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Note

For My Doctor's Eyes Only: *Ferguson v. City of Charleston*

Sandi J. Toll*

"I went to MUSC because I was looking for help, because I had an illness that I couldn't get rid of by myself. Instead they treated me like an animal."¹

I. INTRODUCTION

In 1989, the Medical University of South Carolina (MUSC),² in conjunction with state and local law enforcement officials, developed and implemented the Interagency Policy of Management of Substance Abuse During Pregnancy ("MUSC's policy").³ MUSC's policy required hospital personnel to obtain urine samples from pregnant women suspected of drug abuse.⁴ If a patient tested positive, she would

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1. *Nightline, How Far Can You Go to Protect an Unborn Child?* (ABC television broadcast, Sept. 27, 2000), at http://www.abc.go.com/onair/nightline/transcripts/n1000927_trans.html (quoting petitioner Patricia R. Williams); see also *infra* note 245 and accompanying text (profiling the petitioners who filed suit in *Ferguson v. City of Charleston*).

2. MUSC is a public hospital in Charleston, South Carolina that receives state and federal funding. Kimani Paul-Emile, *The Charleston Policy: Substance or Abuse*, 4 MICH. J. RACE & L. 325, 326 n.1 (1999); see also *infra* note 202 and accompanying text (profiling the race and socioeconomic status of MUSC's patients).

3. Paul-Emile, *supra* note 2, at 326. MUSC hospital officials and Charleston law enforcement developed and implemented a policy requiring pregnant women who satisfied one of nine criteria to take a urine drug test. NOW Legal Defense and Education Fund, *Safeguarding the Rights of Pregnant Women*, at <http://www.nowldef.org/html/courts/2000-2001/Ferguson.shtml> (last visited Aug. 8, 2001). For a detailed discussion of MUSC's policy, see *infra* notes 201-34 and accompanying text.

4. See *infra* notes 211-13 and accompanying text (discussing the drug testing requirements and procedures of MUSC's policy).

be required to immediately enter a residential drug treatment program or face arrest and criminal prosecution.⁵

Although MUSC established the policy to treat pregnant drug abusers and their unborn children, the policy punished, rather than helped, the women who sought prenatal care at MUSC.⁶ Thirty women were arrested under MUSC's policy, even though many of them were still recovering from delivery.⁷ For example, one patient was handcuffed to her bed during delivery while others were arrested wearing their hospital gowns and still bleeding from childbirth.⁸ In 1993, ten of these women challenged MUSC's policy as a violation of their Fourth Amendment right against unreasonable searches.⁹

When *Ferguson v. City of Charleston* reached the United States Supreme Court, the issue became whether MUSC could test pregnant women, absent a warrant or patient consent, for illegal drug use and then turn positive test results over to the police.¹⁰ The Court concluded that the drug tests did not fall within the special needs exception to the Fourth Amendment's traditional warrant and probable cause requirements.¹¹ Despite the dangers of prenatal drug use, the majority held that the governmental interest did not justify violating a patient's constitutional right to privacy.¹² As a result, the drug tests were unconstitutional searches in violation of the Fourth Amendment.¹³

5. See *infra* notes 217-26 and accompanying text (discussing the ramifications of violating MUSC's policy and explaining treatment options).

6. See Paul-Emile, *supra* note 2, at 326.

7. See *infra* notes 231, 234 and accompanying text (describing patients who were arrested pursuant to MUSC's policy).

8. Brief for Petitioners at 17, *Ferguson v. City of Charleston*, 121 S. Ct. 1281 (2001) (No. 99-936).

9. *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1286 (2001) [hereinafter *Ferguson II*]. The Fourth Amendment states:

the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV; see also *infra* notes 28-39 and accompanying text (providing a more detailed analysis of the Fourth Amendment).

10. *Ferguson II*, 121 S. Ct. at 1284.

11. See *infra* Part II.B (examining judicial development of the special needs doctrine). The special needs exception is applicable under circumstances where "the existence of special needs, beyond the normal needs of law enforcement, make the warrant and probable cause requirements impractical." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

12. See *Ferguson II*, 121 S. Ct. at 1294; see also *infra* note 306 and accompanying text (discussing the Court's finding that protecting the health of unborn children did not qualify as a special need).

13. *Ferguson II*, 121 S. Ct. at 1293.

Because of *Ferguson*, hospitals can no longer test pregnant patients for illegal drug use without their consent if positive results are used for future prosecution.¹⁴

Part II of this Note begins with an overview of the Fourth Amendment, including a discussion of the special needs exception to its warrant and probable cause requirements.¹⁵ Part II then summarizes the history of fetal abuse prosecution and outlines the development and implementation of MUSC's policy.¹⁶ Part III then explores the United States Supreme Court's decision in *Ferguson*.¹⁷ Part III will then argue that the majority is correct in holding that MUSC's policy does not fall within the special needs exception to the Fourth Amendment, but questions why the concurring opinion left open the possibility of allowing fetal abuse prosecutions when a warrant or patient consent is obtained.¹⁸ Part IV will also argue that the dissenting opinion incorrectly minimized the use of law enforcement officials to implement and enforce MUSC's policy.¹⁹ Part V demonstrates how the *Ferguson* decision insures that pregnant drug abusers will continue to access prenatal care and at the same time protect the health of their unborn children.²⁰ This Note concludes, however, by cautioning that the *Ferguson* opinion leaves unanswered questions regarding the future of fetal abuse prosecutions²¹ and the scope of the special needs doctrine.²²

II. BACKGROUND

Exploring the interwoven nature of constitutional law and the social interests surrounding government-sponsored drug testing policies is important to understanding the *Ferguson* opinion.²³ The Fourth

14. National Coalition for Patient Rights, *Supreme Court Limits Drug Tests During Pregnancy*, at <http://www.nationalcpr.org/supremecourtlimits42001.htm> (last modified Aug. 3, 2001).

15. See *infra* Part II.A–B (discussing the requirements of the Fourth Amendment and the development of the special needs exception).

16. See *infra* Part II.C–D (discussing both the societal pressures that led MUSC officials to develop its drug testing policy and the policy's specific components).

17. See *infra* Part III.C.1 (discussing the majority opinion); *infra* Part III.C.2 (discussing the concurring opinion); *infra* Part III.C.3 (discussing the dissenting opinion).

18. See *infra* Part IV.A–B (analyzing the majority and concurring opinions).

19. See *infra* Part IV.C (questioning the analysis and conclusions reached by the dissent).

20. See *infra* Part V.A (discussing the positive implications resulting from the Court's decision).

21. See *infra* Part V.B (examining the breadth of possibilities that may trigger fetal abuse prosecutions under the reasoning of the concurrence).

22. See *infra* Part V.C (discussing the uncertainty that remains in special needs jurisprudence).

23. See *infra* Part II.A–D (discussing the development of the special needs exception to the Fourth Amendment and the societal issues that led to the implementation of MUSC's policy).

Amendment requires all searches and seizures to be reasonable.²⁴ The impracticality of obtaining a warrant in certain situations, however, led the Supreme Court to develop the special needs exception to the Fourth Amendment's traditional requirements.²⁵ From a societal perspective, the *Ferguson* decision arose from the government's desire to protect both the health of unborn children and stem the explosion of infants born addicted to crack cocaine.²⁶ In response to these concerns, MUSC and Charleston law enforcement officials developed and implemented the MUSC policy.²⁷

A. *The Fourth Amendment*

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures by government officials.²⁸ An individual's Fourth Amendment rights are only implicated when a government official has unfairly infringed upon his or her expectation of privacy.²⁹ Designed to prevent arbitrary and unnecessary infiltration into an individual's personal zone of privacy,³⁰ the Fourth Amendment only applies to searches and seizures conducted by government agents.³¹

24. See *infra* Part II.A (discussing the constitutional requirements of the Fourth Amendment).

25. See *infra* Part II.B (outlining the development of the special needs exception to the Fourth Amendment).

26. See *infra* Part II.C (discussing the hostile environment surrounding the rise in prenatal drug use and crack-addicted infants).

27. See *infra* Part II.D (discussing the development of MUSC's drug testing policy).

28. See U.S. CONST. amend. IV; see also *supra* notes 6-9 and accompanying text (discussing the unreasonable seizures that led to the challenge in MUSC's policy). A search is defined as an invasion of one's privacy in order to find an illegal product. See, e.g., *Oliver v. United States*, 466 U.S. 170, 177-78 (1984) (holding that a government search was reasonable because the defendant's property, an open field, was accessible to the public). A person is seized when, given all of the circumstances surrounding a stop or arrest, a person reasonably believes that he or she is unable to freely leave the area. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (requiring an objective determination of an individual's ability to voluntarily leave police custody); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (listing specific factors to determine when an individual has been seized by a government official).

29. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (finding that the Fourth Amendment requires the individual to have an expectation of privacy that is viewed as reasonable by societal standards).

30. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

31. *Walter v. United States*, 447 U.S. 649, 656 (1980) (limiting the Fourth Amendment to actions of the federal government). The Fourth Amendment is applicable to both federal and state actors. See *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (holding that the Fourth Amendment's right to privacy is "implicit in 'the concept of ordered liberty' and is enforceable against state officials").

To the trier of fact, the constitutionality of a search or seizure turns on whether it is (1) reasonable³² and (2) based on probable cause.³³ In deciding whether a search is reasonable, the trier of fact must balance the government's interest in conducting the search against the invasion of a person's privacy.³⁴ In addition, the government's conduct must be based on probable cause, and executed pursuant to a warrant.³⁵ Taken together, the Supreme Court determined that searching an individual without individualized suspicion of wrongdoing is per se unreasonable.³⁶

However, the principle that all searches must be conducted with probable cause is not absolute.³⁷ When the government's interests outweigh the individual's privacy expectations, government officials may be allowed to conduct a search without individualized suspicion.³⁸

32. See U.S. CONST. amend. IV; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (stating that the Fourth Amendment only prohibits unreasonable searches). The reasonableness requirement often prevents the government from searching or seizing an individual without particularized suspicion. *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

33. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) (stating that probable cause is required unless a special need makes the warrant and probable cause requirements futile); see also Jill Dorancy-Williams, Comment, *The Difference Between Mine and Thine: The Constitutionality of Public Employee Drug Testing*, 28 N.M. L. REV. 451, 463 (1998); *infra* note 35 (describing the probable cause requirement as it relates to Fourth Amendment jurisprudence).

34. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989).

35. *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting, however, that certain established exceptions exist). Probable cause is defined as the level of suspicion necessary to justify a search that ordinarily would be protected by the Fourth Amendment. *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Probable cause exists when known circumstances would reasonably suggest that a suspect has evidence of a crime in his or her possession. Seanna M. Beck, *Thirtieth Annual Review of Criminal Procedure: Overview of the Fourth Amendment*, 89 GEO. L.J. 1055, 1062 (2001). It requires a fair possibility that an illegal item will be found in a specific place or on the person. *Illinois v. Gates*, 462 U.S. 213, 283 (1983). In order to issue a warrant, a judge must be satisfied that law enforcement has probable cause to justify the search. See *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

36. *Chandler*, 520 U.S. at 308. The Court reiterated that requiring the search to be reasonable "generally bars officials from undertaking a search . . . absent individualized suspicion." *Id.*; see also Michael S. Vaughn & Rolando V. del Carmen, "Special Needs" in *Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. CIV. RTS. J.L. 203, 203-04; cf. *United States v. Martinez-Fuerte*, 428 U.S. 543, 555-56 (1976) (holding that although the Fourth Amendment does not explicitly mention individualized suspicion, it is generally required for a search or seizure to be found constitutional). But see *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (holding that a search without a warrant is unreasonable unless it fits within a narrowly defined exception to the Fourth Amendment's warrant requirement).

37. *Von Raab*, 489 U.S. at 665 (stating that "neither a warrant nor probable cause, nor indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance").

38. 2 DAVID O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES* 802-09 (2d ed. 1995). Other examples of searches that do not require a warrant

Under circumstances where the government's interests are of great importance and the individual's privacy expectations are deemed less significant, the Supreme Court found the strict warrant probable cause requirements unnecessarily restrictive and began utilizing a reasonableness standard to evaluate the constitutionality of the search.³⁹

B. Development of the Special Needs Doctrine

The special needs exception stands as one of the most frequently utilized exceptions to the Fourth Amendment's warrant and probable cause requirements.⁴⁰ This exception enables government officials to randomly search individuals when they have a special need that extends

include searches after an individual has been arrested, cases where the suspect has voluntarily consented to the search, searches conducted while in pursuit of a suspect, situations where the search is necessary to prevent an individual from destroying exculpatory evidence, searches at sea, vehicle searches, border searches, inventory searches, and searches where the special needs of the state override an individual's privacy interests. Douglas K. Yatter et al., *Twenty-Ninth Annual Review of Criminal Procedure: Warrantless Searches and Seizures*, 88 GEO. L.J. 912, 912 (2000).

39. George M. Dery, *Are Politicians More Deserving of Privacy Than School Children? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 76 (1998). For example, searches incident to an arrest or stop and frisk searches of suspicious individuals do not require government officials to obtain a criminal warrant based upon probable cause. Yatter, *supra* note 38, at 912-13; *see also* New York v. Belton, 453 U.S. 454, 461 (1981) (holding that officers do not need individualized suspicion to search an arrested suspect for weapons); United States v. Robinson, 414 U.S. 218, 235 (1973) (finding that preserving evidence validates a search under similar circumstances); Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that if a police officer has a reasonable suspicion that an individual is engaging in criminal activity, the officer may detain the individual, ask questions, and perform a pat-down for weapons). Similarly, nonconsensual administrative searches for health and safety purposes do not require the same degree of probable cause because of the necessity of regular inspections and reduced privacy expectations related to intense government oversight. New York v. Burger, 482 U.S. 691, 702-03 (1987) (upholding warrantless administrative searches of regulated industries when the state has a substantial interest in regulating the industry, the search is required to further that interest, and notice has been given). In *New York v. Burger*, the Court held that requiring government officials to obtain a warrant would reduce the effectiveness of unannounced inspections. *Id.* at 710. Moreover, the defendants already had a reduced expectation of privacy because of their involvement in a highly regulated industry. *Id.* at 704-07; *see also* Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21 (1978) (finding that satisfaction of "reasonable legislative or administrative standards" fulfills the probable cause requirement for an administrative search). Finally, if the underlying purpose of the administrative search is to uncover criminal wrongdoing, the government must obtain a criminal warrant based upon probable cause. Michigan v. Clifford, 464 U.S. 287, 294 (1984). In *Michigan v. Clifford*, the fire department suspected that a fire-damaged house was the result of arson. *Id.* at 289-91. The Supreme Court held that if the fire department's only purpose was to determine the cause of the fire, then they did not need to obtain a criminal warrant. *Id.* at 293-94. If the underlying purpose of the search was to find evidence of arson, however, a warrant based on individualized suspicion of wrongdoing was required. *Id.* at 294.

40. Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 259 (2000); *infra* note 70 (defining the special needs exception).

beyond the normal need for law enforcement.⁴¹ When the government posits a special need, a court can weigh the government's interests against the individual's right to privacy and determine if the search is reasonable.⁴²

In order for a search to fall within the special needs exception, the government must demonstrate that it has an interest beyond normal law enforcement goals by presenting clear evidence that the search will remedy a "real" problem.⁴³ In addition, the government must show that the underlying purpose of the search cannot be achieved if the Fourth Amendment's warrant and probable cause requirements are enforced.⁴⁴ If these elements are satisfied, the court will then balance the government's interest in conducting the search against the individual's privacy interests.⁴⁵ Only if the court is convinced that the government's interest outweighs the individual's privacy interest will the warrantless search or seizure be upheld.⁴⁶

Special needs determinations are based upon the totality of the circumstances.⁴⁷ Legal scholars have argued, however, that this high

41. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). "Normal" has been interpreted as searches conducted by police officers in order to obtain evidence for criminal prosecution. Jennifer Y. Buffaloe, Note, "Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. L. REV. 529, 543 (1997).

42. Bryony J. Gagan, Note, *Ferguson v. City of Charleston, South Carolina: "Fetal Abuse," Drug Testing, and the Fourth Amendment*, 53 STAN. L. REV. 491, 501 (2000).

43. *Griffin*, 483 U.S. at 873. Justice Ginsburg defined a "real" problem as one that is "important enough to override the individual's acknowledged privacy interest and sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 318 (1997); see also Yatter, *supra* note 38, at 982-83. A "special need" is therefore even greater than the prosecutorial needs of law enforcement. *Skinner*, 489 U.S. at 619; see also *infra* notes 163-65 and accompanying text (describing the Court's current approach to what constitutes a "special need").

44. *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 533. In this case, the Court found that the government interest in dispensing with the warrant requirement was based on whether "the burden of obtaining a warrant is likely to frustrate the government purpose behind the search." *Id.*

45. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989).

