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Criminal Appellate Procedure—CONFLICT OF LAWS—STATE RIGHT TO APPEAL IN A CRIMINAL CASE REMOVED TO FEDERAL COURT—*Arizona v. Manypenny*, 608 F.2d 1197 (9th Cir. 1979).

While on duty in Arizona as a border patrolman of the United States Immigration and Naturalization Services, William Dale Manypenny fired three shotgun blasts at a fleeing suspect, hitting him in the back and paralyzing him. The State of Arizona brought a criminal prosecution against Manypenny in state court, charging him with assault with a deadly weapon.¹ On Manypenny's motion, the case was removed to federal court.² The case was tried before a jury, which returned a verdict of guilty. Manypenny then made a motion for arrest of judgment, which was granted.³ The state responded with a motion for reconsideration, which was also granted. Upon reconsideration, the district court construed Manypenny's motion for arrest of judgment as a motion for acquittal. Relying on its own mishandling of the governmental immunity issue,⁴ the district court granted the motion for acquittal,⁵ set aside the jury's verdict, and held Manypenny not guilty.⁶

The state sought appellate review of the district court's ac-

1. The charge was brought under ARIZ. REV. STAT. ANN. § 13-249(A)-(B) (1976).

2. The removal was ordered pursuant to 28 U.S.C. § 1442(a) (1976), which provides:

A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

3. Manypenny moved for arrest of judgment under FED. R. CRIM. P. 34 or, alternatively, for a new trial under FED. R. CRIM. P. 33. The court granted the Rule 34 motion.

4. The district court said:

Procedurally, it is unclear if the determination as to whether defendant Manypenny was carrying out federal duties in performing the act should be decided as a question of law by the Court or should be decided by a jury as a question of fact. . . .

In either event, this Court committed fundamental error; the issue was not properly resolved by the Court at the time of trial. The Court should have considered this principle of law and thus granted defendant's motion for verdict of acquittal or failing that should have submitted the matter to the jury on altogether different instructions which embodied this federal law on the matter of the officer's reasonable belief.

Arizona v. Manypenny, 445 F. Supp. 1123, 1127 (D. Ariz. 1977).

5. The judgment of acquittal was granted under FED. R. CRIM. P. 29(c).

6. *Arizona v. Manypenny*, 445 F. Supp. 1123, 1127-28 (D. Ariz. 1977).

tion before the Court of Appeals for the Ninth Circuit. A three-judge panel considered the appeal and, with one judge dissenting, dismissed it for lack of jurisdiction. The majority concluded that the state did not have the specific statutory authorization required for the prosecution to appeal an adverse decision in a criminal case.⁷

I. BACKGROUND

Whether a state has a right of appeal when prosecuting a criminal case in federal court is a question that has never before been litigated.⁸ Although it has not arisen before, it is an extremely important question. If states lose their right to appeal in criminal prosecutions against federal officers when those prosecutions are removed to federal court, the delicate balance of federalism will be upset.

A. *Federalism and Criminal Law*

The nature of the balance between state and national interests in the federal system was illuminated in *Younger v. Harris*,⁹ in which the Supreme Court defined federalism as

a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and

7. *Arizona v. Manypenny*, 608 F.2d 1197 (9th Cir. 1979).

8. However, the question whether the District of Columbia or the Virgin Islands, neither of which is a sovereign state, can appeal such a decision has been litigated. In *United States v. Cefaratti*, 202 F.2d 13 (D.C. Cir. 1952), cert. denied, 345 U.S. 907 (1953), the court of appeals found that the government had broad rights of appeal in the District of Columbia because of a statute passed by Congress to govern criminal prosecutions in the District of Columbia. D.C. CODE § 23-105 (1951) (current version at D.C. CODE § 23-104 (1973)).

In *Government of Virgin Islands v. Hamilton*, 475 F.2d 529 (3d Cir. 1973), the Third Circuit ruled that the government of the Virgin Islands had no right to appeal from an adverse decision of the federal district court in a criminal case because there was no statutory authorization for such an appeal. *Hamilton* is distinguishable from the instant case. The Virgin Islands is a territory and the federal district court serves as an appellate court for the Municipal Court of the Virgin Islands, while in the instant case *Arizona* is a sovereign state and the criminal case was removed to federal court under 28 U.S.C. § 1442(a)(1) (1976).

