Collateral Order - Knee-Deep in Confusion: Its Continuing Saga -

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COLLATERAL ORDER – KNEE-DEEP IN CONFUSION: 
ITS CONTINUING SAGA - SELL V. UNITED STATES, 

Under the final judgment rule, a federal defendant normally must 
wait until a final judgment, such as a judgment of guilt, to obtain appellate 
jurisdiction.\(^1\) Congress, however, enacted 28 U.S.C. § 1291 ("§ 1291"),\(^2\) 
and the United States Supreme Court interpreted the statute to create the 
collateral order doctrine as an exception to the final judgment rule.\(^3\) Thus, 
under the doctrine, a defendant may appeal a decision that “does not neces-
sarily mean the last order possible to be made in a case.”\(^4\) In Sell v. United 
States,\(^5\) the Supreme Court considered whether a defendant can appeal a 
pre-trial order that requires him to receive medications so that he can stand 
fit for the trial.\(^6\) Over Justice Scalia’s strong dissent, the Court ruled that 
the pre-trial order qualified as an exception under §1291, permitting the 
defendant to appeal.\(^7\)

In Sell, the issue over the application of the collateral order doctrine 
arose when Charles Sell, a defendant and former practicing dentist, refused 
to take antipsychotic medication for his mental illness while facing trial for 
fraud and attempted murder.\(^8\) A federal magistrate judge (“Magistrate”) 
initially found Sell, who had a long history of mental illness, competent to 
stand trial but later revoked bail because Sell’s condition worsened.\(^9\) Sell

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\(^1\) See Catlin v. United States, 324 U.S. 229, 233 (1945) (explaining final judgment 
rule that federal appellate jurisdiction depends on existence of final judgment). The Court 
defined a final judgment as a “decision . . . that ends the litigation on the merits and leaves 
nothing for the court to do but execute the judgment.” Id.

\(^2\) 28 U.S.C. § 1291 provides, in pertinent parts: “The courts of appeals shall have 
jurisdiction of appeals from all final decisions of the district courts . . . except where a direct 
review may be had in the Supreme Court.” See infra notes 23-25 and accompanying texts 
(stating reasons for creating collateral order doctrine).

\(^3\) See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949) (explain-
ing Supreme Court’s genesis of collateral order doctrine).

\(^4\) Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) (defining meaning 
of “final order” under § 1291).


\(^6\) See id. at 2181.

\(^7\) See id. at 2183 (indicating holding of case).

\(^8\) See id. at 2179 (describing events triggering defendant’s attempt for application of 
collateral order doctrine). Sell stood trial for numerous charges including mail fraud, Medi-
caid fraud, money laundering, and attempt to murder a FBI agent and a former employee. 
See id.

\(^9\) See Sell, 123 S. Ct. at 2179.
subsequently asked the Magistrate to reconsider his competence to stand trial.

After holding a hearing, the Magistrate had Sell examined at a United Stated Medical Center for Federal Prisoners, found him mentally incompetent to stand trial, and ordered him hospitalized to determine whether he could recover the capacity to stand trial. While in the hospital, Sell refused to take antipsychotic medication as prescribed by the staff and ultimately challenged the prescribed medication in court. Upholding the recommended medication, the Magistrate authorized forced administration of antipsychotic drugs.

Sell appealed and the District Court issued a pre-trial order staying the Magistrate's ruling of forced medication. The Eighth Circuit affirmed, assuming jurisdiction over Sell's appeal without discussing the issue of the collateral order doctrine for the district court's pre-trial order. The Supreme Court, however, vacated the appellate decision and remanded the case. The Court first held that the Eighth Circuit properly exercised jurisdiction on hearing Sell's appeal and reversed the order for forced administration of antipsychotic drugs.

