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A Test for Appealability: The Final Judgment Rule and Closure Orders

I. INTRODUCTION

The timing of an appeal from a state or federal trial court order is usually governed by some form of the "final judgment rule": appeals may be heard only from orders "that '[end] the litigation on the merits and [leave] nothing for the court to do but execute the judgment.'"¹ This general rule is subject to a number of exceptions,² which are designed to allow immediate appeal of interlocutory trial court orders when the disadvantages of piecemeal review are outweighed by the need for immediate review of trial court decisions.³ Appellate courts have adopted several different approaches to the application of the final judgment rule and its exceptions, resulting in inefficient


The courts of appeals 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.


². The United States Supreme Court has refrained from referring to those instances in which it has not applied the final judgment rule as "exceptions" to the rule; rather, the Court has stated that it has merely made a determination of "finality." See, e.g., Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (section 1291 has long been given a "practical rather than a technical construction"); Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848) ("this Court has not heretofore understood the words 'final decrees' in [the] strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature"). Commentators have nevertheless agreed that these doctrines are more accurately described as "exceptions" to the final judgment rule than as definitions of what is "final." See, e.g., 9 J. MOORE FEDERAL PRACTICE, supra note 1, ¶ 110.10, at 130; Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 COLUM. L. REV. 69, 90 (1975).

³. See notes 11-21, 92-140 infra and accompanying text. For an example of the harm strict adherence to the final judgment rule can cause, see Redish, supra note 2, at 99-100 (discussing Parr v. United States, 351 U.S. 513 (1956)).

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use of judicial resources and inadequate protection of the various interests involved.

These differences are evident in the development of the law with respect to motions to close criminal proceedings to the public, a procedural maneuver that has received great attention since the United States Supreme Court has indicated its willingness to limit public access to various stages of a criminal proceeding.\textsuperscript{4} In judging the appealability of orders in regard to such motions, some courts have steadfastly adhered to the final judgment rule and have refused to hear the appeal until trial's end,\textsuperscript{5} others have immediately heard the appeal under an exception to the final judgment rule,\textsuperscript{6} and one has decided the issue under a test purporting to balance the competing policy interests.\textsuperscript{7} Whether an appeal from a trial court order granting or denying a motion to close a criminal proceeding is subject to immediate appellate review affects several major interests: the defendant's interest in a fair and speedy trial, the government's interest in preserving judicial resources, and the public's interest in open proceedings.

This Note reviews the final judgment rule and its exceptions, and examines how the exceptions have been applied in cases in which litigants appeal from interlocutory orders such as those granting or denying motions to close criminal proceed-

\textsuperscript{4} In Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the trial judge in a sensational murder case prohibited only release of accounts of events that transpired in the courtroom at the preliminary hearing. The Supreme Court ruled that the order was an impermissible prior restraint on the media's first amendment rights, but indicated that instead of "gagging" the press, the trial court could have closed the preliminary hearing to the press and the public, 427 U.S. at 564 n.8, 568. In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the Court upheld the closure of a pretrial suppression hearing to the press and the public in a murder case when the purpose of the closure was to limit potentially prejudicial pretrial publicity. The Court found that neither the press nor the public has a constitutional right to attend the pretrial hearings. 443 U.S. at 387.

According to the Reporter's Committee for Freedom of the Press, 300 motions have been made to close criminal proceedings since Gannett Co. v. DePasquale was decided on July 2, 1979. See Court Watch Summary, News Media & L., Oct.-Nov. 1980, at 34. For a summary of those efforts, see id. See United States v. Powers, 622 F.2d 317, 320 (8th Cir.), cert. denied, 101 S. Ct. 112 (1980) (immediate appeal allowed partially "because of the fallout from the Gannett case and the proliferation of cases coming on line dealing with the issue of closure"); New York v. Wright, 5 Media L. Rptr. [BNA] 1372, 1372 (N.Y. 1979) (court implied that closure was requested because of the Gannett decision, which was decided only days before).

\textsuperscript{5} See note 10 infra and accompanying text.

\textsuperscript{6} See notes 14-15, 19-21 infra and accompanying text.

\textsuperscript{7} See United States v. Powers, 622 F.2d 317 (8th Cir.), cert. denied, 101 S. Ct. 112 (1980); notes 32-38 infra and accompanying text.
ings to the public.\textsuperscript{8} After demonstrating the problems with the traditional approach, this Note examines alternative pragmatic balancing approaches, and proposes a test based upon the salient factors underlying the final judgment rule and its traditional exceptions is proposed. The Note concludes by applying this analytically consistent test to the various contexts in which orders respecting closure motions can result in requests for immediate appellate review.

II. APPEALABILITY OF CLOSURE ORDERS UNDER PRESENT DOCTRINE

A. THE FINAL JUDGMENT RULE AND ITS EXCEPTIONS

The final judgment rule’s prohibition against appeals from trial court orders that do not end the litigation on the merits is derived primarily from the interest in judicial economy and the belief that better appellate decision making results from the review of only those issues that are “ripe” for appeal.\textsuperscript{9} Absent an exception, the rule clearly controls appeals from orders regarding closure motions since under the rule such orders are in no way final. Thus, appellate courts refusing to hear immediate appeals from orders regarding closure motions have typically

\textsuperscript{8} Suppression of evidence hearings are the most common closed pre-trial hearings. See, e.g., Gannet Co. v. DePasquale, 443 U.S. 368, 375 (1979); Philadelphia Newspapers, Inc. v. Jerome, 478 Pa. 490, 387 A.2d 425, 428 (1978), dismissed, 443 U.S. 913 (1979); State ex rel. Feeney v. District Court, 607 P.2d 1259, 1261 (Wyo. 1980). In some cases, voir dire of potential jurors has been closed. See, e.g., Commercial Printing Co. v. Lee, 262 Ark. 87, 89, 553 S.W.2d 270, 271 (1977); Great Falls Tribune v. District Court, 608 P.2d 116, 117 (Mont. 1980); Rapid City Journal Co. v. Circuit Court, 283 N.W.2d 563, 565 (S.D. 1979). Other cases have involved closure of portions of the trial, for example, when there is a perceived need to protect a testifying witness, or the whole trial. See, e.g., Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814, 2816 (1980); United States v. Powers, 622 F.2d 317, 319 (8th Cir.), cert. denied, 101 S. Ct. 112 (1980); Oliver v. Postel, 30 N.Y.2d 171, 176, 331 N.Y.S.2d 407, 409 (1972). At least one attempt has been made to close a post-trial sentencing proceeding in order to prevent injury to the defendant’s case pending in a neighboring jurisdiction. See United States v. Fiumara, 605 F.2d 116, 117 (3d Cir. 1979). One court has entertained a motion to close a post-conviction habeas corpus hearing, see Houston Chronicle v. McMaster, 598 S.W.2d 864, 865 (Tex. Crim. App. 1980) (en banc), and another has heard a motion to close a post-trial hearing to set aside a guilty verdict, see Gannett Co. v. Mark, 54 A.D.2d 818, 387 N.Y.S.2d 336, 338 (1976).

done so under the final judgment rule and its underlying rationales.10

A number of exceptions to the basic requirement of finality have been developed to alleviate some of the problems and injustices that can occur as a result of the strict application of the final judgment rule.11 The classic exception to the final judgment rule is the "collateral order" or "irreparable harm" doctrine of Cohen v. Beneficial Industrial Loan Corp.12 Interlocutory orders may be immediately appealed under this doctrine if they concern issues that are essentially unrelated to the issues of the main dispute, are themselves final and conclusive, and involve a right that will probably be irreparably lost if review is delayed.13 In the context of closure orders, for example, the Third Circuit Court of Appeals held that it could hear an appeal of several members of the news media from a district court order closing a pretrial suppression hearing and sealing the record.14 The court noted that the order "constituted a final decision since it determined a matter independent of the issues to be resolved in the criminal proceeding itself, bound persons

10. See, e.g., United States v. Powers, 622 F.2d 317, 320 n.2 (8th Cir.) (court expressed "grave doubts concerning the appealability of interlocutory orders regarding closure of criminal trials to the public"), cert. denied, 101 S. Ct. 112 (1980); United States v. Fiumara, 605 F.2d 116, 118 (3d Cir. 1979) (a decision denying closed trial not immediately appealable because not final and did not meet requirements of exceptions to final judgment rule); State ex rel Feeney v. District Court, 607 P.2d 1259 (Wyo. 1980) (closure orders are within trial court's discretion, and thus not appealable).