9. 401 U.S. 37 (1971). *Younger v. Harris* involved an attempt by a criminal defendant to have a district attorney enjoined from prosecuting him under an act that was allegedly unconstitutional on its face. A three-judge district court declared the act overbroad and void for vagueness and granted the injunction. The Supreme Court reversed, relying in part on the concept of federalism. See Dittfurth, *The Younger Abstention Doctrine: Primary State Jurisdiction Over Law Enforcement*, 10 ST. MARY'S L.J. 445 (1979).

protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.¹⁰

The Supreme Court has recognized that preventing and dealing with crime is one of these legitimate state activities and "much more the business of the States than it is of the Federal Government."¹¹

The recognition that dealing with crime is primarily the business of the states has led to "a strong judicial policy against federal interference with state criminal proceedings."¹² Not only have the courts adhered to this policy, but "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts."¹³ And yet, the federal government has recognized, by enacting 28 U.S.C. § 1442¹⁴ and its predecessors, that it must interfere in certain state prosecutions in order to protect itself in the exercise of its constitutional powers.¹⁵ The federal government needs to intervene in prosecutions against federal officers for acts committed under color of their offices by removing the prosecutions to federal court because the federal government

can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, . . . and if the general government is powerless to interfere at once for their protection, . . . the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its

10. 401 U.S. at 44. The Supreme Court defined the related notion of "comity" as a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id.

11. *Patterson v. New York*, 432 U.S. 197, 201 (1977).

12. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 600 (1975).

13. *Younger v. Harris*, 401 U.S. at 43.

14. (1976). This statute provides for removal to federal court of criminal prosecutions against federal agents or officers. For the text of subsec. (a) of § 1442, see note 2 *supra*.

15. *Tennessee v. Davis*, 100 U.S. 257, 262-63 (1879).

laws. . . . And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.¹⁶

The conflict between a state's interest in enforcing its own laws and the federal government's interest in protecting its officers and agents in the legitimate performance of their duties creates a serious problem for federalism. The removal approach is an elegant solution to this problem. It allows a state to continue its prosecution while permitting the defendant to plead a defense of governmental immunity¹⁷ in a forum receptive to that defense. If the federal courts are evenhanded in their application of the law, the removal approach does not upset the balance of federalism; federal interests and rights can be vindicated in a way that does not unduly interfere with legitimate state activities.

B. *Choice of Law in Criminal Cases Removed to Federal Court*

The *Erie* doctrine governing choice of law in civil diversity cases does not apply in criminal removal cases.¹⁸ Instead, choice of law in criminal removal cases is governed by a separate set of rules that has grown out of the special considerations in this area of the law. For instance, the federal courts look to state law to define the criminal offense.¹⁹ If they did not, removal would defeat the prosecution because there is usually not a comparable federal law to apply. And, of necessity, federal law must govern the defense of official immunity,²⁰ which the removal statutes were designed to safeguard.²¹ Otherwise, a state could abrogate the official immunity defense.

The Federal Rules of Criminal Procedure "apply to criminal

16. *Id.* at 263.

17. "If a person is authorized to do an act by the law of the United States, and if he does no more than what is necessary and proper for him to do, he is innocent of any crime against the laws of any state." *Arizona v. Manypenny*, 445 F. Supp. 1123, 1127 (D. Ariz. 1977). See *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977) (discussing the history and present status of the official immunity defense).

18. The Rules of Decision Act, 28 U.S.C. § 1652 (1976), upon which the *Erie* doctrine is based, is limited by its terms to civil cases. Decisions subsequent to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), have limited the holding of *Erie* almost exclusively to diversity cases. *E.g.*, *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947).

19. *North Carolina v. Gosnell*, 74 F. 734, 735 (C.C.W.D.N.C. 1896).

20. *Tennessee v. Davis*, 100 U.S. 257, 272 (1879).

21. *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

prosecutions removed to the United States district courts from state courts and govern all procedure after removal."²² The Advisory Committee on Rules states in a note following Rule 54 that in removal cases under 28 U.S.C. § 1442 "the Federal court applies the substantive law of the State, but follows Federal procedure."²³

The case law supports the Advisory Committee's formulation. In *Tennessee v. Davis*²⁴ the Supreme Court held a predecessor of section 1442 constitutional and answered for the first time the question whether there was any mode of procedure prescribed in criminal removal cases. In that case the Court said:

[T]he mode of trial is sufficiently obvious. The circuit courts of the United States have all of the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. . . . [I]n cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.²⁵

The cases subsequent to *Tennessee v. Davis* have uniformly agreed that state law should govern the substantive rights of the parties and federal law should govern the procedure.²⁶ Unfortunately, not everything is clearly substantive or clearly procedural, and case law does not provide much guidance for making that distinction in a close case.