46. *Id.* The degree of intrusion is measured by both objective and subjective standards. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990). The objective intrusion is "measured by the duration of the seizure and the intensity of the investigation." *Id.* The subjective intrusion is "measured by the extent to which the method chosen minimizes or enhances fear and surprise on the part of those searched or detained." *Id.*

47. *Chandler*, 520 U.S. at 314 (holding that the trier of fact must review the individual facts of each case when determining the legality of a special needs search); see also *United Teachers v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 856-57 (5th Cir. 1998) (finding that drug testing employees injured on the job did not constitute a special need); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 373 (6th Cir. 1998) (validating certain school policies while invalidating others under the special needs exception); *Willis v. Anderson Cmty. Sch.*

level of subjectivity clouds the ability of a court to completely assess the level of the privacy intrusion.⁴⁸ Moreover, they contend that the delineation between special needs and law enforcement searches is increasingly unclear.⁴⁹ Despite these criticisms, courts continue to uphold the constitutionality of the special needs exception.⁵⁰

1. Origin of the Special Needs Exception: The Administrative Search Doctrine

As the government's interest in conducting warrantless searches rose in the arena of public health and safety, the administrative search doctrine developed.⁵¹ While this doctrine furthered the development of the special needs exception,⁵² the Supreme Court's decision in *Camara v. Municipal Court of City & County of San Francisco* laid the actual foundation for the special needs exception.⁵³

Corp., 158 F.3d 415, 419 (7th Cir. 1998) (finding a public school's policy of drug testing students suspended for fighting did not qualify as a special need); *Hatley v. Dep't of the Navy*, 164 F.3d 602, 604 (Fed. Cir. 1998) (holding that governmental interest in keeping firefighters drug free did not qualify as a special need under the Fourth Amendment).

48. Vaughn & del Carmen, *supra* note 36, at 221. The authors argue that the balancing test has become so generalized that governmental interests will always outweigh an individual's interest in protecting his or her privacy. *Id.*; see also Dery, *supra* note 39, at 74 (concluding that the Court balances the competing interests of the government and the individual without consulting any objective standards).

49. Vaughn & del Carmen, *supra* note 36, at 222.

50. Since its official introduction in *New Jersey v. T.L.O.*, the Supreme Court has continuously recognized the validity of the special needs exception to the Fourth Amendment's traditional requirements. See, e.g., *Ferguson II*, 121 S. Ct. 1281, 1288-90 (2001); *Chandler*, 520 U.S. at 318-22; *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619-33 (1989); *Von Raab*, 489 U.S. at 665-66.

51. Vaughn & del Carmen, *supra* note 36, at 206. Administrative searches generally consist of "fire, health, or safety inspections of residential or private commercial property." Yatter, *supra* note 38, at 978. Prior to conducting an administrative search, government officials must obtain an administrative search warrant. *Id.* This warrant is based on a lower probable cause standard than criminal investigations. *Id.* For example, evidence of statutory violation or a reasonable suspicion that public safety is at risk is enough to establish probable cause. *Id.* at 978-79.

52. Vaughn & del Carmen, *supra* note 36, at 206.

53. *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967). Prior to *Camara*, the Court in *Frank v. Maryland* had previously upheld the conviction of a private homeowner prohibiting a municipal health inspector from entering and inspecting his premises without a search warrant. *Frank v. Maryland*, 359 U.S. 360 (1959), *overruled in part by* *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967). Similarly, the *Camara* decision arose out of a property owner's refusal to allow a warrantless inspection of his residential apartments. *Camara*, 387 U.S. at 525. Arguing that the inspection was a significant intrusion upon his privacy interests, the owner asserted that the inspection constituted an illegal search. *Id.* at 527. Specifically, *Camara* asserted that the search was unconstitutional because it "authorize[d] municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code existed therein." *Id.*; see also *infra* note 57 and accompanying text (discussing the Court's decision in *Camara*).

In *Camara*, the Court recognized that health and safety concerns may provide justification for relaxing the Fourth Amendment's reasonableness requirement.⁵⁴ The Court distinguished between a criminal search that must comply with the stringent Fourth Amendment requirements and an administrative search designed to protect public health and safety.⁵⁵ Recognizing that requiring individualized suspicion for administrative searches may frustrate the government's purpose in conducting the search,⁵⁶ the Court concluded that the reasonableness of an administrative search must be measured in light of public policy.⁵⁷

Camara's main value, however, arises in its departure from the strict probable cause requirements.⁵⁸ In *Camara*, while probable cause was still required, the government no longer needed individualized suspicion when the government's need to conduct an administrative search was greater than an individual's privacy expectation.⁵⁹ Commentators argue, however, that this subsequent lack of probable cause enabled the

54. Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 92 (1992).

55. *Camara*, 387 U.S. at 535. The Court found that unlike criminal searches, "the inspection programs at issue [were] aimed at securing city-wide compliance with minimum physical standards for private property." *Id.*

56. *Id.* at 533. Unlike a search pursuant to a crime, the San Francisco city inspectors were attempting to minimize conditions that were dangerous to public safety. *Id.* Despite this need, however, the Court ultimately refused to depart from the Fourth Amendment's warrant requirement. *Id.* at 528 (finding that warrants were necessary for a constitutional search "except in certain carefully defined classes of cases").

57. *Id.* at 534-37; see also Nuger, *supra* note 54, at 92. The Court determined that the reasonableness of a search was based on "balancing the need to search against the invasion which the search entails." *Camara*, 387 U.S. at 537. The inspection was reasonable because of the public's acceptance of housing code enforcement, the public's interest in negating dangerous living environments, and the limited invasion of personal privacy. *Id.* Although the inspectors lacked individualized suspicion of wrongdoing, the searches were reasonable because enforcement of housing regulations was necessary to promote health and safety interests. *Id.* at 535-36. A search is reasonable only when it satisfies the probable cause requirement. *Id.* at 535.

Despite the Court's willingness to depart from strict probable cause requirements, however, the Court ultimately upheld the owner's conviction of housing code violations. *Id.* at 540. Under the specific circumstances of this administrative search, the Court determined that *Camara's* privacy expectation outweighed the housing inspectors' need to search his property because there was not an urgent need to inspect the premises. *Id.* As such, a warrantless search of *Camara's* property was unreasonable and violated the Fourth Amendment. *Id.*

58. Jennifer E. Smiley, Note, *Rethinking the Special Needs Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of the Fourth Amendment Protections*, 95 NW. U. L. REV. 811, 814-15 (2001).

59. *Id.*; *Camara*, 387 U.S. at 536-37. Under these circumstances, the Court could now determine the reasonableness of an investigation by balancing the individual's legitimate privacy expectation against the government's need to conduct a warrantless search. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (citing *Camara*, 387 U.S. at 536-37).

Court to become increasingly deferential to the government.⁶⁰ From this deference to government interests, a new exception to the Fourth Amendment's warrant and probable cause requirements arose in the form of the special needs exception.⁶¹

2. Emergence of the Special Needs Exception: *New Jersey v. T.L.O.*

In *New Jersey v. T.L.O.*, the Court recognized a new type of warrantless search which was similar to administrative searches.⁶² For the first time, the Court recognized that certain government interests are so "special" that searches may be conducted without adhering to traditional warrant and probable cause requirements.⁶³ It was from this determination that the special needs exception emerged.⁶⁴

T.L.O. was a freshman at a New Jersey public school when she was caught smoking by a teacher in violation of school policy.⁶⁵ After T.L.O. denied that she had been smoking, the assistant vice-principal demanded to search her purse, where he discovered a pack of cigarettes and evidence of drug paraphernalia. Subsequently, the school used the evidence from the search against T.L.O. in school and delinquency proceedings.⁶⁶ The United States Supreme Court applied the balancing test and held that requiring public school officials to obtain a warrant would significantly interfere with the school's interest in maintaining discipline.⁶⁷ Moreover, the school's substantial interest in preserving an orderly educational environment prevailed because students have a

60. Nuger, *supra* note 54, at 92. Nuger argued that if the Court determines that the government's interest is particularly important, it will find a way for the search to comply with the Fourth Amendment. *Id.* As a result, the individual's privacy rights are given little weight when determining if the search is reasonable. *Id.*

61. *Id.* at 93.

62. *T.L.O.*, 469 U.S. at 325.

63. *Id.* at 351 (Blackmun, J., concurring); *infra* notes 70-75 and accompanying text (discussing Justice Blackmun's concurrence in *T.L.O.*); *see also* Dodson, *supra* note 40, at 262.

64. Smiley, *supra* note 58, at 815.

65. *T.L.O.*, 469 U.S. at 328.