12. 337 U.S. 541 (1949). In Cohen, the Supreme Court affirmed the Third Circuit Court of Appeal's exercise of jurisdiction to hear an appeal from the trial court's denial of the defendant's motion to require the plaintiff to post bond for expenses in a shareholder derivative suit. The Court reasoned that immediate appeals should be granted from orders that are "final" in that they will not be subsequently changed by the trial court and will not be merged with the final judgment. Id. at 546.


who were non-parties in the underlying criminal proceeding and had a substantial, continuing effect on important rights."^{15}

Many state courts have used this "irreparable harm" rationale to justify immediate review of closure orders under extraordinary writs such as mandamus and prohibition,^{16} but in the federal courts, the use of extraordinary writs may be more questionable. Despite the Supreme Court's general expansion of the availability of mandamus as a vehicle for interlocutory appellate review in cases involving a need for the "supervisory and advisory" power of the appellate courts,^{17} the Court has

15. Id. (quoting United States v. Schiavo, 504 F.2d 1, 5 (3d Cir.) (en banc), cert. denied, 419 U.S. 1096 (1974)).


Extraordinary writs are codified at the federal level in the All Writs Act, 28 U.S.C. § 1651(a) (1976), and at the state level in a variety of similar provisions. See, e.g., CAL. CIV. PROC. CODE §§ 1084, 1102 (West 1980); MNN. STAT. § 586.01 (1980). Though technically not an appeal, the effect of an extraordinary writ is ultimately the same as an appeal.

17. The use of mandamus was traditionally allowed "only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Allied Chem. Corp. v. Daiflon, Inc., 101 S. Ct. 188, 190 (1980) (quoting Will v. United States, 389 U.S. 90, 95 (1967) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943))). In two important cases, however, the Supreme Court expanded the availability of mandamus for interlocutory appeal. In LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), the trial judge, to help clear a congested court calendar, had ordered the referral of two complex and potentially lengthy antitrust cases to a master under Rule 53(b) of the Federal Rules of Civil Procedure. All parties objected to the referral, and sought a writ of mandamus from the Court of Appeals for the Seventh Circuit. The Seventh Circuit granted the writ, and the Supreme Court affirmed, stating:

We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here.

352 U.S. at 259-60. This "supervisory power" has generally been interpreted to apply to cases in which the lower court's ruling is "characteristic of an erroneous practice [which is] likely to reoccur." General Motors Corp. v. Lord, 488 F.2d 1096, 1099 (8th Cir. 1973); see Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595, 610 (1973). In Schlagenhauf v. Holder, 379 U.S. 104 (1964), the defendant in a negligence action challenged an order that had required him to submit to a physical examination, arguing that his "physical and mental condition" were not "in controversy" within the
not approved the use of mandamus in a criminal case "to re-
view an interlocutory procedural order . . . which [does] not 
have the effect of a dismissal." In the state courts, however,
the extraordinary writs of both mandamus and prohibition 
have been invoked to obtain immediate appellate review of or-
ders regarding closure motions in a variety of contexts. For ex-
ample, the Arkansas Supreme Court took jurisdiction under 
mandamus to hear a newspaper's appeal from the closing of a 
voir dire examination of potential jurors in a criminal case, 
because the press would not have had standing to appeal after 
the trial, an Ohio appellate court approved the use of a writ of 
prohibition to open a closed criminal trial when the order clos-

meaning of the rule and that good cause had not been shown for the multiple medical examinations requested by the cross-defendant. In allowing the appeal to be heard under a writ of mandamus, the Supreme Court held that man-
damus is appropriate for an "issue of first impression that [calls] for construction and application . . . in a new context." Id. at 111.

18. Will v. United States, 389 U.S. 90, 98 (1967). In Will, the Seventh Circuit Court of Appeals invoked mandamus to compel a district court judge to vacate a portion of a pretrial order compelling the government to turn over a list of witnesses prior to a criminal trial. In refusing to allow the court of appeals to issue the writ against Judge Will, the Supreme Court emphasized the ex-
traordinary nature of the writ and its traditional limited use as a remedy for abuse of discretion by the lower courts. Id. at 95 (citing DeBeers Consol.
Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)). The Court stated that only exceptional circumstances "amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy," 389 U.S. at 95, and distinguished Will from other mandamus cases on the ground that Will in-
volved the use of mandamus in a criminal proceeding, noting that "additional considerations . . . flow from the fact that the underlying proceeding is a crim-
nal prosecution." Id. at 96. See generally Snyder, The Use of Extraordinary 
Writs for Interlocutory Appeals, 44 TENV. L. REV. 137, 150-51 (1976); Note, supra
note 17, at 624.

Arguably, Will should control in federal cases involving closure orders of various kinds, since the criminal nature of the case in Will was determinant of the Supreme Court's ruling. As articulated in Will, when the public or the government appeals from an order closing a criminal proceeding, the policy considerations of speedy trial and double jeopardy weigh in favor of delaying appeal until the end of the trial. See 389 U.S. at 96. These considerations may not apply, however, when the defendant seeks review of an order denying a motion for closure. See note 107 infra and accompanying text. But see United States v. MacDonald, 435 U.S. 850, 862 (1978) (speedy trial is societal right, not only right of defendant). Moreover, it has been argued that the context of Will incited the Court's strong language. See Note, supra note 17, at 624-28. This argument is supported by the Court's entertainment of the government's request for mandamus in a criminal case in at least one instance subsequent to Will. See United States v. United States District Court, 407 U.S. 297, 301 n.3 (1972) (propriety of mandamus was not contested in the Supreme Court). Will has had no apparent impact on the state courts' use of extraordinary writs in the context of closure orders.

19. Commercial Printing Co. v. Lee, 262 Ark. 87, 92, 553 S.W.2d 270, 272 
(1977), Star Journal Publishing Corp. v. County Court, 197 Colo. 234, 236, 591 
P.2d 1028, 1029 (1979) (prohibition).
ing the trial was clearly beyond the jurisdiction of the trial court. Yet, even in the state courts, it is less than clear which writs are most useful; state courts have recently recognized a variety of other extraordinary writs in matters involving closure orders without discussing the appropriateness of immediate appeal or of the use of the particular writ employed.

