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## Controlling the Criminal Justice System: Colorado as a Case Study

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# CONTROLLING THE CRIMINAL JUSTICE SYSTEM: COLORADO AS A CASE STUDY

GABRIEL J. CHIN<sup>†</sup>

## ABSTRACT

Criminal justice reformers have recognized that many in the criminal justice system have the power to incur expenses that will be paid by someone else; a city police officer can make an arrest, for example, that will result in jail expenses paid for by the county, a county prosecutor can charge a crime which will result in a prison sentence paid for by the state. There is another, largely unexamined means by which actors in the criminal justice system can externalize cost: states have donated law enforcement authority to the federal government, and vice versa. Using the example of Colorado, this Article maps out the ways in which Colorado shares arrest and prosecutorial power. The United States, in turn, makes it possible for Colorado law enforcement officers to make arrests for federal crimes, and Colorado prosecutors to prosecute them. Because charging authority (and therefore spending authority) has been diffused, it will be more difficult for decision makers in one jurisdiction to establish binding criminal justice policy, even in its own courts.

## TABLE OF CONTENTS

INTRODUCTION.....	497
I. CONSTITUTIONAL POWERS OF STATE OFFICERS .....	499
II. BROAD DIFFUSION OF STATE LAW ENFORCEMENT AUTHORITY.....	501
III. SHARED STATE AND FEDERAL POWERS .....	503
<i>A. Colorado Donation of Powers to the United States</i> .....	503
<i>B. Federal Donation of Authority to Colorado</i> .....	505
CONCLUSION .....	508

## INTRODUCTION

Contemplation of justice reinvestment requires appreciation of the diffusion of authority in the system. A growing body of scholarship recognizes the consequences of the lack of centralization of authority in the system, and the lack of financial accountability.<sup>1</sup> A police officer making

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1. W. David Ball and others have authored recent important works. See W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060, 1063–64 (2014); W. David Ball, *Tough on Crime (on*

an arrest, a prosecutor charging a case, and a judge imposing a sentence spends tax dollars which are often or usually paid for by a wholly separate government agency or branch.<sup>2</sup> Put another way, the system gives no suggestion to police, prosecutors, and judges that their decisions should be made with awareness of the costs. If the responsible leaders of governments paying these costs had a choice, they might often conclude, for example, that a ten-year sentence plus hiring a police officer would be a better use of resources than a forty-year sentence, or that mental health or drug addiction treatment for a particular offender was more likely to promote public safety than a prison sentence. But in many instances, the prosecutor's options are criminal charges or nothing, a judge's options are prison or nothing, resulting in counter-productive or suboptimal results at great expense.

This Article addresses some of the structural difficulties jurisdictions will face in trying to rein in their criminal justice systems. The central observation is this: just as there can be no fire without an ignition source, oxygen, and combustible material, there can be no criminal conviction without someone willing and able to investigate crime and present it to a prosecutor, someone willing and authorized to prosecute it, and a court. Our system widely diffuses authority to investigate arrest and charge—there are many peace officers and many prosecutors who have broad discretion about the cases they should pursue.<sup>3</sup> The system does not widely disseminate judicial authority; a Drug Enforcement Agency (DEA) agent or Colorado State Patrol officer with a drug felony can pursue the case only in the U.S. District Court for the District of Colorado or the state District Court for the appropriate county.<sup>4</sup> Yet, state and federal criminal courts have perhaps the least discretion of any actor in the system about charging; unlike police and prosecutors, they have almost no authority to reject cases properly brought before them.<sup>5</sup> Accordingly, each of the many law enforcement and prosecutorial entities in the criminal justice system

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*the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates—And Why It Should*, 28 GA. ST. L. REV. 987, 1004 (2012); see also, e.g., Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 678–79 (2016) (“Put briefly, prosecutors do not have to internalize the costs of their sentencing decisions because they do not have to run and pay for the prisons and jails. That responsibility falls to the wardens who run the prisons and the sheriffs who run the jails.”); Michael Polakowski & Michael Gottfredson, *The Use of Prisons as a Commons Problem: An Exploratory Study*, 33 J. RES. CRIME & DELINQ. 70, 74 (1996) (examining common pool use of prison space and promoting the allocation of prison space based on a jurisdiction's crime rate). Franklin Zimring and Gordon Hawkins coined the phrase the “correctional free lunch.” FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991). The economics literature also addresses the issues. See, e.g., Kenneth L. Avvio, *The Economics of Prisons*, 6 EUR. J.L. & ECON. 143, 143 (1998).

2. See Gershowitz, *supra* note 1, at 678–79.

3. *Id.* at 677.

4. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”); COLO. CONST. art. II, § 16.

5. See notes 53–54, *infra*, and accompanying text.

can attempt to implement its own criminal justice policy, seeking to persuade like-minded others to help carry it out. Because the criminal justice system now widely disseminates investigating and charging power, to make it possible to impose a unified criminal justice strategy will require significant structural changes.