C. Limitations on Appeals by the Prosecution

The state prosecution's right of appeal was called into question in *Manypenny* because of the rule prohibiting appeals by the prosecution without express statutory authorization. This rule has its roots in English common law.²⁷ It stems from the same

22. FED. R. CRIM. P. 54(b)(1).

23. 18 U.S.C. app. Rule 54(b)(1) note (1976).

24. 100 U.S. 257 (1879).

25. *Id.* at 271-72. See also *Maryland v. Soper* (No. 1), 270 U.S. 9, 32 (1926).

26. See, e.g., *Miller v. Kentucky*, 40 F.2d 820, 822 (6th Cir. 1930); *Carter v. Tennessee*, 18 F.2d 850, 855 (6th Cir. 1927); *Virginia v. Felts*, 133 F. 85, 92 (C.C.W.D. Va. 1904).

27. See *Will v. United States*, 389 U.S. 90, 96-97 (1967); *Carroll v. United States*, 354 U.S. 394, 400 (1957); *United States v. Sanges*, 144 U.S. 310, 312 (1892). See generally Article, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & Soc. PROB. 295 (1976); Comment, *Double Jeopardy Limitations on Appeals by the Govern-*

considerations that spawned the double jeopardy prohibition²⁸—“a general policy in favor of finality and against repeated vexations”²⁹ of the defendant. Early in the history of this country an overwhelming majority of state courts adopted this rule limiting appeals by the prosecution.³⁰ In response, most state legislatures enacted statutes that gave the prosecution a right of appeal at least in certain circumstances.³¹

Although state courts quickly adopted rules limiting the right of state prosecutors to appeal, the Supreme Court of the United States was not confronted with the question whether federal prosecutors had an inherent right of appeal until *United States v. Sanges*³² in 1892. In *Sanges* the Supreme Court followed the weight of state authority and adopted the rule that the prosecution³³ has no right of appeal without express authorization by statute.³⁴ In subsequent decisions federal courts have unalteringly adhered to this rule requiring express statutory authorization; a general grant of jurisdiction such as 28 U.S.C. § 1291³⁵ has not

ment in Criminal Cases, 80 DICK. L. REV. 525 (1976); Comment, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 TEX. L. REV. 303 (1974); Note, *Limited Right of Appeal for the State*, 14 Hous. L. REV. 735 (1977).

28. U.S. CONST. amend. V.

29. Article, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 COLUM. J.L. & Soc. PROB. 295, 303 (1976).

30. For a survey of early state cases, see *United States v. Sanges*, 144 U.S. 310, 312 (1892). According to one commentator, a few state courts have held that their states have an inherent right of appeal, at least in some circumstances. See Note, *Criminal Procedure—Right of the State to Appeal*, 45 Ky. L.J. 628, 628 & n.3 (1957).

31. One commentator has noted:

Today only Texas, Georgia, and Nevada have no right of appeal in criminal cases from an adverse judgment; conversely, three states, Connecticut, Vermont, and Wisconsin, have a right of appeal equal to defendant's. Between these extremes are jurisdictions which recognize by statute the State's right of appeal from pretrial motions and on questions of law.

Note, *Limited Right of Appeal for the State*, 14 Hous. L. REV. 735, 737 (1977).

32. 144 U.S. 310 (1892).

33. The Court's adoption of this rule in *Sanges* has been binding only on federal prosecutors. Each state has been free to adopt or reject this rule. And it is not clear whether all states have adopted the rule. See *State v. Lee*, 64 Conn. 265, 30 A. 1110 (1894). It was not until *Benton v. Maryland*, 395 U.S. 784 (1969), that the Court even held that the fifth amendment's double jeopardy prohibition applied to the states through the fourteenth amendment.

34. 144 U.S. at 312, 323.

35. (1976). Known as the final judgment rule, § 1291 reads:

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.

been enough.³⁶

Congress responded to *Sanges* and its progeny with the Criminal Appeals Act of 1907,³⁷ which gave the government limited rights of appeal. In 1971 Congress amended the Act,³⁸ broadening the government's right of appeal to all cases in which the Constitution does not prohibit an appeal.³⁹ The legislative history of the 1971 amendments makes it clear that Congress intended to improve the effectiveness of law enforcement and the quality of criminal justice by removing archaic barriers to appeals by federal prosecutors.⁴⁰

II. INSTANT CASE

In the instant case the Ninth Circuit was confronted with the novel question: Does a state prosecution have a right of appeal in a criminal case removed to federal court? Although recognizing that their decision would substantially affect "the delicate balance of our federal system,"⁴¹ the majority held that there was no statutory authorization for such an appeal.