B. THE GILLESPIE BALANCING APPROACH

The confusion generated by the uncertain application of the final judgment rule and its various exceptions has prompted calls for a more straightforward approach to the appealability issue. The balancing test invoked by the Supreme Court in Gillespie v. United States Steel Corp. represents an attempt at such an approach. In Gillespie, the Court affirmed the Sixth Circuit Court of Appeal's immediate review of the


The remaining traditionally recognized exceptions to the final judgment rule share the essential characteristics of either the collateral order doctrine or the extraordinary writs. Statutes or rules permitting certification of questions for appeal allow trial judges to authorize appeals from interlocutory orders that meet stated criteria for "significance," see 28 U.S.C. § 1292(b) (1976 & Supp. III 1979), or that are final with respect to only some parties in a multi-party action. See Fed. R. Civ. P. 54(b). The former are based on the same rationale that often underlies mandamus—the need of the trial court for guidance in deciding a difficult issue—and the latter have obvious similarities to collateral orders. See text accompanying notes 71-74 infra, 14-15 supra. Useful only in civil actions, these statutes and rules have limited application to immediate review of orders pertaining to closure motions, which usually arise in criminal contexts. But see Cazarez v. Church of Scientology, 6 Media L. Rptr. [BNA] 2109, 2109 (Fla. 1980); Sentinel Star v. Edwards, 6 Media L. Rptr. [BNA] 1603, 1603 (Fla. 1980); English v. McCrary, 328 So. 2d 257, 258 (Fla. 1976), aff'd, 348 So. 2d 293 (1977); cf. CBS, Inc. v. Young, 522 F. 2d 234, 236 (6th Cir. 1975) (gag order); Cooper v. Rockford Newspapers, Inc., 34 Ill. App. 3d 645, 646, 339 N.E.2d 477, 478 (1975) (same); ABC v. Smith Cabinet Mfg. Co., 160 Ind. App. 367, 369, 312 N.E.2d 85, 86 (1974) (same).

Other limited or abandoned exceptions only add to the confusion. The oldest exception arises out of Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848), which held that decisions regarding the immediate delivery of property from one party to another were immediately appealable. For an example of an abandoned exception, see Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 123 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) (abandoned in Cooper's & Lybrand v. Livesay, 437 U.S. 463, 474 (1978)); Cohen, "Not Dead But Only Sleeping": The Rejection of the Death-Knell Doctrine and the Survival of Class Actions Denied Certification, 59 B.U.L. Rev. 257, 267-73 (1979).

22. See, e.g., Redish, supra note 2, at 91-92.
trial court's dismissal of the claims of several members of a decedent's family in a wrongful death action, despite the lack of certification of that issue for appeal. The Supreme Court stated:

[O]ur cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality.

Because of the difficulty in determining whether an order is "final," the Court reiterated that the term should be given a "practical rather than a technical construction," and balanced "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."

The Gillespie balancing test is unique among the various exceptions to the traditional final judgment rule in that it attempts to encompass all questions of appealability. The Gillespie opinion has been severely criticized, however, for its "clouded reasoning and enigmatic conclusions"; in short, it has failed to provide courts with the orderly retreat from the final judgment rule that some commentators have advised. Courts attempting to use the Gillespie balancing approach have not only had trouble with the test itself, but have had particular difficulty in reconciling its use with the other recognized exceptions to the final judgment rule.

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24. 28 U.S.C. § 1292(b) (1976 & Supp. III 1979) allows a trial court judge in a civil action to authorize an appeal when the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion and ... an immediate appeal from the order may materially advance the ultimate termination of the litigation." Id.
25. 379 U.S. at 152.
27. Id. at 152-53 (quoting Dickenson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)).
28. Although the Gillespie opinion could lead one to believe that the Court had merely expanded the definition of "final," one commentator has noted that "[u]nder traditional standards, the order in Gillespie could in no sense be considered marginally final. There was no question that much remained to be done at the trial level." See Redish, supra note 2, at 118. Nor were the issues within the collateral exception of Cohen, since all of the dismissed claims could have been "readily revived on a successful appeal after trial." Id. Therefore, Gillespie must be considered another "exception" to the final judgment rule. See note 2 supra.
29. See C. Wright, supra note 11, § 101, at 511; Redish, supra note 2, at 118.
30. See Note, supra note 9, at 669.
31. See generally United States v. Powers, 622 F.2d 317 (8th Cir.), cert. de-
This difficulty is evident in the Eighth Circuit Court of Appeal's decision in *United States v. Powers*, the only instance of judicial invocation of the *Gillespie* test in a case involving an appeal from an order regarding a motion for closure. In *Powers*, the Eighth Circuit rejected the defendant's appeal on the trial court's interlocutory order denying his request for a closed trial insofar as the appeal was based on mandamus or the *Cohen* collateral order doctrine, but ultimately permitted appellate review under the balancing test of *Gillespie*. A majority of the circuit court panel interpreted *Gillespie* to permit courts to grant immediate review of first impression issues, foreshadowing numerous subsequent cases in which early review might clarify the court's position and give guidance to the trial courts. The entire panel recognized that the closure issue in *Gillespie* raised such an issue. The dissenting judge, however, thought that immediate review could be granted only under mandamus, not under the *Gillespie* balancing approach, because use of a court's "supervisory power" to discuss issues of first impression normally justifies mandamus jurisdiction and because the trial court had abused its discretion, another mandamus consideration. Thus, while immediate review was available under either *Gillespie* or mandamus, the Eighth Circuit justices could not agree on the most appropriate approach, despite the similarity of their rationales.

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33. Id. at 319-20 n.2.
34. Id.
35. Id.; see Gannett Pac. Corp. v. Richardson, 59 Hawaii 224, 227, 580 P.2d 49, 53 (1978) (court heard request for prohibition to prevent closure of a preliminary hearing partially because "it appears ... only too clear that the district courts are in immediate need of direction from this court on a procedural and substantive matter of public importance"); note 4 supra.
37. See 622 F.2d at 327 (McMillan, J., dissenting). See generally note 17 supra and accompanying text.
38. See 622 F.2d at 327 (McMillan, J., dissenting). See generally note 17 supra and accompanying text.
The Supreme Court recognized long ago that the case law on finality was "not altogether harmonious," and more recently noted that "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." The Court's desire to follow a pragmatic approach to finality questions, though understandable, has nevertheless led to confusion and uncertainty, striking at the heart of the rationale for the general final judgment rule by encouraging numerous appeals, inconsistent decisions, and waste of judicial resources.

If in Gillespie the Supreme Court was attempting to begin an orderly retreat from the strictures of the traditional final judgment rule and its exceptions, its failure to reduce the confusion does not mean that a balancing approach is an inappropriate method of dealing with the problem. Indeed, one commentator has argued that a broad view of appellate jurisdiction, such as that suggested by Gillespie, is certainly preferable to an expansion of existing exceptions to the final judgment rule, which would only provide "make-shift substitutes for the establishment of a rational, flexible and predictable balancing approach." Under this modification of the Gillespie approach, courts would determine appealability after consideration of four specific factors:

1) the delay which might result before the case would ultimately be heard on appeal after a final judgment, 2) the harm such delay would cause to the litigant's financial and personal situation, . . . 3) the length and expense of discovery and trial, in relation to the relative financial capabilities of the parties seeking appeal, that may prove unnecessary if the district court's order is ultimately reversed[, and]

   . . . [4)] the likelihood that the order from which appeal is sought will be reversed.

Though superior to the open-ended Gillespie test, this approach fails to offer a method of assigning relative weights to the particular factors, or to suggest any other means by which a

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41. Cf. Redish, supra note 2, at 98, 116 (expansion of appealability necessary because "[i]n a significant number of cases not falling within any of the established exceptions to the final judgment rule . . . the danger of prejudicing the litigants as a result of delaying appeal will be so substantial as to outweigh any countervailing interest in avoiding the harms of piecemeal appeal").
42. Id. at 127.
43. Id. at 100.
court can compare these factors in a given case. The approach therefore does little to alleviate, and may exacerbate, the confusion in the area of finality. A balancing approach without clear guidelines leads to an increase in the number of appeals filed and thus to an increase in delay and expense for the parties and the courts. Moreover, appellate courts likely find it difficult to dismiss appeals summarily when they lack guidance in deciding where the balance lies in a particular case. Finally, an unclear balancing test results in uncontrolled discretion and inconsistency among the appellate courts. A principled approach that is based upon the policies and purposes underlying the final judgment rule and its exceptions, but that avoids the arbitrary application of the traditional approach and the problems of uncertainty and delay caused by unclear balancing tests, is needed.

