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Important" and "Irreversible" but Maybe Not "Unreviewable": The Dilemma of Protecting Defendants' Rights Through the Collateral Order Doctrine

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"Important" and "Irreversible" but Maybe Not "Unreviewable": The Dilemma of Protecting Defendants' Rights Through the Collateral Order Doctrine

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DR. CHARLES SELL has spent the last five years confined to a federal psychiatric facility awaiting trial for charges of Medicaid fraud and money laundering, a trial he is not competent to undergo at present because he suffers from delusional disorder, persecutory subtype, a rare psychological condition.[1] His confinement has exceeded his possible imprisonment under the federal sentencing guidelines. Why does Dr. Sell continue to wait for a trial that may never happen? Dr. Sell waits—often in solitary confinement—because he does not want to take antipsychotic medication the government hopes will make him competent to stand trial.[2] In April 2001, the United States District Court for the Eastern District of Missouri ordered the administration of such medication over Dr. Sell's objection, upholding a decision by a federal magistrate.[3] In May 2002, the United States Court of Appeals for the Eighth Circuit upheld that order.[4] Yet Dr. Sell persisted in his objection and sought appeal in the Supreme Court. His petition for certiorari was granted and Dr. Sell believed the end of his ordeal was

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1. *See* United States v. Sell, 282 F.3d 560, 563 (8th Cir. 2002), *vacated*, 123 S. Ct. 2174 (2003).

2. *See* Brief for Petitioner at 21–22, United States v. Sell, 123 S. Ct. 2174 (2003) (No. 02-5664).

3. United States v. Sell, No. 4:98CR177DJS 4:97CR209DJS (E.D. Mo. Aug. 9, 2000) (order approving involuntary medication).

4. *See Sell*, 282 F.3d 560, *vacated*, 123 S. Ct. 2174.

finally in sight. He could never have predicted that his very ability to seek judicial review would rest on the application of an obscure doctrine of appellate procedure hardly recognized by the ordinary practicing lawyer.

Mere days before oral argument, the parties received an order from the Court for supplemental briefs on the issue of the court of appeal's jurisdiction to review the district court's order supporting the magistrate's determination that involuntary medication was warranted.[5] The jurisdictional issue was clearly at the forefront of the minds of several of the Justices. Indeed, counsel for Dr. Sell spent a large portion of his argument time addressing questions about the appellate court's jurisdiction over an order of involuntary medication in an attempt to render a pretrial detainee competent to stand trial for nonviolent crimes.[6] This focus on jurisdiction by the Court was particularly interesting in light of the fact that the United States had not challenged appellate jurisdiction at any point during the proceeding and did not challenge it in its supplemental brief, but rather had acknowledged jurisdiction, agreeing with the circuit courts that had already examined the issue and found it satisfied the requirements for immediate appeal under the collateral order doctrine.[7] However, what the Court recognized is that the only way the court of appeals would have had jurisdiction to review the order before trial was if it met the narrow requirements of the collateral order doctrine, something difficult to do and particularly onerous in criminal proceedings.

With its analysis of the order in *Sell*, the Court stepped onto a path of further convolution and inconsistency in this complicated area of law. In the end, its opinion would not serve to untangle the web but rather would add new twists and knots for litigants and appellate courts to confront in the future.

Section I of this article will discuss the background of the collateral order doctrine. Section IA reviews the "final judgment rule" and the policies underlying it. Section IB reviews the collateral order doctrine itself, beginning with its inception in *Cohen v. Beneficial Industrial Loan Corp.*,[8] and continuing through an overview of the Court's civil

5. *See* Sell v. United States, 537 U.S. 1230, 1230 (2003) (order requesting supplemental briefs on jurisdiction).

6. *See* oral argument transcript at 3–10, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664).

7. *See* Brief for Respondent at 13, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664); and Supplemental Brief for Respondent, Sell v. United States, 123 S. Ct. 2174 (2003) (No. 02-5664).

8. 337 U.S. 541 (1949).

collateral order jurisprudence illustrating the development of the "requirements" for attaining appellate review under the doctrine. Section IC concludes with an overview of the doctrine's application to criminal cases. Section II will examine the role of "important rights" in the Court's collateral order cases and will attempt to determine whether "importance" is an additional requirement of the collateral order test. In addition, the section will seek to define what the Court means by an "important" right or issue, and to explain the view that some rights are sufficiently "important" to outweigh costs of piecemeal appeals. Section III will consider the "unreviewability" requirement of the collateral order doctrine, specifically what constitutes an "unreviewable" order under the doctrine and what, if anything, is the distinction between an "unreviewable" order and an order that leads to "irreversible" harm. Finally, Section IV will return to the most recent case in which the Court discussed and applied the collateral order doctrine, *Sell v. United States*,[9] contending that both the majority's markedly broad reading and the dissent's highly restrictive view of both the collateral order doctrine's requirements and its application to pretrial involuntary medication orders are inconsistent with and further complicate the Court's prior collateral order jurisprudence. Finally, it will propose a way that the collateral order doctrine could be applied in the involuntary medication setting while upholding the doctrine's narrow application and furthering the policies behind the final judgment rule.

I. Background

A. The Final Judgment Rule and Its Underlying Policy

Finality is central to the American system of appellate jurisdiction, and as such, the necessity of a final judgment as a prerequisite for bringing an appeal is not easily ignored. In fact there is no constitutional right to an appeal. Appeal rights in civil cases were instituted by statute in 1889, but the right to appeal criminal cases did not come about until 1911.[10]

The statutory basis for jurisdiction of the United States courts of appeals is found in 28 U.S.C. § 1291.[11] This section evidences a congressional policy against interlocutory or "piecemeal appeals" and

9. 123 S. Ct. 2174 (2003).

10. *See* Abney v. United States, 431 U.S. 651, 656 (1977) (recognizing district court's denial of motion to dismiss on double jeopardy grounds is appealable under collateral order doctrine).

11. The statute, in pertinent part, reads as follows:

stresses the requirement of "finality" as a prerequisite for federal appellate jurisdiction.[12] Often referred to as the "final judgment rule," the statute gives the courts of appeals jurisdiction over "final decisions of the district courts" of the United States.[13] Additional appellate jurisdiction for interlocutory orders deemed to involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" is granted under 28 U.S.C. § 1292(b).[14] However, this provision applies only to civil cases—not to criminal cases.

The final judgment rule is rooted in the need to promote efficient and effective judicial administration at both the trial and appellate levels. The United States Supreme Court articulated the importance of efficiency and its role in the final judgment rule when it stated:

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration . . . . To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice . . . . An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law.[15]

In addition to creating problems of cost, inconvenience, and delay, appeals before a final judgment can undermine the workings of the trial court. Appellate courts owe a level of deference to trial court rulings that precede a final judgment. Allowing interlocutory review of such rulings threatens trial judges' independence and ability to su-

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> The courts of appeals (other than the U.S. Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291 (2000).

12. *Abney*, 431 U.S. at 656.

13. 28 U.S.C. § 1291 (2000).

14. *Id.* § 1292(b).

15. Cobbledick v. United States, 309 U.S. 323, 325 (1940).

pervise proceedings in their courts[16] and forces appellate courts to hear appeals based on incomplete records and involving rulings that, if the trial had gone on to its conclusion, may have been inconsequential.[17]

Members of the federal judiciary have cited the importance of adherence to the final judgment rule as they address problems of appellate overload in the federal system. In his dissenting opinion in *Behrens v. Pelletier*,[18] Justice Breyer attacked the Court's decision to create an exception to the final judgment rule as a "threat[ ] [to] busy appellate courts . . . at a time when overloaded dockets threaten the federal appellate system." He quoted Chief Justice Rehnquist's remarks to the Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit saying: "One of the chief needs of our generation is to deal with the current appellate capacity crisis in the Federal Courts of Appeals. Few could argue about the existence of such a crisis, born of spiraling federal filings and an increased tendency to appeal District Court decisions."[19] Justice Breyer further stressed the importance of adhering to the final judgment rule by citing statements from the Judicial Conference of the United States's 1995 "Long Range Plan for the Federal Courts," which concluded that if the courts of appeals continue on their current course, "it may be necessary to consider some limitations on the right to appeal."[20]

Yet, despite its statutory basis and the policies underlying the final judgment rule, the Court has recognized that there are situations where the rule must bend to avoid "the danger of denying justice by delay . . . ."[21] Appealability is decided for categories of orders rather than for individual orders, so appellate courts cannot engage in a case-by-case balancing of the interests involved in order to determine

16. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430, 436 (1985) ("[T]he *district judge* has primary responsibility to police the prejudgment tactics of litigants, and . . . can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings."); *see also* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (the final judgment rule recognizes the "independence of the district judge, as well as the special role that individual plays in our judicial system.").

17. *See* Johnson v. Jones, 515 U.S. 304, 309 (1995).

18. 516 U.S. 299, 322 (1996) (Breyer, J., dissenting).

19. *Id.* (quoting Remarks of Chief Justice William H. Rehnquist, Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 256, 257 (Apr. 30, 1992)).

20. *Id.* (quoting Judicial Conference of the United States, Long Range Plan for the Federal Courts 132 (Dec. 1995)).

21. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

whether immediate appeal is appropriate.[22] Thus, when deciding the appealability of a category, the Court should look to the "competing considerations underlying all questions of finality" including costs and inconvenience of piecemeal review on the one hand and the "danger of denying justice by delay" on the other.[23] The means for achieving such a balance and allowing immediate appeal when appropriate is found in the collateral order doctrine.

B. *Cohen v. Beneficial Industrial Loan Corporation* and Its Progeny—Defining the "Test" for Appealable Collateral Orders

The purpose of the collateral order doctrine[24] is to identify a "class of orders where the error-correcting benefits of immediate appeal likely outweigh the costs, delays, diminished litigation coherence, and waste of appellate court time potentially associated with multiple appeals."[25] Because appeals allowed under the collateral order doctrine are exceptions to the final judgment rule, "the distinction between a final order and an interlocutory order that is nonetheless appealable under the collateral order doctrine is, as a practical matter, purely terminological."[26]

The collateral order doctrine originated in 1949 in the Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*,[27] a stockholder derivative action. The case centered on whether a federal district court exercising diversity jurisdiction was obligated to apply a state statute passed during the pendency of the litigation.[28] In 1943, Cohen, a stockholder, brought an action in the United States District Court for the District of New Jersey against Beneficial Industrial Loan Corporation claiming that the corporation and its management defrauded the corporation and its stockholders in excess of $100,000,000 over a period of more than eighteen years.[29] Cohen owned a small number of Beneficial's total stock, only 100 shares of more than two million total.[30] Other stockholders intervened in the action, bringing the total

22. Johnson v. Jones, 515 U.S. 304, 315 (1995).
23. *Id.*
24. For an extensive discussion of the evolution of the collateral order doctrine, predictions of future trends, and recommendations for action, see Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1998).
25. Behrens v. Pelletier, 516 U.S. 299, 315 (1996) (Breyer, J., dissenting).
26. Occidental Petroleum Corp. v. S.E.C., 873 F.2d 325, 331 (D.C. Cir. 1989).
27. 337 U.S. 541 (1949).
28. *Id.* at 543.
29. *See id.*
30. *See id.* at 544.

share of stock represented by the plaintiffs in the action to approximately 0.0125% of the total.[31] In 1945 the New Jersey legislature passed a statute, made applicable to pending actions, that held a plaintiff with "small"[32] interests liable for "reasonable expenses and attorney's fees of the defense if he fail[ed] to make good his complaint and . . . entitles the corporation to indemnity before the case [could] be prosecuted."[33] Beneficial moved to enforce the statute against Cohen and the intervenors and to require a security bond of $125,000. The district court disagreed and ruled that the New Jersey statute did not apply to the action pending in federal court. Beneficial appealed to the Court of Appeals for the Third Circuit, which reversed. Cohen filed a petition for a writ of certiorari, which was granted.[34]

