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PERLMAN APPEALS AFTER MOHAWK

Bryan Lammon *

Abstract

When a federal district court orders the disclosure of allegedly privileged information, privilege claimants have had—until recently—at least one option for seeking immediate appellate review. Claimants who control disclosure can disobey the order, be found in contempt, and immediately appeal the contempt finding. Claimants who don't control disclosure can take what's called a Perlman appeal. But that latter option is disappearing for some litigants. Several courts of appeals recently have held that only non-parties can take Perlman appeals. For parties, an appeal after final judgment must suffice.

This development in the Perlman doctrine is mistaken. Contempt appeals and Perlman appeals both exist to protect against a specific harm of erroneous discovery orders—the disclosure of confidential information. Once confidential information is disclosed, its secrecy is lost and can never be recovered. Contempt appeals and Perlman appeals provide privilege claimants a chance at appellate review before the secrecy of privileged information is forever lost. And given this purpose, party or non-party status is irrelevant; an appeal after a final judgment is useless for both.

Analysis of this development in the Perlman doctrine reveals a larger point about interlocutory appeals. We are closer now than we have been in some time to codifying the judge-made exceptions to the final-judgment rule. But literature examining this area of law is incomplete. Too many discrete issues have been overlooked. And if codification is to succeed, much work needs to be done. I end this article by laying the groundwork for that future research—a taxonomy of exceptions to the final-judgment rule. Not only will this taxonomy provide some necessary structure for the study of appellate jurisdiction, but it will also help identify the many areas of appellate jurisdiction worth exploring and the connections between these areas.

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I. INTRODUCTION

Federal litigants generally must wait until the end of district court proceedings before taking an appeal. But not always. Numerous exceptions to this general rule (known as the “final-judgment rule”) exist.¹ And these exceptions—which are spread across statutes, rules of procedure, and judicial decisions—are maligned for creating an immense, complex, and confusing web of appellate jurisdiction.²

Some of the most consistently vexing appellate jurisdiction issues involve appeals from discovery orders, particularly those adverse to a claim of privilege.³ Litigants have long tested the appealability of these orders. But courts have, for the most part, rebuffed those efforts, creating only a few narrow avenues for seeking immediate relief from discovery orders. The primary means of appealing a discovery order is the contempt option—the target of a discovery order can refuse to comply, be found in contempt, immediately appeal the contempt finding, and use that appeal to obtain review of the underlying discovery order. And when a discovery order doesn’t target a privilege claimant—when, for example, an attorney is ordered to testify over a claim of attorney-client privilege—the claimant could immediately appeal under what’s known as the *Perlman* doctrine.⁴

But things are changing. The courts of appeals have recently cut back on the scope of *Perlman* appeals, suggesting that only non-parties can take them. And these courts have done so spurred primarily by the Supreme Court’s statement in its most recent major case on interlocutory appeals—*Mohawk Industries, Inc. v. Carpenter*—which

1. Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 428–29 (2013). For an overview of the judge-made exceptions to the final judgment rule, see, e.g., Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 737–47 (1993); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 360–86 (2010). For an overview of the statutory and rule-based exceptions to the final-judgment rule, see, e.g., Martineau, *supra*, at 729–36.

2. See, e.g., Martineau, *supra* note 1, at 729 (“[T]he unanimous view of commentators is that the [final-judgment] rule has either too many or too few exceptions, but in any event requires revision.”); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238–39 (2007) (cataloguing criticisms of the current interlocutory appeal system).

3. See generally David S. Coale, *Five Years After Mohawk: Interlocutory Review of Key Pretrial Rulings*, 34 REV. LITIG. 1 (2015); Robyn R. English, *Limitations on the U.S. District Courts’ Discretion: Immediate Review of Post-Aéropostiale Discovery Decisions*, 44 GEO. J. INT. L. 1455 (2013); Nicole E. Paolini, *The Cohen Collateral Order Doctrine: The Proper Vehicle for Interlocutory Appeal of Discovery Orders*, 64 TUL. L. REV. 215 (1989); Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733 (2006).

4. See *Perlman v. United States*, 247 U.S. 7 (1918); see also *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992) (“[A] discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.” (citing *Perlman*, 247 U.S. 7)).

held that an appeal after a final judgment generally suffices to protect the rights of parties facing an order to disclose allegedly privileged information.

This new restriction on *Perlman* is mistaken. Discovery orders adverse to a claim of privilege can implicate a unique harm: wrongful disclosure. Privileged information is secret, and once lost that secrecy can never be recovered. *Perlman* appeals—like contempt appeals—exist to allow appellate review before privileged information is disclosed and secrecy is forever lost. Given this purpose, the party or non-party status of a privilege claimant is largely immaterial; an appeal after a final judgment is worthless to both.

So why have the courts of appeals so unanimously gotten this wrong? I suspect the courts deciding these issues overlook *Perlman*'s purpose. And they likely did so due to the incomplete body of knowledge on *Perlman* appeals. These appeals have not (until now) received substantial academic study. Indeed, many discrete issues involving appeals before a final judgment have not been sufficiently addressed in the literature. And research exploring these issues could be more valuable now than ever before. After decades of calls for reform, the Advisory Committee on Appellate Rules recently has explored the possibility of codifying the judge-made exceptions to the final-judgment rule.⁵ This would be a daunting task. It could also be a worthwhile one. If codification is to succeed, much research needs to be done.

But before getting to that, more on *Perlman*. Part II starts with a brief background on appeals before a final judgment, followed by an exploration of *Perlman* appeals both before and after *Mohawk*. Part III then contends that post-*Mohawk* developments in the *Perlman* doctrine are mistaken, largely due to the courts overlooking *Perlman*'s purpose. Finally, in Part IV, I set out a preliminary taxonomy to guide study of the exceptions to the final-judgment rule. This taxonomy—though preliminary—will both illuminate areas for further research and allow researchers to see similarities, differences, purposes, practices, strengths, weaknesses, and more. I also outline several topics for research within this taxonomy that are ripe for pursuit. Part V concludes.

5. See Advisory Committee on Appellate Procedure, *Minutes of Spring 2014 Meeting, Item Nos. 09-AP-D & 11-AP-F (response to Mohawk Industries)* (Apr. 28 and 29, 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/appellate-minutes-04-2014.pdf>; see also Catherine T. Struve, *Memorandum re Item Nos. 09-AP-D & 11-AP-F*, in *Agenda Book for the Advisory Committee on Appellate Rules*, at 169 (Oct. 20, 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/2014-10-Appeals-Agenda-Book.pdf>.

II. THE FINAL-JUDGMENT RULE AND DISCOVERY APPEALS

A. Appeals Before a Final Judgment

District court judges often decide a number of issues during the course of litigation.⁶ Nearly all of these decisions are interlocutory—they're made at some point before a final judgment and leave other issues for later resolution. As a general rule, federal litigants must wait until the end of proceedings in the district court—when all issues have been decided and all that remains is enforcing the judgment—before appealing an interlocutory order.⁷ This limit on federal appellate jurisdiction is codified at 28 U.S.C. § 1291 and commonly called the “final-judgment rule.”⁸

The final-judgment rule is thought to strike the general balance between the conflicting interests in appellate review—efficiency and error correction.⁹ The efficiency benefits are obvious: district court proceedings are free from appellate interruption, appellate judges generally address a case only once, litigants are saved the cost and potential harassment of multiple appeals, and interlocutory appeals that might eventually become unnecessary—say, because the aggrieved party ultimately prevails at trial—are avoided.¹⁰ But the final-judgment rule also has costs. Appellate decisions can develop unclear areas of the law and correct errors. Appellate intervention can speed along trial court proceedings and cut short what would later be deemed unnecessary litigation. And the delay between an erroneous district court decision and vindication on appeal can cause substantial, sometimes irreparable, harms.¹¹

6. I've adapted much of this section's introductory material from Lammon, *supra* note 1, at 428–31.

7. See 28 U.S.C. § 1291 (“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”); *Catlin v. United States*, 324 U.S. 229, 233 (1945) (defining a “final decision” as one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment”). *But see Ray Haluch Gravel Co. v. Central Pension Fund*, 134 S. Ct. 773, 780 (2014) (holding that outstanding issues regarding fees and costs will not preclude a judgment from being final); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) (same).

8. See, e.g., *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Mitchell v. Forsyth*, 472 U.S. 511, 543 (1985) (Brennan, J., concurring in part and dissenting in part); *Abney v. United States*, 431 U.S. 651, 657 (1977). For discussion of the final-judgment rule's history, see, e.g., Petty, *supra* note 1, at 356–60.

9. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 805 (8th ed. 2011).

10. See, e.g., *Will v. Hallock*, 546 U.S. 345, 350 (2006); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987).

11. Cf. *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955) (noting that exceptions to

By generally postponing appeal until the end of district court proceedings, the final-judgment rule reflects a belief that the benefits of delaying appeal outweigh the costs in most cases.¹² But like any rule, the final-judgment rule strikes that balance only generally. Sometimes the balance shifts because the need of immediate review outweighs (or is at least thought to outweigh) the loss in efficiency.¹³ And sometimes it can be more efficient—systematically speaking—to allow interlocutory appeals.¹⁴

So the final-judgment rule has exceptions. In fact, it has many exceptions.¹⁵ Some are found in statutes.¹⁶ Others are in rules.¹⁷ And still others come from judicial decisions.¹⁸

the final-judgment address the “need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.”). For example, parties who cannot obtain immediate review might feel compelled to abandon or settle a case—even if they would have won on appeal—rather than bear the costs of discovery and trial.

12. See 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3911.2, at 379 (2d ed. 1992) (“The final-judgment rule . . . rests on a rough calculation that ordinarily the balance between the values of immediate appeal and delayed appeal swings in favor of deferring appeal.”)

13. Immunity appeals are a primary example of this situation.

14. Arguments for a system of discretionary appeals (discussed momentarily) often make this point. See, e.g., Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285, 301–02 (1999). I have argued elsewhere that this is an entirely plausible argument. See Lammon, *supra* note 1, at 434. But it is one for which the opposite argument—that discretionary appeals would be overall less efficient—is similarly plausible. See *id.* The point is that we do not know—and likely cannot know—which argument is more accurate without trying out a system of discretionary appeals. (I suggest one potential way for conducting such an experiment in Part IV.) The same goes for many arguments about the likely effects of any change to the system of interlocutory appeals. See *id.* at 432–36.

15. For a more in-depth discussion of the exceptions to the final-judgment rule, see Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 182–201 (2001); Martineau, *supra* note 1, at 729–47; Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1652–59 (2011) [hereinafter Pollis, *Multidistrict Litigation*]; Steinman, *supra* note 2, at 1244–72.

16. 28 U.S.C. § 1292(a)(1), for example, gives the courts of appeals jurisdiction over appeals from “[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.” The Federal Arbitration Act permits immediate appeals from interlocutory orders involving arbitration. See 9 U.S.C. § 16(a)(1)–(2). And a district court can certify an interlocutory order for immediate review under 28 U.S.C. § 1292(b) so long as the order involves “a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the litigation.”

17. Federal Rule of Civil Procedure 23(f) allows for immediate appeals from district court orders granting or denying class certification. And Federal Rule of Civil Procedure 54(b) authorizes a district court to enter a final judgment for some (but not all) of the claims or parties in a case “if the court determines that there is no just reason for delay,” thereby allowing an immediate appeal from orders that would otherwise have to wait for a final judgment.

