

# Drugs on the Docket Podcast

## Season 1 Episode 6 – *Whren v. United States*, *Terry v. Ohio*, and the Fourth Amendment with Gabriel “Jack” Chin

### TRANSCRIPT:

**Hannah Miller:** In previous episodes, we've discussed how prosecutorial discretion can play a significant role in the charges brought against a defendant and how judicial discretion can strongly impact a sentencing outcome. In today's episode, we dissect how police discretion can shape police practices, public safety priorities and law enforcement. According to the Bureau of Labor Statistics. There are over 650,000 police on patrol in the United States, all connected by a common thread—the power to use their discretion while carrying out law enforcement duties.

Discretion is defined as the freedom to make decisions through the use of personal judgment. But as society has evolved—with new crimes, new tools, and new social norms—so too has police discretion. For instance, a police officer may stop someone if they suspect the person is involved in criminal activity. That suspicion, influenced by that police officer's experience or bias, could lead to a pat down. While not entirely benign, this use of police discretion is fairly common. And then there are more contentious examples of law enforcement system discretion, like the allowance of no-knock warrants, which resulted in the murder of Breonna Taylor in 2020. The word warrant in the context of policing evokes a similar civilian understanding of law enforcement. If an officer doesn't have a warrant, they don't have the right to search your persons or property, right? Turns out, searches and seizures are a much greater area than we think, which can be unsettling, especially for communities of color historically overpoliced and over criminalized. So how did police discretion come about, and what are the limits to police discretion, if any?

From the Drug Enforcement and Policy Center at The Ohio State University, this is Drugs on the Docket. Each episode will tell the story of how U.S. court decisions impacted drug law and policy and continue to shape the War on Drugs. I'm your host, Hannah Miller. Today, we're discussing unreasonable search and seizures and the Fourth Amendment. If you like what you hear in today's episode, visit [go.osu.edu/drugsonthedocket](http://go.osu.edu/drugsonthedocket) to follow the series.

So for today's episode, I'm joined by Professor Ric Simmons from The Ohio State University Moritz College of Law. Ric's research focuses on the intersection of the Fourth Amendment and new technology, like the use of big data in the criminal justice system, searches of cell phones and other electronic devices and hyper intrusive surveillance devices. He currently teaches evidence, criminal law, criminal procedure, and computer crime and surveillance, and has written about the privatization of the criminal justice system. Welcome, Ric.

**Ric Simmons:** Thanks for having me.

**Hannah Miller:** Now, if you could, would you do the honor introducing today's guest?

**Ric Simmons:** Sure. Today, we're joined by Professor Gabriel “Jack” Chin from the University of California, Davis School of Law, where he teaches criminal law, criminal procedure and immigration. His writings on the topics of immigration law, criminal procedure and race and the law have appeared in myriad of esteemed publications. His work on the collateral consequences of criminal conviction has been cited by the United States Supreme Court on multiple cases, including *Chaidez v. United States*, *Padilla v. Kentucky* and *Utah v. Strieff*. So, Jack, thank you for taking the time to chat with us today.

**Gabriel “Jack” Chin:** Great to be here. Thanks.

**Hannah Miller:** I feel like this podcast has an unofficial tagline that is essentially a non-lawyer purposefully subjects herself to the professional musings of case law and drug policy. I'm talking about myself here, but today's topic is probably the most tangible in that, like, warrants and racial profiling and the term search and seizures are really part of a regular citizen's lexicon, as opposed to the particulars of sentencing guidelines or established reasonableness in criminal proceedings.

Basically, and I'm definitely oversimplifying here, if anyone listening has watched *The Wire*, *We Own This City* or even *Minority Report*, you might have a primer for what you really need to get into this episode. But I want to start by asking each of you why you find the Fourth Amendment and policy and cases related to the Fourth Amendment so compelling.

**Ric Simmons:** I think at its core, the Fourth Amendment law is about tension between two values, liberty and security. And essentially there are two goals we have been growing procedure. One is to ensure those who are guilty of crimes are arrested and the other is to protect citizens from the power of the State. So the question is how much personal privacy and freedom do we want? How much safety and security do we want, and how do we sacrifice between those two? Sometimes the values are not in conflict. We can increase the efficiency of police and privacy. But a lot of times they are. So I'll give an example, which is we have to decide in criminal procedure when police need a warrant to conduct a search. We can say that they never need a warrant, and they can go into your home any time they want to and search for whatever they want. They can search you whatever they want. But of course, that would be very invasive on our personal privacy. It would help crime control, but to be too invasive. We could say that they always need a warrant for any kind of search, even if they're following someone on a public street. And that would probably be too far the other way. That would give us very little in extra privacy and it would actually hurt law enforcement a lot. So we have to essentially choose between the two and the decision making here, I think, are what make it interesting.

Second aspect, which we'll get into I think later on, is how much discretion we give to different actors in the system and which actors get that discretion. So on the one hand, we don't want people to be applying the laws or mechanically like robots with strict formality. We want to give them some flexibility. Other hand, too much discretion gives us arbitrary enforcement, inconsistent results, and sometimes discriminatory actions. So we have to figure out where to set that discretion, how much to give. So that's really what I find interesting about studying and reading about the Fourth Amendment.

**Hannah Miller:** What about you, Jack?

**Gabriel "Jack" Chin:** Well, I agree with everything that Ric said. It's a fascinating area of law. I guess what I would add is, in my view, it's one of the most intense and important arenas in which we interact with government. You know, we're interacting with government all the time, paying taxes, but that's like through the mail, you know, and the government is in the background of a lot of things. When we buy food and we go to the bank, you know, there's the government in the background monitoring these things. But I've never seen a FDA inspector at the supermarket or a bank examiner or anything like that. It's pretty transparent. They're pretty invisible. But one way in which the average person in society deals with government in a direct, up close and personal way, is through the police.