The court applied the widely accepted rule that the prosecution has no right to appeal an adverse decision without express statutory authorization. After examining the federal enabling statute, 18 U.S.C. § 3731,⁴² and its legislative history,⁴³ the majority concluded that since Congress had not considered appeals by state prosecutors, the statute should be strictly construed as au-

36. See, e.g., *Dibella v. United States*, 369 U.S. 121, 130 (1962).

37. Act of Mar. 2, 1907, ch. 2564, 34 Stat. 1246 (current version at 18 U.S.C. § 3731 (1976)).

38. Act of Jan. 2, 1971, Pub. L. No. 91-644, § 14(a), 84 Stat. 1890 (codified at 18 U.S.C. § 3731 (1976)).

39. *United States v. Wilson*, 420 U.S. 332, 337 (1975). See generally 1978 B.Y.U. L. REV. 742.

40. S. REP. No. 1296, 91st Cong., 2d Sess. 2, 18-19 (1970).

41. 608 F.2d at 1200.

42. (1976). The statute provides in part:

In a criminal case *an appeal by the United States* shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The provisions of this section shall be liberally construed to effectuate its purposes.

18 U.S.C. § 3731 (1976) (emphasis added).

43. S. REP. No. 1296, 91st Cong., 2d Sess. 2 (1970); H.R. REP. No. 1768, 91st Cong., 2d Sess. 21 (1970).

thorizing only appeals by federal prosecutors. The majority also held that the court could not look to a state statute to authorize an appeal by state prosecutors because federal law rather than state law governs cases removed to federal court under 28 U.S.C. § 1442(a)(1).⁴⁴

Judge Kennedy, in a dissenting opinion, expressed concern that the decision would create serious federalism problems. He offered several bases for appellate jurisdiction to avoid these problems. First, he argued that 18 U.S.C. § 3731 should be liberally construed to authorize an appeal by a state prosecuting in federal court. Second, he argued that 28 U.S.C. § 1291⁴⁵ granted appellate jurisdiction. Finally, he rejected the majority's conclusion that federal law governed all aspects of the case. Citing a note of the Advisory Committee on Rules that states that in section 1442 removal cases, "the Federal Courts apply the substantive law of the State, but follow Federal procedure,"⁴⁶ the dissent suggested that the right of appeal could be considered substantive, thus coming under state law.

III. ANALYSIS

A. *The Effect of the Manypenny Decision*

The decision in *Manypenny* creates an unfortunate situation: when a criminal prosecution is removed to federal court, the state is denied any right of appeal that it would otherwise have had in its own courts. The denial of such a substantial right is a serious invasion of state sovereignty, an invasion that upsets the delicate balance of the federal system. Moreover, the decision places unlimited power in the hands of a federal trial judge to acquit another federal official who may have committed serious offenses against a state or its citizenry. With such power concentrated in the hands of one person whose actions are not subject to review, the potential for abuse is great. The result of the decision is as anomalous as it is unfortunate when contrasted with the congressional policy allowing the federal government to bring any appeal not barred by the Constitution,⁴⁷ a policy formulated to prevent district court judges from frustrating congressional objectives in law enforcement.⁴⁸

44. 608 F.2d at 1200.

45. See notes 35-36 and accompanying text *supra*.

46. 18 U.S.C. app. Rule 54(b)(1) note (1976).

47. See note 39 and accompanying text *supra*.

48. C. WRIGHT, LAW OF FEDERAL COURTS § 105 (3d ed. 1976).

B. *Flaws in the Court's Analysis*

The majority in *Manypenny* recognized some of the negative consequences that would result from their decision but felt compelled by their analysis of the applicable law to deny the state a right of appeal.⁴⁹ However, this conclusion is not the only rational conclusion that can be drawn; as the dissent pointed out, there are other ways to analyze the issues, some of which lead to a better result. Had the court used an analytical approach that more squarely faced the issues presented by this case, it probably would have decided the case differently.