18. The major judge-made exception to the final-judgment rule is the collateral order doctrine. See Lammon, *supra* note 1, at 431 (calling the collateral order doctrine “the most common and most maligned exception to the final-judgment rule”). Although the exact requirements of that doctrine can vary from case to case, it generally allows immediate appeals from types of orders that are conclusively decided in the district court, separate from the merits of the trial court proceedings, and effectively

B. Immediate Appeal of Discovery Orders

Some of the most persistently difficult issues in interlocutory appeals involve the appealability of discovery orders. Federal litigants have long tested the appealability of discovery orders.¹⁹ But the courts have regularly rebuffed these efforts.²⁰ And for good reason. Discovery decisions are often within the district court judge's discretion; they're accordingly less likely to be reversed and thus less in need of immediate review.²¹ Discovery rulings are sometimes subject to change as litigation proceeds, which might obviate the need to appeal a discovery order.²² And discovery orders are part of a district court judge's control over pretrial litigation. Immediate appellate review of discovery orders could thus interfere with the judge's management of the litigation.²³

That being said, there are ways to immediately appeal some discovery orders. The standard method is a contempt appeal.²⁴ With this option, the targets of discovery orders can disobey a discovery order and risk being found in contempt of court. If found in contempt, they can (with one exception noted below) immediately appeal the contempt ruling.²⁵ In *that* appeal, the privilege claimants can challenge the underlying discovery order.²⁶ So, for example, if a party in civil litigation is ordered to disclose conversations he had with his attorney over a claim of attorney-client privilege, the party can refuse to comply, be held in contempt, and immediately appeal the ruling that the conversation is not

unreviewable after a final judgment. See *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Another judge-made exception is "pragmatic finality," which allows courts to balance the costs and benefits of an immediate appeal on a case-by-case basis (though nowadays courts very rarely invoke this exception). See *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); see generally 15A WRIGHT ET AL., *supra* note 12, § 3913; Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975).

19. See 15B WRIGHT ET AL., *supra* note 12, § 3914.23, at 123 ("[L]itigants continue to test the opportunities for [appealing discovery orders] in great numbers.")

20. See *Mohawk Indus.*, 558 U.S. at 109; *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); 15B WRIGHT ET AL., *supra* note 12, § 3914.23, at 123 ("Despite the continued assaults of many litigants, the rule remains settled that most discovery rulings are not final.")

21. See 15B WRIGHT ET AL., *supra* note 12, § 3914.23, at 123.

22. See *id.*

23. See *id.*

24. See *id.* ("The basic means of securing review is disobedience to an order compelling discovery, followed by an adjudication of contempt and appeal from the contempt order."); see also *id.* at 140 ("The most generally available means of securing review of a discovery order is to disobey the order, be held in contempt, and appeal the contempt adjudication."); Robertson, *supra* note 3, at 742 ("The oldest method of seeking immediate review of privilege determinations required that a party risk litigation sanctions.")

25. See *Alexander v. United States*, 201 U.S. 117 (1906).

26. See *United States v. Ryan*, 402 U.S. 530, 532–33 (1971); *Cobbledick v. United States*, 309 U.S. 323, 327–28 (1940).

privileged.²⁷ Or someone ordered to testify before a grand jury over a claim of fifth amendment privilege can refuse, be held in contempt, and immediately appeal the ruling that the privilege against self-incrimination did not apply.²⁸

The contempt option is hardly perfect.²⁹ For one thing, being found in contempt doesn't guarantee appealability. Contempt comes in two forms: civil and criminal. The type of contempt can affect appealability; non-parties can appeal from findings of both civil and criminal contempt, while parties can appeal only from findings of criminal contempt.³⁰ A privilege claimant often will not know ahead of time what type of contempt a court might order.³¹ So a party seeking to take a contempt appeal risks the possibility that the court will find the party in civil contempt and render an immediate appeal unavailable. The contempt option also can exact an immense toll on those seeking appeal; contempt penalties can involve large fines and jail time.³² When the privilege claimant is the target of a discovery order, however, the contempt option is probably the most reliable (though not especially attractive) means for the claimant to obtain immediate review.

But discovery orders aren't always directed to the privilege claimant. This occurs, for example, when a court orders someone's attorney to testify before a grand jury. The client holds the attorney-client privilege, but the discovery order targets the attorney. In these circumstances, the contempt option is often off the table—the third-party custodian of the information can rarely be expected to risk contempt just so the privilege claimant can take an immediate appeal. So in our attorney-client example, the privilege-holding client cannot refuse to comply with the order. And the attorney often will comply rather than risk contempt, even if contempt would secure an immediate appeal for the client.

27. See, e.g., *Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364, 1368 (Fed. Cir. 2012).

28. See, e.g., *In re Grand Jury Investigation U.S. Attorney Matter No. 89-4-8881-J*, 921 F.2d 1184, 1186 n.4 (11th Cir. 1991); *In re Hampers*, 651 F.2d 19, 20 (1st Cir. 1981).

29. See Robertson, *supra* note 3, at 761 (noting that the contempt option “has proved to be somewhat haphazard in practice.”).

30. See generally 15B WRIGHT ET AL., *supra* note 12, § 3914.23, at 140 and § 3917, at 376; see also *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) (“The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt.”); *Lamb v. Cramer*, 285 U.S. 217, 220 (1932) (holding that non-parties can immediately appeal from findings of civil contempt); *In re Christensen Eng'g Co.*, 194 U.S. 458, 461 (1904) (holding that a party may immediately appeal a finding of criminal contempt). I put a pin, for now, in whether this distinction is material or makes any sense. See *infra* text accompanying notes 77–78.

31. See Robertson, *supra* note 3, at 761.

32. See Thomas J. Andre, Jr., *The Final-judgment rule and Party Appeals of Civil Contempt Orders: Time for a Change*, 55 N.Y.U. L. REV. 1041 (1980).

In this latter scenario, the second special exception for discovery orders—the *Perlman* exception—applies. This exception allows a privilege claimant to immediately appeal a discovery order directed to a disinterested third party.³³ In *Perlman* itself, the Supreme Court allowed Perlman to appeal an order directing the clerk of a district court to give a district attorney documents Perlman had deposited with the clerk.³⁴ Perlman claimed that disclosure would violate his Fourth and Fifth Amendment rights, but he could not expect the clerk to stand in contempt just so Perlman could immediately appeal the order.³⁵ So the Court let him take an immediate appeal, noting that he was “powerless to avert the mischief of the order.”³⁶

Until 2009, a few courts of appeals allowed one additional avenue for the immediate appeal of discovery orders. These courts had held that discovery orders adverse to a claimed privilege were immediately appealable under the collateral order doctrine.³⁷ (The collateral order doctrine is a judge-made exception to the final-judgment rule that allows for the immediate appeal of orders that are conclusive, separate from the merits, and effectively unreviewable after a final judgment.³⁸) These courts reasoned that the potential loss of confidentiality warranted an immediate appeal; once privileged material is disclosed—or as often said, once the “cat was out of the bag”—its secrecy could never be restored.³⁹ These courts thus allowed immediate appeals of certain discovery orders to allow some appellate review before secrecy was irrevocably lost.

The Supreme Court abrogated this line of cases in *Mohawk Industries, Inc. v. Carpenter*, holding that discovery orders adverse to a claimed privilege were not immediately appealable under the collateral order doctrine.⁴⁰ The Court determined that “postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality

33. 247 U.S. 7 (1918).

34. *Id.* at 13.

35. *Id.*

36. *Id.*

37. See *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1089 (9th Cir. 2007); *United States v. Philip Morris Inc.*, 314 F.3d 612, 621 (D.C. Cir. 2003); *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997). The majority of circuits had held that these orders were not appealable under the collateral order doctrine. See *Boughton v. Cotter Corp.*, 10 F.3d 746, 750 (10th Cir. 1993); *Texaco Inc. v. La. Land & Exploration Co.*, 995 F.2d 43, 43 (5th Cir. 1993); *Chase Manhattan Bank, NA v. Turner & Newall, PLC*, 964 F.2d 159, 162 (2d Cir. 1992); *Reise v. Bd. of Regents of Univ. of Wis. Sys.*, 957 F.2d 293, 295 (7th Cir. 1992); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991).

38. See generally *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 106 (2009); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

39. See *Napster*, 479 F.3d at 1088; *Philip Morris*, 314 F.3d at 617; *Ford Motor*, 110 F.3d at 95.

40. *Mohawk*, 558 U.S. at 106.

of the attorney-client privilege.”⁴¹ The Court also emphasized that privilege claimants already had several avenues for seeking immediate review of discovery orders, including certified appeals under 28 U.S.C. § 1292(b), writs of mandamus, and the contempt option.⁴² Due to these existing means of seeking immediate review, the Court thought it unnecessary to also allow discovery appeals under the collateral order doctrine.⁴³

C. Post-Mohawk Developments

For the past several decades, the courts of appeals have applied *Perlman* broadly. Although *Perlman* itself involved an appeal in the grand-jury context, most courts of appeals had held that *Perlman* appeals also were available in civil and criminal cases.⁴⁴ And the courts made no distinctions based on the party-status of the privilege claimant—anyone claiming a privilege, whether a party or non-party, could appeal a discovery order directed to a disinterested third party.⁴⁵

The *Mohawk* decision sparked two developments in *Perlman* appeals. First, several courts have considered whether *Mohawk* overruled *Perlman*.⁴⁶ They’ve held that it didn’t, and rightfully so.⁴⁷ *Mohawk*

41. *Id.* at 109.

42. *Id.* at 110-11.

43. *Id.* at 110 (“[W]ere attorneys and clients to reflect upon their appellate options, they would find that litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal.”).

44. *See, e.g., Doe v. United States*, 749 F.3d 999, 1005 (11th Cir. 2014); *United States v. Thompson*, 562 F.3d 387, 389 (D.C. Cir. 2009); *In re Subpoena Duces Tecum*, 439 F.3d 740, 743 (D.C. Cir. 2006); *Ross v. City of Memphis*, 423 F.3d 596, 599 (6th Cir. 2005); *see also In re Air Crash at Belle Harbor*, 490 F.3d 99, 106 (2d Cir. 2007) (noting that *Perlman* “applies to appeals from orders issued in both grand jury proceedings and criminal and civil actions” (internal citations omitted)). Only the Tenth Circuit seems to limit *Perlman* appeals to the grand jury context. *See, e.g., United States v. Copar Pumice Co.*, 714 F.3d 1197, 1207 (10th Cir. 2013) (“This circuit has narrowly interpreted *Perlman* to apply in criminal grand jury proceedings”); *see also In re Motor Fuel Temperature Sales Practice Litigation*, 641 F.3d 470, 485 (10th Cir. 2011) (“We are aware of no case . . . that extends *Perlman* beyond criminal grand jury proceedings. We decline to do so here.”).

45. *See, e.g., United States v. Griffin*, 440 F.3d 1138, 1143 (9th Cir. 2006) (holding that the court had jurisdiction to hear a *Perlman* appeal by a criminal defendant); *United States v. Evans*, 113 F.3d 1457, 1458 (7th Cir. 1997) (same); *United States v. Davis*, 1 F.3d 606, 607-08 (7th Cir. 1993) (same); *Ross*, 423 F.3d at 599 (holding that the court had jurisdiction to hear a *Perlman* appeal by a civil defendant); *Federal Deposit Ins. Corp. v. Ogden Corp.*, 202 F.3d 454, 459-60 (1st Cir. 2000) (same); *Conkling v. Turner*, 883 F.2d 431, 433-34 (5th Cir. 1989) (holding that the court had jurisdiction to hear a *Perlman* appeal by a civil plaintiff); *Gill v. Gulfstream Park Racing Ass’n*, 399 F.3d 391, 400 (1st Cir. 2005) (holding that the court had jurisdiction to hear a *Perlman* appeal by a non-party).

46. *See, e.g., Doe*, 749 F.3d at 1006; *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 238 (6th Cir. 2011); *United States v. Krane*, 625 F.3d 568, 572 (9th Cir. 2010); *see also In re Grand Jury*, 705 F.3d 133, 145 (3d Cir. 2012) (“The Government argues that [*Mohawk*] narrows the traditionally understood scope of the *Perlman* doctrine to instances where effective postjudgment review is unavailable.”); *Wilson v. O’Brien*, 621 F.3d 641, 643 (7th Cir. 2010) (“*Mohawk Industries* calls *Perlman* and its

neither discussed nor cited *Perlman*.⁴⁸ And the two decisions are not inconsistent. The collateral order doctrine and *Perlman* appeals are distinct exceptions to the final-judgment rule. They are different doctrinal avenues to similar destinations.⁴⁹ *Mohawk* dealt with only one: the collateral order doctrine. To hold that one cannot immediately appeal a discovery order under the collateral order doctrine says nothing about the entirely separate *Perlman* doctrine.