66. *Id.* Upon searching T.L.O.'s purse, the vice-principal also discovered rolling papers. *Id.* Believing that use of rolling papers was associated with marijuana use, he continued his search and found narcotics, a pipe, empty plastic bags, money, and a list of clients. *Id.*

67. *Id.* at 340 (balancing a student's expectation of privacy against the school's needs to provide a safe environment). The Court found that searching a student will be justified when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated . . . the rules of the school." *Id.* at 342. However, the Court did recognize that students have an expectation of privacy despite the school's custodial role. *Id.* at 338.

lower expectation of privacy.⁶⁸ Thus, the Court held that the warrantless search of T.L.O.'s purse was constitutional.⁶⁹

A discussion of the special needs exception, however, only appeared in Justice Blackmun's concurrence.⁷⁰ Justice Blackmun postulated that the Court neglected to make a crucial inquiry before applying the *Camara* balancing test because it failed to consider whether there were "exceptional circumstances"⁷¹ that justified a special need for the search.⁷² Justice Blackmun believed that the Court should balance the need for the search against the individual's privacy interests only after a special need appears.⁷³ Justice Blackmun concurred because he found a special need, namely that a school must react promptly to behavior that threatens students, teachers, or the learning process, justified forgoing traditional warrant requirements.⁷⁴ Once he identified the special need, Justice Blackmun applied the *Camara* balancing test and reached the same result as the majority.⁷⁵

3. Broadening the Scope of the Special Needs Exception

Two years later in *O'Connor v. Ortega*, the Court had its first opportunity to rely on the special needs doctrine to uphold a warrantless

68. See *id.* at 341. In his dissent, however, Justice Brennan criticized the plurality for an "unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards." *Id.* at 354 (Brennan, J., dissenting). Although recognizing the impracticality of requiring a warrant to conduct school searches, Justice Brennan found that the balancing test was heavily skewed in favor of the government and failed to adequately consider the individual's privacy interests. *Id.* at 352, 361-62 (Brennan, J., dissenting).

69. *Id.* at 347-48.

70. *Id.* at 351 (Blackmun, J., concurring). Justice Blackmun found that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirements impractical, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* (Blackmun, J., concurring). The three factors Justice Blackmun articulated are (1) the need is special, (2) the need is beyond the normal need for law enforcement, (3) that the warrant requirement is impractical. *Id.* (Blackmun, J., concurring).

71. *Id.* at 351 (Blackmun, J., concurring). Justice Blackmun named examples of exceptional circumstances where requiring a warrant is impractical, including "stop and frisk" searches and stopping cars attempting to cross national borders. *Id.* (Blackmun, J., concurring) (citing *Terry v. Ohio*, 392 U.S. 1, 20-21 (1986)); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). *But cf.* Vaughn & del Carmen, *supra* note 36, at 210-11 (arguing that using these examples contradicts the requirement that the special need must go beyond traditional law enforcement interests).

72. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

73. *Id.* (Blackmun, J., concurring).

74. *Id.* at 353 (Blackmun, J., concurring).

75. *Id.* (Blackmun, J., concurring).

search.⁷⁶ After placing Dr. Ortega on administrative leave for purported misconduct, hospital administrators conducted a thorough search of his office and obtained evidence that was used at Ortega's discharge hearing.⁷⁷ Writing for the four member plurality, Justice O'Connor found that the search was constitutional and upheld Ortega's discharge.⁷⁸ Balancing an employee's reduced expectation of privacy in the workplace against the employer's need to closely monitor employee conduct,⁷⁹ the plurality found that the hospital's actions were reasonable.⁸⁰

More importantly, Justice Scalia's concurring opinion marked the first application of the special needs doctrine outside of the public school context.⁸¹ Recognizing that employers have a special need to investigate workplace violations and access work-related documents, Justice Scalia noted that the need for "frequent and convenient" access to an employee's files and office space made it impractical to obtain a warrant prior to conducting a search.⁸² Since these searches are reasonable within the workplace environment, the search of Ortega's office did not violate the Fourth Amendment.⁸³

76. *O'Connor v. Ortega*, 480 U.S. 709 (1987) (plurality opinion). In *Ortega*, officials working for a state hospital investigated allegations of sexual harassment and inappropriate disciplinary actions in Dr. Ortega's management of residents. *Id.* at 712 (plurality opinion).

77. *Id.* at 713 (plurality opinion). Hospital administrators took cards, a photograph, and a book of poetry sent to Dr. Ortega by a former resident. *Id.* (plurality opinion). In order to obtain damages, Dr. Ortega filed a § 1983 civil lawsuit against the public hospital officials, alleging that he was deprived of his constitutional right to be free from unreasonable searches. *Id.* at 714 (plurality opinion) (citing the Civil Action for Deprivation of Rights Act).

78. *Id.* at 721-22 (plurality opinion). Justice O'Connor focused on the realities of the workplace environment and the importance of preventing illegal conduct from negatively affecting daily operations. *Id.* (plurality opinion).

79. *Id.* at 722 (plurality opinion). The Court found work-related searches are primarily related to business matters. *Id.* (plurality opinion). Under these circumstances, requiring a warrant would be impractical. *Id.* (plurality opinion). "[T]he common-sense realization [is] that government offices could not function if every employment decision became a constitutional matter." *Id.* at 722 (plurality opinion) (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

80. *See id.* at 728 (plurality opinion). Justice O'Connor concluded that "employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct." *Id.* at 721 (plurality opinion). For example, they may need access to files while an employee is away. *Id.* at 721-22 (plurality opinion).

81. *Id.* at 732 (Scalia, J., concurring).

82. *Id.* (Scalia, J., concurring). According to Justice Scalia, the government's status as Dr. Ortega's employer and the "employment-related" nature of the search make the special needs doctrine applicable to these circumstances. *Id.* (Scalia, J., concurring).

83. *Id.* (Scalia, J., concurring). Justice Scalia concluded that "government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment." *Id.* (Scalia, J., concurring).

The Court subsequently broadened the scope of the special needs doctrine in *Griffin v. Wisconsin*.⁸⁴ *Griffin* marks the first time that a majority of the Court relied upon the special needs doctrine to determine the reasonableness of a search.⁸⁵ In *Griffin*, law enforcement officials searched a probationer's home for illegal firearms without a warrant or individualized suspicion of wrongdoing.⁸⁶ In a 5-4 decision, the Court utilized the special needs exception to affirm Griffin's conviction and conclude that the search was reasonable.⁸⁷

Writing for the majority, Justice Scalia found that Wisconsin's ability to maintain its probation system presented a "special need" beyond law enforcement.⁸⁸ Justice Scalia then determined that the search was reasonable because the state's interest outweighed Griffin's expectation of privacy.⁸⁹ First, requiring a warrant to search a probationer's house would interfere with the state's ability to respond to alleged wrongdoing and reduce the deterrent effect of unannounced searches.⁹⁰ Second, a search conducted by a probation officer is less invasive than one conducted by a police officer, especially because a probation officer's underlying goal is to help, not prosecute, the probationer.⁹¹ Finally, Justice Scalia argued that a probationer has a decreased expectation of

84. *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

85. See Dodson, *supra* note 40, at 264; see also *infra* notes 88-93 and accompanying text (discussing the majority's use of the special needs doctrine to uphold the constitutionality of a government search).

86. *Griffin*, 483 U.S. at 871. Believing there were guns in Griffin's apartment, probation officers searched his home and found a handgun. *Id.* Government officials searched Griffin's house pursuant to a Wisconsin law that allowed probation officers to search probationers' homes without a warrant as long there was a reasonable suspicion of contraband inside the home. *Id.* at 870-71. Since it was illegal for convicted felons to possess firearms, Griffin received a two-year prison sentence. *Id.* at 872; WIS. STAT. ANN. § 941.29(2)(a) (West 1996 & West 2000) (stating that individuals convicted of a felony in Wisconsin are guilty of a Class E felony if they possess a firearm). Griffin subsequently challenged his conviction on the ground that the search violated his Fourth Amendment rights. *Griffin*, 483 U.S. at 872.

87. *Griffin*, 483 U.S. at 873.

88. *Id.* at 875. The majority argued that Wisconsin's special need to supervise probationers to insure safe communities justified the warrantless search. *Id.* Scalia subsequently compared the operation of the probation system to the operation of a school, government office, or a prison in their need for government supervision of students, employees, or prisoners. *Id.* at 873-74.

89. *Id.* at 876.