When you're driving down the street or for that matter, walking down the street, the police have a lot of power. They can pull you over, they're armed. They can create legal consequences for you. They can take your life legally in some instances. So they're really, they're really unique in that respect. Again, government is everywhere, but the police are the real face of it. The real point at which the average person interacts with the government in this significant way.

The other thing that I find interesting about the Fourth Amendment is the consequences. There are seven or eight million people in prison, on probation or parole in the United States, and most of them are there because the police decided to take action, because the police thought that somebody was worth investigating, worth arresting, worth searching and evidence was found. And so there's tremendous consequences from the Fourth Amendment. It's a huge part of our society and our government, the police using the authority that's that's recognized in the Constitution to search and seize. So, I'm interested in it because it's so important and consequential.

**Ric Simmons:** So, Jack, I'd like to follow up on something we both sort of mentioned in our opening statements. I think another interesting aspect of the Fourth Amendment, is it lets us get a greater understanding of police practices, like you're talking about, the methods they use when they investigate crime, decisions they make when carrying out their duties. And I think a lot of the listeners of this podcast are probably familiar with the concept of judicial discretion, whereby a judge has to make decisions about bail or sentencing and has a lot of discretion in doing so. But they might not be as familiar with the concept of police discretion. So, I was hoping you could explain a bit about what police discretion means in the context of the Fourth Amendment.

**Gabriel "Jack" Chin:** Sure. So, there are some exceptions, but in general, the police can do what they want in the sense that they can investigate whatever crimes they want and make arrests for crimes or not investigate or make arrests if they choose not to. It's up to them to decide how they spend their time. Certain exceptions to this. But as a

general rule, it's true. There have been a couple of significant school shootings lately. I guess there's often school shootings in this country. In Uvalde, Texas, it was noted, because there were videos, that the police didn't rush in to stop the shooter. They stood outside, perfectly legal. Up to them to decide how they respond. And just because there's a murder going on doesn't mean they have to do anything. They can, but they don't have to. It's up to them. Very difficult to control the police out there in the field. Another example, you may remember the Gabby Petito case, a young woman who was murdered evidently by her boyfriend. The couple was stopped by the police and there was a law in Utah that said in cases of domestic violence, the police have to take action. And the police were told that there was domestic violence, but they didn't take action because the tradition of discretion is so powerful. Just because there's a law that says you have to do something, didn't mean that the police were going to do it. They acted on their discretion. And so we hope and that most of the time the police use their discretion on reasonable grounds. They go after the more serious cases where there's evidence of guilt and they stay away from the less serious cases or where there's less evidence of guilt. But the bottom line is it's up to them.

And we do see unfortunate examples of the police acting in their own self-interest and not in the public interest. For example, Ferguson, Missouri, where Michael Brown, a young African-American person, was killed by the police and whatever was going on behind that police killing, the Department of Justice investigation showed that the police used their enforcement discretion, their authority, to focus on raising money from the municipality through issuance of traffic tickets. And there's nothing illegal about that. They can say, look, we choose not to focus on rape, robbery and murder. We're not going to look at that. Instead, we're going to focus on traffic tickets because that's what we want to do. That's perfectly legal. Now, in this context, there is, of course, political pressure. And if the police don't do things that the public wants, in some cases there is a demand on the part of the public that they change their enforcement priorities. But, you know, it's not always visible what the police are doing or why they're choosing to do what they do. And the police are sophisticated political actors. And so I think that it's widely agreed that they're careful to manage their position in ways that help the institution of the police department, keep themselves out of trouble, keep themselves in good standing, while trying to focus on the things that they think are important. And again, in many instances, there'll be a complete alignment of the public interest and the police enforcement priority. But in some cases there isn't. And when there isn't, there's not much that can be done about it.

There does seem to be evidence that the police focus on drug offenses because they're easy to investigate, easy to prove, and they're lucrative for the police in some ways through programs such as civil asset forfeiture, where if the police stop somebody who is believed to be involved in drug trafficking or other criminal activity and they have cash, the cash can be taken from that individual and the police get some of the cash. I as a citizen, would prefer that the resources be put into things like testing rape kits and investigating and solving violent crimes. But from the police perspective, they may not agree with the priorities of other people in the community.

**Ric Simmons:** I'm agreeing with almost all of that. I would just sort of add a distinction that you touched on, which is the difference between individual levels of deference or discretion and institutional discretion. Individual police officers are walking down the street or watching cars go by and they can decide who to stop and frisk or who to pull over based on whether they think it's appropriate to do so. At the institutional level, again, as you're saying, police departments make decisions about where to put their resources. And we hear a lot about overpolicing and underpolicing. The police, the police department might put a lot more resources and officers in certain neighborhoods and not in others. They might decide to, as you say, focus on certain crimes, and not others. We do see examples of that in the drug context you mentioned. I know that there's evidence that, for example, people of different races use marijuana at the same rates. We see that from all sorts of data. But we see a higher level of arrests for blacks that use marijuana than for whites use marijuana. And that's because police departments are making an institutional decision to focus on certain neighborhoods and maybe to essentially profile or arrest certain people and not others for the same crime even though they are committed at the same rate. So it is something I think we have to monitor. And I do think that the political overview is something that we have to pay attention to and make sure we take we take seriously.

