SOLVING THE FEDERAL FINALITY-APPEALABILITY PROBLEM

MAURICE ROSENBERG*

I

INTRODUCTION

The idea that an appeal to the second level of a court system should wait until a final decision has issued at the first level of the system is as sweet and simple as a baby's kiss. But as so often happens with legal affairs that are simple in theory the finality requirement in actual operation becomes "dazzling in its complexity," as Edward Cooper aptly says.[1] This is because in practice the finality-appealability idea gets entangled in a thicket[2] of conflicting values. Finding a path through the thicket is hard work, as those who have made the effort will attest. A great many courses present themselves as possible solutions, but on analysis none appears to be very satisfactory.

Like the basic premise of the finality requirement, the aims of finality command wide support. Most observers agree that cases should not go up to the appellate courts in fragments, should not go up prematurely, and should not go up repetitively. These undesirable procedural spasms can be avoided if appeals are limited to judgments and orders that determine an action on the merits and leave nothing to be done except enforcement. Insisting on that limitation is said to respond directly to important "considerations of judicial economy and concern for the prompt and efficient resolution of disputes . . . ."[3]

There is an obvious paradox in trying to promote promptness in disposing of cases by delaying appeals until the end of the process instead of encouraging early appellate review. In response, supporters of the finality principle maintain that no matter how salutary early appeal seems in theory, the actual long term effect of allowing an appeal to interrupt the progress of a lawsuit which is moving toward disposition on the merits in the trial court is to produce more delay, not less. Probably the pro-finality side is partly right and partly wrong. Sometimes early review is only a time-wasting interruption; but sometimes it does bring the case to a quick, efficient termination. The problem calls for an entirely pragmatic solution—to devise procedures or tests to identify the orders that should be reviewed promptly,

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* Professor of Law, Columbia University School of Law.

1. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context?*, LAW & CONTEMP. PROBS., Summer 1984, at 157.

2. Carrington, *Toward a Federal Civil Interlocutory Appeals Act,* LAW & CONTEMP. PROBS., Summer 1984, at 165, 166.

3. Frank, *Requiem for the Final Judgment Rule,* 45 TEXAS L. REV. 292, 292 (1966); *see also* Note, *Appealability in the Federal Courts,* 75 HARV. L. REV. 351, 351-52 (1961).

without the end-of-the-road finality that comes when the trial court process has run its complete course. That is easily said, but there are many questions: Should the solution take the form of legislative prescriptions or judicial standards? Should the procedures and tests determine the appealability of categories of cases on a wholesale basis or provide for ad hoc, case-by-case determinations? Should the criteria for appealability be stated explicitly or left to the "discretion" of the judges? To these and related questions a great variety of answers and combinations of answers can be devised. Examples of diverse appealability standards drawn from several states and foreign countries, the proposals of Professor Cooper and Dean Carrington, and the Interlocutory Restatement itself make clear how many approaches are possible. In this article I shall comment particularly on the Cooper and Carrington ideas in order to focus on the problem in its federal context.

II

THE EXISTING FEDERAL SITUATION

The existing federal finality-appealability situation is an unacceptable morass. The problem is not merely that the law of appealability is a hodgepodge, a kind of crazy quilt of legislation and judicial decisions. Crazy quilts can be useful and there are occasions when inelegance in the legal system works, but this is definitely not one of those occasions. Entirely too much of the appellate courts' energy is absorbed in deciding whether they are entitled under the finality principle and its exceptions to hear cases brought before them—and in explaining why or why not. These explanations add to the complexity of the problem, but do nothing to dispel the confusion.

Many unkind remarks have been made about the maze of intricately unconnected legislative and judicial prescriptions governing federal appealability today. One of the most blameworthy features of the legislation appears in the first sentence of the finality requirement, section 1291 of the Judicial Code.[4] It causes difficulties from that point on. Section 1291 declares: "The courts of appeals . . . shall have jurisdiction of appeals from final decisions of the district courts . . . ." By negative implication, there is no "jurisdiction" in the court of appeals if the decision is not final. Why make finality a predicate for jurisdiction? Presumably doing so underlines the fact that Congress intends the finality requirement to be a serious and unyielding prerequisite and one that not even the appellate courts themselves may set aside. The apparent analogy is to subject matter competence based upon diversity of citizenship or amount in controversy. The analogy is misconceived. Diversity of citizenship is properly and necessarily prerequisite to federal court jurisdiction in non-federal-question cases because article 3 of the United States Constitution so provides. Amount-in-controversy restrictions on the competence of major courts are sensible legislative means of protecting those courts from inundation by small-claims suits. An important point about both the diversity