Before it could address the merits of the case and the Third Circuit's decision, the Court had to articulate a basis for appellate jurisdiction absent a final judgment on the merits of the stockholder's derivative action. It was here that the Court set forth three bases for its decision to grant an immediate appeal despite the fact that this order was not a final judgment in the case. First, the order represented a final decision on only the particular issue involved. In its decision, the Court explained that "[t]he effect of [section 1291] is to disallow appeal from any decision which is tentative, informal, or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal."[35] The Court held that the district court's refusal to apply the statute to Cohen's action was a "final" decision because the district court had no intention of revisiting the issue later in the litigation.[36]

Second, the Court reasoned that the order warranted immediate appeal because it constituted a final decision on an issue that was separate or separable from the substantive merits of the case. That meant the issue had to be one that would not "merge" into the underlying stockholder's derivative action. This order was not a "step[ ] toward final judgment in which [it would] merge."[37] In other words, an interlocutory appeal and decision on this issue was not of a nature that it

31. *See id.*
32. Small is defined as less than five percent of the aggregate.
33. *Cohen*, 337 U.S. at 544–45.
34. *Id.* at 545.
35. *Id.* at 546.
36. *Id.*
37. *Id.*

would either "affect, or . . . be affected by" the ultimate decision on the merits of the case.[38]

Finally, the finality and separability of the order created a situation where review after final judgment would come too late—the rights conferred by the statute would be "irreparably" lost.[39] The Court also noted that while section 1292 was not directly related to Cohen's appeal, that statute was evidence that Congress intended to "allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties."[40]

In summarizing its rationale in allowing the immediate appeal, the Court concluded that Cohen's appeal fell within a "small class [of non-final orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[41]

Since the inception of the collateral order doctrine in *Cohen*, the Court has stressed repeatedly that the overall purpose of the "requirements [is to] help qualify for immediate appeal classes of orders in which the considerations that favor immediate appeals seem comparatively strong and those that disfavor such appeals seem comparatively weak."[42] With such a balance as its motivation, the Court has consistently read and applied the doctrine's requirements narrowly. This narrow reading underscores the importance of the final judgment rule and the Court's interest in efficiency and economy within the federal court system.[43] Although there is value in reading and apply-

38. *Id.*

39. *Id.*

40. *Id.* at 545.

41. *Id.* at 546.

42. Johnson v. Jones, 515 U.S. 304, 311 (1995).

43. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511 (1985) (Brennan, J., dissenting).

> The [final judgment] rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way. It preserves scarce judicial resources that would otherwise be spent in costly and time-consuming appeals. Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken. Equally important, the final judgment rule removes a potent weapon of harassment and abuse from the hands of litigants. . . . In many cases in which a claim of right to immediate appeal is asserted, there is a sympathetic appellant who would undoubtedly gain from an immediate review of his individual claim. But lurking behind such cases is usually a vastly larger number of cases in which relaxation of the final judgment rule

ing the test narrowly, a balance based on such ambiguous criteria as comparative strength and comparative weakness of considerations favoring and disfavoring appeals almost certainly produces a test prone to inconsistent application.

The most oft-cited statement of the test governing application of the collateral order doctrine stems from the Court's opinion in *Coopers & Lybrand v. Livesay*,[44] a 1978 case where the Court restated and refined the *Cohen* requirements into the modern three-part test. The Livesays, a couple who had purchased securities based on a prospectus that had been certified by the accounting firm of Coopers & Lybrand and others, brought an action on behalf of themselves and a similarly situated class claiming that the firm had violated two separate securities acts.[45] Initially the district court certified the class, but it later revoked that certification.[46] The Livesays filed an appeal in the Court of Appeals, which concluded it did have jurisdiction to hear the immediate appeal and reversed the district court's decertification order.[47] Coopers & Lybrand sought review from the United States Supreme Court.

The Court first addressed whether the order decertifying the class constituted a "final judgment," noting that appellate jurisdiction rests on "the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[48] Because a decertification order does not "of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim," the only basis for jurisdiction in the pending action was to qualify for an "exception to the final-judgment rule."[49]

In holding that the order was not appealable under section 1291, the Court stated the requirements of the collateral order doctrine: 1) "the order must conclusively determine the disputed question"; 2) it

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would threaten all of the salutary purposes served by the rule. Properly applied, the collateral order doctrine is necessary to protect litigants in certain narrow situations. Given the purposes of the final judgment rule, however, we should not relax its constraints unless we can be certain that all three of the Cohen criteria are satisfied.

Id. at 543–46.

44. 437 U.S. 463 (1978) (articulating the three-part test of conclusivity, separability, and effective unreviewability for collateral orders).

45. *Id.* at 465–66.

46. *Id.* at 466.

47. *Id.* at 466–67.

48. *Id.* at 467 (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

49. *Id.* at 467.

must "resolve an important issue completely separate from the merits of the action"; and 3) it must be "effectively unreviewable" after final judgment.[50]

The Court concluded that the decertification order failed each requirement. First, the order itself was not conclusive because it "is subject to revision in the District Court."[51] Second, the order was not sufficiently separable from the underlying action because "class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"[52] The Court noted that the issues involved in determining whether the decertification was proper were closely connected with the merits of the plaintiff's underlying claim. For example, to determine whether the decertification was proper the Court would need to examine the "typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact."[53] Finally, the order was "effectively reviewable" at final judgment because it could be raised and remedied by either the plaintiff or intervening class members.[54]

The three-part test of conclusivity, separability, and effective unreviewability articulated and applied in *Coopers & Lybrand* has become the standard for determining jurisdiction based on the collateral order doctrine.[55] The first prong, conclusivity, is illustrated by the Court's refusal to grant collateral order jurisdiction in a case where the district court denied a summary judgment motion but expressly stated it planned to reconsider the motion before sending the case to the jury.[56] The "tentative" and "incomplete" nature of the ruling left it outside the "conclusivity" requirement.

50. *Id.* at 468.

51. *Id.* at 469.

52. *Id.* (quoting Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 558 (1963)).

53. *Id.* at 469 n.12 (internal quotation omitted).

54. *Id.* at 469.

55. Although *Coopers & Lybrand* provides the test referred to by the Court in its most recent decisions, it should be noted that the circuit courts of appeals have not uniformly followed the same test. The inconsistency of collateral order applications within the circuits is no secret, as the First Circuit pointed out in 1995: "No one can make a seamless web out of all of the decisions on collateral orders. The circuits are not unanimous in every nuance, . . . and even within circuits, a wider scope of review may be available for some interlocutory orders . . . ." United States v. Billmyer, 57 F.3d 31, 35 (1st Cir. 1995).

56. Swint v. Chambers County Commission, 514 U.S. 35, 42 (1995) (holding denial of summary judgment motion not immediately appealable under collateral order doctrine when trial court judge planned to reconsider its ruling on the motion before the case went to the jury).

The second prong, separability, is illustrated by the Court's refusal to recognize as immediately appealable under the collateral order doctrine an order denying a motion to dismiss first on grounds that a foreign defendant who had been extradited was immune from civil process and also on grounds of forum non conveniens.[57] Key to the Court's analysis was its determination that the question regarding the convenience of the forum failed the "separability" requirement of the collateral order test.[58] Citing the importance of avoiding piecemeal review inherent in the collateral order doctrine, the Court concluded that the decision involved a complex balance that would require the district court to become "entangled in the merits of the underlying dispute."[59] Because of the "substantial[ ] overlap [of] factual and legal issues," the order presents a determination that is "unsuited for immediate appeal . . . under § 1291."[60]

The third prong of the collateral order analysis, that the order be "effectively unreviewable" at final judgment, is the most complex of the three and will be addressed with more specificity in section III. However, the basic requirement is illustrated by the Court's recognition of an immediately appealable collateral order in an admiralty case involving the vacating of an attachment order placed on a foreign ship. The Court explained that the order dissolving the attachment was immediately appealable because "[a]ppellate review . . . at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible."[61] The Court contrasted the unreviewable nature of the order dissolving the attachment with the "reviewable" situation wherein an attachment was upheld pending the resolution of the principal claim. In that situation, "the rights of all the parties [could] be adequately protected while the litigation on the main claim proceed[ed]."[62]

Civil district court orders qualifying for immediate appeal under the collateral order doctrine continue to expand as circuit courts address and apply the conclusivity, separability, and unreviewability requirements.[63]

57. Van Cauwenberghe v. Biard, 486 U.S. 517, 529–30 (1988).

58. *Id.* at 527.

59. *Id.* at 528.

60. *Id.* at 529.

61. Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684, 689 (1950).

62. *Id.*

63. The circuit courts continue to expand the scope of the collateral order doctrine in civil cases. For example, in early 2003 the D.C. Circuit held that a defendant in a RICO

C. Criminal Application of the Collateral Order Doctrine

The collateral order doctrine applies in both civil and criminal contexts. Despite the fact that *Cohen* itself was a civil case, the doctrine is based on section 1291, which applies to all "final decisions" of federal district courts, both civil and criminal.[64] Although there is no question that the doctrine can apply in criminal actions, the Court has been reticent to recognize it in the criminal context. To be sure, finality is more strictly scrutinized in criminal cases than it is in civil cases. As the Court itself has written, "[w]e have interpreted the collateral order exception 'with the utmost strictness' in criminal cases."[65] This strict view of finality when analyzing criminal orders is justified by the fact that "encouragement of delay is fatal to the vindication of the criminal law."[66] One of the primary reasons underlying the final judgment rule in criminal cases is the Sixth Amendment right to a speedy trial, which would be rendered meaningless if all pretrial orders were appealable—allowing criminal defendants to extend the length of their trials by numerous intermediate appeals.[67] Society also has an interest in a speedy trial because "delay may prejudice the prosecution's ability to prove its case, increase the cost to society of maintaining those defendants subject to pretrial detention, and prolong the period during which defendants released on bail may commit other crimes."[68]

Therefore, because of the compelling forces encouraging finality before allowing criminal appeals, the Court has found only three criminal pretrial orders to be immediately appealable under the collateral order doctrine, and each involved "'an asserted right the legal and practical value of which would be destroyed if it were not vindi-

action who wished to challenge a discovery order on the grounds of attorney-client privilege was able to do so under the collateral order doctrine. *See* United States v. Philip Morris Inc., 314 F.3d 612, 621 (D.C. Cir. 2003).

64. *See* 28 U.S.C. § 1291 (2000); *see also* Abney v. United States, 431 U.S. 651, 659 n.4 (1977).

65. Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989) (citing Flanagan v. United States, 465 U.S. 259, 266 (1984)).

66. Cobbledick v. United States, 309 U.S. 323, 325 (1940); *see also Abney*, 431 U.S. at 657. "Adherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Id.* (quoting DiBella v. United States, 369 U.S. 121, 126 (1962)).

67. *See* United States v. MacDonald, 435 U.S. 850, 861 (1978).