**Hannah Miller:** I wanted to just comment really quickly, Jack, when I was thinking about police discretion, the fact that there are plenty of sexual assault victims whose cases never get picked up, the police decide not to investigate it. And I really didn't consider that as a form of police discretion. But you've brought that to light, or at least you've given me a word for it. It's a little scary when you think about the fact that there's individual discretion within policing, but then there's institutional discretion depending on what the motivations or incentives are. And those motivations and incentives are not always known by the public. Even though interests might align, it's not always the case that it is the

public, all of the public, it could be a certain portion of the public, i.e. the portion of the public that is voting for the mayor and the mayor puts pressure on the police, etc..

**Gabriel "Jack" Chin:** You know, another aspect of discretion is the discretion of the federal, state and local legislatures to create crimes. I'd be interested in Ric's view on this, but my sense is that there are way, way, way more crimes on the books than could ever actually be enforced. And so discretion is based on the nature of our society, based on our legal system. It's inevitable because if the police were obligated to enforce, you know, to make an arrest for every violation of the law that they saw, then at the beginning of every shift, you know, within a couple of minutes, they'd see some traffic offense and they would have to make an arrest or at least issue a ticket. And they would never be able to get more than two or 300 yards away from the police station because there are so many crimes on the books.

You know, I've had occasion to read the traffic code of various states, and there's just a lot of things that are against the law that you might not know about. And they're not enforced except very, very occasionally. So discretion is, I think, built in inevitable part of the system as it exists now. Maybe it shouldn't, but it is as it exists now. So there has to be some sort of enforcement prioritization. And as Ric said, some of that happens at the individual officer level. Some of that happens at the institutional level and some is mandated by Congress or state legislatures. But we don't have a system where every violation of the law is responded to. So there's going to be choices made.

**Ric Simmons:** Yeah, I agree with that. I don't actually know anyone who studies criminal law seriously, who doesn't think that we have too many laws on the books for whatever reason, whether you're conservative or liberal. I think that's a, that's a common perception of what's going on. And part of that is, again, legislatures love to pass laws to make things legal and run on that: "Look, I made this illegal, I made that illegal." In the end, we ended up with a penal code and a traffic code that is very, very thick, that could never possibly be fully enforced. And that, as Jack says, has led to these kinds of choices that have to be made.

**Hannah Miller:** So the Fourth Amendment was ratified back in the 18th century, but police surveillance, as well as the technologies we use in everyday life, have changed quite a bit in the intervening century. So how has our understanding of the Fourth Amendment been shaped by the increased use of technology, both in policing and in everyday life?

**Ric Simmons:** Yeah. So this is what I think makes studying the Fourth Amendment really exciting at this time in history. Essentially, as you point out, we have two different ways that society evolved since our founders ratified the Fourth Amendment way back in the 18th century. And one is that in everyday life, we have so many more different kinds of ways with technology they couldn't have foreseen back then. And the other is that police use technology to surveil us that didn't exist back then. So if you're trying to think about how to interpret the Fourth Amendment, which is actually a pretty brief provision, it doesn't say very much. It basically says that searches must be reasonable and that you have to have probable cause when you want a warrant, that's pretty much what it says.

So what is a reasonable search? How do we know? Some people might be familiar with the idea of originalism. We're supposed to go back and look at what the people who wrote the Fourth Amendment first thought they were saying when they wrote this back in 18th century. Some of us think we should evolve as our understanding, as the system moves on. But either way, you have some important decisions to make. So let's take the example of the automobile, which didn't exist back in the 18th century, and now is ubiquitous. And when the automobile was first invented, it started spreading across the country. There's a question of how does the Fourth Amendment apply to the automobile? Here you have something criminals can use really easily to get from place to place, to move contraband, to commit their crimes. So do we have to adapt the Fourth Amendment to make the police job easier when they're trying to search automobiles and find out what's going on inside them? More recently, of course, we have email, we have texting, we have cell phones, we have computers. And so the question is when criminals use these kind of technologies to commit crimes, it certainly makes it much more easy to commit crimes if you can talk to anybody you want, anytime you want, you can encrypt your information, you can send emails to people and store things on small jump drives, store it in the cloud. It really helps criminals commit their crimes. So do we have to then change how we interpret the fourth Amendment to allow the police to do more than they could otherwise? So that's an interesting question regarding how the police should be able to respond to the new technologies criminals can use.

But the other issue is, as you mentioned, the new surveillance technologies that police have. They now have more ways of looking into our lives than they did back in 18th century. One example is the thermal imagers. They have devices where you can essentially stand outside of a home and point the device at the home. It tells you where heat is

coming off of the house. There's a famous case the Supreme Court decided two decades ago. The police played a thermal device at a home and they could see where there was a very unusual amount of heat indicating heat lamps, which meant a person was growing marijuana. And this was back when marijuana was illegal, pretty much everywhere. And so they were able essentially to use this as a way to search the home, to find out there were heat lamps inside the home. And the Supreme Court had to basically say, no, no, using thermal imagers, even though they're outside the home, is essentially the same as if you went into the home and looked inside. So using a thermal imager is, is going to be a search and need a warrant for that. But of course, since then, we've seen lots of other technologies. They are able to obviously wiretap our phones. They are able to use what I call stingrays, where they they drive a van around and they pretend they're a cell tower. They intercept all information coming from our cell phone and look at that. So there are a lot of ways they pry into our lives they didn't have before. How do we regulate that? What does the Fourth Amendment have to say about that? Those are, I think, really interesting questions.