4. 28 U.S.C. § 1291 (1976). All statutory sections subsequently discussed also are contained in the Judicial Code, Title 28 of the United States Code.

and amount requirements is that they condition the courts' competence to hear the action on attributes of the case itself, not on incidental procedural circumstances such as whether more remains to be done before the action is at an end. Making the power of the appellate courts to proceed depend on finality causes the courts to try to satisfy the requirement by inventing artificial forms of finality. These strained interpretations, resulting in quasi-finality, are major contributors to the morass. Any worthwhile reform of the federal finality-appealability rules should eliminate the "jurisdiction" language of section 1291. Jurisdiction terminology should also be dropped from the other sections governing appealability, including the time-for-appeal provisions of section 1297.

After laying down the basic requirement of finality, the Code enumerates exceptions and methods of appealing without satisfying the finality provision. Section 1292(a), entitled "Interlocutory Decisions," creates a group of per se exceptions mostly identified categorically in terms of the nature of the action involved.

The courts of appeals are given jurisdiction of interlocutory orders in four situations. Appellate review is in each a matter of right, without regard to the need for immediate appeal in the particular case. Under section 1292(a)(1) the appellate courts are authorized to review interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions. The rationale is that such orders may bring about a "serious, perhaps irreparable consequence."[5] A large body of case law has grown up around the issue of the appealability of orders staying proceedings. In some circuits, but not in others, orders granting or denying stays of arbitration are appealable as injunctions.

Interlocutory orders appointing receivers or refusing to wind up receiverships or to take certain steps in such proceedings are appealable under section 1292(a)(2). The purpose of the exception is similar to that for injunction orders—forestalling irreparable damage. However, futility rather than irreparability is the danger sought to be avoided in section 1292(a)(3) which provides for appeals from interlocutory "decrees" determining the rights and liabilities of parties in admiralty cases in whch appeals from final decrees are permitted. This allows appeals after determination of liability but before a determination of damages to avoid the expense and delay of computing damages in cases in which it turns out the libelant has no right to recover. Judgments in civil actions for patent infringement that are final except for accounting are appealable under section 1292(a)(4), again on the basis that the expense and delay of computing damages can be avoided if the interlocutory appeal results in denying recovery.

In addition to the legislatively defined categories of appealable nonfinal orders, there are two amorphous, undefined categories. One arises from the "mandamus" exception to the finality principle under section 1651(a), which provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." The mandamus route of appeal under the All-Writs provision has been a widening tear in

5. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955).

the fabric of the final-decision limit on appeals. It has become an ordinary rather than an extraordinary route of appeal.

The second amorphous category is created by the provision of Rule 54(b) of the Federal Rules of Civil Procedure allowing appeal of orders disposing of less than all claims or parties in a case involving multiple parties or multiple claims, provided the district court certifies there is no just cause for delay of the appeal.

One of the most confused and troublesome clusters of problems in this field results from the creation by the courts of the category of what are here called "quasi-final" orders. These result from judicial construction of the provisions of the final-decision statute, section 1291. Although ordinarily a final decision under that section is considered to be a judgment or order that determines the litigation on the merits and leaves nothing to be done except enforcement, the Supreme Court has recognized several types of orders as appealable even though they do not pass that test of finality. The collateral order doctrine, which emerged in *Cohen v. Beneficial Industrial Loan Corp.*,[6] laid down the requirements for an order to qualify for review. The "death-knell" doctrine, related to the collateral order doctrine in its rationale, is that immediate appeal should be available from a district court order that, although not strictly final, makes meaningful continuation of the suit legally or practically impossible.