Second, several courts addressing *Perlman* appeals after *Mohawk* have cut back on *Perlman*'s scope, ultimately holding that parties can no longer take *Perlman* appeals.⁵⁰ This development has been somewhat circuitous and requires a bit of explanation.

It all began with the Seventh Circuit's decision in *Wilson v. O'Brien*.⁵¹ Ruminating on the scope of *Perlman* after *Mohawk*, the *Wilson* court declared that "[o]nly when the person who asserts a privilege is a non-litigant will an appeal from the final decision be inadequate."⁵² And it based that conclusion largely on the Supreme Court's statement in *Mohawk* that "whether [a discovery] order is directed against a litigant or a third party, an appeal from the final

successors into question because, whether the order is directed against a litigant or a third party, an appeal from the final decision will allow review of the district court's ruling. Only when the person who asserts the privilege is a non-litigant will an appeal from the final decision be inadequate.").

47. See *Doe*, 449 F.3d at 1007. But see *In re Naranjo*, 768 F.3d 332, 343 n.14 (4th Cir. 2014) ("*Perlman* may no longer provide a viable rule in light of the Supreme Court's more recent decision in [*Mohawk*]").

48. The briefing before the Supreme Court made only minor mention of *Perlman*. *Mohawk Industries*' cert-stage reply brief mentioned *Perlman* in distinguishing a case. See Reply Brief at 2, n.2, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009) (No. 08-678), 2009 WL 52074. Carpenter's brief on the merits mentioned *Perlman* as one of the recognized exceptions to the requirement that targets of discovery orders stand in contempt if they want to immediately appeal. See Brief for Respondent at 13–14, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009) (No. 08-678), 2009 WL 1965294, at **13–14. And a merits-stage amicus brief mentioned *Perlman* as an alternative avenue for appealing a discovery order. See Brief of Former Article III Judges and Law Professors as Amici Curiae in Support of Respondent at 23 n.14, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009) (No. 08-678), 2009 WL 2040423. *Perlman* was not mentioned during oral argument.

49. See *Grand Jury*, 705 F.3d at 146 ("[T]he *Perlman* doctrine and the collateral order doctrine recognize separate exceptions to the general rule of finality under § 1291."); *Holt-Orsted*, 641 F.3d at 239 ("[T]he collateral order doctrine and the *Perlman* exception have historically been viewed as discrete jurisdictional bases for immediate appeal."); *Krane*, 625 F.3d at 572 (same). Some First Circuit decisions, however, have expressed some confusion about whether *Perlman* and the collateral order doctrine are distinct exceptions to the final-judgment rule. See *Gill*, 399 F.3d at 397–98; *Ogden*, 202 F.3d at 459.

50. See *Copar Pumice*, 714 F.3d at 1200; *Holt-Orsted*, 641 F.3d at 238–39; *Krane* 625 F.3d at 572–73; see also *Wilson*, 621 F.3d at 643.

51. *Wilson*, 621 F.3d at 642. *Wilson* involved an interlocutory appeal from an order directing one of Wilson's former attorneys to disclose information at a deposition. See *id.* at 642. The attorney was actually a law student when he assisted Wilson; Wilson had recently had his conviction for murder set aside with the help of the law student and others. See *id.*

52. *Id.*

decision will allow review of the district court's ruling."⁵³ The *Wilson* court never actually held that parties can no longer take *Perlman* appeals, sidestepping the matter to decide the case on other grounds.⁵⁴ But it laid the groundwork for cutting back on *Perlman*.

Next came the Ninth Circuit's decision in *United States v. Krane*, which also did not expressly hold that parties can no longer take *Perlman* appeals.⁵⁵ In *Krane*, a client appealed a discovery order directed to its former attorneys, claiming that the information was protected by the attorney-client privilege.⁵⁶ The court held that the client could take a *Perlman* appeal, emphasizing that "neither the privilege holder nor the custodian of the relevant documents [were] parties to the underlying criminal proceedings."⁵⁷

Finally, the Sixth Circuit held in *Holt-Orsted v. City of Dickson* that parties could no longer take *Perlman* appeals.⁵⁸ In *Holt-Orsted*, the plaintiffs' former attorneys had been ordered to testify over a claim of attorney-client privilege.⁵⁹ The Sixth Circuit quoted *Krane* at length and emphasized the Ninth Circuit's observation that neither the privilege holder nor the custodian in *Krane* were parties.⁶⁰ The *Holt-Orsted* court speculated that "[g]oing forward, application of the *Perlman* doctrine likely [would] be limited to such situations."⁶¹ Because the privilege claimants in *Holt-Orsted* were parties, the court held that they could not take a *Perlman* appeal. They could instead "ultimately . . . avail themselves of a post-judgment appeal which, under *Mohawk*, suffices 'to protect the rights of the litigants and preserve the vitality of the attorney-client privilege.'"⁶²

Other courts of appeals have followed suit.⁶³ Given the unanimity

53. *Id.*

54. *See id.* The court held that because the attorney had already disclosed the information, the appeal was moot. *See id.* This was correct. *See infra* note 148. But it reflects an internal inconsistency in the *Wilson* opinion. The appeal was moot because the harm against which a *Perlman* appeal protects—wrongful disclosure—had already occurred. But if the purpose of a *Perlman* appeal is to allow some appellate review before disclosure (which it is, *see infra* Part III.A), then the party or non-party status of the privilege claimant is largely irrelevant, *see infra* Part III.B.

55. *United States v. Krane*, 625 F.3d 568 (9th Cir. 2010).

56. *Id.* at 570-71.

57. *Id.* at 573.

58. *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 240-41 (6th Cir. 2011).

59. *Id.* at 232-33.

60. *Id.* at 240.

61. *Id.* at 239.

62. *Id.* at 240 (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009)).

63. *See United States v. Copar Pumice Co.*, 714 F.3d 1197, 1207-09 (10th Cir. 2013) ("Because Defendants, as civil litigants, have other review available, they cannot immediately appeal the discovery orders at issue under the *Perlman* doctrine."); *see also In re Naranjo*, 768 F.3d 332, 343 n.14 (4th Cir. 2014) (citing *Copar Pumice* and noting that "*Mohawk* might be read to say that interlocutory appeals concerning the discovery of privileged documents should not be permitted when the privilege-holder has

with which these courts have suggested or held that parties can no longer take *Perlman* appeals, future cases likely will reach the same conclusion.

III. *PERLMAN* APPEALS AFTER *MOHAWK*

The courts of appeals' recent cutting back on *Perlman* appeals is mistaken and reflects a misunderstanding of *Perlman*'s purpose. *Perlman* appeals, like contempt appeals, exist to offer some chance at appellate review *before* the disclosure of confidential information. In other words, they protect against the harm of wrongful disclosure. This harm is largely the same regardless of party status. Little reason thus exists to treat parties and non-parties differently in the *Perlman* context.

A. *The Purpose of Perlman Appeals*

Exceptions to the final-judgment rule reflect a judgment that, in a particular situation, the benefits of an immediate appeal outweigh the costs.⁶⁴ So to understand the purpose of *Perlman* appeals, one must look to why the appealability balance is struck differently in the *Perlman* context. Again, the *Perlman* doctrine allows privilege claimants to appeal discovery orders directed at a disinterested third party. *Perlman* appeals thus exist to allow some appellate review of a potentially erroneous privilege ruling.

Erroneous privilege rulings can impose two types of harm. The first is straightforward: the wrongful use of privileged information in litigation. Privileged information is, generally speaking, not admissible evidence.⁶⁵ So when a district court overrules a claim of privilege, the information then becomes evidence to be used by the parties. This evidence can prolong litigation. It could, for example, be the basis for denying a motion for summary judgment, requiring a trial that would have been avoided had the evidence been inadmissible. The privileged information could also cause a jury to reach a verdict it wouldn't have reached without the information. In either case, the erroneous privilege ruling harms someone by extending litigation or resulting in an erroneous judgment.

other means to protect his privilege rights.”). The Tenth Circuit’s statement in *Copar Pumice* was somewhat superfluous, as that court allows *Perlman* appeals only from grand jury proceedings. See *Copar Pumice*, 714 F.3d at 1207; see also *In re Motor Fuel Temperature Sales Practice Litigation*, 641 F.3d 470, 485 (10th Cir. 2011). *Copar Pumice* was a civil case, so the court had no reason to reach this matter.

64. See *supra* text accompanying notes 9-14.

65. The Federal Rules of Evidence do not specify privileges, instead leaving their development to the courts. See FED. R. EVID. 501.

The second potential harm from an erroneous privilege ruling comes from wrongful disclosure.⁶⁶ Privileged information is secret.⁶⁷ And maintaining that secrecy has its own social value independent of any litigation. In attorney-client relationships, for example, the promise of secrecy ensures that clients can speak openly with their attorneys, which in turn leads to proper legal advice and (we hope) law-abiding behavior.⁶⁸ The secrecy of privileged communications also furthers privacy interests, as can be seen in the spousal-communications privilege. Although this privilege theoretically encourages open communication between spouses, few would seriously argue that it has such an effect.⁶⁹ A much more compelling rationale for the privilege is that a majority of society has deemed certain matters private and unseemly to inquire into.⁷⁰ When a court orders disclosure of that information over a claim of privilege, the claimant loses the secrecy that information once had. This loss is real. And once lost, secrecy cannot be regained.⁷¹

The first harm of erroneous discovery orders—use of the information during proceedings—does not require an immediate appeal. To be sure, the wrongful use of privileged information to prolong litigation or win a judgment imposes costs. These costs, however, are little different from those imposed by all sorts of erroneous district court decisions. If a district court erroneously denies a motion to dismiss, the movant must then proceed to ultimately unnecessary discovery. Any wrongful evidentiary ruling, not just those on privilege, can lead to an

66. See Robertson, *supra* note 3, at 739-40.

67. Federal communications privileges—such as the attorney-client privilege, the spousal-communications privilege, and the psychotherapist-patient-privilege—require that the communication in question be confidential. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.13, at 334-40 (5th ed. 2012) (attorney-client privilege); *id.* at § 5.32, at 420-21 (spousal communications privilege); *id.* at § 5.35, at 428 (psychotherapist-patient privilege). If the communication wasn't confidential when made, there is no privilege. See, e.g., *id.* at § 5.13, at 336-37 (“[A communication] is not considered confidential if the client intended that the communication be later disclosed either publicly or to particular outsiders.”). And if the privilege holder ceases to keep the communication confidential, the communication loses its privilege. See, e.g., *id.* at § 5.13, at 338.

68. E.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“[The attorney-client privilege’s] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”); see also *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998).

69. The Supreme Court appeared to invoke this rationale in *Wolfe v. United States*, 291 U.S. 7, 14 (1934) (“The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.”).

70. See MUELLER & KIRKPATRICK, *supra* note 68, at § 5.32, at 416.

71. See Robertson, *supra* note 3, at 739.

unnecessary trial or reversible verdict.

But courts have determined that appeal after a final judgment suffices for most of these orders. The benefits of generally delaying appeal until after a final judgment are thought to outweigh the costs imposed on individual litigants in specific circumstances.⁷² And that's probably correct; many district court orders have some bearing on whether litigation continues. Were all such decisions immediately appealable as of right, the courts of appeals likely would face a deluge of burdensome and often unnecessary appeals.⁷³ Absent some special circumstances, privilege claimants don't need to be entitled to an immediate appeal to address the wrongful use of privileged information.

The second harm—disclosure—is different. Wrongful disclosure never can be remedied due to the loss of secrecy. If an appellate court is ever to prevent the harm of wrongful disclosure, it must do so immediately, before disclosure of the privileged information. As a result, the risk of that harm is considered sufficient to allow for some immediate appellate review.⁷⁴

Hence, contempt appeals and *Perlman* appeals. Both exist to allow some opportunity for appellate review before disclosure. When a court orders a privilege claimant to disclose potentially confidential information, the claimant has the contempt option. When a court orders a disinterested third party to disclose potentially confidential information, the claimant can take a *Perlman* appeal. These two types of appeals complement one another. They accordingly have the same purpose: ensuring some appellate review before privileged information is disclosed and secrecy irrevocably lost.