III. A TEST FOR APPEALABILITY

A. BASIC FACTORS UNDERLYING THE TRADITIONAL APPROACH TO FINALITY

The purpose of the final judgment rule and its exceptions, like that of many procedural rules, is to achieve an equitable resolution of disputes at minimal cost to the parties and the judicial system. Courts that apply the traditional approach to finality seek to accomplish that purpose by performing a gatekeeping function: the final judgment rule and its exceptions are used to allow immediate appeals only when the costs to the judicial system as a whole of allowing such appeals are less than the costs of deferring resolution of the is-

44. Redish does indicate, however, that there must be some possibility that the order will be reversed, otherwise there will be little point to hearing the appeal. See id.
45. See C. Wright, supra note 11, § 101, at 504 (delay caused by interlocutory appeals “can be justified only if it is outweighed by the advantage of settling prior to final decision an important issue in the case”). Recently, the Second Circuit Court of Appeals has had to limit the appealability of disqualification of attorney orders, due in part to a large number of appeals from such orders. See Armstrong v. McAlpin, 625 F.2d 433, 437-38 (2d Cir.), cert. pending, No. 80-433 (1980 Term); accord, Firestone Tire & Rubber Co. v. Risjord, 101 S. Ct. 669 (1981).
46. See Redish, supra note 2, at 103. An increase in appeals also risks undermining the authority of the trial courts. See Wright, The Doubtful Omnisience of Appellate Courts, 41 MINN. L. REV. 751, 787 (1957).
49. The term “cost” will be used in this Note in a broad sense to include tangible monetary costs, less tangible time costs, and costs involved in errone-
sues until trial's end.\(^{50}\) The basic final judgment rule thus expresses the legislative and judicial judgment that, as a general matter, the aggregate costs to the system are minimized when an aggrieved party is denied immediate appeal of interlocutory issues and is forced to wait until the end of trial for appellate review.

Several factors weigh against piecemeal review. Each time an appeal is filed and heard, monetary costs are incurred by the parties and the judicial system. The parties must prepare briefs and argue the appeal and the judicial system must docket the appeal, hear the argument, and decide the issues.\(^{51}\) The system also must bear the costs of delay attendant upon matters that remain unresolved pending an appellate decision,\(^{52}\) costs that are magnified if review proceeds piecemeal.\(^{53}\) Finally, the quality of appellate decision making suffers because the number of appeals increases and piecemeal review prevents decisions from being made on a complete record.\(^{54}\)

In contrast, two factors favor immediate appellate review. The first is the resource cost of a new trial should the judgment be reversed on review and a new trial be required. When issues are appealed and decided as they arise, the probability of
a reversal upon review at the end of a trial is relatively low, because most significant substantive and procedural issues are resolved during trial; when error would have resulted in a new trial, the immediate appeal has saved these costs. Reservation of the issues until trial's end makes the costs of a new trial necessary if a significant error is made. A second factor weighing in favor of immediate appeal is the credibility cost associated with the failure of trial-end review to protect significant collateral rights or interests of parties or non-parties that will not be merged in the final judgment; such interests can only be protected through immediate appeal.

In the aggregate, the considerations against piecemeal review outweigh the considerations in favor of immediate review. Although the costs of a new trial are substantial, the "harmless" nature of many orders and the tendency of appellate courts to affirm trial court judgments suggest that the risk of a new trial is not significant. Additionally, liberal rules for joinder and intervention suggest that most trial court orders will not affect "collateral" rights for which an adequate post-trial remedy for error is not available. The final judgment requirement is, therefore, an appropriate general rule. When the possibility of reversal and a new trial, or of the inability of the court to remedy the effects of an erroneous ruling upon later review, is particularly great, however, the general rule represents an inefficient policy choice. Thus, trial court orders adversely affecting significant rights or interests under circumstances suggesting a relatively high probability of error, or adversely affecting significant collateral rights or interests, have formed the basis for most instances in which an exception to the final judgment rule has been applied.

1. Significant Right or Interest

All of the traditional exceptions to the final judgment rule

55. For a definition of "significant error," see note 62 infra.
56. See note 12 supra and accompanying text.
57. An error is regarded as harmless "if, upon an examination of the entire record, substantial prejudice [to the defendant] does not appear." Berger v. United States, 295 U.S. 78, 82 (1935); see United States v. Handly, 591 F.2d 1125, 1132 (5th Cir. 1979).
58. See, e.g., Note, The Minnesota Supreme Court 1970-1971, 56 MINN. L. REV. 928, 934 (1972) (of a total of 282 cases appealed to the Minnesota Supreme Court in the 1970-71 term, 215, or 76%, were affirmed).
60. See, e.g., FED. R. CIV. P. 23.
61. See, e.g., FED. R. CIV. P. 24.
have required that the appealed issue be in some sense significant. For example, in deciding the extent to which appellate courts can exercise supervisory power under mandamus, the Supreme Court has stated that such power should be used only to settle important questions of law. Similarly, in Cohen, the Court noted that immediate appeal should be limited to "serious" questions "too important to be denied review." Although in Gillespie the Eighth Circuit Court of Appeals did not explicitly require that the appeal involve a significant issue, such a requirement may be inferred from the balancing test itself. As at least one commentator has noted, if the danger of postponing review is to outweigh the costs of piecemeal review, such danger must be substantial, or else "the danger of prejudicing litigants as a result of delaying appeal will be so substantial as to outweigh any countervailing interest."

This threshold requirement that the issue involve a significant right or interest before it can receive immediate appellate review is consistent with the interest in conserving the resources and preserving the credibility of the judicial system. If the possibility of a reversal and a new trial is the consideration tipping the balance in favor of immediate appeal, the right or interest affected by the order must be significant, since harmless error is insufficient to warrant reversal and a new trial. Similarly, if the inability of the court to remedy the effects of an erroneous order upon later review—collaterality—is the factor justifying immediate appeal, the issue must be significant, since the protection of insignificant collateral rights would not outweigh the disadvantages of piecemeal review.

62. A significant right or interest is a right or interest that is protected by the United States Constitution or one that if erroneously affected by an order of the trial court would warrant reversal and the grant of a new trial. For the purposes of this Note, it is assumed that an error of constitutional magnitude should at least warrant proceeding with the balance of the proposed test for appealability. Cf. Chapman v. California, 386 U.S. 18, 22-24 (1967) (doctrine of "harmless constitutional error" articulated); Goldberg, Harmless Error: Constitutional Sneak Thief, J. CRIM. L & CRIMINOLOGY 421, 421 n.3, 441-42 (1980) (constitutional errors should receive automatic reversals; ten percent of all criminal appeals since Chapman have been decided on basis of "harmless constitutional error" doctrine).

65. Id. at 546.
67. Redish, supra note 2, at 98.
68. The level of significance required for an appeal involving collateral rights or interests arguably should be less than that required for an appeal on a matter important enough to require reversal if an error were made, since collat-
A determination that the interest affected by the interlocutory order is significant, however, does not itself justify an immediate appeal. Appeals of important issues such as the admissibility of evidence are postponed until the end of trial as a matter of course in our judicial system. Immediate appeal of orders affecting even significant rights or interests is justified only in those instances in which significant costs to the judicial system as a whole can be saved by immediate appellate review.

2. Probability of Error

The final judgment rule implicitly recognizes that the probability of error at the trial court level is sufficiently low to assume that the costs of new trials ordered or collateral rights lost, in the few cases in which significant errors are made, are outweighed by the judicial costs saved by avoiding immediate appeal of all trial court orders. Some classes of orders are subject to a higher probability of trial court error than others; when significant rights or interests are involved, immediate appeal is justified for these orders because the relatively high probability of error increases the likelihood that the costs of a new trial or of loss of collateral rights will accrue.