The major flaw in the court's analytical approach was that it did not first consider whether state or federal law governed the state's right of appeal in a criminal removal case. Instead, the court *a priori* assumed that the case was governed by the federal version of the rule requiring express statutory authorization for an appeal by the prosecution. Implicit in the application of the federal version of the rule was the assumption that federal law governs the right of appeal in section 1442 removal cases. Consequently, the court first looked to a federal statute to satisfy the requirement of statutory authorization.

After deciding that the federal statute did not authorize an appeal by the state, the majority summarily dismissed the possibility that a state statute could provide such authorization.⁵⁰ While it is not impossible to conclude that state law does not apply in this context, the court's reasoning and the authority that it cited cannot support this conclusion.

The court's argument against using state law to authorize an appeal consisted of the following syllogism:⁵¹

First premise:

"In a case arising under federal law, federal law, rather than state law, controls."⁵²

Second premise:

"A case before the federal courts under § 1442(a)(1) is one

49. The majority in *Manypenny* stated:

We share the concerns expressed by Judge Kennedy in his dissent that the policy of § 3731, which is designed to "prevent erroneous trial court rulings from thwarting lawful prosecutions," is equally applicable to state prosecutions and federal prosecutions, and that not allowing state appeals in cases removed to the federal courts under § 1442(a)(1) has a substantial effect on the delicate balance of our federal system. However, we cannot rewrite § 3731 for Congress.

608 F.2d at 1200.

50. *Id.*

51. The court reversed the order of the parts, stating the conclusion first, then the second premise, and finally, the first premise.

52. 608 F.2d at 1200.

within the judicial power of the United States, for it arises under federal law.”⁵³

Conclusion:

“[We cannot] look to state law as providing Arizona with a right to appeal in this case.”⁵⁴

The court cited several civil cases⁵⁵ to support the first premise, and *Tennessee v. Davis*⁵⁶ to support the second. The authority used by the court to support its argument is faulty because (1) the distinction between civil law and criminal law weakens, if not destroys, the precedential value of the civil cases used to support the first premise, and (2) criminal removal cases do not “arise under” federal law in the same sense as do federal, nondiversity civil cases.⁵⁷

None of the civil cases cited by the court were grounded on rights created by state law. In every instance, the right sought to be enforced was created by federal statute.⁵⁸ Criminal removal cases originate under state law in state courts. In the context of a criminal removal case such as *Tennessee v. Davis*, the statement, “[a] case before the federal courts under § 1442(a)(1) is one within the judicial power of the United States, for it arises under federal law,”⁵⁹ means only that federal courts are constitutionally empowered to try a criminal case that has been removed from a state court pursuant to a federal statute. *Tennessee v. Davis* actually supports the conclusion that federal courts should try criminal removal cases under state substantive law using federal procedure.⁶⁰

53. *Id.*

54. *Id.*

55. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 456 (1942); *Deitrick v. Greaney*, 309 U.S. 190, 200-01 (1940); *Board of County Comm'rs v. United States*, 308 U.S. 343, 349-53 (1939); *United States v. Crain*, 589 F.2d 996, 998 (9th Cir. 1979).

56. 100 U.S. at 262-65.

57. Judge Choy, who wrote the opinion in *Manypenny*, may have relied too heavily on reasoning and authority from the opinion in *United States v. Crain*, 589 F.2d 996 (9th Cir. 1979), which he authored earlier in 1979. *Compare* 608 F.2d at 1200 *with* 589 F.2d at 998-99.

58. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and *Deitrick v. Greaney*, 309 U.S. 190 (1940), were based on violations of federal banking law; *Board of County Comm'rs v. United States*, 308 U.S. 343 (1939), was based on rights flowing from a federal statute and a treaty between the United States and an Indian nation; *United States v. Crain*, 589 F.2d 996 (9th Cir. 1979), was based on a loan transaction authorized by federal statute.

59. 608 F.2d at 1200.