68. *Id.* at 862.

cated before trial.'"[69] Thus, orders involving bail reduction denials, double jeopardy, and speech or debate clause challenges are immediately appealable because they are separate from the merits of the underlying criminal charges and because "appellate review must occur before trial to be fully effective."[70]

In its first extension of the collateral order doctrine to criminal cases, the Court held that denial of a motion to reduce bail is a "final decision" and immediately appealable under the collateral order doctrine.[71] The Court based its decision in *Stack v. Boyle* on the fact that "there is no discretion to refuse to reduce excessive bail," and as such the denial constituted the district court's final say on the matter.[72] In applying the rule from *Stack,* the United States Court of Appeals for the Eighth Circuit articulated more specifically how a denial of a motion to reduce bail satisfies the requirements of the collateral order doctrine: "The district court order is final; it is collateral to the issue of guilt or innocence; it involves a risk of irreparable injury to constitutional rights; and it involves an unsettled question of law which, if not reviewed, could evade ordinary appellate review."[73]

Later, despite arguments that applying the collateral order doctrine would involve close inspection of the substantive merits of the case, in *Abney v. United States,*[74] the Court extended the collateral order doctrine to apply to a second category of criminal orders: denials of motions to dismiss indictments based on claims that retrial would expose defendants to double jeopardy.[75]

In its opinion the Court restated the three-part analysis from *Cohen* and determined that denials of motions to dismiss based on double jeopardy claims satisfied each. First, the Court concluded that the double jeopardy order was undoubtedly final because it was the "complete, formal . . . and final rejection" of the claim in the trial court.[76] The Court based the finding of finality on the fact that there was nothing else the defendant could do at the trial court level to avoid a trial he believed to be barred by double jeopardy.[77] Next, the

69. Flanagan v. United States, 465 U.S. 259, 265–66 (1984) (quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982)).

70. *Id.* at 266.

71. Stack v. Boyle, 342 U.S. 1, 6 (1951).

72. *Id.*

73. United States v. Spilotro, 786 F.2d 808, 812 (8th Cir. 1986).

74. 431 U.S. 651 (1977).

75. *Id.* at 659.

76. *Id.*

77. *Id.*

Court concluded the double jeopardy order was separable from the underlying criminal charges because "the very nature of a double jeopardy claim is such that it is collateral to, and separable from the principle issues at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged."[78] The Court noted that the defendant did not contest the underlying charges but only asserted that retrial would unconstitutionally expose him to double jeopardy, arguments that the Court found were "completely independent of his guilt or innocence."[79]

Finally, the Court concluded that the denial of the double jeopardy motion would be unreviewable after a full trial because the rights implicated would be "significantly undermined if appellate review . . . were postponed until after conviction and sentence."[80] The Constitution's double jeopardy clause protects the accused from going to trial at all for the same offense—not merely from double punishment.[81] Thus:

> [T]he guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.[82]

In reaching this conclusion the Court recognized that its holding might encourage additional appeals by some defendants, but concluded that "such problems of delay [could] be obviated by rules or policies giving such appeals expedited treatment" and noted that such procedures would be within the courts' supervisory powers.[83]

Finally, the Court extended the application of the collateral order doctrine to challenges to district court orders denying motions to dismiss based on the Speech or Debate Clause of the United States Constitution. In *Helstoski v. Meanor*,[84] a former member of Congress

78. *Id.*
79. *Id.* at 659–60.
80. *Id.*
81. *See id.* at 660–61.
82. *Id.* at 662.
83. *Id.* at 662 n.8.
84. 442 U.S. 500 (1979) (stating that challenges of validity of indictments on Speech or Debate Clause grounds are immediately appealable under the collateral order doctrine).

who was indicted on various counts of conspiracy and bribery raised the Speech or Debate Clause in his defense because the alleged conduct occurred while he was in office and acting within his official capacity.[85] Although Helstoski sought a writ of mandamus, the Court held that immediate appeal under the collateral order doctrine was the proper remedy.[86] Relying heavily on its reasoning in *Abney*, the Court held that the requirements of conclusivity, separability, and effective unreviewability were satisfied by a Speech or Debate challenge because the only way a member of Congress could "avoid exposure to being questioned for acts done in either House and thereby enjoy the full protection of the Clause [is to] challenge the indictment . . . before exposure to trial occurs."[87]

In all other contexts where parties to criminal proceedings have attempted to access immediate appeal under the collateral order doctrine, those requests have been denied.

II. Emergence of "Important Rights" Analysis in Collateral Order Opinions

Despite the seemingly concrete nature of the requirements for gaining immediate appeal under the collateral order doctrine, courts have struggled with whether the requirements are an exhaustive list or whether there is room for additional analysis in the ultimate decision. The most prominent additional factor considered is the "importance" of the issue sought to be appealed. The point that the "importance" of the issue involved in an order that is potentially appealable under the collateral order doctrine might be significant to the ultimate decision goes back to the Court's first analysis of whether a non-final order might be appealed before final judgment.

In *Cohen*, the Court indicated that the right to security in that case "present[ed] a serious and unsettled question"[88] that was part of a small class of orders "too important to be denied review."[89] Later in its restatement and clarification of the collateral order doctrine's requirements, the Court ruled that the order under consideration must "resolve an important issue completely separate from the merits of the action."[90] The types of interests that have been found to be sufficiently

85. *Id.* at 501.
86. *Id.* at 508.
87. *Id.*
88. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949).
89. *Id.* at 546.
90. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

"important" include: avoiding imprisonment under the Excessive Bail Clause; avoiding trial under the Double Jeopardy Clause; avoiding trial under the Speech or Debate Clause; and avoiding trial under Eleventh Amendment immunity.[91]

When deciding whether an order qualifies for immediate appeal under the collateral order doctrine, analysis of "importance" is both implicit and explicit in the Court's collateral order jurisprudence. From the doctrine's creation until the decisions of the 1980s, the analysis was merely implied in the Court's opinions. For example, the analysis in the majority opinion in *Abney* indicates that the Court is willing to relax some of the scrutiny involved in analyzing the traditional three-prong test of conclusivity, separability, and effective unreviewability if the right involved was sufficiently "important."[92] Due to its very nature, review of a denial of a motion to dismiss on grounds of double jeopardy necessarily involves analysis of the merits of the case—something seemingly prohibited by the separability prong of the traditional collateral order test—but the Court concluded that such orders satisfy the collateral order doctrine. The explanation for this result must be that the Court concluded that the rights guaranteed by the Constitutional protection against double jeopardy were "important" enough to downplay the connection between the subject of the "collateral order" and the merits of the case, although the Court fails to state so specifically.

Later, in *Nixon v. Fitzgerald*,[93] the case recognizing absolute presidential immunity as appealable under the collateral order doctrine, the Court referred specifically to the "importance" of claims alleging a breach of Presidential prerogatives under the separation of powers, implying that the importance of the interests involved is relevant to whether the order qualifies under the collateral order doctrine.

The most common way the Court implies that "importance" is relevant to collateral order rulings is through the language used in articulating the test itself. For example, in *Richardson-Merrell, Inc.*, the Court states the second requirement as a "ruling [that] resolves an

91. While it is true that this list of orders includes only those involving constitutional protections, the Court has not gone as far as making that a touchstone for "importance"; rather, the Court has used constitutional or statutory basis as an indicator of "importance." *See* Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994) ("When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'" (citations omitted, alteration in original)).

92. *See* Abney v. United States, 431 U.S. 651, 658–62 (1977).

93. 457 U.S. 731 (1977).

important issue completely separate from the merits."[94] Although the Court does not go on to discuss how the order involved does or does not qualify as "important"—focusing instead on the separability element encompassed in the prong of the test—it is reasonable to conclude that the answer to that query does factor into the Court's ultimate conclusions.

Another way the Court slips "importance" analysis into its reasoning is by commenting on the "importance" of the rights affected by the underlying order. For example, in *United States v. MacDonald*,[95] the Court explained:

> Admittedly, there is value—to all but the most unusual litigant—in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial. Double jeopardy claims are paradigmatic.[96]

The transition from implicit to explicit consideration of "importance" seems to come in a pair of concurring opinions authored by Justice Scalia in the late 1980s. Although absent from the majority's opinion, in his concurrence in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*,[97] Justice Scalia noted that the Court's decision could be alternatively supported by what he referred to as "the rule adopted by the First Circuit"[98] requiring "an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion" as a prerequisite for collateral order jurisdiction.[99] He then asserted that the "importance" approach "has some support" in the Court's earlier opinions creating and interpreting the collateral order doctrine.[100] He cited both *Cohen* itself and *Coopers & Lybrand* to support the contention, finally asserting that while the Court could not formally adopt the analysis without full "adversarial exploration," he personally believed that "our finality jurisprudence is sorely in

94. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431 (1985) (quoting Coopers & Lybrand, 437 U.S. at 468 (1978)).

95. 435 U.S. 850 (1978).

96. *Id.* at 860 n.7.

97. 485 U.S. 271 (1988).

98. *In re* Continental Inv. Corp., 637 F.2d 1, 5–6 (1st Cir. 1980) (holding that "separability, finality, urgency, and importance"—the policy and logic of the collateral order decisions—"suggest that the possibility of irreparable harm resulting from a delay in appellate review is the dispositive criterion of interlocutory appealability.").

99. *Gulfstream Aerospace*, 485 U.S. at 291–92 (1988) (Scalia, J., concurring) (citations omitted).

100. *Id.* at 292.

need of further limiting principles, so that *Cohen* appeals will be, as we originally announced they would be, a 'small class [of decisions] . . . too important to be denied review.'"[101]

Just one year after writing that "importance" analysis had "some support" in the Court's collateral order decisions, Justice Scalia strengthened its standing by asserting that "the importance of the right asserted has always been a significant part of [the Court's] collateral order doctrine."[102] In his concurrence in *Lauro Lines S.R.L. v. Chasser*, Justice Scalia wrote to make explicit what he viewed was "implicit in the [Court's] analysis"—that the reason why the order at issue, the denial of a motion to dismiss based on the contractual forum selection clause, did not qualify for immediate appeal was because "the law does not deem the right important enough."[103] After summarizing the Court's use of "importance" in earlier cases, Justice Scalia opined that although the right asserted would be "positively destroyed" absent the immediate appeal, the right to seek a reversal after trial was "vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals."[104]

After this concurrence, the Court's consideration of "importance" in its collateral order decisions becomes more explicit, whether the analysis is embodied in majority or additional opinions.

In *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*,[105] the Court employed "importance" analysis as it held that denials of Eleventh Amendment immunity qualified for appeal under the collateral order doctrine. In addition to its analysis of the three standard requirements, the Court emphasized that "a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection . . . ."[106] The Court then concluded that "[w]hile application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated."[107]

101. *Id.* (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).
102. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 502 (1989) (Scalia, J., concurring).
103. *Id.*
104. *Id.* at 502–03.
105. 506 U.S. 139 (1993).
106. *Id.* at 145.
107. *Id.* at 146.

The most explicit use of "importance" analysis in determining whether an order qualifies as an appealable collateral order is found in the Court's unanimous opinion in *Digital Equipment Corp. v. Desktop Direct, Inc.*[108] However, the Court approached the issue a bit differently as it concluded that the importance of the question to be resolved is a factor in determining whether an issue is "effectively unreviewable" at final judgment. In stating the collateral order test, the Court repeated the word "important" in a way it had not before: "those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action."[109]

In *Digital Equipment Corp.*, the parties were involved in a trademark infringement action over the use of a trade name.[110] The parties entered into a settlement agreement regarding the use of the name, agreed to waive damages, and filed for dismissal in the district court.[111] Later the plaintiff changed its mind and filed a motion to vacate the dismissal and rescind the settlement agreement, which the district court granted. An appeal to the Court of Appeals for Tenth Circuit followed, but the court dismissed for lack of jurisdiction, noting the absence of a final judgment under section 1291.[112] The court of appeals applied the three requirements of the collateral order doctrine and concluded that the benefits gained under the settlement agreement were not sufficiently "important" to qualify for immediate appeal.[113]

Although it subtly questioned the Tenth Circuit's conclusions about the conclusivity and separability of the order, the Court affirmed the decision based on its conclusion that the order involved failed "to meet the third condition of the *Cohen* test, that the decision on an 'important' question be 'effectively unreviewable' upon final judgment."[114] The right given by a contractual agreement providing immunity from trial "does not rise to the level of importance needed for recognition under § 1291."[115]

108. 511 U.S. 863 (1994).
109. *Id.* at 867.
110. *See id.* at 865–66.
111. *See id.* at 866.
112. *See id.*
113. *Id.*
114. *Id.* at 869.
115. *Id.* at 878.