Traditional exceptions to the final judgment rule suggest the kinds of orders that have been associated with a high probability of trial court error. Under the original interpretation of the use of extraordinary writs, for example, courts stated that the costs of immediate appeal were justified only when a lower court had abused its discretion, or, in other words, when the costs of a new trial or failure to protect collateral rights were virtually certain to accrue. Under current practice, however, the required risk of error seems to have lessened. Courts now invoke the supervisory power of mandamus to hear appeals of "issues of first impression"—issues that, while not necessarily wrongly decided, are susceptible of erroneous resolution by lower courts because of the lack of appellate guidance. Thus, in cases presenting an obvious error by general interests can rarely be protected once a trial has ended. See note 13 supra and accompanying text.


70. See Redish, supra note 2, at 106 n.94. The assumption that the appellate court will render a better decision on the matter than the trial court may not hold true for immediate appeals because of the problem of piecemeal review. See note 54 supra and accompanying text.

71. See note 17 supra and accompanying text.

72. Id.
the lower court, made on a matter of significance,73 or regarding a significant issue that the court has not confronted previously or upon which other courts have developed new case law,74 the appellate court need not wait until final judgment to make its decision.

3. Collaterality

Given the threshold requirement of a significant right or interest, the third factor that justifies immediate review is the relation of the collateral rights or interests affected by the order to the merits of the case. The Cohen exception reflects the judicial recognition that when final judgment comes "it will be too late effectively to review [a collateral] order, and the rights . . . will have been lost, probably irreparably."75 Two kinds of trial court orders may affect these collateral interests. First, a trial judge may issue an order that affects the rights of a party but that will not be merged in the final judgment and therefore cannot be considered on review.76 Second, a trial judge may issue an order that is unobjectionable to the parties, but that nevertheless affects important rights of a non-party.77 In either context, the order, if erroneous, will not be corrected on review, resulting in resource and credibility costs if immediate appeal is not available.78

73. The Ninth Circuit Court of Appeals has stated that:
A rule of thumb as to the meaning of the abuse of discretion standard provides that the trial court's exercise of discretion should not be disturbed unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."


75. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). Irreparable injury should be distinguished from mere inconvenience, as it "results from a ruling which operates to deny a substantive right and which cannot be corrected on appeal from final judgment." Redish, supra note 2, at 113 n.126.

76. In Cohen, for example, the plaintiff appealed the requirement of posting a substantial bond to cover the costs of the trial in the event he lost the action. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 545.

77. For example, the defendant and the prosecutor in a criminal case may agree to close the entire trial and thereby infringe on the public's right to an open trial. See note 4 supra.

78. For example, if a member of the public is forbidden to immediately appeal an order to close a proceeding, the public will suffer the costs of such a refusal because no appeal may be taken after the trial. Although the public
A test based upon these three criteria—a significant right or interest, probability of error, and collaterality—has two distinct advantages: elimination of confusion and relative ease of administration. Under the proposed test, the court would first determine whether the rights or interests adversely affected by the order are significant. If they are not, no appeal should be allowed. If they are significant, the court need only ask whether the probability of error is high—such as with an obvious abuse of discretion or an issue of first impression—or whether the issue is collateral to the merits of the case. Because all of the exceptions to the final judgment rule involve one of these alternative factors, it is only necessary that either probability of error or collaterality, along with a significant right or interest, be present to justify an immediate appeal.

The test is also preferable to a discretionary balancing test because it offers greater guidance to attorneys and the courts than the Gillespie court's balancing of the "inconvenience and costs of piecemeal review on the one hand and the danger of denying justice on the other."79 Moreover, because this test adopts and weighs the relevant factors and eliminates from consideration those factors that are insignificant,80 attorneys can easily determine whether an appeal will be granted in a

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80. For example, delay that could result before a case is ultimately heard on appeal after a final judgment is arguably already weighed in the original final judgment rule balance. See Redish, supra note 2, at 100. If this delay was so extreme as to cause irreparable harm, however, the matter would be appealable as a significant collateral interest.
given case and the appropriate procedures to follow. Further, appellate courts will be able to determine whether to consider an appealability issue and how to decide it. The proposed test should ultimately result in a reduced consumption of judicial resources and an improvement in judicial decision making.

This test can be used to determine the immediate appealability of orders affecting plaintiffs, defendants, and non-parties in both civil and criminal cases. It must be recognized, however, that in at least criminal cases, the costs of delay incurred as a result of immediate appeal from an interlocutory order are to be given more weight than in the normal case, because of the criminal defendant's right to speedy trial and the double jeopardy prohibition. One solution to this problem is to grant an immediate appeal when it is warranted, without granting a stay of the underlying proceeding. In situations in which the issue

81. A choice between attempting an appeal under one of the exceptions to the final judgment rule or seeking an extraordinary writ need not be made.

82. The test presented here is not the only possible ordering of the factors. Other commentators and courts have also attempted to provide a conceptual framework addressing salient factors. For example, three policy considerations have been suggested as rationales underlying all of the exceptions:

1. alleviation of hardship by providing an opportunity to review orders of the trial court before they irreparably modify the rights of the litigants;
2. supervision of the development of the law by providing a mechanism for resolving conflicts among trial courts on issues not normally open on final appeal; and
3. avoidance of a waste of trial court time by providing an opportunity to review orders before they result in fruitless litigation and wasted expense.

Note, supra note 9, at 609 (footnotes omitted). The Ninth Circuit Court of Appeals has listed five factors to be considered when granting mandamus; these factors, however, fall neatly into the three categories considered under the test proposed herein. See Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977). Professor Redish has also suggested four factors to be taken into account to determine appealability. See text accompanying note 43 supra.

The conceptual ordering in this Note provides a more workable test in that it takes into account all important policy concerns, without any extraneous or repetitive concerns, and attempts to provide a means to weigh these concerns so that courts can objectively apply the resulting test.

83. The defendant is protected from double jeopardy by the fifth amendment, while the sixth amendment protects his or her right to a speedy trial. A speedy trial right is applicable to appeals from pretrial orders because a defendant's right to a speedy trial is of little concern once the trial has begun. See Merola v. Bell, 47 N.Y.2d 985, 987, 419 N.Y.S.2d 965, 966 (1979), cert. denied, 100 S. Ct. 3055 (1980). Once the trial has begun, however, double jeopardy limits the appealability of some interlocutory orders.

Delay may also work hardship on parties to civil litigation, but the delay is presumably not as serious as in criminal cases when the defendant may be either in jail or threatened by criminal prosecution. Cf. Redish, supra note 2, at 99-99 (examples of harm that delay can cause in a civil context).

84. Actually, there are three possible procedural routes: 1) the grant of an immediate appeal with a stay of the lower court proceedings; 2) the grant of an immediate appeal without a stay; and 3) review at trial's end. Most courts have
involved is irrelevant to the actual proceedings, this solution is adequate.\textsuperscript{85} In cases in which the issue involved directly affects the proceedings in the courtroom, such as those involving closure, an appeal without a stay inadequately protects the rights underlying the appeal; by the time an immediate appeal will have worked its way through the system, the trial below will normally have long since ended.\textsuperscript{86} It is necessary, therefore, to provide for an expedited appeal when the proposed test indicates that the order affects rights or interests connected with the trial itself. This will reduce the costs of delay to the defendant. An expedited appeal is not a novel suggestion.\textsuperscript{87} In the federal courts, extraordinary writ petitions are given priority over other appellate court matters,\textsuperscript{88} and the courts require the petitioner to set forth reasons why immediate review is warranted so that such petitions can be summarily reviewed.\textsuperscript{89} Most importantly, however, the grant of an extraordinary writ "is always discretionary, [and] may be denied out of hand, without a hearing and with a minimum of procedural maneuvering."\textsuperscript{90} Any delay is therefore minimal.\textsuperscript{91} When combined been willing to hear an appeal from a closure decision that was filed before the trial ended but was not actually argued or decided until after the trial ended, on the ground that although the issue is moot, it is capable of repetition and should be reviewed. See Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814, 2820 (1980); United States v. Cianfrani, 573 F.2d 835, 846 (3d Cir. 1978); Commercial Printing Co. v. Lee, 262 Ark. 87, 91, 553 S.W.2d 270, 272 (1977); cf. United Press Ass'n v. Valente, 308 N.Y. 71, 76, 123 N.E.2d 777, 778 (1954); E.W. Scripps Co. v. Fulton, 100 Ohio App. 157, 160, 125 N.E.2d 896, 899 (1955).