In addition to the legislatively defined and the judicially created categories of cases and decisions that are per se appealable even though not final in fact, Congress has provided in section 1292(b) a means of reviewing on an ad hoc basis an interlocutory order in a civil case if the trial court makes an appropriate certification and the appellate court accepts the case. This certification procedure permits selective avoidance of the finality requirement on a case-by-case basis. It supposedly allows dealing in a flexible way with "occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, upon which in a realistic way the whole case or defense will turn."[7]

III

PROFESSOR COOPER'S PROPOSALS

The foregoing helter-skelter procedures, circumstances and decisions have produced a near-chaotic state of affairs that need prompt attention. Professor Cooper proposes to remedy the situation by enlarging the present scope of the district court's power to certify interlocutory appeals, with discretion in the court of appeals to accept or reject the certification. During a transitional period, in which the present doctrines might wither away, there would be two sets of procedures for appealing interlocutory orders, one based on legislatively and judicially declared criteria, the other based on discretion. Eventually the criteria might be discarded,

6. 337 U.S. 541 (1949).
7. Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 703 (5th Cir. 1961).

leaving a system in which discretionary appeals are the only supplement to appeals from genuinely final judgments.

Professor Cooper's analysis of the present jumbled state of the law and his call for simplification are sound and convincing. He is clearly right to urge a simpler way to determine appealability. "It is very tempting," he states, "to replace the rules with a flexible system that relies largely on discretion to determine the occasions for appeal before a truly final judgment."[8] He succumbs to the temptation. In my view his prescription for a cure is not as sound as his diagnosis of the problem and the need. Of the many helpful insights he offers, two warrant special note. First, he shows that the urgency of allowing an interlocutory appeal may differ markedly from one area of the law to another because of such factors as the higher likelihood of error and the greater severity of injury from delay in correcting the error by appeal. The same is true of some types of procedural rulings, he notes. His analysis goes far beyond the kind of reasoning that identified the problem areas in which section 1292(a) permits interlocutory appeals. Professor Cooper's analytical approach has an important potential in reforming appealability procedures and should be utilized to identify appropriate exceptions to the finality requirements.

Another important insight of the Cooper article is its careful demonstration that a solution to the appealability problem depends not only on developing improved methods of identifying appeal-worthy nonfinal orders, but upon the quality of the judges and the character of the bar. He advances an intriguing theory concerning the interactive effects of the quality of the trial judges, appealability, and scope of review. In recognizing that the key to procedural reform of this kind depends on improvements in personnel and their motivations, as well as on workable standards and methods of decision, Professor Cooper has given a helpful boost to an evolving realism in procedural reform.[9] However, his specific plan of reform is not a promising one.

Whatever else, the Cooper formula for clearing up the finality-appealability mess is straightforward: (1) simplify present procedures for interlocutory appeal via the district court certification route and combine them with extraordinary writ practice; (2) remove present limitations on the district court's power to certify interlocutory appeals; (3) require the would-be appellant to apply to the district court unless a strong showing is made justifying direct application to the court of appeals; and (4) make the allowance of an interlocutory appeal entirely discretionary with the court of appeals. The fourth element—the appellate court's exercise of discretion to allow or disallow the interlocutory appeal—is obviously the keystone of Professor Cooper's structure. That is the chief difficulty with it. Investing the courts of appeals with the power of standardless choice to hear or reject interlocutory appeals will not do much to remedy the main evils of the present situation. Unlike Professor Cooper, I do not see the transformation of rules into discretion as a positive or promising movement in this context.

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8. Cooper, *supra* note 1, at 157.

9. *See* Rosenberg, *The Federal Civil Rules After Half A Century,* 36 ME. L. REV. 243 (1984).

An apparent analog for his plan to allow the reviewing court discretion as to which appeals it will hear is the procedure used by the Supreme Court of the United States and many of the highest courts in the states in granting or denying permission to appeal. Despite surface similarity, there is a great difference between the objectives and functioning of certiorari or other leave-to-appeal procedures and the proposed practice. In the former, the case has ordinarily had the benefit of review by one appellate court to assure the correctness of the proceeding and the decision. The question usually underlying the choice confronting the highest court is whether an "institutional review" should be afforded for law-declaring reasons going beyond the case itself—for example, because the issue is novel, or one of great public interest, or one on which the lower appellate court decisions are in conflict.[10] Those standards provide a fair amount of guidance for lawyers who frame petitions for review by the highest courts and for the judges of those courts when they make their choices. In contrast, the prime function of a hearing by the federal courts of appeals is not institutional review but monitoring the trial level decision for correctness in the normal way of an intermediate appellate court. The review-for-correctness function implicitly requires that if the court can choose which cases to review it should do so on the basis of magnitude of error, severity of injury, and similar criteria. These features are usually specific to the case and highly resistant to generalizing. What is more, they call for subtle and subjective judgments that are difficult to reach. It is hard to see how exposing the courts of appeals to applications for interlocutory review based on the open-ended criteria mentioned will serve any of the interests we seek to further.