### I. CONSTITUTIONAL POWERS OF STATE OFFICERS

One structural challenge in controlling the criminal justice system legislatively comes from Supreme Court cases. Supreme Court cases sometimes say that particular criminal justice actions are permitted only when founded on a statute meeting particular constitutional criteria, for example, the wiretap case of *Berger v. New York*.<sup>6</sup> More often though, the Court declares that certain conduct by state officers is lawful even without an authorizing statute.<sup>7</sup> That is, the Court reads the Constitution, essentially, as granting a set of specific powers to police which are reasonable even if unauthorized by the law of the jurisdiction empowering and paying the police.<sup>8</sup> Thus, in *Terry v. Ohio*, the Supreme Court upheld the practice of stop and frisk<sup>9</sup> apparently without considering whether the Ohio legislature believed it to be legitimate or desirable.<sup>10</sup>

It is not merely that the Court grants police the power to commit acts not authorized by state law. In *Virginia v. Moore*,<sup>11</sup> the Court held the Fourth Amendment deemed reasonable even actions prohibited by state law.<sup>12</sup> Specifically, “warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.”<sup>13</sup>

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6. 388 U.S. 41, 55 (1967) (“[W]e have concluded that the statute is deficient on its face . . .”).

7. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968); *id.* at 31–32 (Harlan, J., concurring).

8. See *Terry*, 392 U.S. at 32 (Harlan, J., concurring).

9. The Court’s holding was as follows:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

*Id.* at 30–31 (majority opinion).

10. *Id.* at 31–32 (Harlan, J., concurring).

11. 553 U.S. 164 (2008).

12. *Id.* at 178.

13. *Id.* at 176. The Court reasoned that the protection of the Fourth Amendment should not vary jurisdiction by jurisdiction, an odd and, in my view, unpersuasive reason standing alone in that officers generally work in one jurisdiction, and the criminal law of each jurisdiction varies from state to state and between the states and the United States. Accordingly, a well-trained officer is going to have to know the specifics of that jurisdiction’s criminal offenses and procedures.

Of course, state legislatures and courts can pass their own laws and rules regulating the criminal justice system and its actors.<sup>14</sup> But here, too, federal law imposes limits. To a significant degree, states and localities can be subjected to federal statutory requirements.<sup>15</sup> And while the principle of *Printz v. United States*<sup>16</sup> provides that states and their employees cannot be “commandeered” to carry out federal legislation,<sup>17</sup> there is some authority that Congress can permit state employees to engage in conduct.<sup>18</sup> A provision of the Immigration and Nationality Act (INS) invites government officials—not necessarily limited to law enforcement officers—to exchange immigration information with the INS:

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.<sup>19</sup>

Many localities have policies restricting or prohibiting their officers from investigating immigration matters,<sup>20</sup> one of them, the City of New York, sued to have the policy declared unconstitutional.<sup>21</sup> The Second Circuit held that the United States had the power to insist that state and local employees disobey the instructions of their employers: “states do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs.”<sup>22</sup> Federal displacement of state authority over its employees in a regime when the federal government cannot direct and control state employees directly creates employees who, on this issue, can act unilaterally and be answerable to no one.<sup>23</sup> Another example of federal displacement of state authority is the Law Enforcement Officer’s Safety Act, allowing

14. See *id.*; *McNabb v. United States*, 318 U.S. 332, 341 (1943) (recognizing “supervisory authority over the administration of criminal justice in the federal courts”); *People v. Renander*, 151 P.3d 657, 660 (Colo. App. 2006) (noting court’s “supervisory authority to protect the integrity of the judicial process”).

15. See, e.g., *Reno v. Condon*, 528 U.S. 141, 143 (2000); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530–31 (1985).

16. 521 U.S. 898 (1997).

17. *Id.* at 928, 935.

18. See, e.g., 8 U.S.C. § 1373(a) (2012).

19. *Id.*; see also 8 U.S.C. § 1644 (“Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

20. See *Ingrid v. Eagly*, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 256–57 (2016).

21. *City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999).

22. *Id.* at 35. But see *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 724 (Cal. Ct. App. 2009) (upholding LAPD rule restricting immigration investigations).

23. The home rule provisions of Colorado’s constitution also may impose some limits on state regulation of peace officers. See, e.g., *Fraternal Order of Police, Colo. Lodge No. 27 v. City & Cty. of Denver*, 926 P.2d 582, 584–585 (Colo. 1996).

specified state and local police to carry firearms nationally, without regard to state law, or their own department's policies.<sup>24</sup>

