REPLACING THE CRAZY QUILT OF INTERLOCUTORY APPEALS JURISPRUDENCE WITH DISCRETIONARY REVIEW

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> 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.[1]

INTRODUCTION

The primary gatekeeper at the door to the federal courts of appeals is the rule that only final judgments are appealable.[2] The final judgment rule has performed this role well, for the most part.[3] In certain cases, however, a trial court's error on an interlocutory issue is effectively unreviewable on appeal from a final judgment. To deal with this type of injustice, the courts and Congress have created a patchwork of exceptions to the final judgment rule.

Dissatisfaction with this patchwork is now widespread.[4] With

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1. Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, LAW & CONTEMP. PROBS., Summer 1984, at 170, 172.

2. *See* 28 U.S.C. § 1291 (1988) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . .").

3. Most commentators who advocate reform recommend keeping the final judgment rule but creating certain exceptions. The only ones who recommend abolishing the final judgment rule are those who favor abolishing appeals as of right altogether. *Compare* Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, LAW & CONTEMP. PROBS., Summer 1984, at 165, 165–66 (advocating final judgment rule plus categories of interlocutory appeals) *and* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 747 (1993) (advocating final judgment rule plus discretionary review) *and* Randall J. Turk, Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025, 1038 (1979) (advocating final judgment rule plus one new category of interlocutory appeals) *with* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 564 (1932) (arguing for the elimination of appeals as of right) *and* Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985) (same).

4. *See, e.g.*, FEDERAL COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE

this consensus, and with the passage of 28 U.S.C. sections 1292(e) and 2072(c), which give the Supreme Court the power to make rules clarifying appellate jurisdiction,[5] the time has come to unstitch this crazy quilt so that litigants can spend more time arguing about the merits of their cases and less time arguing about when they can argue. The rulemakers should use their new power to adopt the discretionary approach recommended by the American Bar Association (ABA) and implemented in Wisconsin.[6] This approach eliminates the ineffective judicially created exceptions to the final judgment rule, avoids the intractable problem of creating a formula to identify *ex ante* all orders deserving of interlocutory review, and provides the courts of appeals with a relief valve for orders that may result in harsh consequences if appeal is delayed until a final decision. The rulemakers, Congress, and the courts should then proceed to refine this discretionary scheme by identifying classes of orders that will generally or always be allowed or denied interlocutory review.

Part I of this Note relates the current state of the law of federal circuit court jurisdiction over interlocutory appeals from the district courts. Part II examines the recent ABA recommendation for discretionary review, which has been adopted in Wisconsin, and concludes that broad discretionary review is the best way to identify orders appropriate for interlocutory review.[7] Part III applies the recommended discretionary standards to two recent cases, *Reise v. Board of Regents of the University of Wisconsin*

UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95 (1990). The Committee explained,

> The state of the law on when a district court ruling is appealable because it is "final," or is an appealable interlocutory action, strikes many observers as unsatisfactory in several respects. The area has produced much purely procedural litigation. Courts of appeals often dismiss appeals as premature. Litigants sometimes face the possibility of waiving their right to appeal when they fail to seek timely review because it is unclear when a decision is "final" and the time for appeal begins to run. Decisional doctrines—such as "practical finality" and especially the "collateral order" rule—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review.

Id. *See also* Carrington, *supra* note 3, at 165–66; Martineau, *supra* note 3, at 747.

5. 28 U.S.C. §§ 1292(e), 2072(c) (Supp. V 1993).

6. See *infra* note 110.

7. This Note analyzes the process by which courts identify those orders that should be allowed interlocutory review. I recommend that the general process embedded in the Wisconsin-ABA approach—broad discretionary review—be adopted. I do not address in detail the adequacy of any specific standards used to single out orders for interlocutory review.

System[8] and *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*,[9] and concludes that the analysis would often collapse into an evaluation of the merits of the appeal and that the standards may need refinement.

I. APPELLATE JURISDICTION OVER INTERLOCUTORY APPEALS

A. *The Final Judgment Rule*

The final judgment rule can be traced to the writ of error at English common law.[10] The rule developed because at common law an appellate court was required to consider the entire record. This requirement made appeals before a final decision problematic because it was difficult for the King's Bench and the trial court to review the record simultaneously.[11] Equity courts, not limited by this formality, applied a more flexible standard, allowing some appeals before a final decision.[12] In 1789, the United States Congress chose to adopt the common law approach to appeals as part of its basic grants of appellate jurisdiction[13] and the final judgment requirement remains intact, in large part, today.[14]

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8. 957 F.2d 293 (7th Cir. 1992).

9. 113 S. Ct. 684 (1993).

10. 15A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3906, at 264 (1992).

11. Gerald T. Wetherington, *Appellate Review of Final and Non-Final Orders in Florida Civil Cases—An Overview*, LAW & CONTEMP. PROBS., Summer 1984, at 61, 62.

12. *Id.* For a thorough discussion of the early history of the final judgment rule, see 15A WRIGHT ET AL., *supra* note 10, § 3906, at 264–68.

13. *See* The Judiciary Act of 1789, ch. 20, §§ 21, 22, 25, 1 Stat. 73, 83–87:

> [Section 21:] [F]rom final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court . . . .
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> [Section 22:] [F]inal decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court . . . upon a writ of error . . . . And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court . . . where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court . . . .
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> [Section 25:] [A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

14. *See* 28 U.S.C. § 1291 (1988) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . .").

Delay of appellate review until the trial court proceedings are complete has several advantages. First, many issues that a party seeks to appeal before a final decision may become moot upon the disposition of the case on the merits.[15] Second, piecemeal appeals threaten the independence of trial judges.[16] Third, the final judgment rule "avoid[s] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise."[17]

Despite the advantages of the final judgment rule, certain interlocutory orders are effectively unreviewable on appeal from a final decision.[18] A strict application of the final judgment rule can produce harsh consequences for litigants who are unable to challenge a prejudicial and erroneous pre-final order. For example, in *Cohen v. Beneficial Industrial Loan Corp.*, the district court wrongfully refused to condition the plaintiff's continuation of his derivative suit upon his posting bond.[19] The right to have bond posted during trial would have been irreparably lost had the defendant been refused appeal until the trial was completed.[20] Cases involving preliminary injunctions are another example because the failure to prevent or require some action before a final decision is issued may irreparably harm a party.[21]

The battle between these competing concerns[22] explains why the Supreme Court, despite the clarity of the statutes conferring

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15. *See, e.g.*, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987).

16. *See, e.g.*, Flanagan v. United States, 465 U.S. 259, 263–64 (1984) ("[The final judgment rule] helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation."). Similar arguments underlie the relationship between the final judgment requirement for U.S. Supreme Court review of state court decisions and the independence of state courts. *See* 15A WRIGHT ET AL., *supra* note 10, § 3908, at 284–90.

17. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)).

18. Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1169 (1990).

19. 337 U.S. 541, 546 (1949). For a more complete discussion of *Cohen*, see *infra* text accompanying notes 29–44.

20. *Cohen*, 337 U.S. at 546.

21. Solimine, *supra* note 18, at 1169.

22. For a more thorough discussion of the benefits and detriments of interlocutory review, see Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, LAW & CONTEMP. PROBS., Summer 1984, at 157, 157–58; Crick, *supra* note 3; Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351–53 (1961).

appellate jurisdiction,[23] for many years failed to apply the final judgment rule rigidly, eschewing a clear definition of "final judgment."[24] In 1945, in *Catlin v. United States*, the Court appeared to settle the controversy in favor of precluding interlocutory appeals when it held that a final order is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[25]

B. *Over, Under, and Around the Final Judgment Rule*

Catlin, however, could not overcome dissatisfaction with the inflexibility of the final judgment rule. In a patchwork process that continues today, both Congress and the courts have proceeded to weave a crazy quilt of exceptions, which are often "overlapping . . . [and] each less lucid than the next."[26] What follows is a brief description of the most significant exceptions to the rule.[27]

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23. *See supra* notes 13–14.