**Gabriel "Jack" Chin:** And I would add, you know, that there's multiple entities that are interpreting the values underlying the Fourth Amendment. Currently, the Supreme Court says that the content of the Fourth Amendment is determined by a reasonable expectation of privacy. What is a reasonable expectation of privacy? And if you don't have a reasonable expectation of privacy, you have no Fourth Amendment protection. And if you do have a reasonable expectation of privacy, then maybe some of the limits that are given substance by the Fourth Amendment like warrants and probable cause will apply. And there's two major entities that determine what a reasonable expectation of privacy is, and one is the Supreme Court, and the other is sort of the people, the public. And they're not always on the same page.

And so we have situations where the Supreme Court or the courts say that a certain technological situation is not subject to a reasonable expectation of privacy, and the people disagree. So, one example is cordless phones, a sort of pre cell phone technology in people's houses. And there were a number of court decisions that say, look, if you use a cordless phone that's on you, if it can be picked up by somebody with some technology that snoops on the cordless phone frequencies that are used, and if the police buy one of these things to listen to a cordless phone and therefore they listen to your phone conversations in your house, you're the one who sent those radio waves out to the sidewalk. You're the one who sent those radio waves out to the police van. That's your problem. But legislatures responded by passing laws that said you can't intercept cordless phone conversations because the legislatures, they did think that there was an expectation of privacy. If you go to the big box store and buy a set of cordless phones for your house to make phone calls to friends and family, that the neighbors, other folks, shouldn't be able to buy a device that listened in to your cordless phone conversations.

So the risk to your privacy by new technology, by having a cell phone, by having all your financial life online and using credit cards and every purchase that you make is recorded somewhere and everywhere you go is recorded by your cell tower hits when you carry your cell phone around, the privacy that you have, your activities, your conduct, your conversations, your communications are much more available over time. And at lots of periods in history, we can see this. It's not just the last 20 or 30 years, it's the development of the microphone and the telephone and all of those things. And there's been this back and forth between the law enforcement interest in using available information to find criminal activity and the court has to decide what they're going to do. And sometimes they say, look, since the technology creates so many more opportunities for criminal activity, we're going to have to give the police an opportunity to look at it. But that's not the only thing they do. Sometimes they say, boy, there's so much personal information that seems to be available to the police under our traditional guidelines that we have to ask whether we should increase privacy protections based on what's going on. And I guess really the heart of this is the smartphone. So many cases on it, it's so ubiquitous. It really does have everybody's life story. So, you know, this is going to be, this has been and will continue to be, I think, a center of of litigation and debate. The police are going to be able to get into it. And it certainly has been critical for for lots and lots of cases of every sort. But it makes the court queasy to say, well, you shared your life with the Apple iCloud and therefore the police can look at it whenever they want and it's not covered by the Fourth Amendment. So there's a balance, a back and forth.

**Hannah Miller:** Yeah, I remember the general panic that a lot of uterus having persons felt after Roe v. Wade was overturned in terms of maybe you should delete your cycle tracking app. You don't know who's going to be looking at that information and how it might be used against you, depending on the jurisdiction you live in and the laws, in terms of what can they glean from that information? It was really scary.

Let's shift again and let's talk a little bit about the interaction between drug policy and drug legislation and the Fourth Amendment. So current federal law essentially bans all drugs. And although state laws have recently liberalized laws

regarding marijuana use, every state still prohibits possession of almost every other drug. So how does this zero-tolerance policy regarding drugs influence the surveillance and searches that law enforcement undertake?

Ric Simmons: I've always thought there was a direct link between the war on drugs and the zero policy and the increasing intrusiveness of government, and the tendency of police to push the boundaries when they conduct searches to try and be more and more intrusive. And my idea is that essentially you have a what we call a victimless crime. And some people understand and think that drugs do have victims, obviously the people who take the drugs and so on might be victims of the crime. But the idea that there's no direct harm where someone who is using drugs is not directly harming somebody else. So it's a victimless crime in that sense. But we have a victimless crime like that. The only way the police can detect this kind of crime is by being extremely intrusive in their search is by doing more surveillance and more and more invasive surveillance.

If there's a victim, the harm is detected, the victim can report the crime. There's other evidence of what happened. When someone destroys property, there's evidence of that. The only evidence that someone possesses drugs, you can't find that unless you actually search the person or search their home or search their possessions. And so police are forced to be much more aggressive when they're doing the surveillance. And I go back to the very first wiretapping case, way back to the 1930s. And this wasn't a drug case. It sort of was a drug case during prohibition. And they were tracking down bootleggers. And essentially they decide to wiretap this person's phone because they thought he might be making and selling alcohol illegally and because using and drinking alcohol was a victimless crime, they had no evidence other than to literally wiretap his conversations and listen in on his phone conversations and see what he was doing. And we've seen that progress throughout as we've now pivoted to this War on Drugs the last few decades, that the police are forced to be very invasive when they are looking at drug crimes because there's no other way to get good evidence. I just looked it up. The federal government keeps track of all the wiretaps that are issued to state and local governments. So, for example, in 2021, over 2000 wiretaps were approved for law enforcement use, that they were approved to essentially wiretap 2000 phones in this country, and 51% of those was for narcotics cases. So over half of the time the police are listening to our phone conversations is because of drugs. No other crime even comes close. The second most popular reason is conspiracy cases, and that's 11%. And one of many conspiracy cases are actually just drug cases under another name. So really, if we think about the fact that we have a zero tolerance policy, this ban on drug use, that is creating thousands more wiretaps that the police are using.