72. See Lammon, *supra* note 1, at 429.

73. Note, I suspect such a deluge would occur if these orders were appealable *as of right*. Whether a system of discretionary appeals would result in a similar deluge is unclear; discretion-advocates and rule-advocates disagree over discretion's likely effect on appellate caseloads, and we lack sufficient evidence at this point to determine who is right. See *id.* at 433-34.

74. The distinction between the harm of use and the harm of disclosure is analogous to the distinction between the right to avoid liability and the right to avoid litigation in the collateral order doctrine context. Courts have regularly deemed immunities from suit—which protect someone from the costs and burdens of litigation itself, not just from an eventual judgment—can be immediately appealed under that doctrine. See, e.g., *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993) (permitting appeals from the denial of Eleventh Amendment immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 527-30 (1985) (permitting appeals from the denial of qualified immunity for government officials); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979) (permitting appeals from the denial of Speech & Debate Clause immunity); *Abney v. United States*, 431 U.S. 651, 662 (1977) (permitting appeals from the denial immunity from double jeopardy). The whole point of the immunity is to protect the claimant from the burdens of litigation. So if a trial court wrongfully denies a claim of immunity, an appeal after final judgment is useless. In contrast, defenses against liability generally cannot be immediately appealed under the collateral order doctrine. See, e.g., *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 884 (1994); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 500-01 (1989). Thanks to Andrew Pollis for pointing out this analogy.

B. The Irrelevancy of Party/Non-Party Status

Given their identity of purpose, contempt appeals and *Perlman* should be treated the same. In the contempt context, both parties and non-parties are allowed (with one exception discussed momentarily) to take contempt appeals. And rightfully so. A privilege claimant's interest in appealing a denial of privilege is largely the same whether the claimant is a party or non-party. In either case, the privilege claimant simply seeks review before disclosure; when the claimant seeks to maintain confidentiality, an appeal after disclosure is just as useless to parties as it is to non-parties.

Perlman appeals are little different. Whether a party or non-party, the privilege claimant does not control disclosure and thus cannot take a contempt appeal. Just as in contempt appeals, the claimant seeks some appellate review before disclosure. And just as in contempt appeals, the privilege claimant's interest in an immediate appeal is largely the same whether the claimant is a party or non-party. An appeal after disclosure is useless to them both.

To be sure, some differences between parties and non-parties exist in this context. First and most obviously, parties can appeal after a final judgment; non-parties generally cannot. It is for this reason that the courts of appeals have begun cutting back on parties' ability to take a *Perlman* appeal.⁷⁵ But the distinction is irrelevant in this context. Party or non-party, the privilege claimants seek to avoid the harm of wrongful disclosure. And party or non-party, an appeal after a final judgment does nothing to remedy that harm. An appeal can, of course, address the wrongful use of privileged information. But any existing secrecy has been lost forever. That's precisely why courts have both the contempt option and *Perlman* appeals. When privilege claimants control disclosure, they can secure review before disclosure with the contempt option; when they don't, they have *Perlman*. Given the purpose of these appeals, a party's ability to appeal after a final judgment is immaterial.

Second, contempt appeals do not treat parties and non-parties identically: non-parties can immediately appeal from findings of both civil and criminal contempt, while parties can appeal only from findings of criminal contempt.⁷⁶ The rationale for this different treatment is not clear. Indeed, "[t]he distinction that permits parties to appeal a criminal contempt order but not a civil contempt order does not have any obvious functional justification in regulating relationships between district courts and courts of appeals with respect to discovery orders."⁷⁷ Despite

75. See *supra* Part II.C.

76. See *supra* text accompanying note 28.

77. 15B WRIGHT ET AL., *supra* note 12, § 3914.23, at 146; see also Andre, *supra* note 32.

continuing criticism that there's no practical reason for it, the distinction seems to be entrenched.

But this distinction between parties and non-parties in the contempt context should not affect the availability of *Perlman* appeals. For one, the distinction makes little practical sense; it should be abandoned, not used as a reason for restricting *Perlman* appeals. Even with this distinction, parties still can take some contempt appeals; they are not denied them entirely, but only when the contempt is civil. The contempt option's awkward distinction between parties and non-parties thus provides little reason for denying *Perlman* appeals to parties.

Third, contempt appeals have a built-in limiter that *Perlman* appeals don't. Contempt appeals impose a cost beyond the normal cost of appealing on the appellant: the cost of a contempt citation, which can include substantial fines or jail time.⁷⁸ This penalty is thought to discourage unnecessary appeals—those that have little merit or are brought to delay proceedings or harass the other side—and thus limit the contempt option's impact on appellate caseloads.⁷⁹ (Concern over increasing appellate caseloads is always a consideration in defining the scope of interlocutory appeals.)⁸⁰ *Perlman* appeals don't have that cost; the appellant is not at risk of fines or jail time. So *Perlman* lacks the built-in limiter of contempt appeals.

This difference is meaningful. But it ultimately does not justify denying *Perlman* appeals to parties. If the concern is appellate caseloads, then what matters is whether allowing non-parties *and* parties to take *Perlman* appeals will increase caseloads. This question is an empirical one, and we can't be certain of the answer.⁸¹ But if history is any indicator, the concern is misplaced. Until recently, both parties and non-parties could take *Perlman* appeals. And there has never been any suggestion that *Perlman* appeals were overwhelming the courts of appeals. These appeals are not terribly common. And *Perlman* appeals by parties make up only a fraction of them; most involve privilege claimants in grand jury proceedings, where there are no parties besides the government.⁸²

78. See Andre, *supra* note 32, at 1084-1100.

79. See, e.g., *In re Klein*, 776 F.2d 628, 631 (7th Cir. 1985) (“[The contempt option] ensures that people raise only those claims that are sufficiently serious that they are willing to make a sacrifice to obtain appellate review. Self-interest cuts down dramatically on the number of appeals taken to obtain delay.”).

80. See Lammon, *supra* note 1, at 433-36 (describing the widespread concern in the appellate jurisdiction literature over increasing caseloads).

81. Cf. *id.* at 433-36 (noting the lack of data on the impact various appellate rules might have on caseloads).

82. See, e.g., *In re Grand Jury Subpoena*, 745 F.3d 681 (3d Cir. 2014); *In re Grand Jury Subpoena*, 709 F.3d 1027 (10th Cir. 2013); *In re Grand Jury Subpoenas*, 561 F.3d 408 (5th Cir. 2009);

Fourth, parties taking contempt or *Perlman* appeals could—at least in theory—disrupt trial court proceedings more than similar appeals by non-parties. The argument would be that by shifting their focus to an immediate appeal, parties would give less time, effort, and attention to the trial court proceedings, thereby slowing them down. Such an impact on trial court proceedings is plausible. But its extent—or even if it exists—is unknown.

Some of these differences should cause some pause in treating parties and non-parties alike. But none of them ultimately overcome the near identity of interests that parties and non-parties share in contempt and *Perlman* appeals.

C. Mohawk Didn't Change Things

Why, then, have several courts of appeals concluded that *Mohawk* limited *Perlman* appeals to non-parties? A few explanations are possible.

1. Taking Statements Out of Context

First, this might all be a case of misunderstanding stemming largely from courts taking statements in previous opinions out of context. For example, *Wilson v. O'Brien*—the Seventh Circuit case that started the restricting of *Perlman*—stated that “[o]nly when the person who asserts a privilege is a non-litigant will an appeal from the final decision be inadequate.”⁸³ The Sixth and Tenth Circuits relied on this statement in concluding that parties can no longer take *Perlman* appeals.⁸⁴ But the *Wilson* court wasn’t actually addressing whether parties could take *Perlman* appeals when it made that statement. The court was instead discussing whether *the targets* of discovery orders can take an immediate appeal without first being held in contempt.⁸⁵ Before *Mohawk*, the Seventh Circuit had held that they could,⁸⁶ which was inconsistent with the normal rule that the target of a discovery order must use the contempt option to take an immediate appeal. The *Wilson* court surmised that *Mohawk* might have abrogated these decisions, but it

In re Grand Jury, 490 F.3d 978 (D.C. Cir. 2007); *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002).

83. *Wilson v. O'Brien*, 621 F.3d 641, 643 (7th Cir. 2010).

84. See *United States v. Copar Pumice Co.*, 714 F.3d 1197, 1207-08 (10th Cir. 2013); *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 238 (6th Cir. 2011).

85. See *Wilson*, 621 F.3d at 642.

86. See *Burden-Meeks v. Welch*, 319 F.3d 897, 900-01 (7th Cir. 2003); *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997).

ultimately avoided the issue by deciding the case on other grounds.⁸⁷

So *Wilson* might be read as addressing only whether the targets of discovery orders could immediately appeal without a finding of contempt. Such a reading means that subsequent cases simply have misunderstood *Wilson*. This is admittedly not an entirely satisfactory explanation, as the court's statement that only non-litigants needed an appeal before a final judgment seems quite categorical. Other courts have taken it as such.

The Supreme Court's statement in *Mohawk* that "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege" has received similar treatment.⁸⁸ This line, too, must be read in context. In concluding that a privilege claimant could not immediately appeal an adverse discovery order under the collateral order doctrine, the *Mohawk* Court emphasized the alternative avenues for immediate review, which (according to the Court) rendered appeals under the collateral order doctrine unnecessary.⁸⁹ These alternatives included certified appeals under 28 U.S.C. § 1292(b), writs of mandamus, and the previously discussed contempt option.⁹⁰

The contempt option thus was part of the reason why the Supreme Court concluded that appeals after a final judgment generally suffice for parties. Privilege claimants in this situation have means to seek immediate review—including the contempt option—when appeal after a final judgment won't suffice. *Perlman* is, of course, the stand-in for contempt appeals when the contempt route is unavailable. So the availability of *Perlman* appeals actually supports the reasoning in *Mohawk*. To use that holding to then cut back on *Perlman* is perverse.

2. Disfavoring Judge-Made Exceptions

Another potential explanation is the Supreme Court's general hostility for judge-made exceptions to the final-judgment rule. The *Mohawk* Court did not speak highly of them.⁹¹ And in *Mohawk* and elsewhere, the Court has suggested that rulemaking is the appropriate method for creating exceptions to the final-judgment rule.⁹² Concurring in

87. 621 F.3d at 642-43.

88. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009); see also *United States v. Copar Pumice Co.*, 714 F.3d 1197, 1205-06 (10th Cir. 2013); *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 240 (6th Cir. 2011).

89. *Mohawk*, 558 U.S. at 110-11.

90. See *id.*

91. *Id.* at 113-14.

92. See *id.*; *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995).

Mohawk, Justice Thomas suggested that the Court draw a line in the sand and hold that courts could create no more exceptions.⁹³ Most have read *Mohawk* as discouraging any more judge-made exceptions to the final-judgment rule, if not foreclosing them altogether.⁹⁴

But the Supreme Court's general attitude toward judge-made exceptions to the final-judgment rule is just that—a general attitude. Were we writing on a clean slate, it would have some influence. And in a case of uncertainty—when the arguments for and against recognizing a new judge-made exception are in equipoise—it could resolve the tie. Relying on this general attitude to cut back on existing judge-made exceptions, however, would be a mistake. A preference for rulemaking suggests that the judge-made exceptions should be codified. If that's the case, courts should not start dismantling the current system of judge-made exceptions before its replacement exists. To do so will only create further uncertainty and complexity in this area. There might be good reasons to cut back on a judge-made exception to the final-judgment rule. But a general hostility to such exceptions isn't one of them.

3. Overlooking Perlman's Purpose and the Challenge of Perlman More Generally

A more fundamental problem with the recent decisions cutting back on *Perlman* is a failure to recognize *Perlman*'s purpose. These courts determined that an appeal after a final judgment is just as good as an immediate one. But again, that makes sense only if the harm to be addressed is that of wrongful use. If the harm is wrongful disclosure, an immediate appeal is necessary. And that's why the courts have created both contempt and *Perlman* appeals.

This explanation simply raises another question: why have these courts overlooked *Perlman*'s purpose?