The Court rejected the Petitioner's argument that the "importance" analysis that figured prominently in the Tenth Circuit's opinion was not the proper basis for the decision, and that the Court had never found an otherwise appealable order unappealable due to "unimportance." Instead, the Court reasoned that "if 'importance' were truly aberrational, we would not find it featured so prominently in the *Cohen* opinion itself, which describes the 'small class' of immediately appealable prejudgment decisions in terms of rights that are 'too important to be denied review' right away."[116] Further, the Court noted that whether "importance" is a separate requirement or merely a part of the second factor—separability—"neither enquiry could lead to the conclusion that 'importance' is itself unimportant."[117] Instead, the Court concluded that the requirement of effective unreviewability "simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement."[118]

The Court then examined the importance of a right granted by a private contractual agreement. Although it declined to rule on the importance of all contractual rights, the Court did contrast contractual rights with rights guaranteed by the Constitution or other statutes:

> When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its "importance." Including a provision in a private contract, by contrast, is barely a prima facie indication that the right secured is "important" . . . or that it qualifies as 'important' in *Cohen's* sense, as being weightier than the societal interests advanced by the ordinary operation of final judgment principles.[119]

Unfortunately, the Court undermined the clarity of the role of importance in its decision by stating that even if "importance" analysis were removed from collateral order analysis, the decision in the case would not change.[120]

Despite the unanimous opinion in *Digital Equipment Corp.*, as "importance" continued to become a more explicit part of the Court's analysis of collateral order doctrine, it is apparent that the Justices differed in their interpretation of what it means to be "important" and

116. *Id.*
117. *Id.*
118. *Id.* at 878–79.
119. *Id.* at 879.
120. *See id.* at 881.

how an issue's "importance" impacts the ultimate decision under the collateral order doctrine.

In *Behrens v. Pelletier*,[121] the majority and the dissent agreed that the issue involved in the order under consideration—a denial of summary judgment on grounds of qualified immunity—is "important" enough to warrant collateral order review. However, they disagreed as to the ultimate effect of that "importance" in a situation where the question is whether multiple appeals of later discovery orders are likewise permitted. In other words, as Judge Posner of the Seventh Circuit explained, the majority and the dissent disagreed as to whether the purpose of "importance" analysis was 1) to determine the level of importance to the appellant, which could be encompassed in the third requirement of effective unreviewability; 2) to determine the level of importance to "the world at large, [in which case] it is a curious condition to engraft onto a right to appeal"; or 3) to determine the level of importance "merely to make sure that the irreparable harm cross some minimum threshold of severity, since a harm could be at once irreparable and slight and if so it would not warrant a departure from the final decision rule."[122]

Writing for the majority in *Behrens*, Justice Scalia explained the rationale that the "important right" involved was not only the right to avoid trial when protected by qualified immunity but also the right to avoid the "burdens" of such things as pretrial discovery when they are extinguished by qualified immunity.[123] This position seems to retreat from the value Justice Scalia placed on "importance" in both *Gulfstream* and *Lauro Lines*.

Justice Breyer, in his dissent supporting the application of the collateral order doctrine but limiting it to a single appeal, described "importance" as a qualification for appeal as a collateral order, stating that the "interest being asserted must be an *important* one."[124] He stated further that "the *importance* of the interest (an interlocutory appeal is needed to protect) is one necessary requirement for application of the technical labels 'final' or 'collateral order.'"[125] Justice Breyer asserted that avoiding discovery (after the use of a single pretrial appeal to determine whether a denial to avoid trial based on a qualified immunity assertion) is not "sufficiently important" to war-

121. 516 U.S. 299 (1996).
122. Bd. of Educ. v. Ill. State Bd. of Educ., 79 F.3d 654, 658 (7th Cir. 1996).
123. *Behrens*, 516 U.S. at 306.
124. *Id.* at 317 (Breyer, J., dissenting).
125. *Id.* at 324.

rant additional appeals.[126] Thus, despite the common inclusion of "importance" in the analysis of the collateral order doctrine, the Court itself is inconsistent in both its analysis and its application.

This inconsistency in the opinions of the Court has led the lower courts to increasingly incongruent formulations of the collateral order doctrine requirements and the role "importance" plays in such decisions. For example, the Circuit for the District of Columbia relies on statements from the Third Circuit that define the second prong of the collateral order doctrine (separability) as having two parts—separability and importance.[127] In defining the criteria for "importance," the court explained, "for the purposes of the *Cohen* test, an issue is important if the interests that would potentially go unprotected without immediate appellate review of that issue are significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule."[128] The D.C. Circuit further bases its interpretation on the statement from *Digital Equipment Corp.* that "'[i]mportant' as the Supreme Court has explained, '[means] being weightier than the societal interests advanced by the ordinary operation of final judgment principles.'"[129]

Conversely, the Fourth Circuit in its 2003 opinion in *Under Seal v. Under Seal*[130] disputes the inclusion of "importance" analysis at all in collateral order decisions.[131]

Since *Cohen*, the Court has described and/or applied the collateral order analysis at least twenty-nine times in majority opinions.[132] In all but one, the Court used the three *Cohen* factors.[133] Only once, in *Nixon v. Fitzgerald*, did the Court include a fourth factor.[134] In other cases when the Court has referred to the "serious and unsettled" factor, it attributed the "factor" to the circuit court, implying that the factor was applied by the circuit court but not that the Court itself required consideration of such.[135]

126. *Id.* at 317.

127. *See* United States v. Philip Morris Inc., 314 F.3d 612, 617 (D.C. Cir. 2003) (citing *In re* Ford Motor Co., 110 F.3d 954, 959 (3d Cir. 1997)).

128. *Id.*

129. *Id.* (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994)).

130. 326 F.3d 479, 481 (4th Cir. 2003).

131. *Id.* at 481 (rejecting the requirement that a case "present a serious and unsettled question on appeal" as a "fourth factor" to the collateral order analysis).

132. *See id.*

133. *See id.*

134. *See id.* at 482.

135. *See id.*

Thus, despite evidence of "importance" analysis in the Court's opinions dating back to *Cohen* and most explicitly in *Digital Equipment Corp.*, the lower courts lack a coherent and consistent understanding of the role such analysis should play in determining an order's appealability under the collateral order doctrine.

III. The Unreviewability Requirement

The collateral order requirement that has been the subject of the most inconsistency during the sixty years of its existence is the requirement that the order being appealed be "effectively unreviewable" at final judgment. Scholars Wright and Miller summarize this requirement as a two-part test requiring both the risk that the order will evade review on appeal from a final judgment and the risk of significant hardship caused by such lack of review.[136] In reality, however, the Court has not uniformly or even consistently analyzed what it means to be "unreviewable."

Instead, the Court's opinions seem to employ two different methods of analysis under which the order is "unreviewable," with the primary difference being the object of the inquiry—either the party to the litigation or the rights involved. First, several opinions suggest that to be "unreviewable" at final judgment an order must cause "significant," "permanent," "irreparable," or "irreversible" harm to a party. Second, other opinions focus on the rights involved, rather than on the parties themselves, and suggest that "unreviewability" requires that those rights be "irretrievably lost" absent immediate appeal. It should be noted at the outset that the two lines of reasoning are not mutually exclusive and that the Court has used both as the basis for decisions in the same case. They do, however, involve very different analysis and rely on discrete rationale.

A. Significant, Permanent, Irreparable, or Irreversible Harm

The first line of analysis the Court employs when determining whether an order is "effectively unreviewable" and thereby qualifies for immediate appeal under the collateral order doctrine focuses on the harm to the individual involved: the party who is seeking the appeal. Under this analysis, the Court finds the possibility of "irreparable injury" absent immediate review sufficient to satisfy the collateral order requirement. Thus, the requirement that an issue be effectively

136. *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911.3 (2d ed. 1992).

unreviewable later on means that lack of immediate review may result in significant harm.[137] Similarly, Justice Frankfurter, citing to *Cohen* and the collateral order doctrine as support for his contention, opined in his concurrence in *Sears, Roebuck Co. v. Mackey*[138] that "the Court has permitted appeal before completion of the whole litigation when failure to do so would preclude any effective review or would result in irreparable injury."[139] Therefore, this analysis focuses on the actual harm to the parties involved by concluding that an order is effectively unreviewable "when the practical effect of the order will be irreparable by any subsequent appeal."[140]

The Court's focus on harm suffered by the parties is further illustrated by its explanation for why the constitutional right to a speedy trial fails to qualify for immediate appeal under the collateral order doctrine. Distinguishing the right to a speedy trial from the guarantee to avoid double jeopardy, the Court explained that the right to a speedy trial is not the kind of right that "must be upheld prior to trial if it is to be enjoyed at all."[141] Failure to review speedy trial claims before final judgment "does not cause or compound the deprivation already suffered."[142] In other words, the party seeking review does not suffer additional "harm" from having to wait to appeal. Therefore, not only must the harm be suffered, it must be the type of harm that could be averted by immediate appeal because "[t]he 'effective unreviewability' requirement means that failure to review the order on appeal *now* may cause a litigant permanent harm."[143]

Some of the Court's decisions seem to imply that "irreparable harm" by itself can provide the basis for jurisdiction under the collateral order doctrine. The need for finality should "'be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.'"[144] Thus, a refusal to disqualify counsel does not cause irreparable harm of the kind envisioned and as such is not qualified to immediate review.[145] Further, even if the situation arose where a party is irreparably harmed by inability to appeal an

137. *See* Johnson v. Jones, 515 U.S. 304, 310 (1995).

138. 351 U.S. 427 (1956) (Frankfurter, J., concurring). This is a case that does not directly implicate the collateral order doctrine but does address "premature" appeals.

139. *Id.* at 441.

140. DiBella v. United States, 369 U.S. 121, 126 (1962).

141. United States v. MacDonald, 435 U.S. 850, 861 (1978).

142. *Id.*

143. Behrens v. Pelletier, 516 U.S. 299, 315 (1996) (Breyer, J., dissenting).

144. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376 (1981) (citation omitted).

145. *See id.* at 377.

order denying a motion to disqualify counsel, that instance would be so rare that it does not warrant the "[creation of] a general rule permitting the appeal of all such orders."[146] Therefore, under this method of analysis, not only must the actual party suffer harm, but that harm also must be characteristic of all similarly situated parties.

Several courts of appeals have adopted this rationale and tailored their focus to the potential harm suffered absent immediate appeal. The First Circuit articulated more explicitly the possibility of "irreparable harm" as the basis for immediate analysis when it reasoned that the policy and logic of the collateral order decisions "suggest that the possibility of irreparable harm resulting from a delay in appellate review is the dispositive criterion of interlocutory appealability."[147]

The Seventh Circuit recognized the role of "irreparable harm" in determinations of unreviewability under the collateral order doctrine because it seized on a suggestion in *Cohen* itself that "the purpose of the collateral-order doctrine is closely related to that of section 1292(a)(1), which allows immediate appeal of an order granting or denying a preliminary injunction because an erroneous such order must, virtually by definition, cause irreparable harm to one of the parties."[148] Thus, "[f]or an order to be appealable under the *Cohen* doctrine its consequences for the appellant must be irreversible by subsequent proceedings."[149] This formulation identifies the "unifying theme to the complex rules governing the appeal of interlocutory orders within the federal system . . . that such orders are appealable only when they threaten irreparable harm."[150]

The "conclusivity" and "unreviewability" requirements are closely related because if the order at issue is not conclusive or "definitive" then "an immediate appeal is not necessary to ward off harm; there is

146. *Id.* at 378 n.13. It should be noted, however, that the Court suggested that interlocutory appeal under section 1292(b) would be an appropriate remedy in such a situation. Since section 1292(b) applies only in civil cases, resting the definition of "unreviewability" on such analysis would harm parties in criminal proceedings.

