary system, are accomplished at the trial level. The burden on all participants, including the court system, is less on appeal than at trial, and an appellate decision may obviate the need for future litigation which would have to proceed through the trial stage once more. Finally, the interest in appellate review generally, especially as a check on abuse at the trial level, demands facilitation of appeal.

The second policy that should guide the application of mootness law is in the nature of a limitation: mootness should never perpetually frustrate "the vital importance of keeping open avenues of judicial review."[88] If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. This policy overrides the first policy of ensuring the effective functioning of the adversary system, so demonstration of the litigants' personal stake should not be required. The Court must acknowledge that the real choice is not between taking or not taking risks with the quality of the judicial process, but between securing or not securing the values of appellate review — stability, uniformity, and objectivity.[89] The Court should be free to strike this balance in favor of review. The risk in practice, however, should be slight, since many cases of inherent evasion involve a private appellant whose appeal indicates sufficient interest in the litigation and a governmental appellee whose interest is assured.[90]

Mootness analysis should be separated from the distinct question of whether a court should in its equitable discretion grant injunctive or declaratory relief — a broader question taking into

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ness. Furthermore, in *Goldberg* the interest of the agency is assured, and the plaintiffs in effect may represent a class of interested persons, Kelly v. Wyman, 294 F. Supp. 893, 908 (S.D.N.Y. 1968), *aff'd sub nom.* Goldberg v. Kelly, *supra*. *See* p. 1689 *supra*.

[88] Sibron v. New York, 392 U.S. 40, 52 (1968).

[89] *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 550–54 (1969). *See also* Hall v. Beals, 396 U.S. 45, 51–52 (1969) (Marshall, J., dissenting).

[90] *See* pp. 1685–87 *supra*.

account such factors as the degree of the probability of future impact of the issues and whether they are of general public significance.[91] The office of mootness is not ferreting out which cases are not important enough or are too controversial for judicial decision. Conversely, the most pressing doctrinal anomaly in mootness law is the so-called "public interest exception," by which courts reach the merits of cases admittedly moot but involving issues of public importance.[92] The tension between the purpose of mootness in assuring the integrity of the judicial process and the desire to decide issues of public importance cannot be dispelled entirely unless one assumes that the fact that an issue has broad significance of itself assures that it will be well litigated. But this proposition ignores the necessity of a presentation of issues by interested parties upon which a determination can be made by a court. Rather than trading off the needs of the judicial process for the desired judicial resolution of important issues, a more appropriate policy would be to require more assurance about the workings of the process, if such assurance is potentially available, when the issues have broader ramifications.

Nevertheless, the conflict between the mootness doctrine and the desirability of deciding issues of public importance can be reduced consistently with the purpose of mootness. This proposal aims to restrict the sphere of relevance of mootness to the performance of its function of assuring well litigated cases, thus freeing judicial discretion to weigh probabilities and assess the importance of the issues[93] in determining which issues require

[91] The separation of the questions of mootness and grant of relief is exemplified in United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953), in which the Court held the case not moot, but affirmed the district court's denial of injunction based on its finding that there was no need for relief.

[92] *See, e.g.*, Diamond, *supra* note 13, at 138; Note, *supra* note 5, at 787–93. It is often asserted that although state courts may decide the merits of cases concededly moot because of the interest of their citizenry in a resolution of the legal issues raised, federal courts are constitutionally prohibited from doing so. Lower federal courts, however, have seemingly accepted a public interest exception to mootness. *See, e.g.*, Friend v. United States, 388 F.2d 579, 581 (D.C. Cir. 1967) (revocation of conditional release from mental hospital); Dyer v. SEC, 266 F.2d 33, 47 (8th Cir.), *cert. denied*, 361 U.S. 835 (1959) (clarification of securities law); Boggess v. Berry Corp., 233 F.2d 389, 391 (9th Cir. 1956) (dictum) (liquor licensing). *Contra*, Campbell Soup Co. v. Martin, 202 F.2d 398, 399 (3d Cir. 1953). The Supreme Court has asserted the relevance of public interest in the mootness determination, *see, e.g.*, United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); McGrain v. Daugherty, 273 U.S. 135, 182 (1927); Parker v. Ellis, 362 U.S. 574, 594 (1960) (Warren, C.J., dissenting), but it has specifically rejected the suggestion that it decide a moot question on the sole ground of public importance, *see* Street Employees Div. 998 v. Wisconsin Employment Relations Bd., 340 U.S. 416, 418 (1951).

[93] *See, e.g.*, Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112–13

judicial resolution.[94] In that arena the competing philosophies of restraint and activism may assert their influence. Much that is now decided as a matter of mootness law could be lowered to the level of a "rule of judicial convenience." [95] The mootness doctrine would retain significance as a restraint on deciding issues only when the preconditions to the proper functioning of the process can be but are not assured. Once these preconditions are assured, mootness would not influence the determination of whether judicial resolution is unnecessary or for other reasons unwise.

(1962). *See also* Taggart v. Weinacker's, Inc., 90 S. Ct. 876 (1970) (dismissal of certiorari as improvidently granted because case, although not necessarily moot, displayed little likelihood of recurrence).

[94] *See* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 306 (1941).

[95] Benton v. Maryland, 395 U.S. 784, 791 (1969). The Court had on occasions held that the reversal of one of two concurrent sentences would be in effect the determination of a moot point, because it would not affect the terms of the prisoner's confinement. *Benton*, however, took the concurrent sentence doctrine from the ambit of justiciability, reducing it from a jurisdictional rule to a guide to appellate discretion as to the necessity of deciding the merits.