I suspect that the answer lies in the fact that the courts facing this issue had no convenient source to which they could turn for help in

93. *Mohawk*, 558 U.S. at 119 (Thomas, J., concurring in part and concurring in the judgment).

94. See Erwin Chemerinsky, *Court Keeps Tight Limits on Interlocutory Review*, TRIAL (Mar. 2010), 52, 54 (“[*Mohawk*] shows that little, if anything, will be found to fit within the collateral order exception that the Court recognized in *Cohen*.”); James E. Pfander, *Iqbal and Constitutional Torts: Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN. ST. L. REV. 1387, 1404 (2010) (“[T]he Court [in *Mohawk*] . . . suggested that it would no longer adopt judge-made expansions of the collateral order doctrine.”); James E. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 NW. U. L. REV. 1043, 1053 (2011); Rory Ryan, Luke Meier & Jeremy Counseller, *Interlocutory Review of Orders Denying Remand Motions*, 63 BAYLOR L. REV. 734, 776 (2011) (suggesting that after *Mohawk*, “little room exists for the [collateral order] doctrine’s expansion”). But see Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 42 (2011) (“[T]he Court [in *Mohawk*] has left open the possibility that other nonfinal decisions might be deemed final.”).

addressing it. Grasping *Perlman*'s purpose and its interaction with *Mohawk* might be difficult without reading through many of the decisions discussing *Perlman*. In the nearly 100 years since the Supreme Court decided *Perlman*, the courts of appeals have issued hundreds of opinions citing it.⁹⁵ No court should be expected to read even a significant number of them. With their high caseloads, federal appellate judges and their staffs rarely have the luxury of time for deep study into all the issues that come before these.⁹⁶ Study of even a significant number of these decisions might not have been enough; discussions of *Perlman*'s purpose are exceedingly rare.⁹⁷

One place to which the courts might have turned was the literature on interlocutory appeals. But *Perlman* has received short shrift in that literature.⁹⁸ So all the courts could do, and all we can reasonably expect them to do, was to try and reach some reasonable conclusion regarding *Perlman*'s scope. The Supreme Court's pronouncement in *Mohawk* that appeals after a final judgment suffice for parties—when taken out of context—seemed to provide a convenient basis for deciding the cases.

D. Fixing Perlman through Caselaw or Codification

The recent and mistaken curbing of *Perlman*'s scope can be fixed in three ways. First, the courts of appeals could reverse course and fix the issue themselves. Second, given the appropriate opportunity, the

95. Over 200 courts of appeals decisions cite *Perlman v. United States*, 247 U.S. 7 (1918).

96. See RICHARD A. POSNER, *HOW JUDGES THINK* 205 (2008) ("No [generalist judge] can be an expert in more than a small fraction of the fields of law that generate the appeals he must decide, or can devote enough time to an individual case to make himself, if only for the moment . . . , an expert in the field out of which the case arises."); see also *id.* at 206 ("A judge is a generalist who writes an opinion under the pressure of time in whatever case, in whatever field of law, is assigned to him.").

97. See *In re Nat'l Mortg. Equity Corp. Mortgage Pool Certificates Litig.*, 821 F.2d 1422, 1424 (9th Cir. 1987) ("*Perlman* applies only if its application will prevent the disclosure of privileged information. If the third party has already disclosed the information, the reason for expedited review no longer exists."); see also *United States v. Lavender*, 583 F.2d 630, 633 (2d Cir. 1978) (noting that the need for a *Perlman* appeal disappears after disclosure).

98. *Moore's Federal Practice* offers what is probably the deepest discussion of *Perlman*. See 19 MOORE'S FEDERAL PRACTICE § 202.11[2][a], at 202-79-202-83 (3d ed. 2015). Wright, Miller, and Cooper also discuss *Perlman*. See 15B WRIGHT, MILLER & COOPER, *supra* note 12, § 3914.23, at 156-71. Much of that discussion focuses, however, on determining whether a third party is actually "disinterested"; its mention of *Perlman*'s purpose is somewhat vague. See *id.* at 155-56 (noting that a "desire to provide some opportunity for appeal from discovery orders" for persons not bound by a discovery order "led to the 'Perlman' doctrine"). Most articles on interlocutory appeals mention *Perlman* (if at all) only briefly. See, e.g., Glynn, *supra* note 15, at 190-91; Petty, *supra* note 1, at 373-74. The only pieces focusing on *Perlman* are student notes. See Linda Hylenski, *The Attorney-Client Privilege and the Perlman Rule—Should the Nature of the Relationship Determine the Scope of the Rule?*, 1 DET. C. L. REV. 163 (1985); Michael R. Lazerwitz, *The Perlman Exception: Limitations Required by the Final Decision Rule*, 49 U. CHI. L. REV. 798 (1982); Matthew O. Wagner, *Fixing Perlman: How the Misapplication of a 100-Year-Old Doctrine Threatens to Undermine Mohawk Industries, Inc. v. Carpenter*, 79 U. CIN. L. REV. 1631 (2011).

Supreme Court could step in and overrule this development.

The third option is codification. The Appellate Rules Committee is closer now than it has been in some time to codifying the judge-made exceptions to the final judgment rule. Should it do so, *Perlman* could provide the basis for a valuable rule.

Thinking about codifying *Perlman*, however, reveals a wealth of questions about codifying the judge-made exceptions more generally. The very reasons why the courts had difficulty with *Perlman*—the immensity of the caselaw and the incomplete discussion of the doctrine in the literature—arise with several exceptions to the final-judgment rule. If codification is to succeed, further work on interlocutory appeals must be done. I turn now to the challenges codification presents and how legal scholarship might address these challenges.

IV. CODIFYING INTERLOCUTORY APPEALS

A. Complexity, Criticism, and Codification

The current system of appellate jurisdiction—a general final-judgment rule with a variety of exceptions—is both large and complex.⁹⁹ It has a wealth of exceptions scattered across the U.S. Code, rules of procedure, and judicial decisions. All of these exceptions have different requirements and apply in different contexts. Some are appeals as of right,¹⁰⁰ while others are discretionary.¹⁰¹ Some exceptions have quite clear requirements.¹⁰² Others, less so.¹⁰³ And some are about as

99. See, e.g., Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 L. & CONTEMP. PROBS. 165, 165–66 (Summer 1984) (noting “the unconscionable intricacy of the existing law, depending as it does on overlapping exceptions, each less lucid than the next”); Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 L. & CONTEMP. PROBS. 157, 157 (Summer 1984) (“The final judgment requirement has been supplemented by a list of elaborations, expansions, evasions, and outright exceptions that is dazzling in its complexity.”); Eisenberg & Morrison, *supra* note 14, at 291 (calling the current system “arcane and confusing”); Pollis, *Multidistrict Litigation*, *supra* note 15, at 1651 (noting the “labyrinthian conglomeration of jurisdictional rules”); Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 L. & CONTEMP. PROBS. 171, 172 (Summer 1984) (“The existing federal finality-appealability situation is an unacceptable morass.”); Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 556 (2002) (noting the “dizzying array of statutory and judicially-created [finality] exceptions”).

100. See, e.g., 9 U.S.C. § 16(a) (orders denying arbitration).

101. See 28 U.S.C. § 1292(b); FED. R. CIV. P. 23(f).

102. Federal Rule of Civil Procedure 23(f), for example, is relatively straightforward. It gives the courts of appeals discretion to hear an immediate appeal “from an order granting or denying class-action certification.” FED. R. CIV. P. 23(f). But even this relatively clear rule contains some ambiguity at the margins. See, e.g., *Matz v. Household International Tax Reduction Investment Plan*, 687 F.3d 824, 826 (7th Cir. 2012) (addressing whether an order modifying the scope of a previously certified class is appealable under Rule 23(f)); *Fleischman v. Albany Medical Center*, 639 F.3d 28, 31 (2d Cir. 2011) (per curiam) (addressing whether an order denying a motion to amend a class certification order revives

vague as a legal rule can be.¹⁰⁴ Some exceptions apply in only specific contexts,¹⁰⁵ while others can be invoked in nearly any type of case.¹⁰⁶ And the body of caselaw addressing all of these exceptions is immense.¹⁰⁷

All this complexity breeds uncertainty and seemingly wasteful litigation over the appealability of district court orders.¹⁰⁸ So the current

the time for taking a Rule 23(f) appeal).

103. The collateral order doctrine often has been criticized for having unclear requirements. *See, e.g.,* 15A WRIGHT ET AL., *supra* note 12, § 3911, at 330 (noting the several Supreme Court decisions that “alternately support and twist or ignore the pronounced elements of the [collateral order] doctrine”); Lloyd C. Anderson, *The Collateral Order Doctrine: A New “Serbonian Bog” and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 540 (1998) (arguing that the collateral order doctrine is built on “inconsistent [Supreme Court] opinions” that “caus[e] unacceptable confusion over which nonfinal rulings are appealable”); Kristin B. Gerdy, “Important” and “Irreversible” but Maybe Not “Unreviewable”: The Dilemma of Protecting Defendants’ Rights Through the Collateral Order Doctrine, 38 U.S.F. L. REV. 213, 246, 248 (2004) (characterizing a recent collateral order decision as “less than consistent and even contradictory of earlier iterations of the doctrine” and criticizing it for threatening to expand the collateral order doctrine “beyond reason”); Glynn, *supra* note 15, at 205; Steinman, *supra* note 2, at 1277 (characterizing the collateral order doctrine as “confus[ed] and incoheren[t]”). Other exceptions have substantive requirements that inject some uncertainty into their application, such as those for a certified appeal or a writ of mandamus. *See* 28 U.S.C. § 1292(b) (requiring that the district court order “involve[] a controlling question of law as to which there is substantial ground for difference of opinion”); *id.* § 1651 (requiring that the district court patently err and leave a party with no other effective remedy, *see, e.g.,* *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–82 (2004)).

104. There seem to be no concrete requirements for taking a pragmatic appeal under *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); the decision of whether to allow such an appeal appears largely discretionary. That being said, the Ninth Circuit has tried to make elements out of pragmatic appeals. *See* *Commissioner v. JT USA, LP*, 630 F.3d 1167, 1171–72 (9th Cir. 2011).

105. *See, e.g.,* 9 U.S.C. § 16(a) (applies only in cases involving arbitration).

106. Extraordinary writs are available in essentially all cases. *See* 28 U.S.C. § 1651. Other exceptions apply relatively broadly, such as those for appeals regarding injunctive relief and certified appeals. *See id.* at § 1292(a)(1) (available whenever injunctive relief is sought); *id.* § 1292(b) (available in any civil case).

107. While the Supreme Court has decided scores of cases involving judge-made exceptions to the final-judgment rule, the courts of appeals have decided thousands. A Westlaw search of cases mentioning the collateral order doctrine—the most common judge-made exception to the final-judgment rule—returns over 5,000 court of appeals decisions. (The search terms were: (“COLLATERAL-ORDER-DOCTRINE” (1291 /s COHEN) (“COLLATERAL-ORDER” /s JURISDICTION) “COLLATERAL-ORDER-RULE” “COHEN-DOCTRINE” “COHEN-RULE” “COHEN-DOCTRINE”)) Note, this number wouldn’t include unpublished orders in which a court deems a district court order not appealable under the collateral order doctrine. Decisions on other judge-made exceptions to the final-judgment rule, though not as prevalent, number in the hundreds. As noted above, over 200 courts of appeals decisions cite *Perlman v. United States*, 247 U.S. 7 (1918). And over 340 courts of appeals decisions cite *Gillespie*, 379 U.S. 148, the central Supreme Court case for the pragmatic finality exception to the final-judgment rule.