90. *Id.* The majority concluded that the inevitable delay in obtaining a warrant would hinder the probation officers' ability to quickly react to probation violations. *Id.* To demonstrate his argument, Scalia suggested that "one might contemplate how parental custodial authority would be impaired by requiring judicial approval for search of a minor child's room." *Id.*

91. Dodson, *supra* note 40, at 265 (citing *Griffin*, 483 U.S. at 876-77).

privacy based on his prior conviction.⁹² As the state's interest outweighed Griffin's privacy interest, the Court determined that the search was reasonable.⁹³

Although *Griffin* and *Ortega* marked the first time that members of the Court specifically relied on the special needs exception to decide the reasonableness of a warrantless search, the decisions still conformed to traditional Fourth Amendment requirements.⁹⁴ Individualized suspicion remained a required component of all searches, yet played a more restrictive role than under the traditional Fourth Amendment analysis.⁹⁵ It was not until the seminal cases of the late 1980s that the Court dispensed with the individualized suspicion requirement and allowed random searches to be considered reasonable under the special needs exception.⁹⁶

4. Individualized Suspicion is Gone: Using the Special Needs Exception to Justify Mandatory Drug Testing

Eventually, the special needs exception expanded beyond school and property searches in the companion cases of *Skinner v. Railway Labor Executives' Association*⁹⁷ and *National Treasury Employees Union v. Von Raab*.⁹⁸ In both cases, the Court found that the government's purpose for the search was a special need allowing the Court to dispense with the Fourth Amendment requirements and apply the reasonableness balancing test.⁹⁹ More importantly, these cases outlined the specific elements of the special needs doctrine and the conditions that

92. *Griffin*, 483 U.S. at 874 (citing *Morrissey v. Brewer*, 408 U.S. 471, 480) (finding that "probationers do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions'").

93. *Id.* at 873.

94. *Id.*; *O'Connor v. Ortega*, 480 U.S. 709, 732 (1987) (Scalia, J. concurring); *see also supra* notes 81-83 and accompanying text (discussing Justice Scalia's use of the special needs doctrine in his concurring opinion); *supra* notes 88-93 and accompanying text (discussing the majority's use of the special needs doctrine to uphold the constitutionality of a government search).

95. Dodson, *supra* note 40, at 265. Dodson notes that the Wisconsin regulation in *Griffin* "specifically required that there be 'reasonable grounds' for the search." *Id.* (citing *Griffin*, 483 U.S. at 871).

96. *Id.* (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)).

97. *Skinner*, 489 U.S. 602.

98. *Von Raab*, 489 U.S. 656.

99. Robert S. Logan, Note, *The Reverse Equal Protection Analysis: A New Methodology For "Special Needs" Cases*, 68 GEO. WASH. L. REV. 447, 454-55 (2000); Michael Polloway, Comment, *Does the Fourth Amendment Prohibit Suspicionless Searches—Or Do Individual Rights Succumb to the Government's "So-Called" Special Needs?*, 10 SETON HALL CONST. L.J. 143, 155 (1999). Polloway argues that these decisions "eviscerat[ed] the explicit warrant and probable cause requirements of the Fourth Amendment." Polloway, *supra*.

government officials must satisfy in order to conduct a warrantless search.¹⁰⁰

Skinner involved Federal Railroad Administration (FRA) regulations that required mandatory blood and urine samples from employees involved in train accidents.¹⁰¹ After determining that collecting and testing bodily fluid samples constitutes a search under the Fourth Amendment,¹⁰² the Court applied the special needs doctrine to determine if the FRA must obtain a warrant before testing its employees.¹⁰³ First, the Court concluded that insuring the safety of railroad passengers qualified as a special need beyond normal law enforcement.¹⁰⁴ Second, to require railroad employers to obtain a warrant before collecting and analyzing employee samples was

100. *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665-67.

101. *Skinner*, 489 U.S. at 602. The FRA developed these regulations pursuant to the Federal Railroad Safety Act of 1970 (FRSA), which authorized the Secretary of Transportation to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." Federal Railroad Safety Act of 1970, 45 U.S.C. § 431(a) (repealed 1994). The sections of the FRSA pertaining to drug testing were subparts C and D. *Skinner*, 489 U.S. at 609. Subpart C required all railroad employees directly involved in train accidents that caused (i) a fatality, (ii) the release of hazardous materials, or (iii) property damage greater than \$500,000 to provide urine and blood samples for drug testing. *Id.* Section D authorizes, but does not require, employers to conduct drug tests following an accident and in conjunction with an employer's suspicion of drug or alcohol abuse. *Id.* at 611. Employees could also be tested if an employer had reasonable suspicion of abuse following a speeding incident or violation of other regulations. *Id.*

The regulations were passed by the FRA in response to several train accidents that resulted from drug and alcohol use. *Id.* at 606-08. The Railway Labor Executives' Association (the "Railway") brought suit against *Skinner*, the Secretary of Transportation, claiming that the regulations violated the Fourth Amendment. *Id.* at 612. Specifically, Railway argued that the regulations mandated testing even though there was no individualized suspicion of drug or alcohol abuse. *Id.* at 609, 612.

102. *Skinner*, 489 U.S. at 616-17. As an initial matter, Justice Kennedy addressed whether collecting urine samples constituted a search that would be subject to Fourth Amendment protections. *Id.*; *Schmerber v. California*, 384 U.S. 757, 768 (1966) (finding that a "compell[ing] intrusion[] into the body for blood to be analyzed for alcohol content" constituted a Fourth Amendment search). Although a urinalysis did not require an intrusion into the individual's body, the Court recognized that chemical analysis of bodily samples can reveal extremely personal information. *Schmerber*, 384 U.S. at 768. Specifically, "there are few activities in our society more personal or private than the passing of urine . . . it is a function traditionally performed without public observation . . . [and] its performance in public is generally prohibited by law as well as social custom." *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd*, 489 U.S. 656 (1989). As such, the Court determined that collecting and testing bodily samples constituted a search under the Fourth Amendment. *Skinner*, 489 U.S. at 617.

103. *Skinner*, 489 U.S. at 619-33.

104. *Id.* at 620-21. The Court noted that the FRA only mandated the tests "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id.* (citing 49 C.F.R. § 219.19(a) (1987)). They were not an attempt to criminally prosecute employees. *Id.* at 620.

impractical and unnecessary.¹⁰⁵ The Court explained that the time required to obtain a warrant could allow the body to eliminate traces of drugs and alcohol from the bloodstream.¹⁰⁶ Moreover, the regulations already defined the limited situations where an employee can be tested.¹⁰⁷

Moving to the balancing test, the Court determined that the government's interest in protecting the safety of railroad passengers and the general public from train accidents substantially outweighed the employees' privacy interest.¹⁰⁸ The Court found it significant that the railroad industry was already subject to a higher degree of scrutiny than other industries.¹⁰⁹ Because the regulations were designed to be as minimally intrusive as possible,¹¹⁰ the test results were only released to the employee's supervisor,¹¹¹ and the employees were never subject to criminal prosecution,¹¹² the Court upheld the FRA's regulations and concluded that the warrantless searches were reasonable.¹¹³

On the same day, the Court in *Von Raab* determined that the United States Customs Service ("Customs Service")¹¹⁴ could require mandatory drug tests for agents who carried firearms, handled classified materials, or were involved in drug interdiction.¹¹⁵ Writing for the

105. *Id.* at 623.

106. *Id.*

107. *Id.* at 622 n.6.

108. *Id.* at 624. The Court found that requiring individualized suspicion where the privacy interests implicated were minimal was a heavy burden. *Id.* Moreover, it found that "where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.*

109. *Id.* at 627. With respect to railroad employees, the Court noted that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Id.*

110. *Id.* at 625-26.

111. *See id.* at 611, 623-24.

112. *See id.* at 623.

113. *Id.* at 633-34.

114. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660-61 (1989). The U.S. Customs Services is "responsible for processing persons, carriers, cargo, and mail into the United States, collecting revenue from imports, and enforcing customs and related laws." *Id.* at 659. One of its primary functions is drug enforcement. *Id.* at 660.