## II. BROAD DIFFUSION OF STATE LAW ENFORCEMENT AUTHORITY

Colorado law makes many categories of persons peace officers, with powers to arrest,<sup>25</sup> apply for, and execute warrants<sup>26</sup> or orders to produce records,<sup>27</sup> and sign a summons and complaint.<sup>28</sup> Not surprisingly, "peace officers" include police officers of a municipal police department,<sup>29</sup> sheriffs and deputy sheriffs,<sup>30</sup> town marshals and deputy marshals,<sup>31</sup> reserve police deputy sheriffs, deputy marshals,<sup>32</sup> Officers of the Colorado State Patrol,<sup>33</sup> and agents of the Colorado Bureau of Investigation.<sup>34</sup> But the fifty or so categories listed in the Colorado Revised Statutes also include, for example, the Commissioner of Agriculture<sup>35</sup> and members of the Public Utilities Commission.<sup>36</sup>

District attorneys are the principal prosecutors in the state,<sup>37</sup> and they may get investigative support and case referrals from the police and sheriffs in their counties. However, they do not need to rely on other agencies. They may employ investigators who are peace officers.<sup>38</sup> Indeed, district attorneys, including deputy, assistant, and special assistant district attorneys, are themselves peace officers.<sup>39</sup> Similarly, while the attorney general has more constrained criminal jurisdiction, attorney general investigators are peace officers,<sup>40</sup> as are the Attorney General and deputies and assistants involved in criminal enforcement or who are so designated.<sup>41</sup>

24. 18 U.S.C. § 926B(a) (2012).

25. COLO. REV. STAT. § 16-3-102 (2016).

26. *Id.* § 16-3-305(5).

27. *Id.* § 16-3-301.1(5)(a).

28. *Id.* § 16-2-104.

29. *Id.* § 16-2.5-105.

30. *Id.* § 16-2.5-103(1).

31. *Id.* § 16-2.5-108.

32. *Id.* § 16-2.5-110(1)(b).

33. *Id.* § 16-2.5-114.

34. *Id.* § 16-2.5-113.

35. *Id.* § 16-2.5-118.

36. *Id.* § 16-2.5-143.

37. *People ex rel. Losavio v. Gentry*, 606 P.2d 57, 62 (Colo. 1980).

38. COLO. REV. STAT. § 16-2.5-133 ("A district attorney chief investigator and a district attorney investigator are peace officers whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.")

39. *Id.* § 16-2.5-132 ("A district attorney, an assistant district attorney, a chief deputy district attorney, a deputy district attorney, a special deputy district attorney, and a special prosecutor are peace officers whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.")

40. *Id.* § 16-2.5-129 ("An attorney general criminal investigator is a peace officer whose authority shall include the enforcement of all laws of the state of Colorado and who shall be certified by the P.O.S.T. board.")

41. *Id.* § 16-2.5-128 ("The attorney general, chief deputy attorney general, solicitor general, assistant solicitors general, deputy attorneys general, assistant attorneys general of criminal enforcement, and certain other assistant attorneys general and employees of the department of law who are

There has been litigation about the authority of peace officers who are off duty and with regard to those working in a limited geographical jurisdiction. The Colorado Supreme Court has held that peace officers may make arrests off duty.<sup>42</sup> However, conviction of a suspect for resisting arrest based on an off-duty arrest may require evidence that the arrest was authorized by the employing agency.<sup>43</sup>

The Colorado Supreme Court has recognized that peace officers may investigate throughout the state if they are working on crimes that may have taken place in their jurisdiction.<sup>44</sup> However, in *People v. Wolf*,<sup>45</sup> the Court held that officers could generally only make arrests within their jurisdiction, yet declined to impose an exclusionary sanction because the arrest was made based on probable cause.<sup>46</sup> Justice Quinn dissented, insisting that a geographical restriction “help[s] to preserve the political autonomy of municipal and county subdivisions of government by limiting the extraterritorial authority of municipal police officers to the carefully defined exigencies therein described.”<sup>47</sup> The Court later stated “that in many situations citizens of a particular community may best be served by the requirement that local officers familiar with local neighborhoods accompany peace officers from other jurisdictions seeking to arrest a defendant allegedly present in the community.”<sup>48</sup> The legislature at least partially disagreed, subsequently enacting a statute allowing peace officers to make arrests for crimes taking place in their presence anywhere in the state.<sup>49</sup>

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designated by the attorney general are peace officers whose authority shall include the enforcement of all laws of the state of Colorado and who may be certified by the P.O.S.T. board.”).

42. *People v. Rael*, 597 P.2d 584, 586 (Colo. 1979) (permitting off-duty arrests by holding “[a]uthority for performance of the duty, service or function is not limited by the person’s status as an On-duty peace officer”).

43. *People in Interest of J.J.C.*, 854 P.2d 801, 802 (Colo. 1993) (en banc); *see also* COLO. REV. STAT. § 16-3-109 (allowing off-duty arrests).

44. *People v. Thiret*, 685 P.2d 193, 200 (Colo. 1984), *abrogated on other grounds by* *People v. Begay*, 325 P.3d 1026 (Colo. 2014). Similarly, the attorney general may investigate in situations where prosecution is limited to a district attorney. *People v. Corr*, 682 P.2d 20, 23 n.10 (Colo. 1984) (“We agree with the Attorney General that statutory investigative powers can exist independent of prosecutorial powers.”).