108. This is particularly true of the broader exceptions to the final-judgment rule. *See* Lammon, *supra* note 1, at 431 (“The broader exceptions are much less predictable. They are plagued by vague terms and inconsistent treatment in the courts, such that both litigants and judges spend far too much time trying to determine what can be appealed and when.”); *see also* Cooper, *supra* note 99, at 157 (arguing that even “[l]awyers and judges who are expert in working with the system . . . often encounter elusive uncertainty in seeking clear answers to many problems”); Luther T. Munford, *Dangers, Toils*,

regime of interlocutory appeals has received substantial criticism and calls for reform.¹⁰⁹ Indeed, critics have been calling for changes to the current system of interlocutory appeals for decades. But little has changed. Only two significant developments have occurred in the last twenty years. First, Congress authorized the Supreme Court to define by rule when district court orders are final and when they can be appealed.¹¹⁰ Second, the Rules Committee used that authority to enact Rule 23(f), which allows for appeals from district court orders granting or denying class certification.¹¹¹

But things might be changing. Although it has not fully joined the chorus of calls for reform, the Supreme Court recently chimed in on the possibility of change. In *Mohawk*, the Court suggested that when it comes to interlocutory appeals, judge-made exceptions are out and rulemaking is in.¹¹² Rulemaking, the *Mohawk* Court noted, “draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions.”¹¹³ And so rulemaking—“not expansion by court decision”—is now “the preferred means for determining whether and when prejudgment orders should be immediately appealable.”¹¹⁴

Mohawk also has spurred some limited preliminary action by the Appellate Rules Committee. The Committee has received two requests to address the specific issue addressed in *Mohawk*—the appealability of discovery orders adverse to a claim of attorney-client privilege.¹¹⁵ In September 2013, a memo from Andrea L. Kuperman, Chief Counsel to the Committee, discussed some preliminary doctrinal research on interlocutory appeals.¹¹⁶ And in October 2014, a memo from Professor

and *Snares: Appeals Before Final Judgment*, 15 LITIG. 18, 18 (Spring 1989) (noting that the appealability regime “provides the kind of excursions into legal history and abstract analysis that can drive practical litigators crazy”); Rosenberg, *supra* note 99, at 172 (“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 explaining why or why not.”).

109. See, e.g., Glynn, *supra* note 15, at 258–67; Steinman, *supra* note 2, at 1276–94.

110. See 28 U.S.C. § 1292(e) (“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), (b), (c), or (d).”); *id.* at § 2072(c) (authorizing the Supreme Court to prescribe rules “defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.”).

111. FED. R. CIV. P. 23(f). For more in depth discussions of Rule 23(f), see generally Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531 (2000).

112. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 110, 113–14 (2009).

113. *Id.* at 114 (internal citation omitted).

114. *Id.* at 113–14 (quoting *Swint v. Chambers County Commission*, 514 U.S. 35, 42 (1995)).

115. *Minutes of the Spring 2014 Meeting of the Advisory Committee on Appellate Rules*, *supra* note 5, at 15.

116. See Andrea L. Kuperman, *Memorandum re Immediate Appealability of Prejudgment Orders*,

Catherine T. Struve, Reporter to the Committee, discussed various issues regarding appeals from discovery orders adverse to a claim of attorney-client privilege.¹¹⁷

So the potential for reforming the current system of interlocutory appeals appears greater than it has been in some time. That is not to say reform is certain. One member of the Committee “stated that it would be wildly unrealistic to attempt a global project to overhaul the treatment of appealability of interlocutory orders.”¹¹⁸ Another Committee member proposed removing the issue from the Committee’s agenda entirely.¹¹⁹ And the Committee has abandoned its efforts to craft a rule regarding appeals from attorney-client privilege decisions.¹²⁰ But the Committee’s preliminary steps toward potential codification suggest that a realistic chance of reform currently exists.

As for the actual reform, critics of the current system generally have split into one of two camps.¹²¹ Some advocate for a system of categorical rules defining what can be appealed and when.¹²² Most prefer switching to a system of discretionary appeals.¹²³ Under such a system, the courts of appeals would have discretion to hear an immediate appeal from nearly any district court order. Commentators herald a discretionary system’s flexibility and suggest that it would not overwhelm appellate courts with a flood of interlocutory appeals.¹²⁴

Though an academic favorite, a wholesale switch to discretionary appeals appears unlikely in the short (and perhaps even medium) term. For one thing, discretion advocates don’t seem to have the Supreme Court on their side. Although the Court’s preference for rulemaking could conceivably mean rules allowing discretionary appeals, that is probably not what it had in mind.¹²⁵ Moreover, the Committee’s

in Agenda Book for the Advisory Committee on Appellate Rules, at 367 (Sept. 20, 2103), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/2014-04-Appeals-Agenda-Book.pdf>.

117. See Struve, *supra* note 5.

118. *Minutes of the Spring 2014 Meeting of the Advisory Committee on Appellate Rules*, *supra* note 5, at 16.

119. See *id.*

120. See Draft Minutes of Fall 2014 Meeting, in Agenda Book for the Advisory Committee on Appellate Rules, at 25 (Apr. 23-24, 2015), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-appellate-procedure-april-2015>.

121. See Lammon, *supra* note 1, at 432-36 (discussing the two camps of reformers).

122. See Carrington, *supra* note 99, at 167-68; Glynn, *supra* note 15, at 259; Rosenberg, *supra* note 99, at 179.

123. See Cooper, *supra* note 99, at 163-64; Eisenberg & Morrison, *supra* note 14, at 293-302; Martineau, *supra* note 1, at 748-87; John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 214-22 (1994); see also Redish, *supra* note 18, at 124-27.

124. See, e.g., Eisenberg & Morrison, *supra* note 14, at 301-02; Martineau, *supra* note 1, at 788.

125. I suggest later on that an experiment with discretionary appeals might be a useful part of

preliminary work has not indicated any consideration of entirely discretionary appeals; the little work that has been done so far has looked primarily to categories of appealable orders and a possible categorical rule for attorney-client privilege rulings.¹²⁶ Perhaps most importantly, a wholesale switch to discretionary appeals in federal court might be too radical a change for the Committee or the federal courts in general to swallow. Reform of interlocutory appeals in federal court often moves at a near-glacial pace.¹²⁷ So whatever the future prospects of discretionary appeals, they are an unlikely next step.

B. The Challenge of Codification

Practically speaking, any reform of the current system of interlocutory appeals is thus likely to take the form of codifying categorical rules. Such a system probably would leave in place the existing statutory and rule-based exceptions to the final-judgment rule. But it would replace the judge-made exceptions with rules.¹²⁸

Even if discretion ultimately would be a superior system of appellate jurisdiction, codification might still be an improvement over the current regime. Codification could simplify and streamline this body of law and make it more manageable. Courts could focus their attention on the merits of a case rather than on issues of appellate jurisdiction. Litigants also could benefit from the increased predictability of codification and save time and money by litigating appellate jurisdiction less frequently.

For codification to succeed, more research into interlocutory appeals is needed. The issue discussed above—the courts of appeals' recent cutting back on *Perlman*'s scope—is merely an example of a larger problem. Just as the body of knowledge on *Perlman* appeals was insufficient for the courts to correctly assess *Mohawk*'s impact, the body of knowledge on interlocutory appeals, as a whole, is insufficient for the Committee to successfully codify the judge-made exceptions. Future research must address at least two shortcomings in the existing research.

First, the existing literature on interlocutory appeals has not addressed many discrete issues that arise in this area. Too much of the literature

codification. See *infra* Part IV.D.

126. Kuperman's preliminary study of interlocutory appeals mentioned only two avenues for codification: a larger project of "specify[ing] by rule the universe of interlocutory orders that should be appealable" or a more narrow project of "consider[ing] only the appealability of particular categories of orders that are brought to the Committee's attention." Kuperman, *supra* note 116, at 1. Struve's memo looked to appeals of attorney-client privilege orders. See Struve, *supra* note 5.

127. This is not unique to interlocutory appeal reform—"judicial reform is no sport for the short winded." ARTHUR T. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xix (1949).

128. See generally Glynn, *supra* note 15.

makes a global assessment of interlocutory appeals.¹²⁹ But interlocutory appeals are lousy with narrow issues worth researching. (I give several examples below, but more exist.) Before we can be confident in our global assessment of the entire system, we require a better understanding of its discrete workings. Some extremely valuable work on discrete issues of appellate jurisdiction already has been done.¹³⁰ Treatises—particularly the Edward H. Cooper-edited volumes of *Federal Practice and Procedure*—provide a much deeper look into many discrete issues of appellate jurisdiction.¹³¹ Even so, more research is needed.

Second, too much of the existing literature focuses primarily—sometimes entirely—on the decisions of the Supreme Court.¹³² The courts of appeals are largely overlooked.¹³³ This focus presents a gap in the knowledge of interlocutory appeals. At the very least, we should be curious about what the courts of appeals are doing. After all, these courts have the final say on many legal questions and are the court of last resort for nearly all federal litigants.¹³⁴ So the Supreme Court's decisions simply cannot capture all that is going on in the field of interlocutory appeals. Some of the more valuable research on interlocutory appeals already takes a more court of appeals-focused approach.¹³⁵ Future research should do the same.

129. See generally, e.g., Martineau, *supra* note 1; Petty, *supra* note 1; Steinman, *supra* note 2.

130. See generally, e.g., Brad D. Feldman, *An Appeal for Immediate Appealability: Applying the Collateral Order Doctrine to Orders Denying Appointed Counsel in Civil Rights Cases*, 99 GEO. L.J. 1717, 1739-44 (addressing the appealability of orders denying appointed counsel in civil rights cases); Robertson, *supra* note 3 (addressing the appealability of adverse privilege rulings); Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 GREEN BAG 2D 199, 204-10 (2013) (addressing pendent appellate jurisdiction in the context of official immunity appeals).

131. Specifically, volumes 15A, 15B, and 16 address appeals before a final judgment.

132. See, e.g., Anderson, *supra* note 103; Glynn, *supra* note 15; Petty, *supra* note 1; Steinman, *supra* note 2.

133. Even when commentators discuss the courts of appeals, it is often only to mention the ultimate decisions they reach; little attention is paid to the courts' approach or reasoning. See Anderson, *supra* note 103, at 603-06; Glynn, *supra* note 15, at 215-16; Steinman, *supra* note 2, at 1273-75.

134. FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS 1-2* (2007) ("[The courts of appeals] are much more important [than the Supreme Court] in setting and enforcing the law of the United States" and "play by far the greatest legal policymaking role in the United States judicial system."); *id.* at 2 ("Although an individual Supreme Court decision is more important than a corresponding individual circuit court decision, the very limited docket of the Supreme Court leaves U.S. law largely to the judgment of the circuits.").

135. See, e.g., Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343 (2012); Roger J. Perlstadt, *Interlocutory Review of Litigation-Avoidance Claims: Insights from Appeals Under the Federal Arbitration Act*, 44 AKRON L. REV. 375 (2011); Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711 (2013) [hereinafter Pollis, *Rule 54(b)*]; Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1193-1201 (1990).

C. A Preliminary Taxonomy of Interlocutory Appeals

Although the challenge of codifying the judge-made exceptions to the final-judgment rule highlights the existing literature's shortcomings, it also presents huge potential for future scholarly research. In this section, I suggest a preliminary framework to guide that literature.

I do so with a taxonomy of interlocutory appeals. This taxonomy will help identify the discrete issues with each exception that require investigation. I suspect that the hierarchical relationship of a taxonomy (as opposed to, say, a simple list of exceptions) also will help identify the relationships between different exceptions and the purposes underlying them. A taxonomy could help identify, for example, which exceptions, or which kind of exceptions, work better when codified rather than left to judicial definition and development. This structure also could help identify the situations in which appeals as of right are more appropriate than discretionary appeals, and vice versa.

This taxonomy, however, is necessarily preliminary. It should not be treated as a concrete structure for investigating interlocutory appeals. It will develop, expand, and perhaps even change wholesale as more research is done. But it will still be a useful preliminary structure for immediate research.

1. A Note About "Exceptions"

In discussions of interlocutory appeals, the vocabulary is not always entirely clear or consistent. This ambiguity can lead to confusion when discussing appellate jurisdiction. For example, I call the collateral order doctrine an "exception" to the final-judgment rule. But there's some debate over whether that characterization is correct. The Supreme Court used to call the doctrine an exception to § 1291 but has more recently denied as much, instead characterizing it as a "practical construction" of that statute.¹³⁶ There's similar debate over whether orders appealed under a judge-made exception are actually "interlocutory" orders. The judge-made exceptions are (at least in theory) an application of 28 U.S.C. § 1291's grant of appellate jurisdiction over "final decisions."