115. *Id.* at 660-63. Customs agents who tested positive for narcotics without a reasonable explanation were subject to dismissal. *Id.* at 663. However, the test results could not be used for criminal prosecution. *Id.* The Commissioner of Customs implemented the drug-testing program because of the increased possibility that Customs agents could engage in illegal drug use. *Id.* at 660. During the course of their employment, Customs employees will likely interact with individuals who participate in narcotics distribution. *Id.* Given that drug enforcement had

majority, Justice Kennedy opined that the Customs Service had a special need, beyond normal law enforcement, to test its employees for drug use.¹¹⁶ Specifically, the Customs Service had a dual purpose: (1) to deter drug use among employees eligible for positions involving increased levels of contact with illegal narcotics and (2) to prevent drug users from ascending to those positions.¹¹⁷ As in *Skinner*, the Court found that a warrant was unnecessary given that the scope and procedures of the test were clearly defined, limiting possible abuses of discretion.¹¹⁸

Applying the balancing test, the Court again determined that the Customs Service's interest outweighed the employee's privacy expectations.¹¹⁹ Given the safety concerns and the sensitive nature of a customs agent's work, the Customs Service had a substantial interest in ensuring that its employees remained drug-free.¹²⁰ Conversely, the Court found that the agents had a lower privacy expectation because all employees who requested a promotion to a "covered" position were aware that they must submit to a drug test.¹²¹ In light of the Customs Service's interest in drug detection, the Court concluded that the testing program did not require individualized suspicion of drug use and was therefore constitutional.¹²²

Although both cases were factually similar and analyzed according to the same doctrine, a greater number of justices voted with the majority in *Skinner* than in *Von Raab*.¹²³ According to Justice Scalia, who joined the majority in *Skinner* but dissented in *Von Raab*, the existence of an

become the agency's primary responsibility, the Commissioner argued that the Customs Service could not tolerate individuals who violated criminal drug laws. *Id.*

116. *Id.* at 666.

117. *Id.*

118. *Id.* at 661-63, 667. Under the policy's drug testing procedures, a customs employee was only tested if he fell within one of the pre-determined employment categories. *Id.* at 660-61. The policy also clearly outlined a specific testing protocol, who had access to the test results, and test confirmation procedures. *Id.* at 662-63.

119. *Id.* at 677.

120. *Id.* at 674. The Court argued that "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Id.* at 668. The government's interest in protecting its citizens from drug use would be compromised if the agents themselves were addicted to illegal narcotics. *Id.* at 670.

121. *Id.* at 667. Additionally, the "operational realities" of working for the Customs Service contributed to the decreased expectation of privacy. *Id.* at 671-72.

122. *Id.* at 677.

123. Logan, *supra* note 99, at 455. *Skinner* was a 7-2 decision while *Von Raab* was decided by a 5-4 margin. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 605 (1989); *Von Raab*, 489 U.S. at 658.

identifiable drug problem differentiated the two cases.¹²⁴ He noted that while the government in *Skinner* demonstrated that multiple train accidents resulted from employee drug and alcohol abuse, the Customs Service provided no evidence that drug abuse hindered the agency's effectiveness.¹²⁵ Justice Scalia argued that in order to utilize the special needs exception, the government must prove that the search was addressing a real, and not hypothetical, harm.¹²⁶

Ultimately, *Skinner* and *Von Raab* were significant because the Court utilized the special needs exception to justify random searches of individuals without any individualized suspicion of wrongdoing.¹²⁷ The Court would ultimately expand the special needs exception to include a wider number of situations where the government's interest in public safety outweighed an individual's right to privacy.¹²⁸ Despite Justice Scalia's dissent, the Court also appeared willing to apply the special needs exception based on perceived state interests that were not supported by evidence.¹²⁹

5. Special Needs in Schools: *Vernonia*

Six years passed before the Court would consider another special needs case.¹³⁰ During this period, however, local, state, and federal agencies attempted to increase the number of occupations where drug testing was mandatory.¹³¹ For example, government officials attempted to implement randomized drug testing for federal prison guards,¹³²

124. Logan, *supra* note 99, at 465 (citing *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting)).

125. See *Von Raab*, at 681-82 (Scalia, J., dissenting). Justice Scalia argued that this was the dispositive factor in his decision to join the dissent. *Id.* (Scalia, J., dissenting). He noted that the Agency failed to demonstrate that any of the hypothesized incidents such as taking bribes from drug dealers, illegally utilizing classified information, or carelessly firing a weapon had actually occurred. *Id.* at 683 (Scalia, J., dissenting). Most damaging was that out of 3,600 drug tests, only five agents tested positive. *Id.* at 683-84 (Scalia, J., dissenting).

126. *Id.* at 681 (Scalia, J., dissenting).

127. Gagan, *supra* note 42, at 503.

128. Dodson, *supra* note 40, at 268; Smiley, *supra* note 58, at 820. Smiley argued that the *Skinner* and *Von Raab* decisions "opened the door" for government officials to require drug tests in both governmental and non-governmental jobs. Smiley, *supra* note 58, at 820.

129. The reasoning in Justice Scalia's dissent would eventually be used in *Chandler* to find Georgia's drug testing law unconstitutional. See John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799, 804 (2000).

130. *Vernonia School District v. Acton* was decided in 1995. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

131. Dodson, *supra* note 40, at 268.

132. *Am. Fed'n of Gov't Employees v. Roberts*, 9 F.3d 1464, 1468 (9th Cir. 1993) (upholding drug testing of federal prison guards).

airline employees,¹³³ and hazardous waste workers.¹³⁴ Although numerous challenges were made, lower courts overwhelmingly upheld work-related drug testing programs as a special need exception to the Fourth Amendment's warrant and probable cause requirements.¹³⁵

In *Vernonia School District v. Acton*, however, the Court chose a public school district to revisit the special needs doctrine and uphold the constitutionality of a warrantless search.¹³⁶ Responding to a perceived increase in the number of student athletes using drugs,¹³⁷ the Vernonia School District implemented a random urinalysis drug-testing program that applied to every adolescent interested in participating in after-school sports.¹³⁸ In a 6-3 decision, the Court sided with the Vernonia

133. *Bluestein v. Skinner*, 908 F.2d 451, 457 (9th Cir. 1990) (upholding FAA regulation requiring drug testing of airline employees).

134. *Plane v. United States*, 796 F. Supp. 1070, 1075 (W.D. Mich. 1992) (upholding drug testing of hazardous waste workers).

135. See, e.g., *Pierce v. Smith*, 117 F.3d 866, 880 (5th Cir. 1997) (upholding required drug test of resident doctor not based on individualized suspicion or a drug-testing program); *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 932 F.2d 1292, 1309 (9th Cir. 1991) (upholding drug testing of commercial truck drivers); *Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 481 (6th Cir. 1991) (upholding drug testing of GCRTA employees after an accident); *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989) (holding that drug testing of corrections officers was constitutional); *Thomson v. Marsh*, 884 F.2d 113, 115 (4th Cir. 1989) (finding that drug testing of pipefitter at chemical weapons plant was constitutional); *English v. Talladega County Bd. of Educ.*, 938 F. Supp. 775, 783 (N.D. Ala. 1996) (upholding drug testing of school bus mechanic); *Wilcher v. City of Wilmington*, 891 F. Supp. 993, 1002 (D. Del. 1995) (upholding random drug tests of firefighters), *vacated on other grounds*, 139 F.3d 366 (3d Cir. 1998); *Laverpool v. New York City Transit Auth.*, 835 F. Supp. 1440, 1456 (E.D.N.Y. 1993) (upholding the drug testing of all employees that could affect public safety); *Bailey v. City of Baytown*, 781 F. Supp. 1210, 1216 (S.D. Tex. 1991) (upholding drug testing of employee who drove a motor vehicle for the city); *Am. Fed'n of Gov't Employees v. Derwinski*, 777 F. Supp. 1493, 1503 (N.D. Cal. 1991) (upholding drug testing of Veterans Affairs employees in some safety-sensitive positions); *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1369 (S.D. Miss. 1991) (upholding drug testing of hospital employee); *Holloman v. Greater Cleveland Reg'l Transit Auth.*, 741 F. Supp. 677, 687 (N.D. Ohio 1990) (finding that drug testing of city bus drivers was constitutional), *aff'd*, 930 F.2d 918 (6th Cir. 1991); *Burka v. New York City Transit Auth.*, 739 F. Supp. 814, 847 (S.D.N.Y. 1990) (finding no Fourth Amendment violation for random drug testing or drug testing with suspicion for some Transit Authority employees); *Moxley v. Regional Transit Servs.*, 722 F. Supp. 977, 982 (W.D.N.Y. 1989) (finding that drug testing of bus drivers was constitutional); *Brown v. City of Detroit*, 715 F. Supp. 832, 835 (E.D. Mich. 1989) (upholding random drug testing of police officers).

136. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 646 (1995).

137. *Id.* at 648-50. The Vernonia School District had initially attempted to curb the alleged drug use through preventative measures such as drug awareness classes, speakers, and demonstrations. *Id.* at 649.

