

SYMPOSIUM NOTE: BLANK CHECK IN THE CRIMINAL JUSTICE SYSTEM

I. INTRODUCTION

On Friday, February 3, 2017, at the University of Denver Sturm College of Law, Professor Gabriel J. Chin, from the University of California Davis, spoke at the *Denver Law Review* Symposium on Justice Reinvestment. Prof. Chin incorporated an article he is currently writing for the *Denver Law Review* into his presentation titled, *Blank Check in the Criminal Justice System*. The presentation focused on the power sharing issue affecting players in the criminal justice system.

Prof. Chin begins by explaining he believes the state and federal governments spend far too much money on the criminal justice system but even with “political will” it is going to be incredibly difficult to change the system and accomplish the reform desired by so many individuals.¹ The issues surrounding this desired reform are the main takeaways from the presentation.

In discussing the structural issues in the criminal justice system, Prof. Chin emphasized three main points: (1) there is no criminal justice system; (2) the system is afflicted by the “free lunch problem”; and (3) there is a “blank check problem” in the system.²

II. THERE IS NO CRIMINAL JUSTICE SYSTEM

The first point Prof. Chin emphasized was there is no criminal justice system. Using California as an example, he explained how one of the biggest costs for the state is state prisons³ and that the California Department of Corrections has no control over its population.⁴ Inmates are sent to the facilities by independently elected judges, and the charges that put these inmates in front of the judges are brought by independently elected prosecutors.⁵ Going even further, prosecutors get their cases from agencies such as the municipal police department, the county sheriff, and any local office of the state police.⁶ The issue is in many states there is no one in charge of the system because each player in the system can do what they chose.⁷ For

1. Gabriel J. Chin, Univ. of Cal., Davis Coll. of L., Speech at the Univ. of Den. L. Rev. Symposium: Justice Reinvestment, The Solution to Mass Incarceration? (Feb. 3, 2017).

2. *Id.*

3. *California's prison spending is out of whack*. L.A. TIMES, (Jan. 14, 2016) <http://www.latimes.com/opinion/editorials/la-ed-de-incarceration-dividend-20160114-story.html>;
Chin, *supra* note 1.

4. Chin, *supra* note 1.

5. Chin, *supra* note 1.

6. *Id.*

7. *Id.*

example, Prof. Chin explained how a district attorney could not dictate the actions of the county sheriff, nor can a superior court judge dictate the actions of the attorney general.⁸ Although Prof. Chin conceded that having independent elections is important to retaining the states independent source of power, he also pointed out that the elected officials are not responsible to each other nor do they follow one overarching policy regarding the goals of the state's criminal justice system.⁹ Thus, each player is given the ability to incentivize their own re-election.¹⁰

Next, Prof. Chin suggested an alternative to the unfettered discretion given to players and agencies in the state system. In the federal system for example, the U.S. attorney general is in charge of, among other things, the local U.S. attorney's in the county who file charges; the Federal Bureau of Investigation; the Bureau of Alcohol, Tobacco, Firearms and Explosives; and the United States Marshall Service.¹¹ Thus, Prof. Chin suggested that in principle the attorney general can set priorities for a system as a whole and monitor the number of people incarcerated.¹² However, Prof. Chin asserted, in state systems the broad range of independently elected players lead to the "free lunch problem."¹³

III. THE FREE LUNCH PROBLEM

After acknowledging speakers at the *Denver Law Review* Justice Reinvestment Symposium who spoke on Thursday, February 2, in greater length on this topic, Prof. Chin described the "free lunch problem" as a way players in the criminal justice system may chose to internalize benefits for themselves while forcing others to pay for those benefits.¹⁴ For example, a city police officer can make an arrest that results in a financial cost for the county sheriff for detention; the county prosecutor can charge an individual for a crime, paid for by the state;¹⁵ a police officer can decide whether to issue a ticket or make a full custodial arrest;¹⁶ the district attorney can offer a plea bargain of one year or three years for the same offense.¹⁷ Prof. Chin conceded that although the discretion given to players in the criminal justice system is important, the district attorney offering the three-year plea deal as opposed to the one-year deal and the police officer making significantly more arrests than his or her colleague do not

8. *Id.*

9. *Id.*

10. Chin, *supra* note 1.

11. *Id.*; COLO. REV. STAT. § 16-2.5-147(1).