24. *See, e.g.*, McGourkey v. Toledo & Ohio Cent. Ry., 146 U.S. 536, 544–45 (1892) ("Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees . . . . The cases, it must be conceded, are not all together harmonious.").

25. 324 U.S. 229, 233 (1945).

26. Carrington, *supra* note 3, at 166.

27. Less significant exceptions to the final judgment rule include the *Forgay v. Conrad* rule, the appeal of attorney's fees orders, the appeal of bankruptcy orders, the *Gillepsie* balancing approach, and the death knell doctrine. *See* Martineau, *supra* note 3, at 738–46; Turk, *supra* note 3, at 1033–38.

The *Forgay v. Conrad* rule is a narrow exception that allows appeal in the rare case when a court orders a transfer of property but retains jurisdiction for accounting purposes. Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848); Martineau, *supra* note 3, at 738–39. In Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988), the Supreme Court adopted a rule whereby orders concerning attorney's fees are per se appealable regardless of the status of the decision on the merits.

Interlocutory appeals from bankruptcy court orders have been allowed more liberal appeal under 28 U.S.C. § 158(d), Supp. V (1993) because many interlocutory orders in bankruptcy cases conclusively resolve the rights of parties. Martineau, *supra* note 3, at 745. In Gillepsie v. United States Steel Corp., 379 U.S. 148, 152–53 (1964), the Supreme Court articulated a balancing approach to interlocutory appeals, allowing the appeal of an interlocutory order because the costs of continuing the litigation before an appeal outweighed the costs of piecemeal review. *Id.* at 153. This potentially sweeping new approach to interlocutory appeals has been "criticized by the commentators and avoided by the courts." Turk, *supra* note 3, at 1034. Finally, according to the death knell doctrine, an order is final if that order as a practical matter ends the litigation even though no formal final order has been entered. 15A WRIGHT ET AL., supra note 10, § 3912, at 439. This theory serves as an adjunct to the collateral order doctrine and prevents injustice when orders involve the merits of the case. *Id.* at 440.

1. *The Collateral Order Doctrine.* Only four years after the articulation of a rigid final judgment rule in *Catlin*,[28] the Court retreated when it pronounced the collateral order doctrine in *Cohen v. Beneficial Industrial Loan Corp.*[29] *Cohen* was a shareholder's derivative suit in which the district court refused to apply a statute of the forum state. This statute required the plaintiff in a derivative suit to post bond to cover the defendant's costs in the event the suit turned out to be frivolous.[30] The appellate court heard the appeal on the grounds that the issue was collateral and "final in its nature."[31]

As a threshold question, the Supreme Court considered whether the court of appeals had jurisdiction to hear the appeal.[32] Although the order was not formally part of a final decision, Justice Jackson, writing for a unanimous Court, reasoned that 28 U.S.C. § 1291 should be given a "practical rather than a technical construction."[33] To define a "final decision" under section 1291, the Court looked to the purpose of the statute, which is to "combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."[34]

Justice Jackson listed four characteristics of the order in question that, when all are present, make an order effectively final and suitable for interlocutory appeal. First, the order was not "tentative, informal or incomplete."[35] Second, the order was separate from the merits of the case.[36] Third, delay of review risked serious irreparable harm to the defendant.[37] Finally, the disputed order presented a "serious and unsettled question."[38]

After *Cohen*, several commentators predicted that courts would construe the collateral order doctrine broadly until little

28. 324 U.S. 229, 243 (1945).
29. 337 U.S. 541, 546–47 (1949).
30. *Id.* at 544–45.
31. Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44, 49 (3d Cir. 1948) (quoting United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926)).
32. *Cohen*, 337 U.S. at 545.
33. *Id.* at 546.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 547.

would be left of the final judgment rule.[39] This trend never materialized.[40] The Supreme Court has limited interlocutory appeals under the collateral order doctrine to a small class of cases.[41]

A clear signal of the Court's unwillingness to apply broadly the collateral order doctrine came in *Coopers & Lybrand v. Livesay*.[42] The Court denied the interlocutory appeal of a decertification order in a class action suit because the challenged order met none of the *Cohen* requirements.[43] The Court restated the *Cohen* test in a frequently cited passage: the order in question "must [1] conclusively determine the disputed question, [2] resolve an important issue [3] completely separate from the merits of the action, and [4] be effectively unreviewable on appeal from a final judgment."[44]

Whether an order "conclusively determines" an issue depends on the appellate court's assessment of the likelihood of reconsideration. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court held that the challenged order granting a stay, although not conclusive in a technical sense, was final in practice.[45] Virtually any order is not formally final until the trial judge signs it, because until then the judge has the power to alter it.[46] The Court held, however, that an unsigned order is not what the *Coopers & Lybrand* Court meant by "inherently tentative."[47] The dividing line between interlocutory and final orders is marked not by the formal ability to revise, but instead by the reasonable likelihood of revision.[48]

In contrast, in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*,[49] the Court considered an interlocutory appeal of an order denying a motion for a stay. The Court held that the order was

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39. *See, e.g.*, Theodore D. Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 301–02, 317–20 (1966).

40. Solimine, *supra* note 18, at 1171.

41. *Id.*

42. 437 U.S. 463 (1978).

43. *Id.* at 469.

44. *Id.* at 468. For a list of Supreme Court and circuit court decisions applying the *Coopers & Lybrand* formula, see 15A WRIGHT ET AL., *supra* note 10, § 3911, at 349 n.59.

45. 460 U.S. 1, 11–12 (1983).

46. *Id.* at 12.

47. *Id.* at 12 n.14.

48. *See id.*

49. 485 U.S. 271 (1988).

"inherently tentative."[50] "[A] district court usually will expect to revisit and reassess an order denying a stay in light of events occurring in the normal course of the litigation."[51]

Most courts have paid little attention to the "importance" requirement.[52] A handful of courts, however, have rejected appeals at least in part on the grounds that the order in question was not important.[53]

The "separate from the merits" requirement serves to reconcile interlocutory appeals with some of the goals of the final judgment rule.[54] Interlocutory review of orders that are collateral to the merits does not disrupt the trial court proceedings and does not require the reviewing court to refamiliarize itself with the merits of the case upon final appeal.[55] However, the collateral requirement sometimes is swept aside by concerns of hardship to litigants denied effective review.[56] The paradigmatic example of an order that is separate from the merits is the order denying security in *Cohen*.[57] An example of an order that is not collateral is an order dismissing counterclaims on a motion for summary judgment.[58]

The requirement of "effective unreviewability" is the " 'central focus' and perhaps even the 'dispositive criterion' of appellate

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50. *Id.* at 278.

51. *Id.*

52. 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 110.10, at 71–72 (2d ed. 1993 & Supp. 1993–1994).

53. *E.g.*, Minnesota v. Pickands Mather & Co., 636 F.2d 251, 255 (8th Cir. 1980) (holding that an order denying leave to file a third-party complaint for contribution against a former codefendant "does not present a 'serious and unsettled' question of law"); Wilk v. American Medical Ass'n, 635 F.2d 1295, 1298 n.6 (7th Cir. 1980) (observing that refusal to modify protective discovery order did not present an important and unsettled question).

54. 15A WRIGHT ET AL., *supra* note 10, § 3911.2, at 379; *see supra* text accompanying notes 15–17.

55. 15A WRIGHT ET AL., *supra* note 10, § 3911.2, at 379–80.

56. 15A *id.* at 379. For example, in Mitchell v. Forsyth, 472 U.S. 511, 527–29 (1985), the Court allowed the interlocutory appeal of the denial of a motion for dismissal based on qualified official immunity, despite the entanglement of the official immunity claim with the merits of the case.