147. *In re* Continental Inv. Corp., 637 F.2d 1, 6 (1st Cir. 1980); *see also* Irons v. FBI, 811 F.2d 681, 683–84 (1st Cir. 1987) ("[T]he fact that the right asserted is, like this one, essentially incapable of vindication if the aggrieved party must await an appeal from final judgment, 'should be the 'central focus' and perhaps even the 'dispositive criterion' of appellate jurisdiction over [interlocutory] orders.' Here, irreparable harm would plainly result to the appellants from an inability to obtain precompliance review.") (second alteration in original) (citations omitted).

148. *In re* UNR Indus., Inc., 725 F.2d 1111, 1117–18 (7th Cir. 1984).

149. *Id.* at 1118.

150. Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1987) (citation omitted).

no harm yet."[151] Further, the party seeking the appeal need not actually suffer harm; instead, a showing that there is "a danger" that irreparable harm will occur absent immediate appeal is sufficient to satisfy the "unreviewability" requirement.[152] This was precisely the situation in *Cohen* itself, where there was simply the danger that "the fees would disappear into insolvent hands."[153]

Finally, the Seventh Circuit suggests that if irreparable harm is part of the determination then likelihood of success on the appeal should also factor into the equation. If likelihood of success is low then there is very little for the appellant to lose if the appeal is not heard immediately.[154] However, this interpretation seems at odds with the Supreme Court's decision in *Stringfellow v. Concerned Neighbors in Action*,[155] where the Court held that an order granting permissive intervention but not intervention by right is not "effectively unreviewable" because the intervenor's rights will not be "irretrievably lost in the absence of an immediate appeal."[156] There the Court rejected the argument that the party would suffer harm because the likelihood of prevailing on an appeal after final judgment was slight and should not affect the analysis of whether the order qualified for immediate review. "Although it may be difficult for [the intervenor] to show that the harm from the intervention order is sufficiently great to overturn the final judgment, this has little bearing on whether [the intervenor] has the right to an interlocutory appeal under the collateral order doctrine."[157]

Again, the common rationale throughout these opinions is that "unreviewability" is measured by the degree of harm parties would be forced to suffer without the ability to immediately appeal orders before final judgment.

B. Rights That Would Be Irretrievably Lost

The second line of "unreviewability" analysis focuses on the right asserted and how it could be lost or destroyed if appeal is not granted rather than on the harm the individual might suffer. The foundation for this analysis is found in the *Cohen* opinion recognizing immedi-

151. *Id.*
152. *Id.* at 1319.
153. *Id.*
154. Bd. of Educ. v. Ill. State Bd. of Educ., 79 F.3d 654, 658–59 (7th Cir. 1996).
155. 480 U.S. 370 (1987).
156. *Id.* at 376–77.
157. *Id.*

ately appealable collateral orders. There the Court acknowledged that "[w]hen the time comes [for a final judgment], it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."[158] In subsequent cases invoking the doctrine, the Court repeated its focus on rights as the basis for "unreviewability" stating that "[t]he collateral order doctrine['s] . . . reach is limited to trial court orders affecting rights that would be irretrievably lost in the absence of an immediate appeal. . . ."[159] Additionally, an order is effectively unreviewable if it "involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial."[160] Finally, determinations of "unreviewability" for collateral order purposes look to "whether the right affected by the ruling can and should be protected by appeal prior to judgment" in contrast to looking at the expenses that would be imposed by a "possibly erroneous ruling."[161]

Thus, under this line of "unreviewability" analysis, enabling parties to receive protection guaranteed by important rights is central to appealability. For example, in *Helstoski v. Meanor*,[162] wherein the Court held that orders denying immunity under the Speech or Debate Clause are appealable collateral orders, the Court recognized that "if a Member 'is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs.'"[163]

158. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

159. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430–31 (1985) (citation omitted).

160. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 499 (1989); *see also* Van Cauwenberghe v. Baird, 486 U.S. 517, 524 (1988) ("[T]he final judgment rule requires that except in certain narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal, . . . litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review.") (citation omitted).

161. *Richardson-Merrell, Inc.*, 472 U.S. at 436.

162. 442 U.S. 500 (1979) (holding that challenges of validity of indictments on Speech or Debate Clause grounds are immediately appealable under the collateral order doctrine).

163. *Id.* at 508 (quoting Abney v. United States, 431 U.S. 651, 662 (1977) (alterations in original)); *see also* Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985):

> The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

Some of the Court's opinions seem to require that the asserted right that might be irretrievably lost be a "right not to be tried." When denying to grant collateral order status to a speedy trial claim the Court reasoned that "[t]he nature of the speedy trial right was such that '[p]roceeding with the trial does not cause or compound the deprivation already suffered.'"[164] The Court then made a "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges. . . . The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not."[165] In *Midland Asphalt v. United States*,[166] the Court rejected petitioner's argument that even if the order at issue would be "theoretically reviewable" after trial it would be "effectively unreviewable."[167] The Court based its conclusion on its view that the right merely not to be convicted is not the same as the "right not to be tried at all."[168] Anticipating future cases where creative lawyers would attempt to craft nearly any right into a "right not to be tried," the Court clarified its reasoning by explaining that while, "[i]n one sense, any legal rule can be said to give rise to a 'right not to be tried' if failure to observe it requires the trial court to dismiss the indictment or terminate the trial . . . that is assuredly not the sense relevant for purposes of the exception to the final judgment rule."[169] Instead, "[a] right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause . . . or the Speech or Debate Clause . . . ."[170]

However, despite these opinions, the Court has continually emphasized that a party's ability to characterize the right affected should not be the determining factor in deciding collateral order jurisdiction:

> Even as [our cases] have recognized the need for immediate appeals under § 1291 to vindicate rights that would be "irretrievably lost" if review were confined to final judgments only, our cases have been at least as emphatic in recognizing that the jurisdiction of the courts of appeals should not, and cannot, depend on a party's agility in so characterizing the right asserted. This must be so because

164. United States v. Hollywood Motor Car Co., 458 U.S. 263, 269 (1982) (citation omitted).

165. *Id.*

166. 489 U.S. 794 (1989).

167. *Id.* at 800.

168. *Id.* at 801.

169. *Id.*

170. *Id.* (citations omitted).

> the strong bias of § 1291 against piecemeal appeals almost never operates without some cost. . . . [A]lmost every pretrial or trial order might be called "effectively unreviewable" in the sense that relief from error can never extend to rewriting history.[171]

In addition, unlike some circuit courts that have found the possibility of "irreparable harm" dispositive in collateral order decisions, when adopting the "rights" line of analysis the Court has maintained that the "mere identification of some interest that would be 'irretrievably lost'" is not sufficient to satisfy the third prong of the *Cohen* test.[172] Instead the right must be of the kind where its protection is more important than the costs associated with an appeal in advance of final judgment.[173]

As they have with the line of analysis focusing on irreparable harm to parties, the circuit courts of appeal have adopted and applied the irretrievable loss analysis. The most consistent application of this analysis is found in cases involving privacy rights, privilege, or other matters of personal liberty. For example, the First Circuit held an order unsealing private financial statements is appealable under the collateral doctrine because "[t]he privacy right to which the appellants lay claim must be vindicated now, or it will be forever lost."[174]

The Seventh Circuit has applied irretrievable loss analysis to rights protecting confidentiality and privilege. In *United States v. Dorfman*,[175] the Seventh Circuit granted immediate appeal to criminal defendants who challenged an order unsealing wiretap transcripts on the ground that the publication of the transcripts would invade defendants' right of privacy. The court explained this was so because the defendants' privacy would be "gone forever as soon as the media began disseminating their news stories; and it is doubtful, to put it mildly, that if the appellants ultimately convinced this court or the Supreme Court that the motion had been improperly granted, they could get any monetary redress."[176] In other words, the defendants' privacy rights would have been irretrievably lost absent immediate appeal.[177] The Seventh Circuit then distinguished its ruling from possible appeals based on a defendant's fair trial rights. The court explained that had the appeal been grounded on the contention that

171. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 871–72 (1994).
172. *Id.* at 872.
173. This analysis gets intertwined with the Court's analysis of "importance." *See supra* Part II.
174. FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 407 (1st Cir. 1987).
175. 690 F.2d 1230 (7th Cir. 1982).
176. *Id.* at 1232.
177. *See id.*

public disclosure of the transcript would prevent a fair trial, "[n]ot only could such an appeal delay the trial, but the appellants, though not the media, could look forward to having an effective remedy if it turned out that the motion had been granted improperly—an order for a new trial."[178]

The Sixth Circuit allowed immediate appeal of an order committing a criminal defendant for forty-five days to undergo psychiatric examinations in an attempt to determine competence because there could be no effective remedy by later appeal for the loss of liberty and the forced intrusion of the exam.[179] In reaching the same conclusion on a similar order, the Tenth Circuit reasoned that "[a]s in the denial of bail, if the appeal is not allowed there can be no remedy for the resulting loss of liberty. . . . A defendant must not be left without recourse to appellate review where there is an immediate and significant loss of personal liberty."[180]

Although the two lines of analysis governing application of the "unreviewability" requirement in the collateral order doctrine are not necessarily incompatible, the Court's failure to explain precisely whether either alternative is acceptable or the circumstances in which each line is preferred or even necessary, leads to a legal rule that is less than clear for application in future cases. The lack of such clear direction and the problems it creates for litigants, trial courts, and appellate courts is clear upon examination of the Court's most recent explanation of the collateral order doctrine in *Sell v. United States.*[181]

IV. Illustration and Analysis of the Involuntary Medication Cases and the Court's Failure to Reach an Effective Resolution in *Sell v. United States* Using the Collateral Order Doctrine

Prior to the Court's decision in *Sell,* the secure markers in the Court's earlier cases made the analysis of appellate jurisdiction in cases involving orders authorizing the involuntary administration of antipsychotic medication in attempts to restore a pretrial criminal defendant's competence to stand trial seemingly straightforward. Although the Court's opinion in *Sell* supports the conclusion of each lower court addressing the issue, it further complicates the collateral

178. *Id.*
179. *See* United States v. Davis 93 F.3d 1286, 1288–89 (6th Cir. 1996).
180. United States v. Boigegrain, 122 F.3d 1345, 1349 (10th Cir. 1997).
181. 123 S. Ct. 2174 (2003).

order doctrine by slightly changing the requirements for appellate jurisdiction under that doctrine.

This section will review the circuit courts' resolution of jurisdiction in involuntary medication cases. It will next examine the Court's decision in *Sell* and argue that the decision imprudently expands and further complicates appellate court jurisdiction under the collateral order doctrine—something unnecessary to award jurisdiction in the case. It will then turn to the dissent in *Sell* and argue that the positions advocated therein constitute a narrow and inconsistent approach to jurisdiction under the doctrine. Finally, the section will offer a recommendation of a ruling that would have been in line with prior collateral order jurisprudence without unnecessarily expanding its narrow scope and yet still supporting the policies underlying the final judgment rule.

A. Background: The Circuit Courts' Resolution of Jurisdiction in Involuntary Medication Cases

Five different circuit courts of appeal have addressed their jurisdiction to review involuntary medication orders in criminal cases. Three of these courts have expressly considered the requirements of the collateral order doctrine, uniformly concluding that such orders qualify for immediate appeal. The other two circuits exercised jurisdiction on such appeals without expressly addressing the basis for their jurisdiction.