85. See, e.g., Stack v. Boyle, 342 U.S. 1 (1951) (order denying motion to reduce bail). In Stack, the Court held that the order was appealable as a collateral issue because "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried." Id. at 12.

86. In the case of a government appeal, no new trial could be ordered because of the double jeopardy clause. See U.S. Const. amend. V.

87. In Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), Justice Brennan in his concurring opinion stated: "In this case, prior restraints were in effect for over 11 weeks, and yet by the time those restraints expired, appellate review had not yet been exhausted. Moreover, appellate courts might not accord these cases the expedited hearings they so clearly would merit." Id. at 609 n.38 (Brennan, J., concurring).

88. FED. R. APP. P. 23(b). FED. R. APP. P. 3(a) also provides for a form of expedited appeal for orders certified under § 1292(b).

89. FED. R. APP. P. 21(a). This requirement may also have the effect of discouraging groundless petitions. See Note, supra note 13, at 473 n.116.

90. 9 J. MOORE, FEDERAL PRACTICE, supra note 1, § 110.10, at 136.

with this system of expediting appeals in criminal cases, the test proposed above adequately balances the salient factors underlying the final judgment rule and its exceptions.

**IV. APPLICATION TO APPEALS FROM CLOSURE ORDERS**

Recent decisions in which the Supreme Court has expressed a willingness to accept limitations upon public access to various stages of criminal proceedings have led to numerous requests for closed proceedings. Courts continue to debate the merits of the conflict between the interests of the public and the parties in open proceedings and the interests that may be furthered by the protection offered by closure. Meanwhile, interested parties have continued to press for recognition of their rights with respect to motions for closure, and the courts have failed to develop a consistent approach for handling the parties' concerns once an order granting or denying the motion has been issued.

The proposed test for the appealability of interlocutory orders can be applied by courts to the common situations involving closure motions to provide greater uniformity and certainty than can be achieved under the traditional approach. Such is the case when the defendant appeals from orders granting or denying closure, the prosecutor appeals from orders granting or denying jurisdiction be allowed five days to review the gag order. See Note, Ungagging the Press: Expedited Relief From Prior Restraints on News Coverage of Criminal Proceedings, 65 Geo. L.J. 81, 117 (1976). During that time the underlying criminal proceeding would continue and the "gag" would remain in force. Id. at 118. After the five days had elapsed, however, the order would automatically expire. Id. at 117.

It is hoped that, under the five-day approach, appellate courts would be prompt in their review of such orders, at least when the order appeared to be constitutional, to ensure that defendants' rights to a fair trial would be respected. See, e.g., United States v. Cianfrani, 573 F.2d 835, 843 (3d Cir. 1978). Under this proposal, the defendants' rights to a speedy trial would be completely guarded, but the public's right to be present at the proceeding would be somewhat infringed. In order to preserve both the rights of the defendant and of the public, therefore, the above proposal should be modified so that the entire proceeding is stayed during the five-day waiting period. Furthermore, the stay would only commence if a person other than the defendant submitted a petition for appeal, as in current extraordinary writ practice. See generally text accompanying notes 88-90 supra. For a closure case in which an expedited writ with a stay was granted, see Gannett Pac. Corp. v. Richardson, 59 Hawaii 224, 226-27, 580 P.2d 49, 52-53 (1978). Although this method might infringe on defendants' right to a speedy trial, it probably would be a slight infringement that would not give rise to a constitutional violation. Moreover, unlike the above proposal, this method safeguards the public's right to open criminal proceedings.
denying closure, or the media or the public appeals from orders granting closure.

A. APPEALS BY DEFENDANTS

1. Appealing an Order Denying Closure

Defendants may attempt to have various stages of their proceedings closed for a number of reasons: they may desire to have a pretrial hearing closed to protect against jury contamination or they may wish to have entire trials closed to avoid scandal or embarrassment to themselves or a witness, to protect against prejudice of pending litigation in the same or a neighboring jurisdiction, or even out of fear for their lives or those of family members. All of these interests involve the defendant's fundamental right to a fair trial, the violation of which will result in a reversal of the conviction and a new trial. A significant right of the defendant is therefore involved, and the threshold test for the appealability of an order denying closure is met.

The determination of whether the probability of error in the lower court's denial of closure is sufficiently large to justify an immediate appeal—whether there is an abuse of discretion or an issue of first impression—depends on the facts of each individual case. United States v. Powers was the first case in which the Eighth Circuit Court of Appeals had confronted a closure order since the Supreme Court's important Gannett decision.

93. See, e.g., State v. Poindexter, 231 La. 630, 92 So. 2d 380 (1956) (denial of closure so that defendant's witness would testify deprived defendant of fair trial).
94. See, e.g., United States v. Fiurmara, 605 F.2d 116 (3d Cir. 1979).
The fact situations in Gannett and Powers differed, and there was also a question as to whether the majority's test in Gannett, or the test found in Justice Blackmun's dissent, was the appropriate test for closure. All of these considerations produced a relatively high probability of error by the lower court, justifying immediate appeal under the test proposed by this Note. The court in Powers indicated, moreover, that future interlocutory closure appeals on this issue would not be heard, a decision consistent with the proposed test, because the probability of error in subsequent cases would be very low.

Absent a high probability of error, collaterality will rarely justify a defendant's immediate appeal from an order denying closure. If the defendant is not acquitted in the original trial, the defendant's rights to a fair trial are generally protected by the possibility of appeal and a new, closed trial. The delay, expense, and hardship suffered by the defendant, as well as the potential unavailability of important witnesses for the new trial, are taken into consideration in the basic final judgment rule. These concerns are not unique to closure orders and do not justify an immediate appeal under ordinary circumstances.

Given the many alternatives available to judges to guarantee a fair trial, while keeping the trial open over defendants' objections, closure will rarely be necessary to protect significant rights of defendants. Thus, the general rule should

99. See 622 F.2d at 320 n.2.
100. Gannett involved a closed pretrial hearing, while Powers involved a closed trial.
102. See 622 F.2d at 320 n.2; accord, State ex rel. Feeney v. District Court, 607 P.2d 1259, 1267 (Wyo. 1980) (lack of exceptional circumstances barred use of mandamus).
104. See text accompanying notes 48-56 supra.
105. Ordinarily, these concerns are simply not significant enough to meet the threshold test. In some cases, however, they may rise to a significant level. For example, a situation could occur in which delay would lead to the death of a party.
106. Courts have suggested such alternatives as admonitions to the jury and, if necessary, sequestration, Oliver v. Postel, 30 N.Y.2d 171, 182-83, 282 N.E.2d 306, 311, 331 N.Y.S.2d 407, 415 (1972), voir dire, continuance, change of venue, or jury instructions, State ex rel. Beacon Journal Publishing Co. v. Kaimrad, 46 Ohio St. 2d 349, 352, 348 N.E.2d 695, 697 (1976). Other alternatives include: change of venire, enforcement of courtroom decorum, control over courtroom personnel and officers of the court, mistrials, new trials, and rever-
be that appeals of orders denying a defendant's request for a
closed proceeding should not be heard until after trial, unless
the case presents an issue of first impression or there has been
an abuse of discretion by the lower court.\textsuperscript{107} This position is
supported by a majority of the courts that have addressed the
issue.\textsuperscript{108}

2. **Appealing an Order Granting Closure**

Defendants may appeal orders that close the proceeding
sua sponte\textsuperscript{109} or at the request of the prosecution\textsuperscript{110}—orders
usually made to protect a prosecution witness.\textsuperscript{111} Because a
criminal defendant has a sixth amendment right to an open
trial,\textsuperscript{112} an incorrect decision to close a trial in its entirety will
generally constitute reversible error,\textsuperscript{113} and will meet the

\textsuperscript{107} It can be argued that by requesting an immediate appeal in those cases
in which an immediate appeal is warranted, the defendant has waived the
prohibitions against delay in criminal trials. During the pendency of the ap-
peal, the defendant could be released under 18 U.S.C. § 3146 (1976) and thus not
suffer great harm from delay. This argument seems rather harsh, however, and
it might be sound public policy to grant a stay of the underlying proceedings
and an expedited appeal for defendants as well as non-defendants.