We can also see how it affects other aspects of the Fourth Amendment. The Fourth Amendment that says that if you want to get a warrant to search your home, you have to show probable cause. But you also have to state with particularity what you're looking for and where you're looking for it. So you have to basically to be able to search someone's home, you have to say, well, I'm going to search in certain places because the things I'm looking for might be in those places. Now if you're looking for stolen televisions or a stolen car or something, you can always search for places where you might find those things. So you couldn't rip open a mattress to look for a stolen television. You couldn't go through all the cupboards and everything. If you're looking for drugs, you can literally look anywhere because the requirement of the Fourth Amendment no longer has any teeth at all because if you're looking for a small stash of marijuana or cocaine or heroin, that could be anywhere. They can go through your entire home and your smallest crevices anywhere where you might be hiding it. And so there's no more protection from that particular provision in the Fourth Amendment.

Another sort of, I guess, final point, we've seen this in the news recently, this idea of no-knock search warrants that police are able to with special permission, which they generally get, enter into your home with a warrant without knocking or announcing themselves first. Burst down the door, run in and start the search. And these are very dangerous both for the police and for the people whose homes they're searching. Breonna Taylor case, which a lot of people have heard about, was a no-knock search warrant where the police burst in and the person in there thought that they were being invaded by somebody and shot and they shot back. And this happens at least dozens or hundreds of times and year when they do these no-knock search warrants that people react violently and police react violently back. And a primary reason for doing a search warrant is drugs because drugs are so easily disposed of. Again, if they're looking for guns or contraband of some other kind, stolen goods, they wouldn't they wouldn't be able to give you 30 seconds, a minute to announce themselves and say, hey, we're coming in and everyone would know what's going on and it would be a much calmer process. But because drugs can easily be destroyed, flushed down a toilet or secreted somewhere can be found, police are asking for and receiving the permissions to essentially burst in on people without any notice. Not only are they more intrusive, but also much more dangerous for everyone.

**Hannah Miller:** Is that because with a no-knock warrant, you mentioned that there had to be specificity in terms of where you would be searching for something?

**Ric Simmons:** It's beyond particular requirements because they are essentially telling a judge, look, if we give them a minute, we tell them we're here and give them a minute before we enter the home, they can destroy the drugs before that. So, we need to be able to burst in without any notice. And that is a reasonable search in this context, because otherwise they could destroy the drugs before we got there. So essentially, the reasonableness part of the Fourth Amendment usually requires the police to knock, announce, wait, and then enter if the person doesn't let them in. But if police say, well, there's drugs that can be destroyed easily, then a judge will say, okay, it was reasonable for you not to knock and announce, but to burst in sometimes by battering the door down, guns drawn, because this person might be able to destroy the drugs too quickly. It's another example of Fourth Amendment protections that are weakened or essentially obliterated because we are looking for these drugs that are easily hidden and easily destroyed.

**Gabriel "Jack" Chin:** I would add, I think that making drugs illegal is the phenomenon in the background that allows the police to be entrepreneurial, that allows the police to go fishing for targets through things like stop and frisk and through things like highway interdiction. Drug use is much more widespread than most other crimes. If the police were out there on the highways, if the police were out there doing stop and frisk, looking for, let's say, false income tax returns, they wouldn't get many hits because it's very unusual for somebody to be driving down the street with a false income tax return, you know, face up on the passenger seat in some way that's going to be very clear to the police. The only reason for them to go out there sniffing for things, is to look for drugs, because it's a crime that's very common and it's a crime that with your drug sniffing dog or through conversation and consent search or whatever the police can actually uncover right there on the spot, right there on the scene. And so that fact plus, as I mentioned before, the financial incentives. There's a lot of financial incentives to do drug enforcement, including grants to police agencies to do drug enforcement, the civil asset forfeiture fines and fees. There are economic reasons for them to do it and to be sort of more visible and more engaged and looking for folks walking down the street or driving down the streets who might be targets in a way that I think is unique compared to other crimes. You know, again, the police, if they have a reason to think that somebody has been kidnaped, they should go after that person. But that's that's not the sort of dragnet that they use for things like stop and frisk and drug interdiction. They're looking for a specific person, a specific car, a specific description. That's very different from the kind of discretionary enforcement that we see in the drug context.

The other thing that's going on here is that liberalization of drug laws only goes so far because one of the sort of characteristics of the law enforcement system is that if, let's say, state or local police come across a crime that they themselves cannot prosecute, because it's not illegal in their state, let's say marijuana, it's very common for them to hand that case off to other law enforcement officials or prosecutors and vice versa. And so if a state takes a strong stance against marijuana enforcement, let's say they don't want to be in that business anymore. That doesn't mean that the police aren't going to be involved in law enforcement because there is this tradition of discretion and this tradition of cooperation between different levels of government. And I don't think that that's going to stop. What I'm trying to say is, and this is to some extent because of the Fourth Amendment, the state legislature does not have complete control over the police that it hires and funds because the Fourth Amendment says that it doesn't matter if a search is illegal under state law, evidence that's obtained in violation of state law can be admitted in federal court. And so the Fourth Amendment says we're going to essentially authorize the police to do these things regardless of state law.

**Ric Simmons:** Jack, I want to follow up on one thing you've been mentioning a couple of times. It's sort of the elephant in the room here, which is pretextual policing and racial profiling, because I think they interact with drug policy in a couple of interesting ways. So, could you give the listeners a brief explanation of the case *Whren v. the United States* and talk about the effect that has on policing and criminal proceedings?