While Professor Cooper is right in saying that better judges and wiser lawyers will contribute to solving the finality-appealability puzzle, I doubt that he is forecasting accurately in suggesting that "with a very wise and well accultured appellate bar, rules of discretion might satisfy all needs for interlocutory review."[11] Decades of experience with the similar grant of discretion in section 1292(b) have not produced evidence to support such optimism.[12] Judicial discretion remains today one of the most intricate and mysterious of the concepts judges and lawyers regularly encounter.[13] It would be a mistake to make it the keystone of a redesigned finality-appealability structure.

Presumably, the reason the present certification-discretion procedure is not used more frequently is the inhibitory effect of the triad of limitations on district court certifications mandated by section 1292(b). With those removed by the Cooper revisions, there is every prospect that large numbers of interlocutory appeals will seek certification. Assume that a conscientious district judge then consults the tangled entrails of the finality-appealability doctrines that the caselaw

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10. R. MACCRATE, J. HOPKINS & M. ROSENBERG, APPELLATE JUSTICE IN NEW YORK 69-71 (1982) [hereinafter cited as R. MACCRATE].

11. Cooper, *supra* note 1, at 161.

12. *See* Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025, 1028-29 (1979); Redish, *The Pragmatic Approach to Appealability in Federal Courts*, 75 COLUM. L. REV. 89, 109 (1975).

13. Friendly, *Indiscretion About Discretion*, 31 EMORY L. REV. 747 (1982); Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

(including the extraordinary writs decisions) has produced and that the certification is granted. The appellate court, with high volumes of appeals of right pressing on it, now has to decide whether to add to its burden by accepting the certified interlocutory appeal as a matter of grace. This often is not merely a decision on the "timing" of the appeal—whether to hear it now or later—but on whether there is to be any review of the order being challenged. If an appeal on that question is not heard now, one may never materialize, either because the would-be appellant wins at trial or because the issue prompting the present appeal becomes moot. But whatever the future may hold in store for the case, one thing is clear: the appellate court will have to spend time and energy today deciding whether to accept the appeal, certified or not. This follows from an axiom Paul Carrington has been know to utter, namely: "I can't think about whether I ought to think about a question without thinking about it." Added deliberative efforts of that type, if they were to be encountered in many cases, could doom an all-discretionary interlocutory appeal regime.

IV

DEAN CARRINGTON'S PROPOSALS

Dean Carrington appears to be in basic agreement with Professor Cooper about what is wrong with the federal law of finality-appealability but he has a very different idea about how to right it. What is wrong, in Carrington's view, is the "unconscionable intricacy of the existing law," which depends on "overlapping exceptions, each less lucid than the next."[14] These exceptions are understandable efforts to prevent the injuries that strict adherence to the finality requirement would inflict in some cases; however, the courts' practice of reaffirming the final-decision dogma even as they circumvent it by exceptions is confusing. The Carrington plan is to correct this situation by rules, not discretion. Most of the rules are contained in a draft statute he entitles "A Civil Interlocutory Appeals Act," which he conceives to be a "statutory machete" to trim away the overgrowth of exceptions that hide what the courts are actually doing to resolve the finality-appealability dilemma. The Act invites supplementation by the adoption of rules made pursuant to the Rules Enabling Act.

In the respects relevant here the Carrington statute provides, first, that final decisions are appealable if they are really final, with finality to depend not on variable definitions but on a document signed by the district judge or magistrate manifesting intent that the case be at an end. Under this standard "finality" will meet even the stringent Yogi Berra test of ultimacy, namely: "It ain't over 'til it's over."

Second, under the Act, interlocutory orders will be appealable if they (a) fall into a specified category of actions or orders relating to injunctions, receivers or patents; or (b) affect substantial rights that cannot be effectively protected on review following a final decision; or (c) fall within the class of appealable orders

14. Carrington, *supra* note 2, at 166.

designated by a rule adopted pursuant to the Rules Enabling Act; or (d) comply with the certification and related requirements contained in section 1292(b).