\textsuperscript{108} \textit{Cf.} Cromer v. Alameda County Sup. Court, 6 MEDIA L. Rm [BNA]
1821 (Cal. App. 1980) (court grants writ of mandamus to seal transcript of pur-
ported confession disclosed in closed pretrial hearing). \textit{See generally} United
States v. Powers, 622 F.2d 317 (8th Cir.), \textit{cert. denied}, 101 S. Ct. 112 (1980);
United States v. Fiumara, 605 F.2d 116 (3rd Cir. 1979); Mallott v. State, 608 F.2d
737 (Ala. 1980). Although the \textit{Cromer} court did not clearly indicate the reason
for its decision, \textit{Cromer} can be considered an instance of abuse of discretion in
the lower court, as the appellate court found that in this extraordinary situa-
tion—the trial of a woman who allegedly kidnapped and murdered a five year
old boy—there was no other alternative that could protect the defendant's right
to a fair trial.

\textsuperscript{109} For cases involving sua sponte orders, \textit{see generally}, Pechter v. Lyons,
441 F. Supp. 115 (S.D.N.Y. 1977); Gannett, Inc. v. Mark, 54 A.D.2d 818, 387

\textsuperscript{110} \textit{See, e.g.}, People v. Jones, 47 N.Y.2d 409, 412, 391 N.E.2d 1335, 1338,
joined a motion to close a criminal proceeding in 46 out of 300 cases since the
\textit{See Court Watch Summary, supra} note 4, at 34.

\textsuperscript{111} \textit{See, e.g.}, United States \textit{ex rel.} Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d
Cir.), \textit{cert. denied}, 423 U.S. 937 (1975); People v. Hinton, 31 N.Y.2d 71, 73, 286
N.E.2d 265, 266, 334 N.Y.S.2d 885, 887 (1972), \textit{cert. denied}, 410 U.S. 911 (1973);
have also been used to justify closure in at least one case. \textit{See United States v.
during discussion of anti-hijacking procedures).

\textsuperscript{112} U.S. Const. amend. VI.

\textsuperscript{113} \textit{See, e.g.}, People v. Jones, 47 N.Y.2d 409, 413, 391 N.E.2d 1335, 1338, 418
threshold requirement of significance. If only a pretrial hearing or a segment of the trial is closed to protect a state witness, however, the error will not likely be serious enough to warrant reversal. Thus, it appears that only some defendants' appeals of orders granting closure will qualify for immediate appeal under the threshold portion of the test.

The effect of the second factor, probability of error, will again depend upon the specific facts of each case. For example, if the trial court totally disregards the defendant's right to an open trial and abuses its discretion by permitting a closed trial merely because it is more convenient, an immediate remedy is necessary to protect the defendant's constitutional rights. Similarly, if the state requests closure to protect a witness in a situation that has never occurred before, the request will present an issue of first impression for the court and an immediate appeal will probably be justified. On the other hand, if the trial judge closes the trial on grounds very similar to those that appellate courts have repeatedly upheld, an immediate appeal should not be granted, based upon the probability of error factor. Because a new, open trial should almost always be sufficient to correct any harm to the defendant caused by a closed trial, collaterality will rarely require the granting of an immediate appeal from an order granting closure.

B. Appeals by the Prosecution

1. Appealing an Order Denying Closure

Occasionally, the prosecution will make a motion to close a criminal proceeding to the public. Although the prosecution's burden of proof to justify closing a proceeding over a defendant's objections is great, the right to public trials is not

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114. But see People v. Jones, 47 N.Y.2d 409, 413, 391 N.E.2d 1335, 1338, 418 N.Y.S.2d 359, 362 (1979) (closure of trial during testimony of state witness, without showing need, not harmless error and new trial granted). 115. Id. 116. See Beckman v. Commonwealth, 388 N.E.2d 678, 679 (Mass. 1979) ("the error complained of must be irremediable so that an order for a new trial in the normal process of appeal will not put the defendant in the status quo"). But see Cromer v. Alameda County Superior Court, 6 Med. L. Rptr. [BNA] 321, 1823 (Cal. App. 1980) (appropriate standard is whether there is a "reasonable likelihood of substantial prejudice"). 117. See generally note 110 supra.
absolute, and there may be instances in which an appellate court would find the prosecution's interest in a closed proceeding paramount. As in the preceding contexts, the court will have to make the threshold determination of the significance of the prosecution's right or interest in a closed proceeding. These interests might, for example, involve such concerns as the ability of the state to present evidence, or the protection of a third party informant. These interests arguably are significant, in that the effective functioning of the judicial system ultimately depends upon the willingness of witnesses to come forward at trial to present evidence. A closed proceeding may be the only means available to secure witness cooperation.

Again, the impact of the probability of error factor will depend upon whether the order resulted from either an abuse of discretion or an attempted resolution of an issue of first impression. Once the threshold test has been met, however, perhaps the most important factor in determining the appealability of an order of this type is the collaterality factor. Because of double jeopardy considerations, the prose-

118. The authorization for appeals by the government in criminal cases is found in the Omnibus Crime Control Act of 1970, 18 U.S.C. § 3731 (1976). In United States v. Wilson, 420 U.S. 332 (1975), the Supreme Court noted that Congress' intent in enacting this statute was to allow the courts to define the constitutional boundaries of the government's right to appeal. Id. at 337. For a detailed discussion of the issues raised by the double jeopardy clause, see Comment, A Procedural Question to Appeal in Criminal Cases--The Government's Right, 7 Pepperdine L. Rev. 387 (1980).


120. See cases cited in note 111 supra.

121. See Nemerson, Coercive Sentencing, 64 Minn. L. Rev. 669, 679 (1980).

122. As with defendants' appeals, whether the order possesses a high probability of error as an abuse of discretion or as an issue of first impression depends upon the individual case. See text accompanying notes 97-98 supra. The probability of error factor, however, may never be considered if a closure order, when issued over the state's objections, is sufficiently collateral to the merits to justify immediate appeal under the collaterality factor. Although defendants may argue at the close of trial that they were denied a fair trial or an open trial and may convince the court that they should be granted a new trial, the state, given double jeopardy considerations, has a much more limited right to appeal from a final judgment. See text accompanying note 118 supra. Thus, the state should generally be granted an immediate appeal from decisions refusing closure of criminal proceedings, provided the issue first meets the threshold level of significance.