In Cohen v. Beneficial Industrial Loan Corp., the Supreme Court first articulated the collateral order doctrine of federal appellate jurisdiction. Interpreting § 1291, the Cohen Court developed a three-prong test to determine whether a litigant may appeal a final order as a "collateral order" when it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." Since Cohen, the Court has attempted to apply the doctrine "with the utmost strictness" and confined it to very narrow circumstances. Further...
thermore, the Supreme Court has concluded that Congress enacted § 1291 to implement a policy that favored deferring appeals until after conclusion of the trial over continuing costly and potentially unnecessary litigation.\textsuperscript{22}

While the final judgment rule promotes efficiency and prevents "piecemeal adjudication," the Court has created the exception to the final judgment rule to remedy trial court errors that must remain uncorrected until after the litigation.\textsuperscript{23} If uncorrected, the errors would victimize the party who has to bear the unnecessary cost of litigation before having the opportunity to appeal.\textsuperscript{24} Furthermore, erroneous decisions prior to the entry of final judgment might, as a practical matter, inflict harm that is irreparable or incurable after final judgment.\textsuperscript{25}

In deciding whether a pre-trial order is collateral, the Court attempted to "eschew a case-by-case approach."\textsuperscript{26} Some decisions, however, suggest the opposite.\textsuperscript{27} Crafting a number of inventive permutations to the Cohen three-prong test, these decisions tried to balance competing interests, inconsistently applying the doctrine and utilizing an ad hoc case-by-case approach.\textsuperscript{28} In Local No. 438, Construction & General Laborers'
Union v. Curry, the Supreme Court permitted an appeal because denying it would have undermined national labor policy. Although the appeal would have been moot after the conclusion of the case, as required by Cohen's third prong, the Court allowed the appeal because it favored the national labor policy over a strict adherence to Cohen.

In Mitchell v. Forsyth, the Court's treatment of the second prong—the "separate from the merits" requirement—proved most controversial. In Mitchell, the Court held that a denial of a government official's defense of qualified immunity is appealable under the collateral order doctrine. To determine whether an official is entitled to immunity from civil charges, the district court must examine whether the plaintiff established his right at the time of the official's actions and whether a reasonable person would have realized that he was violating that right. This inquiry is inherently related to the merits of the action, requiring an analysis of the particular circumstances to determine the applicability of the right and whether it was clearly established. Nevertheless, the Court found that the second prong was satisfied because the issue of immunity is "conceptually distinct" from the merits of the action.

In short, the Court's application of the collateral order doctrine has a checkered history, replete with inconsistency and confusion. One Justice complained that "our finality jurisprudence is solely in need of a limiting principle." The judges of the federal circuit echoed the criticism, charging that inconsistent application of the collateral order doctrine has

30 "See id. at 550 (pointing out Supreme Court's reliance on other factors instead of Cohen test).
31 See id. (demonstrating Court's balancing act).
33 See Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Court, 58 GEO. WASH. L. REV. 1165, 1188 (pointing out "[t]he Mitchell opinion has been persuasively criticized"); see also Anderson, supra note 28, at 570 (commenting "[t]he Mitchell Court eviscerated the separability requirement . . .").
34 See Mitchell, 471 U.S. at 530.
35 See id. at 528; Solimine, supra note 33, at 1187-88. Professor Solimine asserted that "qualified immunity should be granted as long as the defendant's actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id.
36 See Solimine, supra note 33, at 1187-88.
37 See Mitchell, 472 U.S. at 527-28. The Court has yet to define adequately what "conceptually distinct" from the merits means. See generally id. See also Anderson, supra note 28, at 568 (opining Mitchell decision reached "its highwater mark" in "expansion of the collateral order doctrine").
38 See Timothy P. Glynn, Discontent and Indiscretion: Discretionary Review of Interlocutory Orders, 77 NOTRE DAME L. REV. 175, 184 (2001) (commenting that "[collateral order] doctrine has had a troubled history").
caused a "litigation explosion," fostered "regrettable expense and delay," and led judges into a "maze" of confused and contradictory doctrinal minutiae.