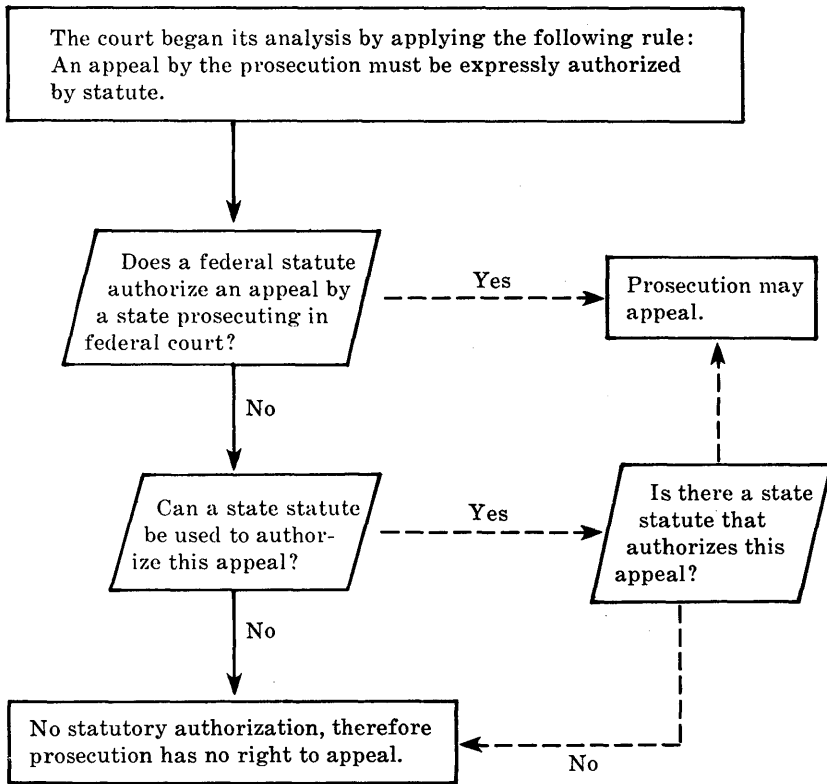
60. 100 U.S. at 271-72.

C. *An Alternative Analytical Approach*⁶¹

The first issue that should have been decided in *Manypenny* was whether state or federal law governs the state's right of ap-

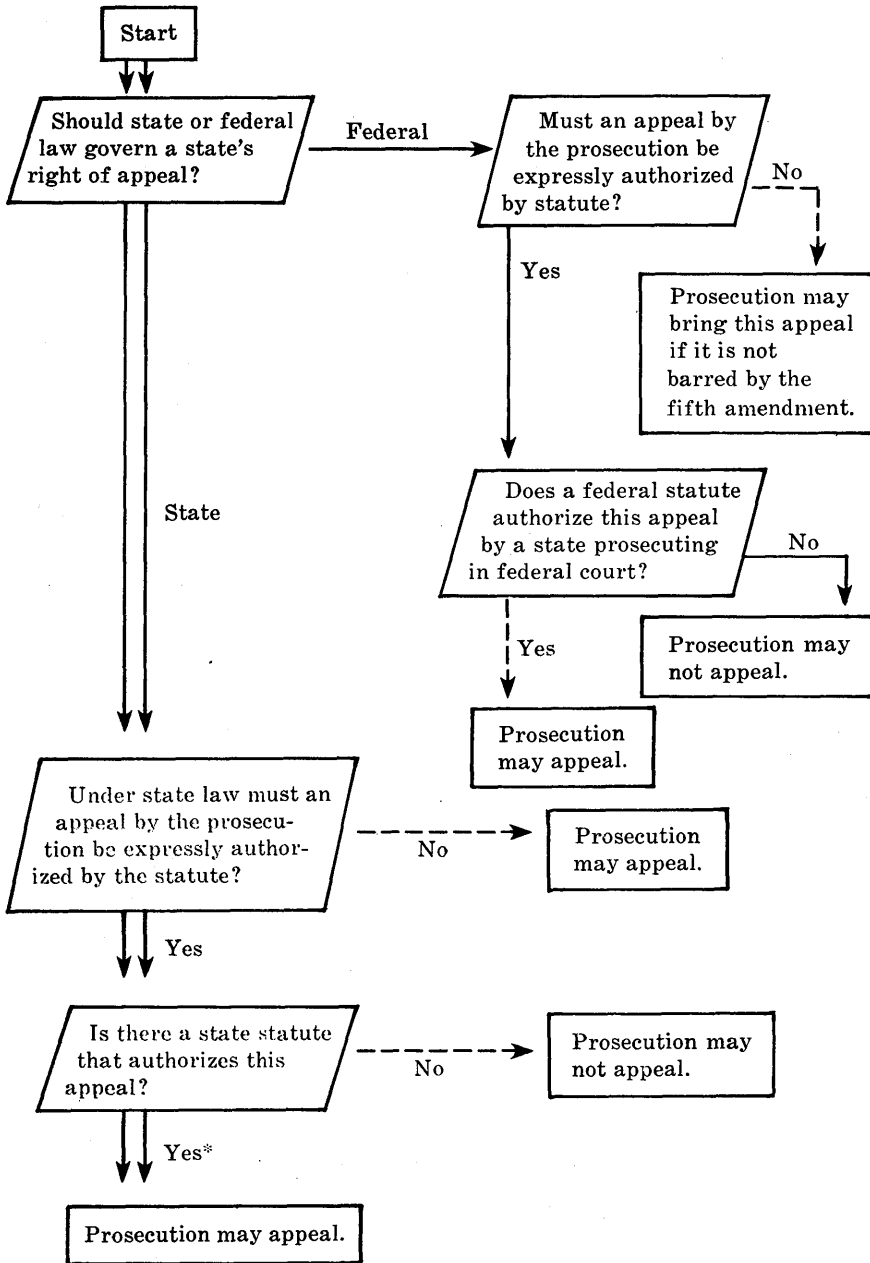
61. The following diagrams illustrate the analytical approach used by the *Manypenny* court and the analytical approach suggested by this Note:

Analytical Approach Used by the Manypenny Court



The solid lines represent the choices made by the court.
The dotted lines represent options that the court recognized but did not take.

Analytical Approach Suggested by this Note



The double solid lines represent the choices advocated by this Note. The solid lines indicate the path which the court would have had to follow to reach its result using this analytical approach. The dotted lines represent other options.

* ARIZ. REV. STAT. ANN. § 13-4032 (1979 Cum. Supp.) authorizes an appeal by the state from “[a]n order arresting judgment,” or “[a]n order made after judgment affecting the substantial rights of the state.” This statute could be used to authorize an appeal

peal. The case law and the Advisory Committee on Rules suggest a substantive-procedural test for deciding which law should govern.⁶² However, the case law does not classify the right of appeal as procedural or substantive. The only guidance given by criminal removal cases for making that distinction is dictum in *Virginia v. Felts*,⁶³ in which the court construed language in *Tennessee v. Davis*⁶⁴ "as a direction to adopt the state law in all respects except as to mere matters of procedure."⁶⁵ The time limits for taking an appeal and the manner in which an appeal can be taken would seem to be such matters of procedure. But the right of appeal is a substantial right, one which parties would jealously guard, and certainly not a *mere* matter of procedure. Indeed, in 18 U.S.C. § 3772,⁶⁶ the statute authorizing the Supreme Court to make rules governing procedure after verdict in criminal cases in federal court, Congress distinguished the right of appeal from matters of procedure saying, "The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals"⁶⁷ Based on this language in section 3772 and on a commonsense distinction between substance and procedure, the right of appeal appears to be substantive and, therefore, governed by state law.

Allowing state law to govern a state's right of appeal also satisfies the pertinent policy considerations. Federal interests are not jeopardized if state law continues to govern the state's right of appeal following removal. Federal courts have no difficulty applying state law,⁶⁸ and there is no danger of harming the federal interests that removal is designed to protect.⁶⁹ The federal government's interest in protecting its sovereign power is fully vindicated when removal takes place; its officers then have the privilege of pleading their defenses before a sympathetic forum. The

in *Manypenny*. See *Arizona ex rel. Dawson v. Superior Court*, 112 Ariz. 123, 538 P.2d 397 (1975); *Arizona v. Allen*, 27 Ariz. App. 577, 557 P.2d 176 (1976); *Arizona v. Gradillas*, 25 Ariz. App. 510, 544 P.2d 1111 (1976).

The dissent in *Manypenny* concluded that under state law the prosecution could appeal. 608 F.2d at 1202-03 (Kennedy, J., dissenting).

62. See text accompanying notes 22-26 *supra*.

63. 133 F. 85 (C.C.W.D. Va. 1904).

64. For the language from *Tennessee v. Davis*, see text accompanying note 25 *supra*.

65. 133 F. at 92.

66. (1976).

67. 18 U.S.C. § 3772 (1976).

68. *Tennessee v. Davis*, 100 U.S. at 271.

69. For a discussion of the purpose of the removal statute, see text accompanying notes 15-16 *supra*.

removal statutes were designed to do no more than insure federal officers this opportunity: "Neither immunity nor impunity is guaranteed the alleged offender; the statute merely transfers his trial to the Federal courts."⁷⁰ On the other hand, if the state's right of appeal is curtailed through the application of federal law when state criminal prosecutions are removed to federal courts, the state's sovereign interest in exercising its police powers is threatened. In such circumstances, a single federal judge could frustrate the state's legitimate law enforcement objectives by unreasonably expanding the defense of official immunity. The judge's error would never be remedied because it could not be reviewed.⁷¹

When the federal interests are balanced against the state's interests in the question of which law should govern the right of appeal in criminal removal cases, federal interests do not outweigh the state's interest in protecting its police powers. Therefore, the court should apply the substantive-procedural test, which dictates that state law should govern.