57. *See* 15A WRIGHT ET AL., *supra* note 10, § 3911.2, at 380–81.

58. *See, e.g.*, Western Elec. Co. v. Milgo Elec. Corp., 568 F.2d 1203, 1207 (5th Cir. 1978) ("The district court's decision that certain counterclaims must fail . . . is a decision sustaining a substantive defense to the cause of action asserted; it is a 'step toward the final disposition of the merits of the case.' " (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949))).

jurisdiction" over interlocutory appeals under the collateral order doctrine.[59]

> [A]n order is "effectively unreviewable" only "where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.' " . . . It is always true . . . that "there is value . . . in triumphing before trial, rather than after it," and this Court has declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order.[60]

Thus, for example, a litigant claiming absolute or qualified immunity from suit could obtain interlocutory review of an order denying a motion to dismiss.[61] The immunity from the burdens and expenses of litigation would be destroyed if the trial were allowed to continue.[62] Conversely, a litigant claiming that a court lacks jurisdiction cannot obtain interlocutory review, because "the right not to be subject to a binding judgment may be effectively vindicated following final judgment."[63]

Despite the Court's attempt to clarify the collateral order doctrine in *Coopers & Lybrand* and several other cases, the doctrine has proved unsatisfactory as a cure for the rigidity of the final judgment rule. It has been costly in terms of judicial and party resources,[64] and the results have been mixed at best. The test often is applied inconsistently from circuit to circuit,[65] and courts sometimes reduce the requirements to an ad hoc balancing test.[66] Judge Posner accurately observed that

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59. Boreri v. Fiat S.P.A., 763 F.2d 17, 21 (1st Cir. 1985) (quoting *In re* San Juan Star Co., 662 F.2d 108, 112 (1st Cir. 1981)); *see also* Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986) (reaching the same conclusion), *cert. denied*, 481 U.S. 1049 (1987).

60. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498–99 (1989) (citations omitted).

61. Nixon v. Fitzgerald, 457 U.S. 731, 742–43 (1982).

62. Mitchell v. Forsyth, 472 U.S. 511, 525 (1985).

63. Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988).

64. *See* Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986) (observing that the collateral order doctrine has "spawned an immense jurisprudence"). As of September 1994, 1,380 reported federal cases discussed the "collateral order doctrine." Search of Westlaw, Allfeds database (Sept. 6, 1994).

65. *Compare, e.g.*, Reise v. Board of Regents, 957 F.2d 293, 294–95 (7th Cir. 1992) (holding that an order compelling a physical examination under Rule 35 of the Federal Rules of Civil Procedure is not appealable under the collateral order doctrine) *with* Acosta v. Tenneco Oil Co., 913 F.2d 205, 207–08 (5th Cir. 1990) (granting interlocutory review of a similar order).

66. *See, e.g.*, Bender v. Clark, 744 F.2d 1424, 1427 (10th Cir. 1984) ("[I]n the unique

> as with so many multi-"pronged" legal tests [the collateral order doctrine] manages to be at once redundant, incomplete, and unclear. The second "prong" is part of the third. If the order sought to be appealed is not definitive, an immediate appeal is not necessary to ward off harm; there is no harm yet. The first "prong" seems unduly rigid; if an order unless appealed really will harm the appellant irreparably, should the fact that it involves an issue not completely separate from the merits of the proceeding *always* prevent an immediate appeal?[67]

2. *Mandamus Review—28 U.S.C. § 1651.* The writ of mandamus provides a second route for litigants to obtain review of interlocutory orders. As with the final judgment rule, the power to issue extraordinary writs can be traced to the first Judiciary Act.[68] The current version of the All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[69]

Appellate courts should use the writ of mandamus only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."[70] Mandamus is a "drastic and extraordinary remed[y]"[71] and should be used only "where there is clear abuse

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instance where the issue is not 'collateral' but justice may require immediate review, a balancing approach should be followed . . . ."); Shakur v. Malcolm, 525 F.2d 1144, 1147 (2d Cir. 1975) ("[T]he *Cohen* exception, as applied, has evolved into a balancing test with the disadvantages of piecemeal appeal weighed against the importance of the questions raised by the interlocutory order.").

67. *Palmer*, 806 F.2d at 1318.

68. *See* Act of Sept. 24, 1789, ch. 20, §14, 1 stat. 73, 81–82 ("[A]ll the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus* . . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.").

69. 28 U.S.C. § 1651 (Supp. V 1993).

70. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)). Many cases have cited this formulation of the purpose of extraordinary writs. *See, e.g.*, Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978); Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976); Will v. United States, 389 U.S. 90, 95 (1967); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202 (1945); *Ex parte* Republic of Peru, 318 U.S. 578, 583 (1943).

71. *Ex parte* Fahey, 332 U.S. 258, 259 (1947).

of discretion or 'usurpation of judicial power' . . . ."[72] Extraordinary writs should not be used as a general substitute for appeals.[73]

Despite the drastic nature of a mandamus writ, some circuit courts use it as a general method of hearing appeals of interlocutory orders.[74] Reliance on a writ of mandamus for interlocutory review is risky, however. The standards are stringent[75] and the writ is granted not as a matter of right, but as a matter of judicial discretion.[76] A litigant's chances of obtaining review are best when there is a "clear and indisputable" demonstration of error[77] or "new and important problems" of law at stake.[78]

3. *28 U.S.C. § 1292.* The most significant statutory exceptions to the finality requirement of 28 U.S.C. § 1291 are set out in section 1292.[79] Section 1292(a)(1) gives the courts of appeals jurisdiction over "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . ."[80]

The boundaries of section 1292(a)(1) are determined by the interlocutory nature of the order in question, not by the interlocutory relief at issue.[81] Thus, clearly within section 1292(a)(1) are interlocutory orders directly granting or refusing to grant preliminary injunctions as well as interlocutory orders granting permanent injunctions.[82] More troublesome are interlocutory orders that have

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72. *Bankers Life & Casualty Co.*, 346 U.S. at 383 (citation omitted).

73. *Id.*

74. Martineau, *supra* note 3, at 747. For a survey of cases delineating the use of the writ of mandamus as a tool for interlocutory review, see 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3935 (1977 & Supp. 1994).

75. *See supra* text accompanying notes 71–72.

76. Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976); Parr v. United States, 351 U.S. 513, 520 (1956); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202 (1945).

77. Will v. United States, 389 U.S. 90, 96 (1967) (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953)).

78. Schlagenhauf v. Holder, 379 U.S. 104, 111 (1964).

79. 28 U.S.C. § 1292 (1988 & Supp. V 1993). Another exception for interlocutory orders not favoring arbitration is found at 9 U.S.C. § 16(a)(2) (Supp. IV 1992). For a brief discussion of § 16, see Martineau, *supra* note 3, at 734–36.

80. 28 U.S.C. § 1292(a)(1) (1988).

81. 16 WRIGHT ET AL., *supra* note 74, § 3924, at 67.

82. 16 *id.*

the practical effect of denying injunctive relief without directly addressing injunctive consequences.[83] For example, a court may dismiss a claim requesting injunctive relief for lack of jurisdiction or standing.[84] In such cases, section 1292(a)(1) allows appeal only if the order "might have a 'serious . . . consequence,' and . . . the order can be 'effectually challenged' only by immediate appeal . . . ."[85]

Section 1292(a)(2) gives the courts of appeals jurisdiction to hear appeals of interlocutory orders appointing receivers or refusing to wind up receiverships.[86] Section 1292(a)(3) allows interlocutory appeal from district court decrees in admiralty cases.[87]

Section 1292(b) supplements this categorical approach with a two-step discretionary process for the interlocutory appeal of certain orders.[88] First, the party challenging an order must obtain from the district court judge a written statement certifying the order for appeal.[89] The district judge's decision whether to certify is discretionary.[90] In order to certify, the district court judge must find that a "controlling question of law [is involved] as to which there is a substantial ground for difference of opinion and . . . [the immediate resolution of which] may materially advance the ultimate termination of the litigation . . . ."[91] Once the district court

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83. 16 *id.*

84. 9 MOORE ET AL., *supra* note 52, ¶ 110.20[1].

85. Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981). For a more thorough discussion of the scope of § 1292(a)(1), see 9 MOORE ET AL., *supra* note 52, ¶ 110.20[1]; 16 WRIGHT ET AL., *supra* note 74, §§ 3921–3924.

86. 28 U.S.C. § 1292(a)(2) (1988).

87. *Id.* § 1292(a)(3).

88. 28 U.S.C. § 1292(b) (1988) states in full:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

89. *See id.*

90. *See* D'Ippolito v. Cities Serv. Co., 374 F.2d 643, 649 (2d Cir. 1967) ("[W]e cannot conceive that we would ever mandamus a district judge to certify an appeal under 28 U.S.C. § 1292(b) in plain violation of the Congressional purpose that such appeals should be heard only when both the courts concerned so desire.").

91. 28 U.S.C. § 1292(b) (1988).

certifies, the court of appeals has complete discretion whether to hear the appeal.[92]

Courts agree that an order involves a controlling question of law if reversal of that order would require reversal of the final judgment.[93] Conversely, an order that would have little or no effect on subsequent proceedings is not controlling.[94] In considering orders characterized by neither of these extremes, courts generally turn to the "materially advance" prong of section 1292(b). The result then turns on the likelihood that interlocutory appeal could save the litigants and the court time and expense.[95] The "substantial ground for difference" requirement depends on the trial court's estimation of the probability of reversal of the order in light of the law within the court's circuit.[96]

The "materially advance" requirement has posed some problems of interpretation. In addition to the requirement that interlocutory review shorten the proceedings, some courts have added the requirement that the case be large and exceptional.[97]

4. *Rule 54(b).* Rule 54(b) of the Federal Rules of Civil Procedure allows a judge to enter a final judgment for individual claims in cases with multiple claims or parties or both.[98] The rul-

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92. *See id.*

93. 16 WRIGHT ET AL., *supra* note 74, § 3930, at 159.

94. 16 *id.*

95. 16 *id.* at 159–60; *see* Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974). *But see In re* Cement Antitrust Litig., 673 F.2d 1020, 1027 (9th Cir. 1982) (pointing out that this approach makes the controlling question requirement superfluous), *aff'd*, 459 U.S. 1190 (1983). For a discussion of numerous cases holding orders to be either controlling or not controlling, see 9 MOORE ET AL., *supra* note 52, ¶ 110.22[2], at 268–76.

96. 16 WRIGHT ET AL., *supra* note 74, § 3930, at 158–59.

97. Kraus v. Board of County Rd. Comm'rs, 364 F.2d 919, 922 (6th Cir. 1966); United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966); Gottesman v. General Motors Corp., 268 F.2d 194, 196 (2d Cir. 1959). This added requirement has been criticized. *See* 9 MOORE ET AL., *supra* note 52, ¶ 110.22[2], at 276 ("[C]ritics have the better argument."); Solimine, *supra* note 18, at 1193–96. The House Report supports the "big case" interpretation, but the Senate Report does not. *Id.* (referring to H.R. REP. NO. 1667, 85th Cong., 2d Sess. 3 (1958); S. REP. NO. 2434, 85th Cong., 2d Sess. 1 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255).

98. FED. R. CIV. P. 54(b) states:

> [w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other

ing involved must be otherwise final under section 1291 in order to be eligible for Rule 54(b).[99] The Rule was intended to protect litigants whose claims are finally determined early in a complex and protracted case.[100] Under Rule 54(b), such litigants do not have to await a final decision on all claims if the trial judge certifies the individual claim as final.[101]

5. *The New Rulemaking Power—28 U.S.C. Sections 1292 and 2072.* The Federal Courts Study Committee, created by statute in 1988[102] to "make a complete study of the courts of the United States,"[103] suggested that

> [t]o deal with difficulties arising from definitions of an appealable order, Congress should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals.[104]

Congress has adopted these recommendations. The Federal Courts Study Committee Implementation Act of 1990[105] added subsection (c) to 28 U.S.C. § 2072 (the Rules Enabling Act), giving the Supreme Court the rulemaking power to define a "final" decision under section 1291.[106] In 1992, the Federal Courts Administration Act[107] added subsection (e) to 28 U.S.C. § 1292, giving the Supreme Court rulemaking power to create new categories of interlocutory appeals.[108] To date, however, the rulemakers

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> form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties.

99. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 438 (1956).

100. Turk, *supra* note 3, at 1031.

101. *Id.* at 1030.

102. Federal Courts Study Act, 28 U.S.C. § 331 (1988).

103. FEDERAL COURTS STUDY COMM., *supra* note 4, at 31.

104. *Id.* at 95.

105. Pub. L. No. 101-650, § 315, 104 Stat. 5104, 5115.

106. As amended, § 2072(c) provides that "such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 . . . ." 28 U.S.C. § 2072(c) (Supp. V 1993).

107. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506.

108. As amended, § 1292(e) provides that "[t]he Supreme Court may prescribe rules,

have yet to exercise their powers under either section 1292(e) or section 2072(c).

II. DISCRETIONARY INTERLOCUTORY APPEALS

In a recent article, Professor Robert Martineau suggests that Congress adopt the approach to appealability recommended by the ABA and adopted in Wisconsin.[109] The ABA recommends first that only judgments that are formally final be appealable as of right and second that interlocutory judgments be appealable only by permission of the reviewing court.[110] Before deciding how to

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in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)." 28 U.S.C. § 1292(e) (Supp. V 1993).

109. Martineau, *supra* note 3, at 719.

110. ABA COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.12, at 25 (1977) [hereinafter ABA STANDARDS]. The text of § 3.12 reads:

> Appealable Judgments and Orders.
>
> (a) Final Judgment. Appellate review ordinarily should be available only upon the rendition of final judgment in the court from which appeal or application for review is taken.
>
> (b) Interlocutory Review. Orders other than final judgments ordinarily should be subject to immediate appellate review only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will:
>
> (1) Materially advance the termination of the litigation or clarify further proceedings therein;
>
> (2) Protect a party from substantial and irreparable injury; or
>
> (3) Clarify an issue of general importance in the administration of justice.

Subsection (a) is similar to 28 U.S.C. § 1291, which provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . ." Thus, the adoption of § 3.12(a) as it stands would do little to prune the "practically final" exceptions to the final judgment rule such as the collateral order doctrine. What is missing from subsection (a), and is relegated to the comments following § 3.12, is a clear definition of "final." *See* ABA STANDARDS, *supra*, at 21–24.

The Wisconsin statute adopting the ABA recommendation remedies this deficiency:

> (1) Appeals as of right. A final judgment or a final order of a [trial] court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order [entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in ch. 799 cases or traffic regulation or municipal ordinance violation cases prosecuted in circuit court] which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.
>
> (2) Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:
>
> (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;

fix appellate jurisdiction, reformers must remove the parts that do not work. The first step of the ABA approach, which defines a final order as one signed and filed by the trial judge, would accomplish this goal and should be implemented regardless of how orders for interlocutory review are ultimately singled out.[111] By saying that final means final,[112] the proposed rule would eliminate all judicially created exceptions[113] to the final judgment rule.[114] With only the current statutory and rule-based exceptions to the final judgment rule intact, Congress and rulemakers could then reevaluate when to allow interlocutory appeals without worrying about interference from the judicially created patches on the crazy quilt. Eliminating judicially created exceptions to the final judgment rule also would greatly simplify questions of appellate jurisdiction over interlocutory appeals and eliminate voluminous satellite litigation of these procedural issues.[115]

Reform of interlocutory appeals procedure should achieve two basic goals. First, reformers should define a flexible category of orders that would be appealable whenever, in the discretion of the appellate court, justice or efficiency requires.[116] This policy is ac-

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(b) Protect the petitioner from substantial or irreparable injury; or

(c) Clarify an issue of general importance in the administration of justice.