45. 635 P.2d 213 (Colo. 1981) (en banc).

46. *Id.* at 217 (“Since the arrest in this case did not offend against constitutional restraints on unreasonable seizures, we decline to impose the exclusionary rule as a remedy for the statutory violation. *United States v. Crews*, 445 U.S. 463 (1980); *Michigan v. DeFillippo*, 443 U.S. 31 (1979). Nonetheless, we do not approve of the actions of the Denver police which were in violation of the statutes governing their authority to arrest. Law enforcement officers should not make excursions into another jurisdiction to ferret out crime without first securing approval of the law enforcement authorities in that jurisdiction, or to make an arrest when they are not in fresh pursuit.”).

47. *Wolf*, 635 P.2d at 218 (Quinn, J., dissenting).

48. *People v. Hamilton*, 666 P.2d 152, 155 (Colo. 1983).

49. COLO. REV. STAT. § 16-3-110(2) (2016) (“A peace officer shall have the authority to act in any situation in which a felony or misdemeanor has been or is being committed in such officer’s presence, and such authority shall exist regardless of whether such officer is in the jurisdiction of the law enforcement agency that employs such officer or in some other jurisdiction within the state of Colorado or whether such officer was acting within the scope of such officer’s duties when he or she observed the commission of the crime, when such officer has been authorized by such agency to so act.”).

Discretion is a key aspect of peace officer authority. Law enforcement officers are given power to make arrests or file charges, but they are not generally required to do so.<sup>50</sup> Similarly, in cases recognizing both the right to pursue or not pursue particular charges,<sup>51</sup> the Court has recognized “the prosecutorial discretion vested in the district attorney by separation of powers principles.”<sup>52</sup> However, courts enjoy no such discretion.<sup>53</sup> Colorado law provides that a sentencing judge “shall” impose a sentence as provided by law following a conviction.<sup>54</sup>

### III. SHARED STATE AND FEDERAL POWERS

#### A. Colorado Donation of Powers to the United States

Several provisions of Colorado law grant law enforcement powers to federal law enforcement officers. Of course, federal agents can act under federal authority in the course of their jobs with no requirement of state permission.<sup>55</sup> Nevertheless, the state has invited federal agents to enforce Colorado law in several provisions.<sup>56</sup>

First, Colorado law provides that specified federal law enforcement officers are Colorado peace officers, including agents and officers of the Federal Bureau of Investigation (FBI); Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE); U.S. Marshals Service; Federal Protective

50. Gregory Howard Williams, *Police Discretion: A Comparative Perspective*, 64 IND. L.J. 873, 894 (1989) (“Operational statutes with mandatory enforcement language are presently in decline and are being replaced by provisions much like those found in [COLO. REV. STAT. § 16-3-102 (1986)] . . . .”); see also *People v. Triantos*, 55 P.3d 131, 135 (Colo. 2002) (“[T]he statute grants arresting officers discretion to release or not, but nothing indicates the arrest cannot be a full custodial arrest, and the release after a search incident thereto.”).

51. *People v. Dist. Court*, 527 P.2d 50, 52 (Colo. 1974) (“The statute relating to deferred prosecution, above cited, provides that prosecution is deferred upon order of the court ‘with the consent of the defendant and the prosecution.’ The prosecutor’s consent is a matter of prosecutorial discretion just as is the choice of several possible charges to press or the decision to move for the dismissal of a criminal charge.” (citations omitted)).

52. *People v. Storlie*, 327 P.3d 243, 246 (Colo. 2014); see also *People v. Weiss*, 133 P.3d 1180, 1189 (Colo. 2006) (“Prosecutorial discretion to bring or not bring charges is extraordinarily wide.”).

53. Annotation, *Power of Court to Enter Nolle Prosequi or Dismiss Prosecution*, 69 A.L.R. 240 (1930) (“[T]he court has no power, in the absence of statute, to dismiss a prosecution or to enter a *nolle prosequi* to a good indictment, over the protest or objection of the prosecuting attorney.” (citing *People v. Zobel*, 130 P. 837, 838 (Colo. 1913) (further citations omitted))).

54. COLO. REV. STAT. § 18-1.3-401(6) (“In imposing a sentence to incarceration, the court shall impose a definite sentence which is within the presumptive ranges . . . unless it concludes that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in Section 18-1-102.5. If the court finds such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.”); see also, e.g., *Ex parte United States*, 242 U.S. 27, 42 (1916) (explaining that “the right to relieve from the punishment fixed by law and ascertained according to the methods by it provided, belongs to the executive department” not courts).

55. *Forrest v. Jack*, 294 U.S. 158, 162 (1935) (stating that a federal regulator “acts under federal authority and . . . may not be trammelled, controlled, or prevented by state laws”).