123. See Comment, supra note 118.
cution may not withhold evidence and appeal the decision at the end of trial if a closed proceeding is not initially granted. The state's interests are therefore collateral, and the state should be granted an immediate appeal when the denial of a closed proceeding significantly affects the ability of the prose-
cution to present its case. 124

2. Appealing an Order Granting Closure

The prosecution may wish to appeal a closure order because of its interest in protecting the public's interest in open trials, 125 or for more self-serving reasons. 126 Whether these inter-
estests meet the threshold level of significance is a difficult question. The interest of the prosecution in an open proceed-
ing is arguably less significant than its interest in a closed pro-
ceeding, for its interest in the latter is in protecting its ability to present effectively its case against the defendant 127—a public interest that only the prosecution can protect. Furthermore, in cases in which the media, as representatives of the public, have not expressed an interest in closure, it is unlikely that signifi-
cant interests would be affected by a closed trial. If no member of the public cares to appeal the order, any infringement of the defendant's right against undue delay is unjustified. Accord-
ingly, the general rule should be that the prosecution is not en-
titled to immediate appellate review of an order granting closure when the interest involved fails the threshold test of significance. Only when the state can show an exceptional con-

124. This is an instance in which an expedited appeal is warranted. See note 91 supra.

125. The Supreme Court in Gannett assumed that the prosecution would diligently protect the public's interest in open trials. See Gannett Co. v. DePas-
quale, 443 U.S. at 383-84. Since that decision, however, the prosecution has op-
posed closure motions in only 122 of 300 cases. See Court Watch Summary, supra note 4, at 34.

126. It is always possible that the prosecuting attorney wishes to further his or her own career through the publicity from the trial. It is more likely, how-
ever, that prosecutors will agree to closure. Prosecutors are more "interested in a conviction which will stand on appeal; currently reversal of a conviction be-
cause of prejudicial publicity, through extremely rare, constitutes a real pos-
sibility while reversal of a conviction for infringement of the media's rights, of course remains unheard of." Fenner & Koley, supra note 96, at 456 (emphasis in original); cf. Merola v. Bell, 47 N.Y.2d 985, 393 N.E.2d 1038, 419 N.Y.S.2d 965 (1979) (prosecution appealed order granting closure), cert. denied, 100 S. Ct. 3055 (1980).

127. It is unlikely that the probability of error factor is relevant, as reversal upon review from lower court error is rare, given double jeopardy concerns. The prosecution could be successful, however, under the collaterality factor by arguing that the public's interest in open trial would be irreparably harmed without an immediate appeal. If immediate review is found to be warranted, the appeal should be expedited. See note 91 supra.
cern that rises to a significant interest should an appellate court continue with the balance of the test.\textsuperscript{128}

\section*{C. Appeals by the Public or the Media}

The public, or the media as representatives of the public,\textsuperscript{129} may wish to appeal an order closing a proceeding when the state, the defendant, or the trial judge desire it closed.\textsuperscript{130} Such an appeal is predicated upon the public's interest in open trials.\textsuperscript{131} Under current Supreme Court interpretation, the significance of the rights or interests adversely affected by such an order for purposes of determining whether immediate appeal is appropriate depends upon whether the closed proceeding is a pretrial hearing or a trial. In \textit{Gannett Co. v. DePasquale},\textsuperscript{132} the Supreme Court held that the public does not have a constitutional right to attend a pretrial suppression hearing.\textsuperscript{133} One year later, in \textit{Richmond Newspapers, Inc. v. Virginia},\textsuperscript{134} the Court held that public access to criminal trials is a fundamental right that is constitutionally protected.\textsuperscript{135} It might therefore be argued that, while the right to attend a trial is significant and meets the threshold test for appealability, the interest in attending pretrial hearings does not meet this threshold, and immediate appeals from decisions closing pretrial hearings should never be allowed.\textsuperscript{136}

\begin{itemize}
\item \textsuperscript{128} See text accompanying notes 83-91 supra.
\item \textsuperscript{129} Most commonly, the media are the appellants from orders closing the trial. In at least one case, however, members of the general public appealed. See \textit{Pechter v. Lyons}, 441 F. Supp. 115, 117 (S.D.N.Y. 1977) (immigration hearing on alleged Nazi war criminal closed).
\item \textsuperscript{130} Generally, the media or the public are allowed to intervene in the trial for the purpose of arguing against closure when closure is ordered. See, e.g., \textit{United States v. Cianfrani}, 573 F.2d 835, 843 (3d Cir. 1978); \textit{Oklahoma Publishing Co. v. Martin}, 611 P.2d 253, 253 (Okla. 1980); \textit{State ex rel. Fenney v. District Court}, 607 P.2d 1259, 1268 (Wyo. 1980).
\item \textsuperscript{131} See \textit{Richmond Newspapers, Inc. v. Virginia}, 100 S. Ct. 2814, 2829 (1980).
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} 443 U.S. 368 (1979).
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\end{itemize}
The application of the probability of error factor—abuse of discretion or issues of first impression—once again depends upon the specific facts of the lower court ruling. For example, when a judge summarily closes a trial without stating a reason and without allowing the public to intervene, an abuse of discretion clearly exists, subjecting the order to possible immediate appeal. It may not, however, be necessary to discuss the probability of error factor because closed proceedings may well qualify for appeal by the public under the third factor—collaterality. It is well settled that the erroneous closure of a criminal proceeding is not a ground for reversing a judgment and forcing the parties to go through a new, open trial when a non-party is protesting the closure. Thus, because the public and the media may not seek review at trial's end from an order closing a criminal proceeding, if the defendant is acquitted, they have lost forever their right to attend that proceeding. Moreover, even when the defendant is convicted, the public or the media must rely upon the defendant or the state to appeal the closure motion. If the conviction is not overturned, the right to attend the proceeding is lost if the proceeding was closed in error. For these reasons, courts should adopt a general rule granting the public an immediate appeal of a closure order when the significance of the underlying public interest is established.

There are many rights which are not explicitly included in the Constitution, but which over time have come to be regarded as included or as properly protected. Second, the rights or interests affected under a collateral order such as this one need not be as significant as where a reversal and a new trial are possible upon review at trial's end. Finally, one commentator has argued that “[a] dual system under which ordinary proceedings are open to the public while parts of those that most excite public concern are hidden from view would undermine the ritual role of the trial,” and “[s]uppression hearings, for example, present the chief opportunity for the public to scrutinize police conduct regarding searches and confessions.” Note, Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings, 91 Harv. L. Rev. 1899, 1903 (1978). Such concerns are recognized in court rules such as Minn. R. Crim. P. 25.01, which authorizes an immediate appeal from an order closing a pretrial hearing. Therefore, the general rule should be that the public's right to attend any type of proceeding is generally sufficient to warrant consideration of the other two factors in the test.

137. See, e.g., Hearst Corp. v. Cholakis, 54 A.D.2d 592, 593, 386 N.Y.S.2d 892, 893 (1976) (court granted closure after hearing conducted with only “defendants, their attorneys and court personnel present,” and without considering “any facts that might have shown the presence of ‘unusual circumstances’”).


140. For an excellent history of open trials, see generally Richmond News-
V. CONCLUSION

Although in theory it might make a difference which exception to the final judgment rule is invoked, in practice the question of whether an interlocutory order is appealable depends more on the facts and circumstances of the individual case than on whether the order falls properly into one rule or another. Under the prevailing traditional approach, sympathetic judges can find a way to fit a case within an exception to the final judgment rule and thus can hear the appeal, while strict constructionists of the rule can ignore even the most finely framed exception. The present system of determining appealability has thus reached a point where the parties, the courts, and the public do not understand when an issue should be granted an immediate appeal. Attempts by the Supreme Court and commentators to provide a more uniform test have failed, primarily because they have not been specific enough to offer appellate courts the guidance they need.

This Note has demonstrated that the final judgment rule and its exceptions can be reduced to a consideration of three factors—the significance of the rights or interests adversely affected by the order, the probability of error on the part of the lower court, and the collaterality of the issue to the merits. The test derived in the analysis suggests that, as a general rule, whenever both the first test and one of the latter two tests is met, the appellate court should grant an immediate appeal. In applying these factors to closure orders, it becomes apparent that they provide a valuable framework for making appealability determinations. The factors appear to structure most of the discretion of the appellate courts while allowing flexibility for difficult cases and providing the opportunity to elaborate upon those factors that courts have generally considered only implicitly.