The Sixth Circuit in *United States v. Brandon*,[182] the Fourth Circuit in *United States v. Morgan*,[183] and the Second Circuit in *United States v. Gomes*[184] each concluded that district court orders involving the pretrial involuntary medication of criminal defendants in attempt to restore competence satisfy the requirements for immediate appeal under the collateral order doctrine. The district court orders involved in *Morgan* and *Gomes* directly authorized the administration of medication to the defendants.[185] However, *Brandon* involved a district court's denial of a motion to hold an evidentiary hearing to determine the propriety of involuntary medication in an attempt to make the criminal defendant competent to stand trial.[186] Despite the technical differ-

182. 158 F.3d 947 (6th Cir. 1998).
183. 193 F.3d 252 (4th Cir. 1999).
184. 289 F.3d 71 (2d Cir. 2002).
185. *See Morgan*, 193 F.3d at 258; *Gomes*, 289 F.3d at 78.
186. *See Brandon*, 158 F.3d at 950. Thus, the order in *Brandon* differs from some of the other involuntary medication appeals because the issue is whether a judicial hearing is

ence in the type of order involved, the analysis of the courts was remarkably similar.

Before reaching the merits of the decision, each court acknowledged that it would only have jurisdiction if the order fell within the scope of *Cohen*'s collateral order doctrine.[187] *Brandon* was the only case where the government argued that the district court's order did not fall within the narrow confines of the doctrine and, as such, was not properly appealable before final judgment on the underlying criminal charges.[188] In each of the other cases the parties agreed that jurisdiction was proper. However, as the Second Circuit acknowledged, "jurisdiction cannot be conferred by the parties" and, as such, "we must independently decide the question."[189]

After acknowledging the role of the collateral order doctrine in appellate jurisdiction, each court analyzed and explained how the order at hand satisfied each of the doctrine's three requirements. First, each court held that the issue was "conclusively decided." Two of the decisions address specifically how the orders involved satisfy conclusivity. The Sixth Circuit reasoned that because the district court's decision that additional procedural safeguards were not required before a decision about involuntary medication was made, the issue was not subject to further consideration by the court.[190] The Fourth Circuit reasoned that the district court's failure to indicate intent to "revisit this ruling before the medication is administered" satisfied the conclusivity requirement.[191]

Second, each court concluded that the order was separate from the underlying criminal charges.[192] None of the three circuits offered extended explanation of this requirement; rather, all three stated summarily that the medication order was clearly separate from the charges on which the defendants had been indicted. The most extensive rationale offered was that of the Fourth Circuit, which reasoned that its "determination of whether [defendant] has received the procedural safeguards to which he is entitled before being forcibly medi-

required to protect a defendant's due process rights rather the companion issue of whether the medication order itself violates due process.

187. *See id.* at 951; *Morgan*, 193 F.3d at 259; *Gomes*, 289 F.3d at 79.

188. *See Brandon*, 158 F.3d at 950.

189. *Gomes*, 289 F.3d at 79.

190. *See Brandon*, 158 F.3d at 951.

191. *Morgan*, 193 F.3d at 259.

192. *See Brandon*, 158 F.3d at 951; *Morgan*, 193 F.3d at 259; *Gomes*, 289 F.3d at 79.

cated will have no bearing upon the ultimate question of whether he is guilty or not guilty of those offenses."[193]

Third, each court concluded that the district court's order would be "effectively unreviewable on appeal after a final judgment has been rendered in the criminal trial."[194] The rationale for these conclusions focus on the possibility that the defendants' rights could be irretrievably lost absent immediate appeal. As the Sixth Circuit stated, "because the order relates to the administration of drugs in order to restore [defendant's] competency to stand trial, it would be of little value to [him] for this court to review his due-process claim after he has been forcibly medicated and the trial has concluded."[195] Similarly, the Fourth Circuit reasoned that "[o]nce [defendant] has been forcibly medicated pursuant to the order, a determination of the procedural safeguards to which he was entitled prior thereto would amount to a purely academic exercise."[196] Finally, the Second Circuit concluded that "the district court's order is effectively unreviewable on appeal. If the defendant should prevail after he has been forcibly medicated, his right to refuse to be medicated would have been lost and his victory would be a hollow one."[197] Based on these conclusions, each circuit held that the order qualified for immediate appeal under the collateral order doctrine.

Two additional circuits have exercised jurisdiction on pretrial involuntary medication orders. The D.C. Circuit in *United States v. Weston*[198] exercised jurisdiction over a pretrial involuntary medication order without specific discussion of the application of the collateral order doctrine. Similarly, the Eighth Circuit failed to address or even mention the issue of its jurisdiction in *United States v. Sell.*[199] Its exercise of jurisdiction to review the involuntary medication order before it implies its conclusion that such an order qualifies for review under the collateral order doctrine.

193. *Morgan*, 193 F.3d at 259.
194. *Brandon*, 158 F.3d at 951; *see also Morgan*, 193 F.3d at 259; *Gomes*, 289 F.3d at 79.
195. *Brandon*, 158 F.3d at 951.
196. *Morgan*, 193 F.3d at 259.
197. *Gomes*, 289 F.3d at 79.
198. 255 F.3d 873 (D.C. Cir. 2001).
199. 282 F.3d 560 (8th Cir. 2002).

B. The Court's Decision in *Sell v. United States*: A Broadening of the Scope for the Collateral Order Doctrine

In June 2003, the Supreme Court issued its opinion in *Sell v. United States*,[200] vacating the lower court's decision and remanding the case for further consideration—in effect saying that the government had not proved sufficiently that medication was warranted in Sell's situation. Although it ultimately agreed with each of the lower courts that had previously found involuntary medication orders appealable, the Court, in an opinion authored by Justice Breyer and joined by Justices Rehnquist, Stevens, Kennedy, Souter, and Ginsburg, imprudently expanded and further complicated appellate court jurisdiction under the collateral order doctrine.

Before addressing the merits of the due process, fair trial, and First Amendment challenges brought by the defendant, the Court examined the Eighth Circuit's jurisdiction over the district court's pretrial order affirming an involuntary medication order issued by a magistrate.[201] In so doing, the Court summarized the governing principles of the collateral order doctrine: "a preliminary or interim decision is appealable 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.'"[202] Applying these principles in a shallow discussion barely exceeding one page of the opinion, the Court held that "this District Court order does appear to fall within the 'collateral order' exception."[203] On the surface the Court's conclusion is unremarkable—seemingly applying and reaching a conclusion consistent with its previous interpretations of the collateral order doctrine. However, on closer examination the Court's analysis begins to appear less than consistent and even contradictory of earlier iterations of the doctrine.

Without supporting its determination with any explanation, the Court concluded that the involuntary medication order satisfies the "conclusivity" requirement because the order "'conclusively determines the disputed question,' namely, whether Sell has a legal right to avoid forced medication."[204] The superficial nature of this discussion

200. 123 S. Ct. 2174 (2003).

201. *See id.* at 2181–83.

202. *Id.* at 2182 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)) (alterations in original).

203. *Id.* at 2182.

204. *Id.* at 2177 (quoting *Coopers & Lybrand*, 437 U.S. at 468).

is, unfortunately, not inconsistent with earlier collateral order opinions. With regard to Sell's challenge based on substantive due process rights and any residual First Amendment rights that are not coextensive with due process, the Court's determination of conclusivity is consistent with its earlier application of the requirement. What the Court overlooks, however, is that the district court had not issued a conclusive determination on the issue involving Sell's right to a fair trial. Instead, the district court had expressly stated it would be necessary to continually reassess fair trial issues because a final determination of the affect of involuntary medication on those rights was "premature," as the effects such medication would have on Sell were merely speculative until the medication was actually administered.[205] By ignoring the preliminary nature of at least one part of the district court's order, the Court has undermined the "conclusivity" requirement of the collateral order doctrine and has opened the possibility that other nonconclusive orders may become appealable, thereby diluting the final judgment rule.

Its loosening of the "conclusivity" requirement is not the only area where the Court inserted further inconsistency and perhaps even confusion into an already inconsistent rule. Confusion creeps into its "separability" analysis as well. Here, the potential inconsistency and confusion is not found as much in the application of the rule to the facts of Sell's case as it is in the articulation of the rule itself. Seemingly adopting the views of the Third and D.C. Circuits,[206] the Court divided the second requirement into two discrete parts: first, the order must involve an "important issue" and second, it must be "separable" from the underlying merits of the case.[207]

Concluding that the order "'resolves an important issue,'" the Court reasoned that the discussion of involuntary medication of pretrial criminal defendants is "important" because "involuntary medical treatment raises questions of clear constitutional importance."[208] Noticeably absent from the Court's opinion is any reference to precedent cases recognizing "importance" as a valid requirement for collateral order jurisdiction. Most significant, the Court failed to refer back to its opinion in *Digital Equipment Corp.*, the one unanimous opinion up-

205. Joint Appendix at 351, Sell v. United States, 123 S. Ct 2174 (2003) (No. 02-5664). This is precisely the argument made by the Solicitor General in the government's Supplemental Brief at 7, Sell v. United States, 123 S. Ct 2174 (2003) (No. 02-5664).

206. *See In re* Ford Motor Co., 110 F.3d 954, 959 (3d Cir. 1997); United States v. Philip Morris Inc., 314 F.3d 612, 617 (D.C. Cir. 2003); *supra* Part II.

207. *Sell*, 123 S. Ct. at 2182.

208. *Id.* (quoting *Coopers & Lybrand*, 437 U.S. at 468).

holding the role of "importance" in collateral order decisions. Instead, the Court simply stated that the importance of the issue at bar warrants immediate review. Then, as a seeming afterthought, the Court unremarkably concluded that the "separability" requirement is satisfied because the decision about whether Sell should be involuntarily medicated is "completely separate from the merits of the action," the charges of Medicaid fraud and money laundering on which he had been indicted.[209] Further, the Court noted that "the issue is wholly separate as well from questions concerning trial procedures," forecasting its decision to allow immediate appeal of the challenge based on fair trial grounds, which it did by not restricting Sell's appeal to the due process and First Amendment challenges.[210]

Perhaps the greatest confusion and inconsistency in the Court's opinion is revealed in its analysis of the "unreviewability" requirement. Because it adopted "irreparable harm" or "irretrievable loss" of important rights as absolute touchstones of "unreviewability" without further explanation or guidelines, the Court threatens to expand the collateral order doctrine beyond reason.

The beginning of the Court's analysis is consistent with earlier cases citing "irreparable" or "permanent" harm as indicia of "unreviewability," noting that "[b]y the time of trial Sell will have undergone forced medication—the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted. Indeed, if he is acquitted, there will be no appeal through which he might obtain review."[211] The Court then switches its focus to the intrusion on defendant's rights in a way that could cause them to be "irretrievably lost." Again, this is consistent with earlier decisions. If the Court had then explained how post-conviction review would fail to remedy these harms, it likely would have avoided criticism.

However, the Court failed to complete its analysis and instead concluded that "[t]hese considerations, particularly those involving the severity of the intrusion and corresponding importance of the constitutional issue,"[212] provide the basis for the decision that the order was effectively unreviewable and therefore satisfied the collateral

209. *Id.*

210. *Id.* Despite the Court's conclusory analysis of this issue, the government had argued in its supplemental brief that issues of fair trial were "unsuited" to collateral review because of their overlap with the "factual and legal issues of the underlying dispute." Supplemental Brief for the United States at 10, Sell v. United States, 123 S. Ct 2174 (2003) (No. 02-5664).

211. *Sell*, 123 S. Ct. at 2182.