56. See COLO. REV. STAT. §§ 16-2.5-147(1), 16-2.5-151, 16-3-110.



Service; Homeland Security and Immigration and Customs Enforcement Agents;<sup>57</sup> and Secret Service.<sup>58</sup> In addition, apparently even if not a peace officer under the above sections, “[a] federal law enforcement officer who, pursuant to federal statutes and the policy of the agency by which the officer is employed, is authorized to use deadly physical force in the performance of his or her duties” can use force and make arrests based on a crime committed in the officer’s presence.<sup>59</sup> The Tenth Circuit upheld a conviction under the Assimilative Crimes Act for violating a Colorado statute prohibiting hindering a peace officer.<sup>60</sup> The Court explained that “whatever his status under federal law, Commander Lundy, along with his fellow Federal Protective Service officers, is clearly and expressly treated as a ‘peace officer’ for purposes of Colorado law.”<sup>61</sup>

Colorado law also provides for broad appointment of special deputy district attorneys.<sup>62</sup> The function of this appointment is to allow other state and federal prosecutors to prosecute Colorado crimes on their own, without requiring the time of the regular district attorney’s staff. These specials are unpaid, and

[s]uch special deputies shall only be appointed from among those persons holding office as attorney general, deputy attorney general, assistant attorney general, or special assistant attorney general of the state of Colorado, or as district attorney, assistant district attorney, chief deputy district attorney, or deputy district attorney of another judicial district, or as United States attorney or assistant United States attorney for the district of Colorado, or as city attorney or assistant city attorney of a city and county in this state, or an attorney employed by the Colorado district attorneys' council and actively licensed to practice law in the state of Colorado.<sup>63</sup>

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57. *Id.* § 16-2.5-147(1) (“A special agent of the federal bureau of investigation or the United States bureau of alcohol, tobacco, firearms, and explosives, a deputy or special deputy United States marshal, or an officer of the federal protective service of the United States department of homeland security immigration and customs enforcement, in any jurisdiction within the state of Colorado, is a peace officer whose authority is limited as provided in this section. The special agent, deputy or special deputy, or officer is authorized to act in the following circumstances: (a) The special agent, deputy or special deputy, or officer is: (I) Responding to a nonfederal felony or misdemeanor that has been committed in the presence of the special agent, deputy or special deputy, or officer; (II) Responding to an emergency situation in which the special agent, deputy or special deputy, or officer has probable cause to believe that a nonfederal felony or misdemeanor involving injury or threat of injury to a person or property has been, or is being, committed and immediate action is required to prevent escape, serious bodily injury, or destruction of property; (III) Rendering assistance at the request of a Colorado peace officer; or (IV) Effecting an arrest or providing assistance as part of a bona fide task force or joint investigation with Colorado peace officers; and (b) The agent, deputy or special deputy, or officer acts in accordance with the rules and regulations of his or her employing agency.”).

58. *Id.* § 16-2.5-151.

59. *Id.* § 16-3-110.

60. *United States v. Baldwin*, 745 F.3d 1027, 1035 (10th Cir. 2014).

61. *Id.*

62. *See* COLO. REV. STAT. § 20-1-201(1)(c).

63. *Id.* This statute legislatively overruled *People ex rel. Brown v. District Court*, 585 P.2d 593 (Colo. 1978), which held that an assistant attorney general could not also be appointed as a special assistant district attorney.

Special deputy district attorneys serve at the pleasure of the district attorney and, therefore, presumably could be closely supervised if such is the desire of the agency. On the other hand, the door could also be opened to an essentially wholesale delegation of authority to other lawyers, including Assistant U.S. Attorneys.<sup>64</sup> One could imagine that if a district attorney delegated authority to a member of another respected prosecutorial institution, close monitoring of the cases pursued would not be a high priority. After all, the prosecutions would come at no expense to the district attorney, and in the absence of disproportionately poor results or negative publicity, there might seem little point.

Presumably, no Colorado law enforcement official has the authority to supervise, instruct, or discipline the peace officers who are federal employees.<sup>65</sup> They may act, as may all Colorado peace officers, in their discretion.<sup>66</sup>

### *B. Federal Donation of Authority to Colorado*

Federal law also grants substantial state authority to state and local officials. In terms of arrest authority, it was once thought that the right of state officers to make an arrest for a federal crime turned on state law.<sup>67</sup> More recently the Court has held that even for arrests for state crimes, state law does not determine the validity of an arrest.<sup>68</sup> The Tenth Circuit has recognized the general rule that “[t]he federal constitution allows a state law enforcement officer to make an arrest for any crime, including federal immigration offenses.”<sup>69</sup> This is true if Colorado law fails to authorize or even prohibits such arrests for federal crimes.<sup>70</sup> In addition, state officers

64. COLO. REV. STAT. § 20-1-201(1)(c).

65. *Cf. Cunningham v. Neagle*, 135 U.S. 1, 54 (1890).