In Sell, the Court determined that the District Court's order of forced medication of the petitioner fell within the collateral order exception. Applying the three-prong test, the majority held that the district court's order "conclusively determine[d]" Sell's legal right to avoid forced medication, "resolve[d] ... issue[s] of clear constitutional importance" for involuntary medical treatment that is distinct from Sell's culpability, and was "effectively unreviewable on appeal from a final judgment" on the charges. Furthermore, the majority stressed that the Eighth Circuit's jurisdiction over Sell's appeal was particularly appropriate because the issues "involve[d] the severity of the intrusion and corresponding importance of the constitutional issue."

Dissenting, Justice Scalia argued that both the Supreme Court and the Eighth Circuit lacked jurisdiction over Sell's appeal. Justice Scalia rejected the majority's determination that a post-trial appeal of Sell's medication would "come too late." Rather, like "any substantive-due-process challenge," he argued, Sell's appeal "must wait until after conviction and sentence have been imposed," even if an ordinary appeal would come too late for the "type of remedy [Sell] would prefer."

Therefore, as Sell's claim was based on a "substantive-due-process challenge," Justice Scalia argued, Sell must wait until the end of the trial because precedent rejected such a rationale for granting jurisdiction. Justice Scalia further warned that hearing Sell's appeal would "effect a breathtaking expansion of appellate jurisdiction over interlocutory orders." He also predicted that the majority's ruling would introduce a dangerous precedent because it would empower a defendant to delay the

40 See In re United States, 733 F.2d 10, 14 (2d Cir. 1984).
41 See Manhattan Beach Police Officers Ass'n v. Manhattan Beach, 881 F.2d 816, 817 (9th Cir. 1989).
43 See Sell, 123 S. Ct. at 2177.
44 See id.
45 See id.
46 See id. at 2188 (disagreeing with majority on issue of appellate jurisdiction).
47 See id. at 2189.
48 See Sell, 123 S. Ct. at 2189.
50 See id. at 2190.
Justice Scalia was wary of defendants frivolously challenging pre-trial orders, such as orders objecting to certain courtroom attire.\textsuperscript{52} Unfortunately, the Supreme Court's decision in \textit{Sell} did not dispel the confusion over the application of the collateral order doctrine.\textsuperscript{53} The confusion still persists because the Court relied on \textit{Cohen}, but abandoned strict adherence to its three-prong test for the collateral order exception.\textsuperscript{54} Instead, the Court used a form of heightened constitutional scrutiny — weighing "the severity of governmental intrusion and corresponding importance of the constitutional issue" — and applied it to distinguish the petitioner's appeal from Justice Scalia's examples.\textsuperscript{55} Writing for the majority, Justice Breyer appeared to concede that Justice Scalia's examples may satisfy \textit{Cohen}'s three-prong test.\textsuperscript{56} Justice Breyer, however, distinguished forced medication of antipsychotic medication from Justice Scalia's examples because the former "involve[d] the severity of the intrusion and corresponding importance of the constitutional issue" and the latter did not.\textsuperscript{57} Like \textit{Curry} and \textit{Mitchell}, the logic of the \textit{Sell} decision evoked a balancing approach to appealability under the collateral order doctrine.\textsuperscript{58} Without the "severity of the intrusion and corresponding importance of the constitutional issue" requirement, more liberty interests may qualify as a collateral order.\textsuperscript{59} As such, if the Court were to permit the run-of-the-mill liberty interests as grounds for appeal under § 1291, the demands for ap-
peals would waste judicial economy and cause delay.\textsuperscript{60} As in the precedent cases, this Court tweaked the \textit{Cohen} three-prong test to balance appealability.\textsuperscript{61}

In \textit{Sell} the Court added the heightened constitutional scrutiny to fend off the frivolous claims for appeals that would otherwise meet the \textit{Cohen} three-prong test.\textsuperscript{62} This balancing act, however, cannot escape criticism.\textsuperscript{63} Adding this new heightened constitutional scrutiny – "the severity of the intrusion and corresponding importance of the constitutional issue" - compounded the impression that the Court's standard in collateral order cases is still an ad-hoc, individualized, case-by-case determination.\textsuperscript{64}