138. *Id.* at 650. Students who wanted to play a high school sport had to provide their consent and obtain their parents' consent. *Id.* Every student who made the team was required to submit to a urine test prior to the start of the season. *Id.* Additionally, ten percent of all student athletes were randomly tested each week. *Id.* Although a positive test may result in dismissal from the team, a student would not be subject to criminal prosecution. See *id.* Petitioner James Acton, a

School District and upheld the drug-testing program.¹³⁹ Relying on *T.L.O.*, Justice Scalia concluded that special needs exist in public schools, particularly when school officials attempt to eliminate drug use among the student body.¹⁴⁰ Moreover, the need to maintain a suitable academic environment while quickly responding to disciplinary problems prevents school officials from obtaining a warrant prior to conducting a search.¹⁴¹

Upon balancing the school's interest against the students' expectation of privacy, Justice Scalia specifically focused on the overall nature of student athletics.¹⁴² Because of the inherent risks associated with adolescent drug abuse and the "role model" status of athletes at school and in the community, the Court found that the school district's interest in preventing drug use substantially outweighed the slight invasion into a student's privacy.¹⁴³ Accordingly, the Court determined that the drug-testing program fell within the special needs exception and was therefore constitutional.¹⁴⁴

The *Vernonia* decision expanded the scope of the special needs exception beyond drug testing in the workplace.¹⁴⁵ However, it also marked the point when members of the Court began to question the breadth of the exception.¹⁴⁶ Although Justice Ginsburg concurred with the majority, she expressed concern over the lack of clear boundaries to rein in the special needs exception by explicitly noting the narrowness of the holding.¹⁴⁷ In the dissent, three justices strongly believed that the

seventh grader who wanted to play football, refused to consent to the drug test and was prohibited from playing. *Id.* at 651. He subsequently challenged the law and claimed it violated his Fourth Amendment right to privacy. *Id.* at 651-52.

139. *Id.* at 647.

140. *Id.* at 653.

141. *Id.* "'Strict adherence to the requirement that searches be based upon probable cause' would undercut the substantial need of teachers and administrators for freedom to maintain order in schools." *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985)).

142. *Id.* at 657. Justice Scalia initially determined that student athletes had a lower expectation of privacy because they played together, showered together, and dressed in the same locker rooms. *Id.*

143. *Id.* at 661-62.

144. *Id.* at 665. It is important to note that this opinion only focused on high school athletes. Utilizing Justice Scalia's dissent from *Von Raab*, the school district only provided specific evidence of drug use at the high school level. Based on the decision, however, this information was enough for the Court to uphold a district-wide policy. *Dodson*, *supra* note 40, at 269.

145. *Dodson*, *supra* note 40, at 269.

146. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring).

147. *Id.* (Ginsburg, J., concurring). Justice Ginsburg noted that based on the evidence presented, the Court's decision *only* applied to randomly testing students who wanted to participate in high school sports. *Id.* (Ginsburg, J., concurring); *see also* *Dodson*, *supra* note 40, at 270.

exception was threatening to completely encompass the Fourth Amendment's traditional warrant and probable cause requirements.¹⁴⁸

6. Putting on the Brakes: *Chandler*

Two years later, the Court addressed the concerns voiced by the *Vernonia* dissent and struck down a Georgia law requiring candidates running for state office to submit to a urine drug test.¹⁴⁹ This decision marked the first instance where the Court failed to uphold a search in which the government felt the special needs exception applied.¹⁵⁰ Moreover, the term "special needs" became a new judicial standard as the Court no longer simply accepted the government's assurances without substantial evidence.¹⁵¹

Moving away from past precedent, the Court voted 8-1 to strike down the Georgia law and thus created a new standard for what constitutes a special need.¹⁵² Under the Court's new analysis, a special need became more than just a label for a state's goal beyond normal law enforcement; it was now a "substantial" need that was important enough to significantly outweigh an individual's right to privacy.¹⁵³ Based on this new definition, the Court found that Georgia's drug testing program

148. *Vernonia*, 515 U.S. at 676 (O'Connor, J., dissenting). Justice O'Connor's dissent argued that random testing should only be used when "it has been clear that a suspicion-based regime would be ineffectual." *Id.* at 668 (O'Connor, J., dissenting). Finally, she criticized the district's decision to only test athletes, noting that the policy appeared to be "driven more by a belief in what would pass constitutional muster . . . than by a belief in what was required to meet the District's principal disciplinary concern." *Id.* at 685 (O'Connor, J., dissenting).

149. *Chandler v. Miller*, 520 U.S. 305, 322-23 (1997). Prior to initiating their campaigns, Georgia required candidates running for certain state positions to verify that they had taken a drug test and that the results were negative. *Id.* at 309-10. The petitioners argued that the law constituted a suspicionless search and challenged its constitutionality under the Fourth Amendment. *Id.* at 310.

150. *Id.* at 322-23. Prior to *Chandler*, "when governmental needs beyond those of ordinary law enforcement are involved, the Court has 'not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.'" Keleigh Biggins, Note, *Candidates for Public Office Exempt from Drug Testing-Supreme Court Rules There is No Special Need Justifying a Departure from Fourth Amendment Requirements*, 23 S. ILL. U. L.J. 781, 786-87 (1999) (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989)). By reversing the Eleventh Circuit, the Supreme Court of the United States had "finally found a drug testing program it didn't like." Marcia Coyle, *Was This Term Historic? Maybe, Say Some, But None of its Big Rulings Was Seen as a True Landmark*, NAT'L L.J., Aug. 11, 1997, at B5.

151. Joy L. Ames, Note, *Chandler v. Miller: Redefining "Special Needs" for Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273, 289 (1997).

152. *Chandler*, 520 U.S. at 313. Although the special needs doctrine was firmly established, the balancing test was never applied because the majority created a new definition for the word "special." See *id.* at 318; see also Ames, *supra* note 151, at 289.

153. *Chandler*, 520 U.S. at 318.

failed to meet the required standard.¹⁵⁴ Although Georgia legislators argued that preventing drug use by public officials qualified as a special need,¹⁵⁵ the Court determined that the State failed to provide any evidence that the law was enacted in response to this problem.¹⁵⁶

The majority also developed more rigorous guidelines regarding the reasonableness balancing test.¹⁵⁷ Even if Georgia had a special need that justified dispensing with individualized suspicion, the Court would not apply the balancing test unless the law was responding to a public safety crisis.¹⁵⁸ In the present case, Georgia was unable to show that drug use among potential candidates posed a legitimate threat to public safety.¹⁵⁹ As a result, the Court held that Georgia's drug testing program violated the Fourth Amendment and was thus unconstitutional.¹⁶⁰

7. Criticism of the Special Needs Exception

After *Chandler*, the Court transformed the special needs exception from a broad method of searching individuals without probable cause into a narrower exception that only applied under limited circumstances.¹⁶¹ The Court shaped the doctrine into a more objective test that focused on three identifiable factors to justify a suspicionless drug-testing program.¹⁶² First, the state must have real evidence that drug use is a substantial problem justifying a warrantless search.¹⁶³

154. *Id.* at 318-19.

155. *Id.* at 318. Georgia enacted the law to prevent drug users from holding public office. *Id.* Lawmakers claimed that drug use impaired a public official's ability to carry out her responsibilities, especially regarding anti-drug enforcement efforts. *Id.* Moreover, the public's ability to trust an elected official would diminish and questions would arise regarding the character and integrity of all public officers. *Id.*

156. *Id.* at 318-19. Relying on Justice Scalia's dissent in *Von Raab* and the Court's reasoning in *Vernonia*, Justice Ginsburg explained why Georgia's "need" did not justify a departure from traditional Fourth Amendment requirements. *Id.* Ginsburg stated that, "[n]otably lacking in [the] respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." *Id.*

157. *See id.* at 323.

158. *Id.* The Court derived the "public safety" criteria from its holdings in *Von Raab*, *Skinner*, and *Vernonia*. *See also* Dodson, *supra* note 40, at 271 (noting that Court identified public safety as the common theme among the three cases).

159. *Chandler*, 520 U.S. at 323.

160. *Id.* at 309. The Court concluded that "Georgia's requirement that candidates for state office pass a drug test, we hold, does not fit within the closely guarded category of constitutionally permissible suspicionless searches." *Id.*

161. Ames, *supra* note 151, at 291.

162. *Id.* (stating that the *Chandler* decision "deserves praise for bolstering the objectivity of the 'special needs' doctrine by setting out more precise requirements").

163. *See Chandler*, 520 U.S. at 318-19.