**Gabriel "Jack" Chin:** So *Whren v. the United States* is an older case now, 25 years old or so, that deals with the question of pretextual searches and seizures. And the problem is, you know, what if the police have probable cause for you spitting on the sidewalk, but they really are interested in you because they think that you, let's say, have a gun. Can they arrest you for spitting on the sidewalk and then search you incident to the arrest when they normally wouldn't arrest you for spitting on the sidewalk and they're really using that as a pretext to search you for the gun. And what *Whren v. the United States* says is it's not objectionable that a search or seizure is done for pretextual reasons. If there's probable cause, then the arrest or search is valid, regardless of the real reason that it's being done. And so that case involved a traffic stop by drug investigators in D.C. and these drug investigators had no responsibility for

traffic enforcement. They never made traffic stops and never made traffic arrests. That's not their job. They're investigating drugs. But they were interested in a particular car because they thought that it might have drugs. And the Supreme Court unanimously said that that was fine.

Now, the interesting thing about Whren is that in dicta they said we are rejecting the pretext doctrine so systematically, so completely and so thoroughly, that even if the real reason for the stop or arrest or search is racial profiling, even if it's hostility towards the race of particular people, that's okay. If there's probable cause, then the search or seizure is valid, period. And so Whren essentially seems to say that racial profiling is legal. Now, they went on to say that the Fourth Amendment doesn't prohibit racial profiling, but the equal protection clause of the 14th Amendment prohibits racial profiling. And so, you can challenge a stop, search, arrest, prosecution on the grounds that it was based on race, not under the Fourth Amendment, but under the 14th Amendment. The problem with that is that around the same time they decided Whren, they decided another case called *Armstrong versus United States*, and in that case, they said that you can't get discovery. You as a criminal defendant, cannot get discovery on a claim that you've been racially profiled unless you make a substantial preliminary showing that other similarly situated people were known to the law enforcement authorities and not prosecuted. And that's very hard to do. And there are essentially no cases, maybe one or two cases in the last hundred years, reported cases, where somebody has made a claim of selective search, selective arrest, selective prosecution, on the basis of race and won. And so between Whren versus United States and *Armstrong versus United States*, for practical purposes, racial profiling is on the honor system. The police are not supposed to do it. And there are many, many police agencies that train: don't do this. And I'm sure that there are some police agencies that have punished officers who violate that rule. But in terms of whether a court will get involved to suppress evidence or terminate a prosecution on the grounds that it was based on race, that basically never happens, even though many people, and I count myself among them, believe that the police do sometimes racially profile. It's just very, very difficult to prove that in court because of the doctrinal barriers that the Supreme Court has set up. So, again, I'll say, racial profiling for practical purposes, is not prohibited by the Constitution.

Hannah Miller: We've touched a little bit on how police use discretion, but let's let's now think about systems that might violate Fourth Amendment rights. Interesting thing that I came across was drug testing in school systems. The Supreme Court has allowed high schools to administer mandatory drug tests to students who are involved in athletics or other extracurricular activities, even if the school has no probable cause or reasonable suspicion that the student might be using drugs. So, Ric, can you explain the rationale for allowing these kinds of blanket, suspicionless drug tests?

**Ric Simmons:** Sure. Well, this is a kind of a corner of Fourth Amendment law that is not well understood by most people, I think, called the Special Needs Doctrine. So generally, before the police conduct a search of anybody, they have to show some individualized suspicion, some reason why they think this person committed a crime, either to a judge beforehand or afterwards after they found something illegal, they have to say to the judge, well, we know this person, we had either reasonable suspicion or probable cause to believe this person was committing or had committed a crime. And that's true for almost any kind of search they undertake, unless they claim the special needs test. So a special needs doctrine basically says that if the police are, or any state actor, is conducting a search for a purpose other than law enforcement, then they're allowed to do essentially blanket searches of anybody they want to without having to show any kind of individualized suspicion. No need to show probable cause or suspicion, because they're doing it for reasons than law enforcement.

And one example of this comes up in the school context, as you mentioned, when they want to do drug testing for kids in school, the government basically says, well, we're not doing this to arrest people for drug use, we're doing it because we have to make sure that the school is free of drugs so we can have a good educational environment. So we're doing it for the purpose of having a conducive environment for education, not for law enforcement purposes. The trick to that is that after they conducted their search, whether they're searching a locker for drugs or drug testing someone's urine to see if they've taken drugs, they can then turn the results over to the police so the police can use that to prosecute but they argue is not the main primary purpose of our search in the first place.

And you see this a lot in the drug context. There are some cases many decades old now where the government decided to do drug tests of everyone who runs a train, who worked for the government. And the Supreme Court said, yeah this is a special needs search, we want to make sure the people who run our trains aren't on drugs and running trains. That's a safety issue. Now, it turns out if you find they are drugs, you can you can prosecute them. But that's not why you're doing the search in the first place. Same thing for customs officers, they said, well, you could be

blackmailed if you are using drugs. We don't want customs officers to be blackmailed. So we're able to make sure we have the integrity of the system protected. And of course, if we find drugs, we'll still prosecute you, but that's why we're doing in the first place. And so we see a lot of times where they use these drug tests or they search again school for drugs and they say the reason is not law enforcement, it's something else. And they are able to do this without any kind of individualized suspicion. I wouldn't say it's an exception of the Fourth Amendment, because it's part of Fourth Amendment law. But the exception to the requirement that they have to have some kind of individualized suspicion of a specific person before they conduct a test. And that's how we get a lot of these blanket drug test policies.