66. COLO. REV. STAT. § 16-2.5-101(1).

67. *United States v. Di Re*, 332 U.S. 581, 589–90 (1948) (“[I]n [the] absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity.”); *Marsh v. United States*, 29 F.2d 172, 173 (2d Cir. 1928) (“Assuming, however, that the trooper stopped the car for the violation of a local ordinance, and either saw the liquors or was told of them by the defendant, we have yet to determine whether his seizure of them was lawful. This, as we view it, is a question only of state law, unless we have recourse to some common law of federal criminal procedure, if any there be. We think that the state law authorized what he did, and find it unnecessary to consider the alternative.” (citations omitted)); 1 ORFIELD’S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 4:6, Westlaw (database updated June 2016) (cataloging older authorities looking to state law).

68. *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (“We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.”).

69. *United States v. Argueta-Mejia*, 615 F. App’x 485, 488 (10th Cir. 2015) (citing *United States v. Santana-Garcia*, 264 F.3d 1188, 1193–94 (10th Cir. 2001)); *see also United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999); *cf. George Bach, State Law to the Contrary? Examining Potential Limits on the Authority of State and Local Law Enforcement to Enforce Federal Immigration Law*, 22 TEMP. POL. & CIV. RTS. L. REV. 67, 67 (2012).

70. *United States v. Turner*, 553 F.3d 1337, 1346 (10th Cir. 2009) (“In light of *Moore*, whether APD had authority under Colorado law to arrest Mr. Turner is irrelevant. *Moore* makes clear that if officers have probable cause to believe that a crime has been committed in their presence, they may arrest and search incident to that arrest without violating the Fourth Amendment, even if such police

may actually be given the status of federal law enforcement officers, rather than acting in their state capacities.<sup>71</sup> Thus, they gain any specific powers or rights beyond arrest that might be applicable to particular federal officers. Federal law also provides that attorneys who are not federal prosecutors may be made Special Assistant U.S. Attorneys to participate in or pursue federal cases.<sup>72</sup>

It is frequently the case that state officers make arrests that wind up being prosecuted in federal court.<sup>73</sup> By the same token, federal arrests often result in Colorado prosecutions.<sup>74</sup> There is nothing inherently wrong with handing off arrests to a different level of government. In particular cases, sound reasons might militate in favor of prosecution by one jurisdiction rather than another; the state may have expertise and experience with respect to certain types of crimes, or preferable treatment or sentencing options.

Yet, this practice represents a grant of power to law enforcement; state and local police can “shop” cases to prosecutors willing to take them. If the local district attorney finds a case or category of cases unacceptable or to be a low priority, perhaps it can go to a U.S. Attorney to be prosecuted in federal court (and vice versa). It could even be prosecuted in state court by a special deputy district attorney who is a member of the U.S. Attorney’s Office or another state office. In principle, this means that Colorado (and the United States) could not remove their police and prosecutors from

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action is not authorized by state law. In other words, state law does not determine the reasonableness of a seizure under the Fourth Amendment. We recently applied *Moore* in *United States v. Gonzales*, 535 F.3d 1174, 1183 (10th Cir. 2008), which is directly on point here. In that case, we held that police officers’ traffic stop of the defendant, outside of their jurisdiction and in violation of Colorado law, did not violate the Fourth Amendment.”).

71. *United States v. Cook*, 794 F.2d 561, 564 (10th Cir. 1986) (explaining that “the two state police officers were deputized as Special Deputy United States Marshals” and thus were properly permitted to see otherwise confidential federal grand jury materials).

72. Victoria L. Killion, Comment, *No Points for the Assist? A Closer Look at the Role of Special Assistant United States Attorneys in the Cooperative Model of Federal Prosecutions*, 82 TEMP. L. REV. 789, 792–93 (2009); see also Susan Hoyt, *Daniel P. Rubinstein Appointed District Attorney for 21st Judicial District*, COLO. BAR ASS’N LEGAL CONNECTION (Oct. 7, 2015), <http://cbaclegalconnection.com/2015/10/daniel-p-rubinstein-appointed-district-attorney-for-21st-judicial-district> (noting that “[f]rom 2005 to 2011, [District Attorney Daniel P. Rubenstein] was cross-designated as a Special Assistant U.S. Attorney where he targeted cartels and organized crime”).

73. See *United States v. Novitsky*, 58 F. App’x 432, 433–34 (10th Cir. 2003) (allowing an arrest by a state officer for possession of a firearm by person with a felony conviction to be tried in federal court); *Moreland v. United States*, 347 F.2d 376, 377 (10th Cir. 1965) (allowing an arrest by a state officer for robbery of U.S. property); *United States v. Argueta-Mejia*, 166 F. Supp. 3d 1216, 1219 (D. Colo. 2014) (allowing a state officer to arrest an individual for reentry after deportation), *aff’d*, 615 F. App’x 485 (10th Cir. 2015); *United States v. Paetsch*, 900 F. Supp. 2d 1202, 1210–11 (D. Colo. 2012) (allowing an arrest by state officers for bank robbery), *aff’d*, 782 F.3d 1162 (10th Cir. 2015).