136. Compare *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) ("Section 1291 accordingly provides jurisdiction for this appeal only if orders disqualifying counsel in civil cases fall within the 'collateral order' exception to the final judgment rule."), and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) ("Our decisions have recognized . . . a narrow exception to the requirement that all appeals under § 1291 await final judgment on the merits."), with *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) ("The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it.") (internal citation omitted), and *Will v. Hallock*, 546 U.S. 345, 349 (2006) (same).

So the orders appealed under these exceptions should (again, at least in theory) be “final” and not “interlocutory.” Then there are the appeals that arguably look like an interlocutory appeal in ongoing litigation but are treated as appeals from final orders in a separate proceeding. Contempt appeals are an example of this sort of appeal. The contempt order relates to an ongoing piece of litigation, but the order is treated as a final decision in a separate contempt proceeding.

It might simplify and streamline discussion of appellate jurisdiction to settle on some agreed terms. I suggest looking at the matter practically. Appeals from district court orders relate in some way to a piece of litigation in that district court—they relate to a single judicial unit. Some appeals are closely related to that litigation; an appeal from an order dismissing an entire case for failure to state a claim is one example. Other appeals have a more tangential relationship, such as an appeal from a finding of contempt. The contempt order stems from behavior in litigation but is rarely the main event. Even with these orders, however, some relationship to a district court proceeding exists.

I suggest that any appeal before the traditional end of that district-court proceeding—when all issues are decided and all that remains is enforcing the judgment—be treated as an interlocutory appeal and an exception the final-judgment rule.¹³⁷

This definition recognizes that appeals from district court orders stem from some piece of district-court litigation. While that litigation is still ongoing, the courts are allowing an appeal from something decided in a district-court proceeding before those proceedings are over. Treating all of these instances as interlocutory appeals and exceptions to the final judgment simplifies some unnecessary complexity. It also highlights the relationships between various types of appeals before a final judgment—they’re all variations on the same behavior; recognizing them as such will help illustrate various similarities, differences, purposes, practices, strengths, weaknesses, and more.

This definition doesn’t remove all ambiguity. There still can be, for example, uncertainty of what exactly is an appeal from a traditional final judgment. But this definition can clear away some of the unnecessary ambiguity in future discussions of interlocutory appeals.

137. In practice, this has not always captured all final judgments. Outstanding issues regarding fees and costs will not prevent a judgment from being deemed final and appealable. See *Ray Haluch Gravel Co. Central Pension Fund*, 134 S. Ct. 773, 780 (2014); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). Situations also exist in which courts will treat a district court’s decision as final even though some technical or ministerial action remains to be done in the district court. See 15B *WRIGHT, MILLER & COOPER*, *supra* note 12, § 3915.2, at 279-80. It might be useful to redefine a final judgment to occur only after these lingering issues are resolved. I leave that question, however, for another time.

2. A Preliminary Taxonomy of Interlocutory Appeals

The exceptions to the final-judgment rule should first be divided into those that are judge-made and those that are codified.¹³⁸ This first distinction is particularly appropriate given that the main purpose of this research project is to assist in codification. Dividing the exceptions into those that are judge-made and those that are already codified provides a necessary first step in identifying potential candidates for codification. It also assists in determining what connections exist between the judge-made and codified exceptions, the characteristics of a well-functioning (and not-so-well-functioning) codified exception, and how to potentially codify the judge-made exceptions.

Further sub-dividing the judge-made and codified exceptions could take many forms. At this point, the most helpful distinction is probably to categorize them as individual exceptions. Because the point of this research project, at least initially, is to conduct deep research into each of the exceptions, identifying the exceptions themselves is appropriate. Moreover, any broader type of classification at this point—such as by purpose, underlying theory, discretion versus as-of-right, etc.—likely would be premature. The goal for now should be merely to uncover those broader themes through research into how the courts of appeals use the exceptions.

In the remainder of this Part, I list the potential sub-categories in the interlocutory appeals taxonomy. I also briefly discuss several possible avenues for research on specific exceptions. Neither this list nor the ideas for future research are comprehensive; future work will undoubtedly expand it. I end with a brief discussion of discretionary appeals and what role they might play in codification.

a. Judge-Made Exceptions

There is probably no one way to slice up the various judge-made exceptions to the final-judgment rule. The exceptions are not always presented as distinct doctrines, and some of them overlap in their approach, application, or results. But the existing literature often recognizes at least four distinct judge-made exceptions to the final-

138. Several articles, in their background discussion of exceptions to the final-judgment rule, implicitly or explicitly categorize the exceptions in various ways. See, e.g., Martineau, *supra* note 1, at 729-47 (separately discussing statutory, rule-based, and judicially created exceptions); Petty, *supra* note 1, at 355 (dividing the judge-made exceptions into three “functional groups”: effective finality, practical finality, and partial effective finality); Pollis, *Multidistrict Litigation*, *supra* note 15, at 1648-59 (separately discussing exceptions that provide an appeal as-of-right and an appeal at the court’s discretion). After considering the various ways of cutting up interlocutory appeals, I have settled on one that I think most appropriate for this project.

judgment rule: *Forgay* appeals, the collateral order doctrine, *Perlman* appeals, and pragmatic appeals.

But given my expansive definition of interlocutory appeals and exceptions to the final-judgment rule, many more exceptions could be added to this list. The caselaw has treated several types of orders entered in ongoing litigation as final decisions. Contempt appeals are one example. Appeals from denials of intervention are another. A motion to intervene is made in ongoing litigation. And when courts deny intervention, the would-be intervenor can immediately appeal that decision.¹³⁹ Courts regularly treat these orders as final decisions, and they certainly are final for the would-be intervenor. But the rest of the case keeps going. Bringing these kinds of orders under the umbrella of “interlocutory appeals” and “exceptions to the final-judgment rule” expands the traditional notion of those terms. Treating them alongside more traditional exceptions could inform our wider understanding of our regime of appellate jurisdiction.

But for now, let’s stick with the widely recognized exceptions.

i. The Collateral Order Doctrine

Most of the work on judge-made exceptions to the final-judgment rule likely will focus on the collateral order doctrine, the most prevalent judge-made exception to the final-judgment rule. This rule is rife with potential avenues for investigation.

Cases applying the collateral order doctrine reveal, for example, the potential difficulty of defining categories of appealable orders. The Supreme Court has held that collateral order decisions must be made categorically—a particular type of order is either always appealable or always unappealable.¹⁴⁰ The courts of appeals often follow this mandate. But they sometimes don’t. Indeed, some cases are filled with case-specific, non-categorical reasoning.¹⁴¹ This sporadic-but-persistent defiance of the Supreme Court suggests that we can learn something about the collateral order doctrine by looking to its application in the

139. See *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 524-25 (1947).

140. See *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 206 (1999); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

141. See generally *Harris v. Kellogg Brown & Root Servs., Inc.*, 618 F.3d 398 (3d Cir. 2010); *United States v. Romeo-Ochoa*, 554 F.3d 833 (9th Cir. 2009); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007); *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007); *Houston Cty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265 (5th Cir. 2007); *Pierce v. Blaine*, 467 F.3d 362 (3d Cir. 2006); *Goodman v. Harris Cty.*, 443 F.3d 464 (5th Cir. 2006); *ADAPT of Phila. v. Phila. Hous. Auth.*, 417 F.3d 390 (3d Cir. 2005); *Baldrige v. SBC Commc’ns, Inc.*, 404 F.3d 930 (5th Cir. 2005); *Competitive Tech., Inc. v. Fujitsu Ltd.*, 374 F.3d 1098 (Fed. Cir. 2004); *United States v. Hickey*, 367 F.3d 888 (9th Cir. 2004).

courts of appeals. Judges might, for example, intentionally ignore the categorical requirement when they want to hear (or not hear) a particular case. Or this defiance might be inadvertent. I suspect a third explanation: that non-categorical decisions stem from the practical difficulties of deciding collateral order cases. Courts are asked in these cases to make a pragmatic assessment of whether an entire category of orders should be appealable while having only the limited data of the single case in front of them. Only close study of the courts of appeals' behavior will shed any light on this.

Decisions in the collateral order context might also shed light on the value of flexibility in appellate jurisdiction. One criticism of codification is that it would not be sufficiently flexible to adapt to new, unforeseen circumstances.¹⁴² And one of the collateral order doctrine's benefits is its flexibility.¹⁴³ The Rules Committee will need to determine whether to retain a similar flexibility in the rules and, if so, how to retain it. Study of how the courts have used the collateral order doctrine to address unforeseen issues could inform this work.

Finally, given the immensity and variety of the caselaw on the collateral order doctrine, future research might also benefit from further dividing this exception into sub-categories based on the type of appealable order. Immunity appeals in particular might merit their own focused study. Many cases developing and applying the collateral order doctrine involve some type of Constitutional, statutory, or common law immunity from the burdens of litigation. And the denial of many immunities—such as qualified immunity for government actors and immunity from double jeopardy—can be immediately appealed.¹⁴⁴

142. See Cooper, *supra* note 99, at 157; Martineau, *supra* note 1, at 775; Nagel, *supra* note 123, at 216. Rule advocates disagree. See Glynn, *supra* note 15, at 261 (contending that a categorical approach to interlocutory appeals “offers potential flexibility”); Rosenberg, *supra* note 99, at 179 (suggesting that “experience with [the] stubborn problem [of determining appealability] can be converted into rule-prescribed standards”). Again, which side has the better argument is unclear; both arguments are reasonable, and we lack the data necessary to determine who's right. See Lammon, *supra* note 1, at 434-36.

143. This can be seen in the recent cases addressing appeals denying the protection of anti-SLAPP laws. These laws generally protect defendants from lawsuits brought with the purpose or effect of chilling constitutionally protected speech; early in the litigation, the defendant can force the plaintiff to demonstrate a likelihood of success on the merits before the case can proceed. Some states provide—in their own courts—for an immediate appeal from the denial of an anti-SLAPP motion. When anti-SLAPP motions made their way into federal court (in cases brought under the diversity jurisdiction), the courts of appeals had to then determine whether denials of those motions could be immediately appealed. No one appears to have seen this issue coming, so strict categorical rules would not likely have addressed the issue. But using the flexible approach of the collateral order doctrine, the courts of appeals have reasonably addressed these issues. See, e.g., *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742 (5th Cir. 2014); *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795 (9th Cir. 2012); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009); *Englert v. MacDonnell*, 551 F.3d 1099 (9th Cir. 2009); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

144. See, e.g., *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45

Immunity appeals have created substantial trouble in the appellate jurisdiction caselaw and scholarship.¹⁴⁵ In-depth analysis of how the courts—both the Supreme Court and the courts of appeals—deal with immunity appeals might reveal the outlines for separately codifying the rules on those appeals.

ii. *Perlman* & Contempt Appeals

There's more to say about *Perlman*. In its nearly 100-year history, *Perlman* cases have produced a number of unresolved questions in the courts of appeals. For instance, are *Perlman* appeals available only in the grand jury context or can privilege claimants bring them in civil and criminal cases, too?¹⁴⁶ How should courts determine whether the third-party target of the discovery order is actually disinterested?¹⁴⁷ Does disclosure of the privileged information moot a *Perlman* appeal?¹⁴⁸ How does *in camera* review by a district court affect the availability of a

(1993) (permitting appeals from the denial of Eleventh Amendment immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 527–30 (1985) (permitting appeals from the denial of qualified immunity for government officials); *Helstoski v. Meanor*, 442 U.S. 500, 506–08 (1979) (permitting appeals from the denial of Speech & Debate Clause immunity); *Abney v. United States*, 431 U.S. 651, 662 (1977) (permitting appeals from the denial immunity from double jeopardy).

145. See generally Anderson, *supra* note 103.

146. Most courts of appeals have allowed *Perlman* appeals in civil and criminal cases. The Tenth Circuit limits them to only the grand-jury context. See *supra* note 44.