**Gabriel "Jack" Chin:** And I would add that a discretion problem comes up here just as it does in other contexts and the political problem comes up here. Why are some high schools or some public schools tested and not others? And I can tell you, my kids went to school in a middle class, upper middle class, college town and they didn't have drug testing and we didn't want it. If somebody proposed it, they would have been shouted down. It's a choice to go to some school and not another school, and in some cases, the people who send their children to those schools, the families, the kids themselves, they might want it, but in other cases it's imposed upon them. And it happens only because they don't have the political power to get the government off their back. I think it's unfortunate, and I think I would be very surprised if very many children of judges went to schools where their kids were subject to this sort of indignity. But it's legal for some people to have to go through this and suffer the consequences or not. And again, the issue isn't whether it's good to take drugs, because there are lots of ways to prevent your children from taking drugs or to treat children who are taking drugs and suffer the consequences thereof. But by having mandatory drug testing in public schools, the path is punitive. And that really is not something that most people would choose if they had any other options.

**Hannah Miller:** What if it's not just a school system? What if it's the State itself in terms of implementing a benefits program? I wrote about how states have over the last few decades attempted to implement drug testing as a requirement to receive unemployment compensation or other kinds of public benefits, like Temporary Assistance for Needy Families or TANF. And there is a debate about the constitutionality of these programs. So to make these programs legal, some states have pivoted to have applicants respond to questionnaires, and then the state screened those questionnaires for possible drug use to then justify drug testing. Only about a dozen states have active screening policies. But do you think these kinds of policies will become more prevalent? Will it just depend on the state?

**Ric Simmons:** Yeah, I think they will become more prevalent. I think this is going to be, for better or for worse, a very politically popular program. I think there is no evidence that I'm aware of that people who were on public benefits use drugs at any higher or lower rate than anyone else. Most people see it this way, that there are a lot of employers, private and public employers, that require drug testing before you can work at that job. Law enforcement has to drug test for various reasons. So, a lot of jobs require this. And I think the perspective that most people would have on this is, look, if you need to have drug test to do a lot of jobs, why not have to have a drug test before using taxpayer money? We want to make sure that the money we're giving to people would be for food or for the families of our shelter and so on isn't being used on drugs instead. So, I don't think there's any particular reason and no evidence, again, that there's a higher use of drugs. There's no suspicion. But I think that the states are able to use these programs and screening policies now to try and screen out people using drugs. And that's very, very politically popular. I don't see a way that courts would be able to stop that, because, again, they can use this kind of discretion to try and screen people out.

**Gabriel "Jack" Chin:** The only thing I would add is that when we're talking about state benefits policies, the state legislature can impose greater standards that are imposed by the Fourth Amendment itself. And I think in some states this will be politically controversial and some states will say we are not going to have this policy and they'll pass a law to the contrary on the grounds that it's too intrusive and on the ground, that they have a more capacious view of privacy than the Supreme Court does.

**Hannah Miller:** So there's special charges and enhancements for gun possession and gun use in conjunction with drug offenses. Do you think this has an impact on police practices or how courts look at searches for guns along with drugs? Do Fourth Amendment doctrines or existing laws incentivize law enforcement to look for guns when they are looking for drugs or vice versa?

**Ric Simmons:** Yeah, this is another great example, I think, of how the War on Drugs and banning drugs has encouraged police to be much more aggressive in their surveillance, in their searches of us. I'm just going to give one

example of this that I think people are pretty familiar with, and that's the example of Terry stops and Terry frisks. That is one of the ways they stop someone on the street on reasonable suspicion and they frisk them, which is, again, not the most intrusive search, but it is certainly intrusive search. And there's plenty of evidence that it's done many more times than it should be done. It's done in a way that's racially imbalanced. There was a class action suit against New York City that essentially proved that New York City police were doing this, Terry frisks, in ways that were very racially imbalanced.

And the idea behind Terry stops, there was a case very high up that was again now 50 years old, maybe, and it was a gun case. It was a case where there was a detective in Cleveland, Ohio, who thought that these suspicious people had a gun who were going to commit armed robbery. Turned out he was right. He frisked them and found a gun on them. And the Supreme Court said, well, even though you didn't have probable cause to arrest them, we're going to allow police to essentially stop and ask people questions and if police officer thinks a person might be armed, for the police officers safety, we'll allow the police officer to conduct a frisk of the suspect's body to ensure there's no weapons so that the police officer can be safe when they're asking this question, investigating a crime. So, Terry frisks are all about weapons. They're all about officer safety. That's the reason they exist. That's the only reason they're allowed to be done.

But what we've seen in the decades since the Terry case is that police officers routinely use this procedure when they're actually looking for drugs. This might go back to the pretext that, that Jack was talking about. But you see this over and over, mostly in the inner city and mostly in poor neighborhoods where people of color might live, more predominantly than white people. And police will essentially stop someone on something that might be reasonable suspicion, maybe not, and then they'll just automatically frisk them because they can make the argument, well, we're worried someone might have guns here. We think they might have drugs, they may have guns, and they essentially have a link between the idea that someone who is selling or even possessing drugs might be armed as well. And so frisk has become a part of this essentially routine of this inner city interaction between police and the community there.

The TV show *The Wire*, you know, you watch that show or any other show that's half way realistic about this and you'll see the police commit these frisks almost with impunity because they can always claim that there might be weapons, there might be guns or some other weapon that could hurt us. And it really does become a pile on given how many are done, a very intrusive kind of action. So again, it's another example of how what might be seen as a reasonable Fourth Amendment doctrine, the idea that a police officer can stop someone, investigate whether or not crime is occurring, and if they fear for their life or their safety, they're allowed to conduct a brief frisk to make sure there's no weapons. That on its own in a vacuum might seem like a good policy. But when combined with the ubiquitousness of drugs and the aggressive action taken against the drug crimes, it becomes in practice a policy that has allowed police to harass and conduct searches which are almost without any kind of justification.