74. *United States v. Galindo*, 543 F. App’x 862, 867 (10th Cir. 2013) (“The evidence at trial established that Officer Skelton has worked with the DEA Task Force since 2007, has been formally deputized by the DEA, and carries DEA credentials . . . investigations that are managed and controlled by the DEA nevertheless are frequently charged in state court.”); *People v. Spring*, 713 P.2d 865, 871 (Colo. 1985) (allowing ATF agents arrest of a murder suspect), *rev’d*, 479 U.S. 564 (1987); *People v. Ridley*, 872 P.2d 1377, 1378 (Colo. App. 1994) (discussing a DEA investigation leading to state court drug prosecution).

particular fields of prosecution simply by decriminalizing the conduct. Police and prosecutors might be able pursue such cases while wearing their other hats, just as, say New York police assisted in the enforcement of alcohol prohibition after the repeal of state prohibition.<sup>75</sup> In addition, police and prosecutors can avoid Colorado (or United States) procedural and evidentiary rules by pursuing the case in the other jurisdiction.<sup>76</sup>

State and federal authorities often work together. There are several ongoing joint state-federal task forces, including the Joint Terrorism Task Force,<sup>77</sup> the Southern Colorado Drug Task Force,<sup>78</sup> and a BATFE task

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75. *Gambino v. United States*, 275 U.S. 310, 315 (1927) (“[F]acts of which we take judicial notice . . . make it clear that the state troopers believed that they were required by law to aid in enforcing the National Prohibition Act, and that they made this arrest, search, and seizure, in the performance of that supposed duty, solely for the purpose of aiding in the federal prosecution.”).

76. *United States v. Mosko*, 654 F. Supp. 402, 405–06 (D. Colo. 1987) (“The defendants also argue that the pen register evidence should be suppressed because the applications and court orders failed to comply with Colorado case law holding that pen registers are a search within the meaning of the Colorado Constitution and therefore require a search warrant supported by probable cause. *People v. Sporleder*, 666 P.2d 135, 139–40 (Colo. 1983). This court has previously held that state law on this point is irrelevant to a federal investigation and prosecution. *United States v. Grabow*, 621 F. Supp. 787, 794 (D. Colo. 1985.)”, *aff’d sub nom. United States v. Pinelli*, 890 F.2d 1461 (10th Cir. 1989); *see also, e.g., Butterwood v. United States*, 365 F.2d 380, 384 (10th Cir. 1966) (“[The McNabb-Mallory Rule] was promulgated in pursuance of the federal court’s supervisory power over federal prosecutions. It is not a Constitutional prohibition. It applies only to federal officials and an arrest under federal law. It has no application to an arrest made under state law. Here, appellant was arrested by state police and incarcerated by the state for suspicion of having violated a state law.” (citation omitted)); *cf. Corley v. United States*, 556 U.S. 303, 306 (2009) (noting that McNabb-Mallory Rule remains in effect).

77. *United States v. Ford*, 550 F.3d 975, 977 n.1 (10th Cir. 2008) (“[Colorado’s Joint Terrorism Task Force] is a law enforcement task force comprised of the FBI and other federal, state, and local law enforcement agencies that investigate crimes involving international and domestic terrorism.”); *see also Tung Yin, Joint Terrorism Task Forces as a Window into the Security vs. Civil Liberties Debate*, 13 FLA. COASTAL L. REV. 1, 3 (2011) (“Other counterterrorism investigations involve cooperative ventures between state and federal forces, typically through a Joint Terrorism Task Force (JTTF). In a typical JTTF arrangement, the local police department assigns a number of its officers to work on the task force with federal agents. Although the local officers remain paid by their local department, they are considered federal agents for most purposes, including the United States’ respondeat superior liability under the Federal Tort Claims Act for their tortious conduct. As of 2011, over one hundred American cities are participating in JTTFs.”).

78. *See United States v. Jones*, 69 F. App’x 401, 402 (10th Cir. 2003) (involving an appeal involving a case brought by Southern Colorado Drug Task Force). There is also a Rocky Mountain High Intensity Drug Trafficking Area. *See ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA*, <http://www.rmhidta.org> (last visited Apr. 14, 2017); *see also* 21 U.S.C. § 1706(a)(2) (2006) (repealed 2010) (“The purpose of the [HIDTA] Program is to reduce drug trafficking and drug production in the United States by [] facilitating cooperation among Federal, State, local, and tribal law enforcement agencies to share information and implement coordinated enforcement activities.”).

force;<sup>79</sup> others appear to come and go.<sup>80</sup> There is also state-federal cooperation on an ad hoc basis.<sup>81</sup> These entities, which are neither wholly state nor wholly federal, also create room for officers to pursue their own policies with some independence from their employing jurisdiction. Thus, for example, the U.S. District Court for the District of Colorado held that state officers had no obligation to comply with Colorado law requiring the return of medical marijuana seized pursuant to a Colorado search warrant because the officers were part of a federal task force and could rely on federal law.<sup>82</sup>