Assuming that it does decide that state law governs, the court should next consider whether state law requires express statutory authorization for an appeal by the prosecution. If there is no requirement for statutory authorization, the state may bring any appeal that is not barred by the double jeopardy prohibition. If express authorization is required, the court should examine the state's statutes for such authorization. For most states, the court will find authorization for appeal of at least some lower court actions.⁷²

Even if the court decides that the right of appeal is procedural, and therefore governed by federal law, it does not necessarily follow that the state has no right of appeal. The statute, 18 U.S.C. § 3731, which authorizes appeals "by the United States," can be interpreted to authorize appeals by the states. The majority's strict interpretation of section 3731 is reasonable but not

70. *North Carolina v. Carr*, 386 F.2d 129, 131 (4th Cir. 1967).

71. For example, in the instant case, the trial judge did not know if the defense of official immunity should be treated as a matter of fact or as a matter of law. *Arizona v. Manypenny*, 445 F. Supp. 1123, 1127 (D. Ariz. 1977). Such a question could not be resolved until a defendant appeals, because, under the *Manypenny* analysis, the state cannot appeal. If judges hereafter decide to treat it as a matter of law and always acquit defendants claiming that defense, the state can never test the correctness of the decision to characterize it as a matter of law.

72. See note 31 *supra*.

compelling, especially in light of the statement in section 3731 that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."⁷³ In *United States v. Wilson*⁷⁴ the Supreme Court followed this admonition and ruled that federal prosecutors could appeal from judgments of acquittal, although section 3731 mentions only decisions, judgments, or orders "dismissing an indictment or information." A construction of section 3731 allowing states to appeal would be consistent with the Court's approach in *Wilson*.

Construing section 3731 to give the states a right of appeal would also be consistent with the way the *Manypenny* court applied the federal version of the rule against appeals by the prosecution to the state. Of necessity, the federal version of the rule applies only to the federal government.⁷⁵ By applying the federal version of the rule to the state, the court places the state in the position of the federal government. Once in the position of the federal government for purposes of applying the rule limiting appeals to those authorized by statute, the state should be left in that position for purposes of applying section 3731.

Even though section 3731 can reasonably be interpreted to authorize appeals by state prosecutions, there are some inherent problems with applying federal law to decide if a state prosecution has a right of appeal. If section 3731 is construed to give a right of appeal only to the United States, problems of federalism arise.⁷⁶ On the other hand, if section 3731 is construed to grant a right of appeal to states in addition to the federal government, some states will have greater rights of appeal in federal court than they would have in their own courts.⁷⁷ In those states, defendants with a right of removal may be chilled in the exercise of this right by the knowledge that the state has greater rights of appeal in federal court.

73. 18 U.S.C. § 3731 (1976).

74. 420 U.S. 332 (1975).

75. See note 33 *supra*.

76. Congress could solve the federalism problems by amending § 3731 to provide for appeals by state prosecutions in federal court.

77. For a discussion of the limitations on the rights of the various states to appeal in criminal cases in their own courts, see note 31 *supra*. As interpreted in *United States v. Wilson*, 420 U.S. at 337, § 3731 grants the right of appeal in all cases in which appeal by the prosecution is not barred by the double jeopardy prohibition.

IV. CONCLUSION

The *Manypenny* decision is not based on thorough analysis. The court failed to adequately consider whether state or federal law should govern the state's right of appeal. It dismissed the possibility of using state law to authorize an appeal, relying on authority that does not apply to criminal removal cases. The court also failed to consider the substantive-procedural test that has previously been used in criminal removal cases for determining which law should govern. Had the court applied this test it probably would have decided that the right of appeal was substantive, and therefore governed by state law. Moreover, the court's decision does not satisfy policy considerations involving the balance of federalism that apply to the issues. The denial of a state's right of appeal in a criminal removal case when the state would have had a right of appeal in its own courts is a serious invasion of that state's sovereignty, an invasion that is not necessary to effectuate the purposes of the removal statutes. These considerations of federalism and a careful analysis of the applicable law lead to the conclusion that state law should govern the right of appeal in criminal removal cases.

J. Grant Walker