The confusion, however, does not end there.\textsuperscript{65} The Court distinguished forced medication from Justice Scalia's examples but failed to define a clear contour of what liberty interests "involve the severity of the intrusion and corresponding importance of the constitutional issue."\textsuperscript{66} Justice Breyer's analysis suggested that unwanted antipsychotic medication violates one's liberty interest because it "operate[s] on the individual's thought process, and this implicate[s] ... issues of personhood and individuality."\textsuperscript{67} Unlike nonmedicinal orders such as challenges to courtroom attire, forced administration of anti-psychotic medication alters the chemical balance in a patient's brain and dictates one's identity, behavior, and relationship to his or her surroundings.\textsuperscript{68} Such profound intrusion over

\textsuperscript{60} See supra note 45 and 52 and accompanying text (forecasting litigation explosion without "severity of the intrusion and corresponding importance of the constitutional issue" requirement).

\textsuperscript{61} See supra notes 30-37 and accompanying text (comparing \textit{Sell} to \textit{Curry} and \textit{Mitchell}).

\textsuperscript{62} See supra note 25 and accompanying text (explaining reason behind balancing approach in \textit{Sell}).

\textsuperscript{63} See supra notes 38-42 and accompanying text (pointing out problems with balancing approach).

\textsuperscript{64} See supra notes 36-40 and accompanying text (arguing \textit{Sell} decision did not dispel confusion).

\textsuperscript{65} See infra notes 66-68 and accompanying text (commenting decision in \textit{Sell} adds to current confusion in application of collateral order doctrine).

\textsuperscript{66} See supra notes 43, 50 and accompanying text (asserting need for Court's further characterization of its standard).

\textsuperscript{67} See Brief for Amicus Curiae American Psychological Association, \textit{Sell}, 123 S.Ct. 2174 (2003) (No. 02-5664), available in Lexis, 2002 U.S. Briefs 5664, *8 (comparing antipsychotic drugs with other medicines such as vaccinations or sedatives).

\textsuperscript{68} See Michael H. Shapiro, \textit{Constitutional Adjudication and Standards of Review Under Pressure from Biological Technologies}, 11 \textit{HEALTH MATRIX} 351, 440 (2001) (stating "[M]ental integrity may implicate a particularly strong interest: the mind, after all, is a – probably the – constitutive component of personal identity, more so than our physical constitutions"); see also David M. Siegal et al, \textit{Old Law Meets New Medicine: Revisiting Involuntary Psychotropic Medication of the Criminal Defendant}, 2001 WIS. L. REV. 307, 313 (asserting "[p]sychotropic drugs are powerful chemicals; the removal of neurotic or psychotic symptoms can be accomplished by a lessening of normal anxiety, and can permit a 'don't care' mental status rather than responses based on self-protection").
one’s cognitive process and personhood violates one’s liberty interest from the “right to be let alone . . . giving government the power to control men’s minds.”

Therefore, it appears that Sell’s case is on one end of the spectrum of the severity of the intrusion and corresponding importance of the constitutional issue, and perhaps Justice Scalia’s examples are at the opposite end. The problem, however, rests in the middle of this spectrum because the Court did not precisely establish a standard for what constitutes a severe governmental intrusion that violates one’s liberty interest. This lack of a clear contour on the part of Supreme Court may open the judiciary’s gate to other substantive claims.

In distinguishing Sell’s appeal of liberty interest as a collateral order, the Court created a new heightened constitutional scrutiny — “the severity of the intrusion and corresponding importance of the constitutional issue.” This decision departed from strict adherence to the Cohen standard and demonstrated an ad hoc approach to the application of the collateral order doctrine. Furthermore, the Court’s lack of a precise contour fueled confusion about the prevailing standards applicable to the collateral order doctrine.

H. Joon Chung


70 See notes 43, 52 and accompanying text (comparing Sell’s appeals to that of Justice Scalia’s examples in the degree of “the severity of the intrusion and corresponding importance of the constitutional issue”).

71 See notes 63-68 and accompanying text (forecasting confusion due to lack of definitive contour of what issues involve “the severity of the intrusion and corresponding importance of the constitutional issue”).

72 See supra notes 63-69 and accompanying text.