WIS. STAT. ANN. § 808.03 (West 1994).

111. This approach would not apply to reforms that would eliminate appeals as of right altogether. *See, e.g.*, the reforms discussed in the sources cited *supra* note 3.

112. WIS. STAT. ANN. § 808.03(1) provides that "[a] final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) [i.e., when it is filed with the office of the clerk of the court] . . . ."

113. *See supra* Part I.

114. Although this simplification still would leave the writ of mandamus portion of the quilt intact, the second part of the Wisconsin-ABA approach (broad discretionary review) would remedy this situation. The writ of mandamus is not formally a judicially created exception to the final judgment rule because it is authorized by statute. *See* 28 U.S.C. § 1651 (1988). Nevertheless, by creating a relief valve for interlocutory appeals, extraordinary writs can return to the use for which they were intended—to remedy gross abuses of judicial power.

115. *See supra* note 64 and accompanying text.

116. For examples of such broad categories, see JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32 (1951) ("[A] court of appeals, on the application of a party, may in its discretion authorize an appeal from an interlocutory order, judgment or decree if such court determines that such authorization is necessary or desirable to avoid substantial injustice."); Carrington, *supra* note 3, at 167 ("The courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts when essential to protect substantial rights which cannot be effectively enforced on review after final decision."). One commentator posited the following:

complished by the second step of the Wisconsin-ABA approach, which sets out two such broad categories.[117] Second, reformers should attempt to identify any specific types of orders that should presumptively be allowed or denied interlocutory appeal.[118] These narrow categories could be superimposed on the Wisconsin-ABA approach whenever they would be helpful.

The broad "whenever justice requires" exception to the final judgment rule reflected in the Wisconsin-ABA approach[119] provides potential relief to a litigant who is subject to an interlocutory order that cannot be effectively reviewed on appeal. A broad discretionary exception avoids the difficult, perhaps intractable, problem of defining in advance all the categories of orders that should be appealable before final decision. A purely categorical approach would be both under- and overinclusive.

> The type of order that should be appealable immediately will vary from period to period and from case to case, depending upon all of the variables that make one case different from another. It is impossible to predict when in a particular case the relative interests of the parties, the prospects for early termination of the case, or the public significance of the case will dictate the advisability of an earlier rather than later review of an interlocutory order. Thus, attempting to classify interlocutory orders for appeal purposes whether by statute, rule, or judicial decision, can be nothing other than an exercise in futility.[120]

Courts' experience with the collateral order doctrine confirms this assessment. At its most basic level, the doctrine represents

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> When the court of appeals shall be of the opinion that delaying review of a district court order not otherwise appealable under this section may render the right of ultimate appeal of little or no value to the appellant, and that the cost of delay in review to the appellant outweighs the cost of delay in trial to the appellee, then it may permit an appeal to be taken from such order if, in its discretion, it deems it likely that the order appealed from will be reversed.

Turk, *supra* note 3, at 1040.

117. These two categories are orders that if subjected to interlocutory appeal will "materially advance the termination of the litigation" or "protect the petitioner from substantial or irreparable injury." WIS. STAT. ANN. § 808.03(2)(a)-(b).

118. For example, Congress has decided that orders related to injunctions should categorically be allowed appeal. *See supra* text accompanying notes 79–85.

119. Under the Wisconsin approach, the criteria for discretionary review are whether (1) the termination of the proceedings will be materially advanced, (2) the proceedings will be clarified, (3) the litigant will suffer substantial or irreparable harm absent appeal, or (4) appeal will clarify an issue of general importance. *See* WIS. STAT. ANN. § 808.03(2).

120. Martineau, *supra* note 3, at 775.

several decades of attempts to create a formula that would predictably and accurately decide whether or not a given order should be allowed interlocutory appeal.[121] These attempts failed because it is impossible to define *ex ante* exactly what characteristics of a given order make justice require its immediate review.

The requirements comprising the collateral order doctrine—con-clusiveness, importance, separability, and effective unreviewability—are useful indicators. In different cases, however, different factors dominate. For example, it may make sense to allow interlocutory review of an order that is effectively unreviewable on appeal after final decision and would result in serious consequences for a litigant, even if that order is not truly collateral.[122] This need for flexibility explains the unpredictability of the outcome of attempts to appeal under the collateral order doctrine. To some extent, this unpredictability already has made interlocutory appeals *de facto* a matter of circuit court discretion. It also explains why courts have sometimes collapsed the collateral order doctrine into a balancing of four factors rather than a check for four requirements.[123] A discretionary scheme would end the charade and explicitly recognize the inefficacy of bright-line rules.

Regardless of how artfully the criteria guiding discretionary appeal are drafted, the decision to hear the appeal ultimately is left to the discretion of the appellate court. Some uncertainty is unavoidable. As Professor Rosenberg observed, "Judicial discretion remains today one of the most intricate and mysterious of the concepts judges and lawyers regularly encounter."[124] Ultimately, the litigant must rely on the output of a black box. The circuit courts could take steps to demystify the process by publishing opinions giving prospective appellants guidance as to the courts' reasoning in denying or permitting review. As the law of interlocutory appeals stands currently, judges explain the interlocutory appeals they deny or allow in the framework of the specific requirements of the collateral order doctrine or of extraordinary writs. If, as under the Wisconsin-ABA approach, appeals become fully discretionary, the courts of appeals will have more freedom to explain their underlying reasons for denying or allowing appeal.

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121. *See supra* Section I(A).
122. *See supra* note 67 and accompanying text.
123. *See supra* note 66.
124. Rosenberg, *supra* note 1, at 176.

Wisconsin courts have not provided much guidance as to when petitions for interlocutory review will likely be denied. They have, however, indicated that three types of orders will generally be allowed interlocutory appeal. In *Baxter v. Wisconsin Department of Natural Resources*,[125] the Court of Appeals of Wisconsin observed:

> [I]f [a] motion to dismiss is based on a claim to qualified immunity, an order denying the motion will usually satisfy the criteria for granting a petition for leave to appeal under sec. 808.03(2) . . . . The critical nature of qualified immunity is such that an order denying such a motion is treated as immediately appealable under the federal rules.[126]

Similarly in *State v. Jenich*,[127] the Supreme Court of Wisconsin exhorted:

> [W]e urge the court of appeals to be careful in exercising [its] discretion when the order sought to be appealed is one which denies a motion to dismiss for double jeopardy. Given the serious constitutional questions raised by claims of double jeopardy, review of such orders will often be necessary to protect the accused from "substantial or irreparable injury"—one of the three criteria for testing the appropriateness of review under sec. 808.03(2).[128]

Finally in *State* ex rel. *A.E. v. Circuit Court*,[129] the Supreme Court of Wisconsin advised:[130]

> Given the significance of a waiver of juvenile jurisdiction orders, [which allow juveniles to be tried as adults,] we urge that the court of appeals, in the exercise of its discretion, give careful

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125. 477 N.W.2d 648 (Wis. Ct. App. 1991).

126. *Id.* at 650 n.3 (citing Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985)).

127. 292 N.W.2d 348 (Wis. 1980), *overruled in part on other grounds*, State v. Copening, 303 N.W.2d 821 (Wis. 1981).

128. *Id.* at 349.