The next noteworthy feature of the Act is that it makes passing the appealability tests a sine qua non of "jurisdiction" of the courts of appeals. Thus, a new section 1291(b) declares: "Appellate jurisdiction under this section shall not vest until the final decision of the district court is set forth on a separate document" and signed by the judge or magistrate. A similar effect is provided in section 1292(a) for nonfinal orders, this time by negative implication: "The courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts when essential to protect substantial rights . . . ." Then, in a departure from present law, section 1298(a) of the Act makes a defect of appellate jurisdiction waivable and provides that jurisdiction on appeal may be conferred by consent of the parties. For reasons discussed above, I strongly favor the end result the act would reach, but would achieve it by scrapping the idea that meeting the appealability requirements is a "jurisdictional" necessity. The issues of appealability of a decision for finality or other characteristics (such as the decision's peculiar impact upon a party's interests) and of the timeliness of an appeal ought not to be treated as going to the power of an appellate court to act any more than the untimeliness of starting an action, making a motion, or serving a responsive pleading utterly divests the district court of power to deal with the case. All these questions should be treated as procedural rules—very important rules, to be sure, and subject to serious consequences if violated—but violation should be treated as a procedural failure, not as competence-destroying. As Professor Cooper says, it is important to avoid the "foolish forfeitures" that come from treating defects in appealability as divesting the appellate court of "jurisdiction" over the case submitted to it. If the Carrington statute were revised to treat its subject matter as involving serious requirements of procedure, appropriate provisions could be made to deal with lapses and neither the erection nor the dismantling of jurisdictional constructs would be necessary.

Apart from that reservation, I favor the basic approach and most of the essential provisions of the Act. Getting rid of the judicial game-playing that has produced quasi-finality in the form of collateral orders, death knells and similar doctrines is very desirable. Those strained interpretations of finality have stretched the concept out of shape. Clarity would result from limiting finality to its end-of-the-case meaning. Another benefit of the Carrington proposal would be to return the extraordinary writs practice to its proper place as a repository of appellate power to correct grave errors of egregious dimensions. It should not be what it has become in some decisions—an all-purpose alternative method of appealing.

The key provision of the Act is obviously section 1291(a), allowing interlocutory appeals when "essential to protect substantial rights which cannot be effectively enforced on review after final decision." This is intended to embody the existing practice regarding what I have called "quasi-finality." Its purpose is to direct attention to the "real considerations" in resolving finality-appealability issues and to reduce confusion. This would meet the main defect of the present system—the courts' inability to protect substantial rights, usually procedural in

nature—from erroneous rulings if they await final decision to attempt corrective action. Whether the proposed statute will be effective in allowing those rulings to be appealed soon enough without opening the appealability doors too widely depends on whether "substantial rights" can accurately be recognized to an effective extent. North Carolina and New York have provisions making the quoted term the pivotal one in determining interlocutory appealability. The experience with the term in New York has not been encouraging and a recent study has urged its abolition on the ground that it provides too loose a standard to be continued.[15]

The proposal to identify potential interlocutory appeals by rule of court is an original approach that may well be the best of the available alternatives. It assures that continuing experience with this stubborn problem can be converted into rule-prescribed standards that will give both the courts and the bar a basis for knowing which interlocutory orders are immediately appealable. The rulemaking process is better suited to the careful monitoring effort needed here than the ponderous legislative process.

V

CONCLUSION

The finality-appealability problem is not likely to be solved by a bold stroke in the form of legislation, judicial decisions or scholarly inventions. More than likely, we shall have the problem with us for a long time. However, the law on the subject is presently much more complicated, confused and conflicting than it needs to be. A thorough revision is in order. The Interlocutory Restatement is a major contribution to the process. So are the articles that have been assembled here. Particularly helpful in their treatment of the federal aspects are the Cooper and Carrington papers to which this comment is addressed.

15. R. MACCRATE, *supra* note 10, at 86-88; *see also* Whichard, *Appealability in North Carolina: Common Law Definition of the Statutory "Substantial Rights" Doctrine*, LAW & CONTEMP. PROBS., Summer 1984, at 123, 125.