12. Chin, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. Gregory Howard Williams, *Police Discretion: A Comparative Perspective*, 64 *Ind. L.J.* 873 (1989).

17. Chin, *supra* note 1.

have to worry about the increased financial cost of incarceration or processing.¹⁸ The issue with this flexibility, Prof. Chin suggested, means each individual player can have and carry out her own criminal justice policy.¹⁹

IV. THE BLANK CHECK PROBLEM

After laying the foundation discussed in parts II and III, Prof. Chin described his main focus of the presentation—the blank check problem in the criminal justice system—as the system’s built in diffusion of power. Prof. Chin argued this diffusion of power is difficult to control because the distribution of law enforcement power is exceptionally wide.²⁰ For example, Colorado makes many individuals peace officers, and these peace officers have the power to, among other things, arrest,²¹ sign a summons and complaint,²² and execute warrants.²³ A Colorado statute lists numerous categories, beyond what one would think of as general law enforcement agencies, that can act as a peace officer.²⁴ Some of these people include the Commissioner of Agriculture and members of the Public Utilities Commission.²⁵ Prof. Chin went further by explaining how the Colorado Supreme Court authorized peace officers of any jurisdiction throughout the state to investigate and arrest individuals if the peace officer is working on crimes that took place in their jurisdiction.²⁶ Additionally, although some federal police officers are in the category of a peace officer, if the federal officer is not, all federal law enforcement officers who are authorized to make arrests are authorized to make arrests for any crime that takes place in their presence, but these officers are not under state authority.²⁷

Prof. Chin next described how Colorado law allows a sharing of power between state and federal prosecutors. As discussed above, Colorado gives federal authorities the power to arrest and investigate cases for the state, and federal law grants authority to state players to enforce federal law.²⁸ The danger with this power sharing is that just as federal prosecutors can be made state district attorneys and prosecute cases in state court,²⁹ state prosecutors can be made federal prosecutors and prosecute cases in

18. Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 Wake Forest L. Rev. 677 (2016) (“explaining how prosecutors do not have to internalize the costs of their sentencing decisions”); Chin, *supra* note 1.

19. Chin, *supra* note 1.

20. Chin, *supra* note 1.

21. Chin, *supra* note 1; *see generally* COLO. REV. STAT. § 16-3-102.

22. Chin, *supra* note 1; *see generally* COLO. REV. STAT. § 16-2-104.

23. Chin, *supra* note 1; *see generally* COLO. REV. STAT. § 16-3-105(5).

24. Chin, *supra* note 1; COLO. REV. STAT. § 16-2.5-143.

25. Chin, *supra* note 1; *see generally* COLO. REV. STAT. § 16-2.5-143.

26. *People v. Thiret*, 685 P.2d 193, 200 (Colo. 1984) *abrogated* by *People v. Begay*, 2014 CO 41, 325 P.3d 1026 on other grounds.

27. Chin, *supra* note 1.

28. *Id.*; *see generally* *United States v. Cook*, 794 F.2d 561, 564 (10th Cir. 1986) (explaining how two state police officers were appointed as Special Deputy United States Marshals.)

29. Chin, *supra* note 1; *see generally* COLO. REV. STAT. § 20-1-201(c).

federal court.³⁰ As a result, even though the Attorney General is at the head of the federal system, and even if there were someone at the top of the Colorado system, given the power sharing previously described, control would be almost impossible.³¹

Prof. Chin finished by explaining how the “blank check problem” could affect Colorado specifically. For example, he described that although marijuana may be legal on the state level, state police officers, acting under their special federal power, can make arrests and take that case to federal court.³² Further, even if the federal court has no desire to prosecute a minor marijuana case, the U.S. Attorney’s Office can appoint an assistant district attorney to prosecute the case in federal court.³³ Thus, Prof. Chin asserted, in principle, neither the United States nor Colorado can remove their police officers and prosecutors from areas simply by decriminalizing the conduct and how individual rights that one level of government might create can be evaded by shopping between the state and federal system.³⁴

V. CONCLUSION

Prof. Chin, throughout his presentation, emphasized that having the political will to reform the criminal justice system is not enough given the massive flexibility given to law enforcement bodies and the power sharing between the state and federal criminal justice systems.

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30. Chin, *supra* note 1.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

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