129. 292 N.W.2d 114 (Wis. 1980).

130. Under the Wisconsin system, the court of appeals has complete discretion whether to hear an appeal under WIS. STAT. ANN. § 808.03(2). The Supreme Court of Wisconsin does not review the decision of the court of appeals to refuse to hear an interlocutory appeal. Town of Fitchburg v. City of Madison, 299 N.W.2d 199, 210 n.4 (Wis. 1980). Presumably one could appeal a refusal to hear an interlocutory appeal if the court of appeals refused to exercise its discretion. For example, the court of appeals cannot hold that a certain class of orders is per se not appealable. Similarly, if the court of appeals grounded its decision not to hear an appeal on unconstitutional grounds, the refusal should be reversed.

> consideration to the merits presented by appeals from such orders. Review will often be necessary to protect the minor from "substantial or irreparable injury." . . . Juvenile waiver orders . . . represent a unique type of intermediate order which require prompt appellate review where necessary to prevent "substantial or irreparable injury."[131]

The Wisconsin-ABA approach would not be a superfluous addition to the discretionary review already available under 28 U.S.C. § 1292(b). Section 1292(b) is seldom a successful route to an interlocutory appeal. Professor Solimine suggests that this results from circuit courts applying a big case requirement or narrowly interpreting the statutory criteria.[132] Between 1985 and 1989, 1,411 interlocutory appeals were certified by district courts, 504 of which were accepted by circuit courts.[133] During the same period, 179,998 appeals terminated after a final decision,[134] and approximately 21,000 interlocutory appeals were heard.[135] The Wisconsin-ABA reforms would provide litigants with a better chance of having their petitions granted.

The Wisconsin-ABA approach, if implemented in the federal courts, might increase the workload of the courts of appeals. The courts of appeals would have to review each petition filed, which would require some effort. Professor Martineau downplays the potential for such a result, relying on the experience of the Wisconsin Court of Appeals. Between 1988 and 1990, 6,222 appeals

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131. State *ex rel.* A.E., 292 N.W.2d at 115–16.

132. Solimine, *supra* note 18, at 1193.

133. *Id.* at 1176.

134. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 106 (1990) (38,520 terminated appeals); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 137 (1989) (37,372 terminated appeals); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 141 (1988) (35,888 terminated appeals); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 138 (1987) (34,444 terminated appeals); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 138 (1986) (33,774 terminated appeals).

135. This figure is obtained by multiplying 180,000 by 12%, Judge Richard Posner's estimated percentage of interlocutory appeals heard by federal courts. RICHARD A. POSNER, FEDERAL COURTS: CRISIS AND REFORM 72–73 (1985).

were heard after final judgment in Wisconsin.[136] There were 660 petitions for interlocutory review, 198 of which were granted.[137]

Although these statistics show that in recent years the Wisconsin-ABA approach has not overburdened the Wisconsin system, the numbers tell little of what impact this discretionary scheme would have on the federal system. Without data on interlocutory appeals before the implementation of the discretionary standards in Wisconsin, it is unclear whether the discretionary scheme increased the number of interlocutory appeals filed or heard. Judge Richard Posner has estimated that 12% of appeals heard in the federal courts occur before a final decision.[138] Perhaps many more are filed and dismissed; perhaps even more would be filed if the Wisconsin-ABA approach were adopted in the federal system. Without more data, one can only speculate.

Regardless, the decrease in satellite litigation that would result from a clear definition of "final"[139] would balance, at least in part, any such increase in workload.[140] Furthermore, with the inherent flexibility of a discretionary rule, courts of appeals can limit the time that they spend reviewing interlocutory petitions as the drain on their resources demands.

The Wisconsin-ABA approach would function better than a system that uses similar criteria for granting appeals as of right. Broad categories in mandatory terms would likely lead to substantial amounts of satellite procedural litigation construing the boundaries of these categories. Such litigation would resemble the flood of litigation construing the bounds of the judicially created patches on the crazy quilt that has wasted litigant and court time. Furthermore, broad mandatory categories are likely to become *de facto* discretionary.

Admittedly, making appeals entirely discretionary inevitably would produce unfairness in some cases. Under the present system, if a litigant can meet the standards of the collateral order doctrine, then the court of appeals has jurisdiction to hear the appeal under 28 U.S.C. § 1291.[141] Under the Wisconsin-ABA approach, even if a litigant satisfied one or more of the categories

136. Martineau, *supra* note 3, at 782–83.
137. *Id.*
138. *See* POSNER, *supra* note 135, at 72–73.
139. *See supra* text accompanying note 112.
140. *See* Martineau, *supra* note 3, at 784–85.
141. *See supra* text accompanying notes 33–38.

for interlocutory appeal, the circuit court could refuse to hear the appeal.[142] For example, the circuit court could conclude that its docket is too crowded.

Isolated injustices, however, would not be avoided under a scheme that would mandate hearing the interlocutory appeal once certain criteria were met. A bright-line mandatory scheme would produce injustice because such rules cannot identify all orders appropriate for review.[143] In any case, a broad mandatory category scheme necessarily would become, to a large extent, *de facto* discretionary[144] and would produce the same isolated injustices as well as additional satellite litigation.[145]

The Wisconsin-ABA approach would not require resort to statutory reform rather than rulemaking. Professor Martineau criticizes the adoption of 28 U.S.C. sections 2072(c) and 1292(e) because he believes that these provisions can be used only to expand the scope of interlocutory appeals currently available.[146]

With the passage of sections 2072(c) and 1292(e), the Wisconsin-ABA approach can be implemented by rulemaking rather than by statute. Nothing in the language of section 2072(c)[147] would prevent the use of the rulemaking power to define final rigidly.[148] Perhaps Professor Martineau's underlying concern is that he believes that "[i]t is highly unlikely that the rulemakers" would contract the meaning of final.[149]

One could argue that the language of section 1292(e) does not allow for the addition of a category to section 1292 that would give the circuit courts discretion to hear appeals under the Wisconsin-ABA approach, because under subsection (e), discretionary appeals are already provided for under subsection (b).[150] The

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142. DAVID L. WALTHER ET AL., APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 9.2 (1993).

143. *See supra* text accompanying note 120.

144. *See supra* text following notes 122–23.

145. *See supra* text accompanying notes 64, 67.

146. Martineau, *supra* note 3, at 772.

147. 28 U.S.C. § 2072(c) (Supp. V 1993) ("Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291.").

148. *See* Thomas D. Rowe, Jr., *Defining Finality and Appealability by Court Rule: A Comment on Martineau's "Right Problem, Wrong Solution,"* 54 U. PITT. L. REV. 795, 799–800 (1993).

149. Martineau, *supra* note 3, at 772.

150. 28 U.S.C. § 1292(e) (Supp. V 1993) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a),

adoption of a broad discretionary category would make subsection 1292(b) practically useless—there would be no need to ask both the district court and the circuit court for permission to appeal under more rigid standards when a litigant could seek permission directly from the circuit court under broad standards. However, this argument fails because the terms guiding discretion under the Wisconsin-ABA approach are different from those guiding the double discretion under subsection 1292(b) and thus are literally "not otherwise provided for under [28 U.S.C. section 1292] subsection (a), (b), (c), or (d)."[151]

Finally, before implementing broad discretionary review, rulemakers must recognize that other factors beyond those listed in the broad discretionary category would influence an appellate court's willingness to grant review. For example, if docket pressures on the courts of appeals increase, the courts would become much more reluctant to grant petitions for interlocutory review.[152] Another unavoidable factor would be an appellate court's assessment of a particular trial court judge's competence. An appellate court would be more receptive to requests for interlocutory review of an order issued by a judge that it believes to be a habitual abuser of judicial discretion. Similarly, an appellate court likely would look less carefully at requests for review of orders from a trial court judge that it views favorably. These factors, in any case, probably play a significant role even under the current system.