212. *Id.*

order doctrine's requirements. The problem with this analysis, as the dissent points out, is that from the way the Court has phrased its reasoning it appears that "harm" or "irretrievable loss" can substitute for any other evidence of "effective unreviewability" and could open the door for collateral review of orders that might in fact be reviewable after final judgment.[213]

In addition to the possibility of creating a new avenue for collateral appeal, the Court's analysis fails to clearly explain its application to the two challenges to the district court's involuntary medication order. The "harm" and "irretrievable loss" formula clearly supports the appealability of the order on due process and First Amendment grounds, but its application to the fair trial challenge is less clear. The Court tries to explain its holding by attempting to distinguish between the question of "whether Sell has a legal right to avoid forced medication, perhaps in part because medication may make a trial unfair" and the question of "whether forced medication *did* make the trial unfair."[214] The Court concluded:

213. The Court would have been better served by more clearly illustrating how Sell's loss of liberty would be unreviewable after final judgment. Several circuit courts have employed the same analysis when explaining their application of the collateral order doctrine to cases involving pretrial psychiatric issues. *See, e.g.*, United States v. Weissberger, 951 F.2d 392, 396–97 (D.C. Cir. 1991) (citation omitted):

> [A]n appeal from a competency evaluation order is analogous to an appeal from a denial of bail. If appeal is not allowed from an order requiring pretrial detention, there can be no remedy for the resulting loss of liberty. . . . The issue becomes moot upon conviction and sentence. The same is true here. Not only would [defendant] be subjected to a 30-day confinement in a mental institution, but he also would be subjected to the additional intrusion of a forced medical examination. If he is declared competent and the trial proceeds, post-confinement review will provide no relief for the loss of liberty associated with the competency evaluation.

See also United States v. Gold, 790 F.2d 235, 239 (2d Cir. 1986):

> Unlike a ruling that the defendant *is* competent and *must* proceed to trial, which could be effectively reviewed and remedied, if erroneous, on appeal from any final judgment against him, an order finding that a defendant is not competent to stand trial and committing him for hospitalization would be effectively unreviewable on appeal from a final judgment. First, there may never be a criminal trial if the defendant is never found competent to stand trial; in this instance, there would be no appellate review. If the defendant eventually were found competent to stand trial and were acquitted, there again would be no appellate review. If the defendant were eventually found competent to stand trial and were convicted, the commitment order could be reviewed on appeal from his conviction; but the matter of the relief to be granted if the order were found to have been erroneous would be moot. Whether or not the conviction were set aside, nothing could recover for the defendant the time lost during his confinement; probably no one could be held liable to him in damages for the loss of his liberty.

214. *Sell*, 123 S. Ct. at 2177.

> [T]he first question focuses upon the right to avoid administration of the drugs. What may happen at trial is relevant, but only as a prediction. . . . The second question focuses upon the right to a fair trial. It asks what *did* happen as a result of having administered the medication. An ordinary appeal comes too late for a defendant to enforce the first right; an ordinary appeal permits vindication of the second.[215]

This explanation falls short because fair trial rights are effectively reviewable after trial—they can be remedied by an appeal after conviction and reversal of that conviction would be enough to remedy any violations.[216] The reviewability of trial rights violations is clearly supported by the Court's decision in *Riggins* where it held that prejudice to the defendant's trial rights caused by improper involuntary medication was sufficient to warrant a reversal of his conviction.[217]

Therefore, the *Sell* opinion's inconsistent application of "conclusivity," its bifurcation of "separability," and its adoption of "irreparable harm" or "irretrievable loss" as seeming alternatives for, rather than indications of, "effective unreviewability" only stand to add uncertainty to the already complex nature of collateral order jurisprudence.

C. Scalia's Dissent—A Narrow and Inconsistent Approach to Collateral Order Determinations

Although the Court's opinion in *Sell* arguably extends the collateral order doctrine beyond reasonable limits, the position advocated by the dissenters, Justices Scalia, O'Connor, and Thomas, threatens to restrict the doctrine to such a narrow class of orders that the continued existence of the doctrine would be nearly meaningless. Where the Court found the order involved to be completely conclusive and unreviewable, the dissent found it to be completely reviewable.[218] Their concern for potential misuse of immediate appeals led the dissenters to overlook the valid exercise of pre-final judgment appeals and to so restrict the collateral order doctrine's application that even orders

215. *Id.* at 2183.

216. This is central to the dissent in *Sell; see also* Supplemental Brief for Respondent at 13, Sell v. United States, 123 S. Ct 2174 (2003) (No. 02-5664).

217. *See* Riggins v. Nevada, 504 U.S. 127, 135–38 (1992). Justice Scalia also uses *Riggins* to support his contention that both the fair trial and due process challenges in *Sell* are effectively reviewable after conviction. *Sell*, 123 S. Ct. at 2189.

218. The dissent does not address directly whether it agrees that the order is sufficiently conclusive to satisfy the collateral order requirement, although it does insert a parenthetical judgment "(correct)" as it lists the conclusivity element in a summary of the Court's application of the collateral order; instead it rests its entire analysis on the order's inability to satisfy the third requirement: unreviewability. *Sell*, 123 S. Ct. at 2190–91.

previously granted collateral order status would hardly satisfy the requirements.

The entire basis for the dissenting opinion is that the circuit court lacked jurisdiction to review the district court's medication order until such time that Sell was either convicted or acquitted of the underlying criminal charges.[219] Blaming the Eight Circuit's error on either the fact that the government did not contest jurisdiction or the fact that the other circuits had already concluded that such orders qualified for immediate appeal under the collateral order doctrine, the dissent concludes that "*this* Court's cases do not authorize appeal from the District Court's [pretrial] order, which was neither a 'final decision' under § 1291 nor part of the class of specified interlocutory orders in § 1292."[220] Although the dissent acknowledges that the Court has "invented" (a term it uses "advisedly" to indicate lack of statutory basis)[221] a narrow exception to the final judgment rule, it stresses that the exception is not and should not be applicable to pretrial medication orders because such orders are not "effectively unreviewable" at the time of final judgment.

After reviewing the historical application of the collateral order doctrine to criminal cases and emphasizing the fact that the doctrine had only previously been applied to three criminal orders, the dissent attempted to distinguish the order before it from those earlier applications. Denials of motions to reduce bail are distinguishable, the dissent posits, because they were found to be "unreviewable" because the fact that bail was not reduced becomes moot at final judgment.[222] The dissent correctly relied on *Riggins* to conclude that involuntary medication orders are not rendered moot by conviction on the underlying charges.[223] Double jeopardy and Speech or Debate cases, as explained by the dissent, involve situations where "it was appropriate to interrupt the trial when the precise right asserted was the *right not to be tried.*"[224] Seemingly overlooking prior explanations that the characterization of a right as a "right not to be tried" is not the touchstone of collateral order qualification, the dissent rests its argument on an assertion that the issue involved with pretrial medication orders is not a "right not to be tried, but [rather] a right not to be *medicated.*"[225] As a result, the

219. *See id.* at 2189 (quoting Flanagan v. United States, 465 U.S. 259, 263 (1984)).
220. *Id.* at 2187–88.
221. *Id.* at 2189 n.4.
222. *Id.* at 2190.
223. *Id.* at 2189.
224. *Id.* at 2190.
225. *Id.*

dissent concludes that the pretrial involuntary medication order fails to satisfy the "unreviewability" requirement of the collateral order doctrine.[226]

To support its conclusion of reviewability, the dissent again pointed to *Riggins* where the defendant had also been involuntarily medicated based upon a pretrial order but had brought his appeal after his ultimate conviction for murder. The dissent relied on the fact that the Court in *Riggins* did not find that post-conviction review of the defendant's substantive-due-process claim was impossible but rather it addressed the arguments, agreed with the defendant, and vacated his conviction.[227] Consequently, the dissent concluded, "the Court is therefore wrong to say that 'an ordinary appeal comes too late for a defendant to enforce' this right . . . and appellate review of any substantive-due-process challenge to the [pretrial] order [in Sell's case] must wait until after conviction and sentence have been imposed."[228]

Further, to bolster its reading that involuntary medication orders are in fact reviewable after final judgment, the dissent readily dismissed the possibility that a criminal defendant like Sell would have no avenue for redressing harm to his person or irreparable loss of constitutional rights if acquitted of the criminal charges. The dissent stated:

> To be sure, the order here is unreviewable after final judgment *if the defendant is acquitted.* But the "unreviewability" leg of our collateral-order doctrine—which, as it is framed, requires that the interlocutory order be "effectively unreviewable *on appeal from a final judgment,*"—is not satisfied by the possibility that the aggrieved party will have no occasion to appeal."[229]

The dissent alleges that while the kind of review available may not provide the "type of remedy he would prefer," availability of post-conviction relief is sufficient to satisfy "reviewability."[230]

The dissent's interpretation of the reviewability requirement evidences either a misunderstanding of or an intentional misreading of the Court's collateral order cases. First, it implies that neither irreparable harm nor irretrievable incursion on constitutional rights is sufficient to render an order "effectively unreviewable," and asserts that

226. *Id.* at 2189 n.5.

227. *See id.* at 2189.

228. *Id.* (footnote omitted) (quoting majority opinion).

229. *Id.* at 2189 n.5 (citation omitted).

230. *Id.* at 2189.

such grounds have never been recognized by the Court.[231] Justice O'Connor forecast this analysis during oral argument when she responded to Petitioner's assertion that failure to review the medication order would cause permanent and irreversible effects on Sell's body:

> I think you're confusing unreviewable with irreversible. To be sure, it can't be reversed, but can it be reviewed? In the case of bail, it can't be reviewed because once the trial is over, it's a moot question. It cannot be reviewed. It's not just that it can't be reversed, it cannot be reviewed. But you're here asserting that this issue cannot be reviewed. It seems to me that's just patently false. It can be reviewed. Your complaint is that it can't be reversed, but that has never been the, the *Cohen* criterion.[232]

The dissent criticizes the Court's decision because of the adverse effects of the new rule of law that underlies the holding. The Court's opinion announces that appellate jurisdiction is proper because review after conviction and sentence will come only after "Sell will have undergone forced medication—the very harm that he seeks to avoid."[233] Calling the effects of such a ruling a "breathtaking expansion of appellate jurisdiction over interlocutory orders,"[234] the dissent argues that the Court's holding will allow "any criminal defendant who asserts that a trial court order will, if implemented, cause an immediate violation of his constitutional (or perhaps even statutory?) rights"[235] to immediately appeal and to thus "hold up the trial for months by claiming that review after final judgment 'would come too late' to prevent the violation."[236]

The dissent continues to support its position by setting forth three possible scenarios it alleges would be "immediately appealable" under the Court's holding.[237] First, it illustrates "[a] trial-court order requiring the defendant to wear an electronic bracelet" and characterizes it as "an immediate infringement of the constitutional right to 'bodily integrity.'"[238] Second, it points to "an order refusing to allow the defendant to wear a T-shirt that says 'Black Power' in front of the jury" and predicts a challenge based on "an immediate violation of First Amendment rights."[239] Finally, it gives the example of "an order

231. *Id.*
232. Oral argument transcript at 8, Sell v. United States, 123 S. Ct 2174 (2003) (No. 02-5664).
233. *Sell*, 123 S. Ct. at 2177.
234. *Id.* at 2190.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*

compelling testimony" and foresees an accusation that such is "an immediate denial of Fifth Amendment rights."[240]

However, the dissent overlooks the fundamental difference between these illustrations and the situation involving the involuntary administration of drugs into a defendant's system. Despite its claim that "appellate review of orders that might infringe a defendant's constitutionally protected rights *still* had to wait until final judgment,"[241] this interpretation is clearly at odds with the numerous instances in which the Court relied upon both irreparable harm to the party and irretrievable loss of rights as indications of an order's "effective unreview[ability]."[242]

The dissent also offers a skewed reading of Court precedent when it asserts that "orders denying an asserted right not to be tried" offer an alternative "gate of entry to the collateral-order doctrine"[243] rather than being a subset of those orders found to be unreviewable. It is true that the Court has stated:

> [T]he characterization of the right at issue determines the legal result. In each case, therefore, a careful inquiry must be undertaken to determine whether it is necessary to characterize the right at issue as a right not to stand trial. The final judgment rule presupposes that each party must abide by the trial court's judgments until the end of the proceedings before gaining the opportunity for appellate review. To hold that a given legal claim is in fact an immunity from trial is to except a privileged class from undergoing the regrettable cost of a trial. We should not do so lightly.[244]

However, to assert that the entirety of the Court's collateral order jurisprudence supports the "right not to stand trial" as an alternative ground for immediate appeal is to ignore the more recent statements that a party's ability to characterize the rights involved as a "right not to stand trial" should not be determinative in collateral order decisions.[245]

Finally, the dissent errs in accusing the Court of creating a "brand new consideration" or a "novelty with no basis in our prior opinions" with its inclusion of an "importance" factor in the collateral order decision.[246] The dissent also ignores the underlying consideration in all collateral order determinations that when deciding the appealability

240. *Id.*
241. *Id.*
242. *See supra* Part III.
243. *Sell*, 123 S. Ct. at 2190.
244. Mitchell v. Forsyth, 472 U.S. 511, 551 (1985) (Brennan, J., dissenting).
245. *See* Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872 (1994).
246. *Sell*, 123 S. Ct. at 2191.

of a category the Court should look to the "competing considerations underlying all questions of finality" including costs and inconvenience of piecemeal review on one hand and the "danger of denying justice by delay" on the other[247]—a consideration that at the very least implies that the importance of the rights involved plays a role in the ultimate decision.