### CONCLUSION

To be sure, the United States, Colorado, and their officials have means of carrying out criminal justice policies. If officers or prosecutors of one jurisdiction abused their borrowed authority, their designations

79. The Pueblo Police website notes that “[f]our detectives are assigned to the Drug Enforcement Administration Southern Colorado Drug Task Force, 2 detectives are assigned to the Bureau of Alcohol Tobacco Firearms Explosives (BATFE) Gun Task Force and 1 detective [is] assigned to the Federal Bureau of Investigation Joint Terrorism Task Force.” See *Pueblo Police: Narcotics/Vice Section*, CITY OF PUEBLO COLORADO, <http://www.pueblo.us/430/Narcotics-Vice-Section> (last visited Apr. 14, 2017).

80. See *United States v. Zapata*, 245 F. Supp. 2d 1165, 1167 (D. Colo. 2003) (“Vail Police Department continued coordinated efforts with federal agents in an investigation and sting of a suspected cocaine ring in Eagle County, Colorado. The multi-jurisdictional investigators composed a drug task force.”); see also *United States v. Grabow*, 621 F. Supp. 787, 789 (D. Colo. 1985) (referring to “a Denver Police Department detective assigned to the Drug Enforcement Administration Task Force”); *People v. O’Hara*, 240 P.3d 283, 284 (Colo. App. 2010) (“This case arises from a joint law enforcement task force operation based in Grand Junction, Colorado. The operation’s purpose was to target major illegal drug dealers in the area.”), *aff’d*, 271 P.3d 503 (Colo. 2012).

81. See *People v. Arapu*, 283 P.3d 680, 681 (Colo. 2012) (“Federal Immigration and Customs Enforcement (“ICE”) agents sought to contact Arapu, suspecting he was in the country illegally. In accordance with their standard protocol, ICE requested assistance from local law enforcement, in this case, the Aspen Police Department.”); see also *People v. Montoya*, 517 P.2d 401, 401 (Colo. 1973) (“The marijuana was seized after federal agents and local policemen had broken into defendant’s home on September 27, 1972, under an Arrest warrant.”); *People v. Genrich*, 928 P.2d 799, 801 (Colo. App. 1996) (“Defendant’s convictions arose out of three different incidents in which pipe bombs exploded and injured one victim and killed two other victims. After a lengthy and extensive investigation that included various suspects, law enforcement officers focused on defendant and he was ultimately charged. The investigating officers included both local police officers and agents of the Federal Bureau of Alcohol, Tobacco, and Firearms (BATF).”).

82. In so holding, the court concluded the following:

Regarding the first element, Nord initially disputes that the Respondents were acting as federal agents because, among other things, they confiscated Nord’s property pursuant to a state court issued warrant. However, Respondents were either federal employees (Cortinovis) or deputized DEA agents (Hoefner, Lovin, Kelliher, Murphy, and Reece) who worked full time for a DEA-sponsored task force supervised by DEA personnel. Courts have consistently treated local law enforcement agents deputized as federal agents and acting as part of a federal task force as federal agents. See *United States v. Martin*, 163 F.3d 1212, 1214 (10th Cir. 1998) (local police detective deputized to participate in federal narcotics investigation is a federal officer within the meaning of 18 U.S.C. § 115(a)(1)(B)); *United States v. Torres*, 862 F.2d 1025, 1030 (3d Cir. 1988) (same); *Amoakohene v. Bobko*, 792 F. Supp. 605, 607 (N.D. Ill. 1992) (arrestee prohibited from bringing § 1983 suit against DEA task-force members, including deputized local law enforcement officers, because task-force members were acting as federal agents, not state actors, even though they arrested him on municipal charges).

*People v. Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005).

could be revoked, or the legislature could decide to change the law, for example, to modify or eliminate the Special Assistant U.S. Attorney program. In addition, through institutions like Criminal Justice Coordinating Councils, jurisdictions attempt to monitor the system as a whole.<sup>83</sup> Nevertheless, diffusion of police and prosecutorial authority make the problem of monitoring and controlling the criminal justice system much more difficult.

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83. See *Adams County Crim. Just. Coordinating Council - CJCC*, ADAMS COUNTY COLO., <https://www.adcogov.org/criminal-justice-coordinating-council-cjcc> (last visited Apr. 14, 2017) (“The Adams County Criminal Justice Coordinating Council (CJCC), serves as the designated independent advisory body within the jurisdiction to address systemic criminal justice, juvenile justice and victim services issues informed by evidence-based practices and guided by evidence-based decision-making.”); see also ROBERT C. CUSHMAN, NAT’L INST. OF CORRECTIONS, U.S. DEP’T OF JUSTICE, *GUIDELINES FOR DEVELOPING A CRIMINAL JUSTICE COORDINATING COMMITTEE* 2–3 (2002), <http://static.nicic.gov/Library/017232.pdf>.