III. APPLICATION OF THE WISCONSIN-ABA APPROACH

Even if the rulemakers decide to adopt the Wisconsin-ABA approach, many questions about the application of the standards of discretion would remain. This Part examines two cases under the Wisconsin-ABA standard, one involving discovery, the other involving Eleventh Amendment state immunity. Applying the Wis-

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(b), (c), or (d).").

151. *Id; see* Rowe, *supra* note 148, at 798 (reaching a similar conclusion).

152. *See* Rosenberg, *supra* note 1, at 177 ("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."). Higher caseloads also would diminish the quality of the review of petitions for interlocutory review. *Cf.* Dalton, *supra* note 3, at 63 (arguing that because caseload burdens on the courts of appeals have increased, the quality of appellate review in general has diminished, in some cases to a "mere formality").

consin-ABA standards to these two cases demonstrates that the controlling factor under the proposed approach often would be the merits of the challenge to the order that a party seeks to appeal before a final decision.

Applying the Wisconsin-ABA standards to interlocutory orders involving discovery[153] and official immunity[154] is useful also because it demonstrates a potential need to refine the Wisconsin-ABA approach in the future. If a class of orders such as those involving official immunity should be allowed appeal in all cases regardless of the merits of the appeal, then rather than forcing appellate courts to repeat the time-consuming application of the discretionary standards to these orders, it would be more efficient to superimpose rules on the Wisconsin-ABA standards allowing interlocutory appeal of these orders as a matter of right. Similarly, if a class of orders, such as discovery orders, usually would not satisfy the Wisconsin-ABA standards, then it would be helpful for appellate courts to give prospective appellants notice of this fact.

A. Reise v. Board of Regents[155]

Discovery orders present a difficult question in the interlocutory review context because they often involve the discretion of a trial judge (and thus an appellate court is unlikely to reverse),[156] and yet appeal after a final decision may provide little relief.[157] In the circuit courts, invocations of the collateral order doctrine to appeal discovery orders have been largely unsuccessful.[158] How-

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153. Discovery orders generally are not allowed interlocutory appeal under current law. *See infra* note 158 and accompanying text.

154. Orders involving questions of official immunity generally are allowed interlocutory appeal under current law. *See infra* note 181.

155. 957 F.2d 293 (7th Cir. 1992).

156. *See id.* at 295.

157. Nicole E. Paolini, Note, *The* Cohen *Collateral Order Doctrine: The Proper Vehicle for Interlocutory Appeal of Discovery Orders*, 64 TUL. L. REV. 215, 216 (1989).

158. *See* Dow Chem. Co. v. Taylor, 519 F.2d 352, 355 (6th Cir.) (denying immediate review of an order requiring party to answer interrogatory because review is available upon refusal to obey the order), *cert. denied*, 423 U.S. 1033 (1975); Ryan v. Commissioner, 517 F.2d 13, 19 (7th Cir.) (same), *cert. denied*, 423 U.S. 892 (1975); International Business Mach. Corp. v. United States, 480 F.2d 293, 298 (2d Cir. 1973) (en banc) (denying immediate review of discovery orders in a civil antitrust suit because there was no important wide-ranging issue in question), *cert. denied*, 416 U.S. 980 (1974); *see also* Borden Co. v. Sylk, 410 F.2d 843, 845–46 (3d Cir. 1969), in which the court stated,

> We have detected what appears to be an irresistible impulse on the part of appellants to invoke the "collateral order" doctrine whenever the question of

ever, there are a number of cases allowing immediate appeal of certain discovery orders.[159]

In *Reise,* E.H. Reise applied for and was denied a position on the faculty of the law school of the University of Wisconsin.[160] He filed a claim in the U.S. District Court for the Western District of Wisconsin alleging that the Law School preferentially hired minorities and that because he was a white male, he was not hired.[161] He alleged that the law school's decision not to hire him caused him illness, emotional distress, and mental anguish, for which he sought compensatory damages.[162]

The law school claimed that Reise had put his mental health in issue and thus requested an order to compel him to undergo a mental examination pursuant to Rule 35 of the Federal Rules of Civil Procedure.[163] Reise claimed that because he had recovered from his injuries, the examination would be useless. Judge Shabaz issued the order.[164] Reise appealed the issuance of the order to the U.S. Court of Appeals for the Seventh Circuit. He claimed that under the collateral order doctrine established in *Cohen,*[165] the circuit court had jurisdiction to hear an appeal of this issue before the case was disposed of on its merits.[166] The Court of Appeals concluded that the order did not qualify for appeal under the collateral order doctrine, because such orders can be effectively reviewed on appeal from a final decision.[167]

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appealability arises. Were we to accept even a small percentage of these sometime exotic invocations, this court would undoubtedly find itself reviewing more "collateral" than "final" orders.

159. *See* Acosta v. Tenneco Oil Co., 913 F.2d 205, 207 (5th Cir. 1990) (holding that an order that plaintiff submit to examination under Rule 35 of the Federal Rules of Civil Procedure satisfies the *Cohen* requirements); Smith v. B.I.C. Corp., 869 F.2d 194, 198–99 (3d Cir. 1989) (holding that denial of a protective order to protect against disclosure of trade secrets satisfies the *Cohen* requirements); American Tel. & Tel. Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978) (holding that an order revoking a protective order involving a third party satisfies the *Cohen* requirements), *cert. denied,* 440 U.S. 971 (1979); Carr v. Monroe Mfg. Co., 431 F.2d 384, 387 (5th Cir. 1970) (holding that discovery orders may be appealable when a governmental privilege is asserted in cases in which the government is not a party), *cert. denied,* 400 U.S. 1000 (1971).

160. *Reise,* 957 F.2d at 293.

161. *Id.*

162. *Id.* at 294.

163. *Id.*

164. *Id.*

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

166. *Reise,* 957 F.2d at 294.

167. *Id.* at 295–96.

A discovery order such as the one in *Reise* is not a truly final order. Thus, under the Wisconsin-ABA standard, one must turn to the discretionary criteria. It is unlikely that appeal of this discovery order would "materially advance . . . the litigation" or "clarify further proceedings."[168] The purpose of this category is to allow interlocutory appeals when doing so would save the courts and litigants the time and resources involved in litigating issues under false assumptions borne of erroneous orders. It is plausible to conclude that the order in this case furthers this purpose. If the order was erroneous and were corrected immediately, the parties might be more likely to settle or to attempt to use alternative means to prove the state of Reise's mental health. However, similar benefits would accompany interlocutory appeal of most discovery orders and it would be dangerous to open the floodgates. The sounder conclusion would be to hold that this category is not satisfied. Even if the order compelling a mental examination was erroneous and were corrected immediately, Reise's mental health would still be at issue and the trial would not be substantially shortened by interlocutory appeal.

The interlocutory appeal in question is also unlikely to "clarify an issue of general importance in the administration of justice."[169] The order compelling a mental examination certainly is important to the parties of *Reise*. However, the primary goal of the general importance category is to allow interlocutory appeals when it would benefit the legal system as a whole. The general importance category would encompass orders that pose important legal questions that would evade review if interlocutory appeal were never allowed.

The critical issue, then, is whether denying appeal likely would subject Reise to "substantial or irreparable injury."[170] The potential injury would occur if Reise were forced to undergo a mental examination or risk losing his claim for damages. Reise could risk

168. WIS. STAT. ANN. § 808.03(2)(a) (West 1994).

169. *Id.* § 808.03(2)(c).