**Gabriel "Jack" Chin:** So I think that police are more inclined to look for guns in drug cases than they are to look for drugs in gun cases, because the law I'm familiar with, for the most part, says that carrying or using or having a gun in connection with a drug trafficking offense is a big enhancement, makes it more serious, authorizes a longer sentence. Whereas if there's a gun case where the possession of the gun is illegal or it's an illegal gun, for some reason, then finding drugs on top of that might be an independent charge. But to my knowledge, it's not typically a big enhancement to the underlying gun offense, if that's what the police are investigating. So if we're talking about police investigating drug cases, they definitely have an incentive to look for guns because it's an aggravating circumstance under various legal regimes, various criminal codes, the states or the federal government. It authorizes a longer sentence. And that's true even if, in many instances, even if gun isn't used, even if it's not loaded, even if it's not operable, even if nobody gets hurt, the law in many instances wants to separate guns from drug offenses. And it raises an interesting point now where the Supreme Court is recognizing an individual right to carry firearms in self-defense. And so I wonder how this is going to play out in a situation where the person is committing a drug offense and they have a gun, but the gun really isn't something that they're using violently or necessarily as part of the drug offense. It's just there. Will there be any Second Amendment doctrine that says you can't punish me too severely for doing something that's otherwise illegal because I was committing an unrelated crime? We'll see if that idea gets any purchase in legislatures or in courts. But meanwhile, a law enforcement operation to find drugs, they're going to look in every corner that they can within the limits of the search warrant to see if there's a gun, because that will make the case stronger.

**Hannah Miller:** So I've really enjoyed listening to the two of you diagnose these different problems and challenges we see when applying the Fourth Amendment in the drug context. And so, you know, just to wrap things up, I'd like to

hear from each of you some suggestions on what changes you would make to the law or to our drug policy, federal drug policy as it stands, that might better address the challenges that we've picked apart here today.

**Gabriel "Jack" Chin:** If I had a magic wand, I would realign drug enforcement to focus on public health, harm reduction and less on law enforcement. We can't have people engaging in gun battles in the street over drug turf. We can't have law enforcement officials being corrupted with bribes and things like that. I'm not saying that the public health solution will solve every aspect of the drug problem, but I think it would go a long way. So that's one thing that I would do.

I'm also very concerned about racial profiling. What you see in some jurisdictions is an effort to collect data on things like traffic stops. Why was the person stopped? What is their race? Did the officers search the vehicle, ask for consent to search the vehicles, search the vehicle based on probable cause, and what, if anything, was found? And having more data will show whether there is racial profiling or racial discrimination in stops and searches. And even if the Supreme Court isn't eager to deal with that under the Fourth Amendment, I think it will be helpful for public policy discussions and legislative action to know what's really happening there on the street, around the country.

And the last thing is there is interesting innovation in jurisdictions like California, where I am. California passed the Racial Justice Act and it says, you know, we're not going to follow *Whren versus United States*, we're not going to follow *Armstrong versus the United States*. We're going to say that if there's a reasonable appearance of discrimination, racial discrimination or other forms of discrimination in arrests, searches, seizures, prosecution, sentencing and punishment, any step of the criminal process, then we're going to invalidate that act when we don't care what the Fourth Amendment says. We don't care what the US Constitution says. We in California are going to go beyond that. And I think that given the discussions and the seriousness with which racial profiling is and law enforcement reform has been taken in some parts of this country, I think other states might go along with that. And I certainly, for one would like to see it.

**Ric Simmons:** I like all those ideas. I think I'd add on a couple more. If you could give us a magic wand, as you said, I think we could think about, at least adding this factor to the debate about whether or not to legalize drugs and which drug should be legalized and so on, whether or not we should make all drugs legal in this country. That's something that I think we're gonna be debating for a while. But I think part of that debate, I would like to be that people acknowledge the cost to privacy, the cost that we are paying in less Fourth Amendment rights by making drugs illegal. What it empowers police to do, incentives it creates for police to do things so they can seize property and get money from that and so on. There are these costs that are kind of invisible, that people don't think about when they think about the Drug War. People have talked a lot about how many individuals we are incarcerating, for how long, but I think maybe people don't think about so much how much power we're giving to the police to intrude into our lives with these laws.

I guess the other thing I would say is I talked a bit about the Terry stop and frisks. I would like to see real enforcement of that. I'd like to see the courts actually applying the Terry Law, I think as it was meant to be applied, which is that police cannot frisk someone unless they can prove they had a legitimate, reasonable expectation that someone is armed. And I think if we could enforce that through some mechanism and again, there's not really because of doing this, the only thing we really have a exclusionary rule so that if police do find something and the judges say that, oh, you have reasonable suspicion, then we exclude the contraband. But that doesn't stop police from frisking hundreds or thousands of people every day when they don't find something. So class action suits like the one that brought New York against the NYPD were people illegally. I'd like to see more of that. So I think those are probably my biggest requests, I think.

**Hannah Miller:** Well, Ric, thanks so much for agreeing to be the co-host today and for bringing Jack in on this conversation. And Jack, I really appreciate your time and your expertise in this area. Ric, do you have any final thoughts before we wrap up?

**Ric Simmons:** I also want to thank Jack for lending us his time and expertise. I also want to thank the Drug Enforcement and Policy Center for this series and opportunity to talk about the Fourth Amendment. I think it's a, it's a great resource.

**Gabriel "Jack" Chin:** Yeah. Thanks. Thanks again.

**Hannah Miller:** Drugs on the Docket is a production of the Moritz College of Law, Drug Enforcement and Policy Center. This episode is produced by me, Hannah Miller and Holly Griffin. Doug Berman is our editorial advisor. The music is composed by Joe DeWitt.