It appears that the dissent's fear that recognizing involuntary medication orders as appealable collateral orders will overrun the court system with pretrial appeals has overshadowed both its reading of precedent and its interpretation of the doctrine's requirements. Again, this fear was forecast during oral argument when Justice Scalia commented:

> I'm truly concerned about, about the extent to which this new exception would, would be available to disrupt criminal trials considerably. For example, a defendant, instead of challenging the, the order initially can, can half-way through trial decide he does not want any medication, and then the trial has to be postponed so that, so that the order to continue the medication can be appealed. I just see real difficulties in running a criminal justice system when, when this kind of an order is immediately appealable, rather than reviewable at the end of the criminal case.[248]

This fear resurfaces in the dissent as it charges that the Court's "narrow holding will allow criminal defendants in petitioner's position to engage in opportunistic behavior."[249] The dissent's reasoning is flawed in that it overlooks the other requirements of the collateral order doctrine that would prevent immediate appeals in many circumstances and that other measures can be taken to prevent abuse or delay caused by such appeals.

The government explained the practical effects of extending the collateral order doctrine's reach to involuntary medication orders in its Supplemental Brief on the jurisdictional issue and suggested that such extension would not unreasonably burden the appellate system.[250] First, it suggested that to the extent challenges to involuntary medication orders are based on violations of substantive due process and First Amendment rights, a Court ruling that defendants could be medicated consistent with those rights would "remove that issue from the realm of legal claims that can support a collateral order ap-

247. Johnson v. Jones, 515 U.S. 304, 315 (1995).

248. Oral argument transcript at 6–7, Sell v. United States, 123 S. Ct 2174 (2003) (No. 02-5664).

249. *Sell*, 123 S. Ct. at 2190.

250. Supplemental Brief for the United States at 17, Sell v. United States, 123 S. Ct 2174 (2003) (No. 02-5664).

peal."[251] Second, it reminded the Court that once a "general legal rule permitting involuntary treatment with antipsychotic medications in order to restore a defendant to competence" is established, future cases "can and should be dealt with in a more summary fashion than the appeal in this case."[252] For example, challenges based on a district court's factual findings would be subject to a "clearly erroneous" standard of review and could be "expeditiously" reviewed without causing inordinate delay or expending too many appellate resources.[253] Likewise, challenges to the district court's discretion, to the extent they would be appealable at all under the collateral order doctrine, could be handled expeditiously.[254]

Therefore, after considering the ways in which the Court's decision itself would mitigate potential delays caused by immediate appeals of involuntary medication orders, it seems that the dissent's concern is exaggerated if not unwarranted. And even if some delay is injected into the system, the "considerations that favor immediate appeals seem comparatively strong" in contrast to the "comparatively weak" considerations of such minor delay.[255]

D. A Proposal for Applying the Collateral Order Doctrine While Supporting the Policies Underlying the Final Judgment Rule

The Court could have used its opinion in *Sell* to illustrate how the "important" and "unreviewable" analyses embodied by the collateral order doctrine could be applied to allow a narrow avenue for immediate appeal while still sufficiently serving the interests of the final judgment rule. Rather than expanding the scope of the doctrine's requirements or unnecessarily restricting appeals under the doctrine, the Court could have used its opinion on involuntary medication orders to show how the collateral order doctrine can strike a balance between protecting "important rights" and protecting finality and scarce judicial resources. The foundation for such a decision lies in the distinction between Sell's two challenges to the order: substantive due process and First Amendment rights versus fair trial rights. This section will propose how the Court could have found the district court's order appealable under the collateral order doctrine while still

251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. Johnson v. Jones, 515 U.S. 304, 311 (1995).

retaining the narrow nature envisioned by its traditional requirements.

First, the Court could have determined that the district court's order was "conclusive" with respect to Sell's due process and First Amendment challenges while determining it "inconclusive" with respect to the fair trial challenge. The order allowing involuntary medication conclusively resolves that the government may override the defendant's substantive due process rights and any residual First Amendment rights that may lie in objecting to the medication. Once the medication is administered it cannot be unadministered—merely allowing the government to give the medication determines conclusively that the government's interest in its attempt to restore defendant's competence outweighs his right to remain free from that medication. Thus, a decision that the challenge to the order satisfies the first collateral order requirement acknowledges the importance of the rights involved. Conversely, the district court's order was not conclusive with reference to Sell's fair trial rights. The district court never conclusively resolved whether Sell's right to a fair trial would be violated by allowing the government to administer antipsychotic medication against his will. In fact, the district court noted the potential of a "serious issue" but found consideration of that issue "premature,"[256] concluding that the challenge based on fair trial rights would fail under the first requirement of the collateral order doctrine.

Second, both challenges to the district court's involuntary medication order satisfy the "separability" requirement of the collateral order doctrine. The government's ability to administer antipsychotic medication to a pretrial criminal detainee against his wishes has nothing to do with that detainee's guilt or innocence of the underlying charges, whatever they may be. Unlike cases involving double jeopardy challenges, or even Speech or Debate challenges, where the appellate court would almost certainly be forced to examine at least some of the factual and legal components of the underlying charges, review of involuntary medication orders is completely separable from any crimes of which the defendant stands accused.

Third, the Court could have determined that the district court's order was "unreviewable" with respect to Sell's due process and First Amendment challenges while determining it "reviewable" with respect to the fair trial challenge. This conclusion would have allowed the

256. Order of the United States District Court for the Eastern District of Missouri, No. 4:98CR290-DJS, 4:98CR177-DJS (April 4, 2001), reprinted in Joint Appendix at 339, 351–52 Sell v. United States, No. 02-5664, 2003 WL 21372378 (2003).

Court to better articulate the role that "importance," "irreparable harm," and "irretrievable loss" play in collateral order decisions.

A challenge to the district court's involuntary medication order based on fair trial rights would fail the "unreviewability" test because post-conviction review would not subject the defendant to "irreparable harm" nor would his trial rights be "irretrievably lost." The vacating or reversal of a resulting conviction would certainly suffice to remedy any harm the defendant may have suffered if medication rendered him unable to receive a fair trial. This decision would not undermine the importance of fair trial rights because it would be consistent with other challenges to convictions based on trial rights that result in defendants going free.

In contrast, a challenge to the district court's involuntary medication order based on infringement of a defendant's substantive due process or First Amendment rights would be "effectively unreviewable" because such infringement of these "important" rights would cause the defendant "irreparable harm" that could not be remedied at final judgment because the rights themselves would be "irretrievably lost." The whole of the Court's jurisprudence supports the contention that substantive due process rights are "important"[257] and would almost certainly be classed among the rights the Court envisioned when it established the collateral order doctrine to grant review for those orders "too important to be denied review."[258] Antipsychotic medication infringes upon the recipient's rights of bodily integrity, personal autonomy, and freedom of thought. Arguably, these rights could be characterized as fundamental and require the application of strict scrutiny before government infringement is allowed. Even if these rights do not rise to the level of being fundamental, they assuredly comprise an important liberty interest sufficient to warrant immediate appeal under the collateral order doctrine.

Further, refusing immediate appeal to challenges based on substantive due process and First Amendment rights would lead to irreparable harm to the defendant. Although it seems obvious, once the government is allowed to medicate a defendant nothing can be done to "unmedicate" him. While it is true that the effects of the medication—which are temporary and not like the potentially fatal, lasting effects associated with many antipsychotic drugs—the defendant can

257. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992); Cruzan v. Missouri Dep't. of Health, 497 U.S. 261, 294 (1990); Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).

258. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

never be restored to his pre-medication condition. In addition, the time spent medicated can never be restored to the defendant, and that resulting loss of liberty is irreparably lost absent immediate appeal. As the Sixth Circuit stated, "because the order relates to the administration of drugs in order to restore [defendant's] competency to stand trial, it would be of little value to [him] for this court to review his due-process claim after he has been forcibly medicated and the trial has concluded."[259] At that point the harm is done; it cannot be undone.

Similarly, a defendant's substantive due process and First Amendment rights would be "irretrievably lost" absent an immediate appeal. Even if the order could be reviewed after a final judgment, "the legal and practical value"[260] of the rights would be "irretrievably lost" and any later review would be ineffective. Just as a defendant is not forced to stand trial before appealing a denial to dismiss based on double jeopardy because merely standing trial would cause the defendant "to endure a trial that the Double Jeopardy Clause was designed to prohibit,"[261] forcing a defendant to wait until after he has been medicated to appeal forces him to endure an invasion that both the Fifth and First Amendments were "designed to prohibit." Thus, even if post-judgment review were possible, such review would not be "effective." As the Second Circuit concluded, "[i]f the defendant should prevail after he has been forcibly medicated, his right to refuse to be medicated would have been lost and his victory would be a hollow one."[262]

Post-trial review would also be ineffective because it would have no real consequences for the defendant. As the Fourth Circuit reasoned when addressing the same issue: "Once [defendant] has been forcibly medicated pursuant to the order, a determination of the procedural safeguards to which he was entitled prior thereto would amount to a purely academic exercise."[263]

This analysis would lead to the conclusion that challenges to involuntary medication orders based on substantive due process or First Amendment grounds are appealable as collateral orders while those based on fair trial grounds are not. Such a decision would uphold the policies underlying the final judgment rule (minimizing the costs associated with additional appeals and avoiding unwarranted delay).

259. United States v. Brandon, 158 F.3d 947, 951 (6th Cir. 1998).
260. *See* Abney v. United States, 431 U.S. 651, 662 (1977).
261. *Id.*
262. United States v. Gomes, 289 F.3d 71, 79 (2d Cir. 2002).
263. United States v. Morgan, 193 F.3d 252, 259 (4th Cir. 1999).

Such limited appeals, especially when further restricted by the suggestions proffered by the government in *Sell*,[264] would not add cost, inconvenience, or delay sufficient to outweigh the "danger of denying justice by delay[ing]"[265] review of these important, if not fundamental, rights.

Conclusion

If the Court had separated the challenges involved in Sell's appeal as suggested above, it could have avoided making what will now likely be seen as a revision in the collateral order requirements. It could have retained the limited nature of orders open to immediate appeal without introducing the loophole recognized by the dissent for "importance" to trump "unreviewability." Instead it has only served to further complicate decisions of appellate jurisdiction. Judges on the court of appeals can only hope that the Court will be given the opportunity to remedy its action sooner rather than later.

264. *See* Sell v. United States, 123 S. Ct. 2174, 2190 (2003).
265. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).