170. Subsection 808.03(2)(b) requires the appellate court to conclude that delay of appeal "*will* . . . protect the petitioner from substantial or irreparable injury." *Id.* § 808.03(2)(b) (emphasis added). A reviewing court never can be absolutely sure that a petitioner will be harmed by delaying review until it hears the appeal and concludes that the trial court has made an error. The statute should be read as requiring the substantial likelihood of harm rather than definite harm. The statute seems to have been interpreted this way. *See, e.g.*, State v. Jenich, 292 N.W.2d 348, 349 (Wis. 1980).

his claim by refusing the examination. He then would face the sanctions available under Rule 37(b)(2) of the Federal Rules of Civil Procedure. The most likely sanction would be striking Reise's claim for damages resulting from mental and physical distress.[171] Reise then could challenge the order striking his claim after a final decision, but if he were to lose this appeal, he would lose his claim for damages.

Wrongfully forcing someone to undergo a mental examination imposes a substantial irreparable harm. A forced medical examination is intrusive and once a litigant undergoes an examination, a reviewing court cannot undo the examination. However, in order for the harm to be wrongful, the order compelling the examination must be erroneous. Thus, in determining whether there is a substantial likelihood of injury, the appellate court must consider to the merits of Reise's challenge.[172] There is not a substantial likelihood of injury to Reise because he does not have a very strong case against the order.[173] He made a claim for damages for emotional distress, which put his mental health at issue. In addition, if the court of appeals were to review the order, the standard of review would be abuse of discretion.[174]

If experience were to demonstrate that a class of orders, such as discovery orders, most often do not satisfy the Wisconsin-ABA criteria, then appellate courts should not hesitate to provide litigants with guidance through opinions indicating this tendency.[175] Such opinions could not per se deny interlocutory appeal of a class of orders without running afoul of the terms of the discretionary statute. However, such opinions could discuss the court's reasoning for denying appeal of an order that the court finds typical of similar orders that it has denied appeal in the past.

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171. Reise v. Board of Regents, 957 F.2d 293, 295 (7th Cir. 1992).

172. Collapsing the inquiry into an assessment of the merits of the underlying appeal has already occurred in Wisconsin. State v. Webb, 467 N.W.2d 108, 112 (Wis.) ("The [appellant] must also show a substantial likelihood of success on the merits."), *cert. denied*, 112 S. Ct. 249 (1991).

173. Although Judge Easterbrook did not address the merits of Reise's claim, his hostile language indicated that he did not think it had merit. *Reise*, 957 F.2d at 293, 295 ("Reise is engaged in jousting . . . . It is too late in the day to waste words . . . .").

174. *Id.* at 295.

175. A Westlaw search revealed only two unpublished Wisconsin decisions allowing appeal of a discovery order. *See* Balogh v. Warren, 393 N.W.2d 799 (Wis. Ct. App. 1986) (unpublished disposition available on Westlaw); Nelson v. O'Horo, 375 N.W.2d 220 (Wis. Ct. App. 1985) (unpublished disposition available on Westlaw); Search of Westlaw, WIS-CS database (Sept. 27, 1994).

B. Puerto Rico Aqueduct Sewer Authority v. Metcalf & Eddy, Inc.

In *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*,[176] the Puerto Rico Aqueduct and Sewer Authority (PRASA) contracted with Metcalf & Eddy, Inc. to help PRASA comply with an Environmental Protection Agency consent decree.[177] When PRASA withheld payments on the contract because of alleged overcharging, Metcalf & Eddy, Inc. brought suit in the District Court of Puerto Rico for breach of contract.[178] PRASA claimed Eleventh Amendment immunity as an "arm of the state" and moved to dismiss.[179] The district court found that PRASA was not an arm of the state and denied the motion. The First Circuit refused to hear an interlocutory appeal.[180]

The Supreme Court has held that orders denying motions to dismiss on grounds of qualified and absolute immunity from suit are categorically allowed interlocutory appeal under the collateral order doctrine.[181] In such cases, as in *Metcalf & Eddy*, the defendant is claiming "an *immunity from suit* rather than a mere defense to liability[, which] is effectively lost if a case is erroneously permitted to go to trial."[182] Thus, the collateral order doctrine allows for interlocutory appeals of orders denying claims of Eleventh Amendment immunity as well regardless of the merits of the immunity defense.[183]

Under the Wisconsin-ABA approach, PRASA's claim of immunity from suit would no longer be appealable as of right regardless of the merits of the immunity claim. As with discovery orders, an order denying dismissal is not truly final.[184]

Under the discretionary criteria, an interlocutory appeal in this case would not likely "[c]larify an issue of general importance"[185]

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176. 113 S. Ct. 684 (1993).
177. *Id.* at 686.
178. *Id.*
179. *Id.*
180. *Id.* at 686.
181. *Id.* at 687 (citing Mitchell v. Forsyth, 472 U.S. 511 (1985); Nixon v. Fitzgerald, 457 U.S. 731 (1982)).
182. *Id.* (quoting *Mitchell*, 472 U.S. at 526).
183. *Id.* at 686 n.1, 689 ("We . . . express no view on the merits of the immunity claim."); *id.* at 689.
184. *See supra* text accompanying note 25.
185. WIS. STAT. ANN. § 808.03(2)(a) (West 1994).

because the substantive issues in the immunity claim could be addressed on appeal from final judgment. However, early resolution of the immunity claim might "[m]aterially advance the termination of the litigation[,] . . . clarify further proceedings[, or p]rotect the petitioner from substantial or irreparable injury."[186] Whether there is a substantial likelihood that these standards will be met hinges on an assessment of the merits of PRASA's claim of error.[187] If the denial of the immunity defense was erroneous, then PRASA will be subject to the irreparable, potentially substantial burdens of trial. Furthermore, the entire trial will be moot if the denial of the immunity defense is overturned on appeal.

Applying the Wisconsin-ABA approach to PRASA's claims demonstrates that if this approach is adopted, many orders denying claims of immunity from suit may be denied interlocutory review. Even if the defendant has a meritorious claim, which certainly would not always be the case, the ultimate decision to hear an interlocutory appeal would depend on the discretion of the courts of appeals. Congress, the courts, or the rulemakers would have to address directly whether claims of immunity should categorically or presumptively be allowed interlocutory appeal as an exception to the broad discretionary standards of the Wisconsin-ABA approach.

Ultimately such a decision would turn on an assessment of the extent of harm if an erroneous order of a given type were left in place until a final decision was issued and on the likelihood that a given class of orders is erroneous. With discovery orders, for instance, although the harm will vary, the reversal rate is likely low because the standard of review is abuse of discretion.[188] On the other hand, in cases of qualified official immunity, the reversal rate is high[189] and the potential harm is great because the immunity is from facing trial altogether.[190]

CONCLUSION

Currently, whether interlocutory appeals are allowed is determined by a patchwork of judge-made and statutory rules. The

186. *Id.* § 808.03(2).

187. *See supra* note 172 and accompanying text.

188. *See supra* note 174 and accompanying text.

189. Solimine, *supra* note 18, at 1190 (estimating a reversal rate of five times that in other cases).

190. *See supra* note 62.

various exceptions to the final judgment rule are overlapping, confusing, and often inefficient. With the passage of 28 U.S.C. sections 2072(c) and 1292(e), which allow the rulemakers to define "final" under section 1291 and add categories to section 1292, the time has come to tear apart the judicially created patches of this crazy quilt and start sewing anew.

The rulemakers should adopt the first portion of the Wisconsin-ABA approach, deciding that final means final. This change would eliminate the judicially created exceptions to the final judgment rule and would force those who control appellate jurisdiction to address the issue of interlocutory appeals directly. The rulemakers should then adopt the second portion of the Wisconsin-ABA approach, allowing for broad discretionary review. Such review would provide the courts with the flexible power needed to respond to requests for interlocutory appeals. In the future, narrow categories of orders that should be allowed or denied interlocutory appeal presumably could be superimposed on this discretionary scheme.