147. This question has produced the deepest split in *Perlman* appeals. Most courts of appeals take an objective, categorical approach to this question—either a type of third party (e.g., an attorney) is always deemed disinterested, or it's not. See, e.g., *In re Grand Jury Subpoenas*, 123 F.3d 695, 697–99 (1st Cir. 1997); *In re Klein*, 776 F.2d 628, 631 (7th Cir. 1985); *In re Grand Jury Proceedings—Gordon*, 722 F.2d 303, 306–07 (6th Cir. 1983); *In re Special Grand Jury No. 81-1*, 676 F.2d 1005, 1008 (4th Cir. 1982); *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882, 884–85 (8th Cir. 1981); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 201–03 (5th Cir. Unit A 1981). Other courts adopt a case-by-case approach and ask, as a factual matter, whether the third party is actually disinterested. See, e.g., *In re Grand Jury Proceedings*, 616 F.3d 1172, 1180 (10th Cir. 2010); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985). The majority approach is probably the better one; although it won't screen out all interested third parties, it does not have the problems of appellate fact-finding and odd incentives that the case-by-case approach does.

148. Several courts have held that disclosure does in fact moot a *Perlman* appeal. See *Wilson v. O'Brien*, 621 F.3d 641, 643 (7th Cir. 2010); *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Litig.*, 821 F.2d 1422, 1424 (9th Cir. 1987); see also *United States v. Lavender*, 583 F.2d 630, 633 (2d Cir. 1978) (holding that the need for a *Perlman* appeal vanishes after the allegedly privileged material is disclosed). Others disagree, concluding that the controversy is not moot because the documents can be returned to the privilege claimant. See *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1040 (10th Cir. 1998); *Grand Jury Subpoena Dated Dec. 7 & 8 v. United States*, 40 F.3d 1096, 1100 (10th Cir. 1994); see also *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 103 (3d Cir. 1982) (allowing a *Perlman* appeal after disclosure with no discussion of mootness). The courts that have deemed these cases moot seem to me to have the better argument. Although the controversy over the privileged information is not itself moot, the *Perlman* appeal is moot: *Perlman* appeals exist to prevent wrongful disclosure, and once that disclosure has occurred (and secrecy been lost) there is no longer a need for an immediate appeal.

Perlman appeal?¹⁴⁹ In the course of codifying *Perlman*, the Committee could resolve these issues. But how to resolve them can only be answered after further research into *Perlman*.

If the closely related context of contempt appeals is to be codified, the Committee might consider modifying the current system to allow parties to appeal from findings of civil contempt. Commentators and judges have suggested doing so for some time, and codification might be the best answer. More research into contempt appeals is necessary before determining whether expanding contempt appeals in this manner is wise.

The combination of *Perlman* appeals and contempt appeals could address an appellate jurisdiction issue on which the Committee has spent the most of its time: the appealability of discovery orders adverse to a claim of attorney-client privilege. The Committee has run into several problems with setting out such a rule, among them the lack of contempt appeals when a party is found in civil contempt.¹⁵⁰ One solution could be to change the rule for contempt appeals so that privilege claimants held in any type of contempt could disobey, be found in contempt, and appeal the underlying discovery order. *Perlman* appeals could supplement this route for those instances when the privilege claimant does not control discovery. Still, such a regime wouldn't be perfect; those risking contempt would face the unattractive possibility of stiff fines or jail time. But it could go a long way toward improving the current system.

iii. Pragmatic Appeals

Finally are pragmatic appeals, which stem from the Supreme Court's decision in *Gillespie v. United States Steel Corp.*¹⁵¹ In cases involving pragmatic appeals, the court balances the costs and benefits of an immediate appeal on a case-by-case basis.¹⁵² The Supreme Court appears to have limited the pragmatic finality approach of *Gillespie* to its unique facts—the district court's order, which had struck some but not all of a plaintiff's claims, had “disposed of an unsettled issue of

149. This issue arises when a privilege claimant gives materials to a district court judge for *in camera* review. If the judge then orders discovery of the material, a few courts have held that the privilege claimant can then take a *Perlman* appeal; the district court judge is a disinterested third party—the judge cannot be expected to stand in contempt just so the privilege claimant can appeal—and the privilege claimant no longer possesses the material and thus has no contempt option. See *United States v. Cuthbertson*, 651 F.2d 189, 194 (3d Cir. 1981). The better practice in this scenario is probably for the judge to return the material to the claimant, whereupon the claimant can then take the contempt route. See *In re Grand Jury Subpoena*, 190 F.3d 375, 387 (5th Cir. 1999).

150. See Struve, *supra* note 5.

151. See *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

152. See generally 15A WRIGHT ET AL., *supra* note 12, at § 3913; Redish, *supra* note 18.

national significance . . . and the arguable finality issue had not been presented to [the] Court until argument on the merits”¹⁵³—and deemed the doctrine dead.¹⁵⁴ Commentators agree with this assessment.¹⁵⁵ The doctrine nevertheless pops up from time to time in the courts of appeals, suggesting that the concept may not yet be entirely dead.¹⁵⁶

b. Codified Exceptions

Codified exceptions come in two forms: statutory and rule-based. Further study of these exceptions could be of great use. The codified exceptions fit together with the judge-made ones to make up the system of interlocutory appeals. Understanding the scope of the already codified exceptions is necessary to determining the proper scope of any codification of judge-made exceptions. Study of the codified exceptions also could reveal purposes and policies that cut across the divide between codified and judge-made exceptions, shedding further light on both types of exceptions. Finally, a codification project might also reform some of the codified exceptions.

i. Statutory Exceptions

A number of statutory exceptions to the final-judgment rule provide potential ground for research. These include:

- Interlocutory orders involving injunctions under 28 U.S.C. § 1292(a)(1);
- Certified appeals under 28 U.S.C. § 1292(b);
- Writs of mandamus under 28 U.S.C. § 1651;
- Orders granting or denying a motion to remand a removed class action under 28 U.S.C. § 1453(c)(1); and
- Orders involving arbitration under 9 U.S.C. § 16.

153. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978).

154. *See id.* (“If Gillespie were extended beyond the unique facts of that case, § 1291 would be stripped of all significance.”).

155. *See Petty*, *supra* note 1, at 372 (“*Coopers & Lybrand* definitively shut the door on practical finality in the context of judicial exceptions to the final judgment rule . . .”).

156. For an example of a litigant recently invoking the pragmatic-appeals exception, see *Western Energy Alliance v. Salazar*, 709 F.3d 1040, 1049-51 (10th Cir. 2013). For other signs that pragmatic appeals are not yet entirely foreclosed, see *Comm'r v. JT USA, LP*, 630 F.3d 1167, 1171-72 (9th Cir. 2011) (describing the requirements for a pragmatic appeal in the Ninth Circuit); *Interfaith Cmty Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 702 (3d Cir. 2005) (allowing a pragmatic appeal); *Bender v. Clark*, 744 F.2d 1424, 1427-28 (10th Cir. 1984) (same). *But see Kmart Corp. v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997) (“[T]his Court no longer recognizes the [pragmatic finality] exception.”).

Of these exceptions, certified appeals under § 1292(b) and writs of mandamus probably merit the most attention.¹⁵⁷

Under § 1292(b), a district court judge can certify for an immediate appeal an interlocutory order that “involves a controlling question of law as to which there is substantial ground for difference of opinion” when “an immediate appeal from the order may materially advance the ultimate termination of the litigation.”¹⁵⁸ The decision to certify an order is discretionary and essentially unreviewable.¹⁵⁹ If the district court certifies the matter for appeal, the Court of Appeals has unfettered discretion to decline to hear the appeal.¹⁶⁰

Michael E. Solimine has done some valuable work on the use of § 1292(b), surveying for several calendar years all published circuit and district court opinions using § 1292(b) and the motions to certify a § 1292(b) appeal in the Sixth Circuit.¹⁶¹ Tory Weigand has surveyed all of the available First Circuit decisions on § 1292(b),¹⁶² while Alexandra B. Hess, Stephanie L. Parker, and Tala K. Toufanian have examined fifteen years of § 1292(b) cases in the Federal Circuit.¹⁶³ But more can be done. Solimine’s study could be updated (it’s over twenty-five years old). And with the advent of PACER, research now could investigate district court orders denying motions to certify an appeal under § 1292(b).

As for writs of mandamus, the courts of appeals can use the writ in extraordinary situations to reverse a district court order.¹⁶⁴ The exact requirements for issuing the writ are unclear.¹⁶⁵ It could be illuminating to see how exactly the courts of appeals have used the writ over the past several decades, examining what standards they use in deciding petitions and in what situations they issue the writ. Paul R. Gugliuzza has done

157. Section 1292(a)(1) might also provide some interesting research. That section provides for an immediate appeal, as-of-right, from interlocutory district court orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.” 18 U.S.C. § 1292(a)(1). It could be informative to see the marginal cases in which a court of appeals must determine whether a district court order falls under that subsection’s language.

158. 28 U.S.C. § 1292(b).

159. *But see* Mackenzie M. Horton, *Mandamus, Stop in the Name of Discretion: The Judicial “Myth” of the District Court’s Absolute and Unreviewable Discretion in Section 1292(b) Certification*, 64 BAYLOR L. REV. 976 (2012).

160. *See* 28 U.S.C. § 1292(b) (“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 . . .”).

161. *See generally* Solimine, *supra* note 135, especially at 1193-1205.

162. *See generally* Tory Weigand, *Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review*, 19 ROGER WILLIAMS U. L. REV. 183 (2014).

163. *See generally* Alexandra B. Hess, Stephanie L. Parker & Tala K. Toufanian, *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995–2010)*, 60 AM. U. L. REV. 757 (2011).

164. *See, e.g.*, *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-82 (2004).

165. *See* Steinman, *supra* note 2, at 1269-70.

such a study focused on the Federal Circuit.¹⁶⁶ Other circuits should receive similar treatment.

ii. Rule-Based Exceptions

Only two exceptions to the final-judgment rule are found in the Federal Rules: appeals from orders involving class certification under Federal Rule of Civil Procedure 23(f) and appeals of partial final judgments under Federal Rule of Civil Procedure 54(b). Research into these could be particularly enlightening when thinking about codifying other exceptions. Andrew Pollis already has done some excellent work with Rule 54(b).¹⁶⁷ Rule 23(f) might benefit from similar treatment.

D. Remembering Discretion

In all of this, the arguments for discretionary appeals cannot be ignored. Although a wholesale switch seems unlikely, it might be more plausible to experiment with discretionary appeals. I have argued elsewhere that much of the debate over rules or discretion is abstract and not grounded in experience.¹⁶⁸ Arguments are based on perfectly reasonable assumptions about how people would react to different rules.¹⁶⁹ But those arguments are inconsistent with one another, and there's no theoretical way to resolve the differences.¹⁷⁰

Experimentation can provide some experience that will help resolve these debates or at least move them forward a bit. I have argued for judicial experimentation—an informal common-law process whereby judges continually evaluate the consequences of their appealability decisions.¹⁷¹ But such experimentation also could come from rules. The Committee might, for example, create a system of discretionary appeals in one or two circuits for a limited time. The experience in those circuits would shed some light on the wisdom of discretionary appeals in the federal system. Such experimentation would no doubt face problems—practical, political, and Constitutional—but it might be worth exploring.

166. See generally Gugliuzza, *supra* note 135.

167. See generally Pollis, *Rule 54(b)*, *supra* note 135.

168. See generally Lammon, *supra* note 1, at 433-36.

169. *Id.*

170. *Id.*

171. See *id.* at 444-45.

V. CONCLUSION

The courts of appeals' recent restrictions on *Perlman* appeals are mistaken. *Perlman* appeals, like contempt appeals, exist to allow appellate review before privileged information is disclosed, thereby losing that information's secrecy forever. The courts' limiting *Perlman* appeals to non-parties—based primarily on a line in a Supreme Court opinion taken largely out of context—overlooks *Perlman*'s purpose. And this oversight likely is due to the incomplete body of knowledge on *Perlman*.

This particular issue of appellate jurisdiction is but one of many that are ripe for research. And that research is more valuable than ever. We're closer now to possibly reforming the current regime of interlocutory appeals in federal court than we have been in some time. This reform (should it happen) likely will take the form of transforming the judge-made exceptions into largely categorical rules. If these codified exceptions are to strike a reasonable balance between delaying and allowing appeals, much work needs to be done.