Second, the testing program must be aimed at detecting actual drug use, not just deterrence.¹⁶⁴ Finally, public safety must be at risk to justify dispensing with the traditional Fourth Amendment requirements.¹⁶⁵

Although this change appeared to protect individuals from unnecessary warrantless searches, harsh criticism of this new approach followed the *Chandler* decision.¹⁶⁶ Rather than clarify the special needs doctrine, opponents argued that the decision only served to create more confusion.¹⁶⁷ The opponents criticized the Court for both failing to define what constitutes a special need and for failing to provide clear guidelines for administering the balancing test.¹⁶⁸

Furthermore, opponents noted that equating the special needs exception with a threat to public safety diminished the exception because many laws were enacted to promote public safety.¹⁶⁹ Finally, critics complained that the Court's efforts to outline the exception's requirements failed because the question of whether a search fell under the exception required a subjective determination.¹⁷⁰ This lack of direction, critics argued, allowed judges to adjudicate cases according to their own priorities and beliefs, and not based on constitutional

164. *Id.* Justice Ginsburg argued that the government failed to provide "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." *Id.* at 319.

165. *Id.* at 323; *see also* Dodson, *supra* note 40, at 271 (noting that the Court identified public safety as the common theme among previous special needs cases).

166. *See infra* notes 167-72 and accompanying text (outlining the criticisms of the Court's new approach to the special needs exception).

167. Ross H. Parr, Note, *Suspicionless Drug Testing and Chandler v. Miller: Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL RTS. J. 241, 261 (1998). The author argued that the Court's analysis in the previous three special needs cases would have found Georgia's drug testing program to be constitutional. *Id.* As a result, the lower courts will have to adjust their interpretation of the special needs exception without knowing which interpretation of the exception to apply. *Id.* at 262.

168. Dodson, *supra* note 40, at 274. Dodson notes that "[n]othing in the Court's [special needs] balancing test provides anything concrete by which to measure state interest and compare that interest with individual privacy interests. What the balancing test amounts to is how the Justices feel about a particular law." *Id.*

169. *See id.* at 271. Arguing that laws designed to protect the public safety are generally not categorized as "special," the author notes that "many laws have no utility other than the fact that they promote public safety" such as traffic laws and criminal regulations. *Id.* Furthermore, equating the special needs exception with public safety may allow government officials to invoke a wide variety of laws that mandate random searches under the guise that they are protecting individual citizens. *Id.* at 274.

170. Dorancy-Williams, *supra* note 33, at 480 (arguing that determining the constitutionality of drug testing programs is especially difficult given the lack of clear guidelines).

standards.¹⁷¹ Despite these objections, however, *Chandler* represents the Court's current approach to the special needs exception.¹⁷²

C. Fetal Abuse Prosecution

Marking a return to the special needs exception after a three year absence, the *Ferguson* opinion arose in an entirely new context from the previous special needs decisions: testing hospital patients for illegal drug use. To understand why government officials believed that courts would expand the special needs doctrine to encompass MUSC's policy, it is first necessary to analyze why MUSC developed its drug testing policy, as well as the underlying legal precedent that supported the hospital's interest in preventing maternal drug use. Ultimately, the rise in crack cocaine use, media portrayals of pregnant crack addicts, and the health risks of prenatal drug exposure led to the policy's implementation.¹⁷³ Critics argue, however, that punitive measures will not promote the health interests associated with pregnant mothers and their unborn children.¹⁷⁴

1. Pregnant Crack Addicts

MUSC developed and implemented its policy during a time when legislatures were focusing on the relationship between maternal drug abuse and the explosion of crack cocaine use.¹⁷⁵ Since crack cocaine particularly appealed to women,¹⁷⁶ and most crack-addicted women are generally of childbearing age, the late 1980s saw a tremendous increase in the number of newborns testing positive for drugs.¹⁷⁷ The media

171. See Smiley, *supra* note 58, at 825-26.

172. See *supra* notes 153-60 and accompanying text (discussing the Court's new approach to the special needs exception).

173. See *infra* notes 175-81 and accompanying text (discussing the reasons MUSC developed its policy).

174. See *infra* notes 190-200 and accompanying text (discussing the ineffectiveness of laws designed to punish pregnant drug users).

175. See DOROTHY ROBERTS, *KILLING THE BLACK BODY* 155 (1997). When the policy was first considered in the late 1980s, the United States was unsuccessfully battling the crack cocaine epidemic. See *id.* at 154. In 1986 alone, *Newsweek* and *Time* each ran five cover stories on the crack crisis. *Id.* at 155; see also Richard M. Smith, *The Plague Among Us*, *NEWSWEEK*, June 16, 1986, at 15.

176. Diane Alters, *Women and Crack Equal Addiction, Unequal Care*, *BOSTON GLOBE*, Nov. 1, 1989, at 1, available at 1989 WL 4834699.

177. ROBERTS, *supra* note 175, at 155. The public became aware of this problem after the National Association for Perinatal Addiction Research and Education (NAPARE) published a study that estimated more than 375,000 babies were born addicted each year. See Douglas Besharov, *Crack Babies: The Worst Threat is Mom Herself*, *WASH. POST*, Aug. 6, 1989, at B1, available at 1989 WL 2040363.

began to publicize these findings, which allowed politicians to focus their response on a new group—pregnant crack addicts.¹⁷⁸

Specifically, the media portrayed pregnant crack addicts as irresponsible mothers who subordinated their unborn child's needs in order to further their addiction.¹⁷⁹ Racial stereotypes also emerged to further diminish the image of African-American women in society because the media reported that the majority of addicted mothers were African-American.¹⁸⁰ Utilizing this characterization, politicians warned that addicted mothers were producing a new class of individuals: African-American children addicted to drugs who would become completely dependent on welfare benefits to survive.¹⁸¹

2. Punishing Maternal Drug Use

The media's portrayal of pregnant crack addicts, combined with the perceived dangers associated with drug exposure, led legislators to implement several punitive measures to deter maternal drug use.¹⁸² Despite research at the time that suggested the effects of prenatal drug exposure were short-term and treatable,¹⁸³ a common response was to take temporary or permanent custody of the baby at the moment of

178. Gagan, *supra* note 42, at 496.

179. SHEIGLA MURPHY & MARSHA ROSENBAUM, PREGNANT WOMEN ON DRUGS 11 (1999).

180. ROBERTS, *supra* note 175, at 157 (arguing that "the pregnant crack addict was the latest embodiment of the bad *Black* mother").

181. See Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1016-17 (1999).

182. MURPHY & ROSENBAUM, *supra* note 179, at 11. The response to this crisis was to embrace a mandate of "zero-tolerance" and impose increasingly severe penalties on individuals convicted of possession and distribution of illegal narcotics. Paltrow, *supra* note 181, at 1015. However, this policy has resulted in more than sixty percent of federally incarcerated individuals and twenty-two percent of state incarcerated individuals serving time for drug-related offenses. See Timothy Egan, *Hard Time: Less Crime, More Criminals*, N.Y. TIMES, Mar. 7, 1999, § 4, at 1. Egan notes that:

Americans do not use more drugs, on average, than people in other nations; but the United States, virtually alone among Western democracies, has chosen a path of incarceration for drug offenders. More than 400,000 people are [in] for drug crimes . . . nearly a third of them are locked up for simply possessing an illicit drug.

Id.

183. See Paltrow, *supra* note 181, at 1018. The author argues that while studies confirm that cocaine use has negative effects on unborn children, other research shows that the impact of maternal drug use on prenatal development has been greatly exaggerated. *Id.* Studies have also shown that receiving prenatal care and maintaining a healthy diet while pregnant may minimize the effects of maternal drug use. See Scott MacGregor et al., *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, 74 OBSTETRICS & GYNECOLOGY 882, 885 (1989). Moreover, research suggests that the fetus is more likely to suffer from prenatal exposure to alcohol and tobacco than crack cocaine. Paltrow, *supra* note 181, at 1019.

birth.¹⁸⁴ A second response was the “protective” incarceration of pregnant crack addicts charged with unrelated offenses.¹⁸⁵ Judges would sentence pregnant women to jail terms for misdemeanor offenses, thus enabling the babies to be born in jail and protected from the mother’s addiction.¹⁸⁶

Finally, prosecutors began criminally charging pregnant women for their drug use.¹⁸⁷ Although no state adopted a law that criminalized maternal drug abuse, prosecutors attempted to expand existing laws by charging women with criminal child endangerment.¹⁸⁸ Other jurisdictions charged pregnant drug users with knowingly distributing narcotics to a minor, assault with a deadly weapon, and even manslaughter or murder.¹⁸⁹

3. Problems with Policing Pregnancy

Opponents of fetal abuse prosecution vigorously argued that laws designed to punish women who use drugs during pregnancy are ineffective and ultimately jeopardize the health of both the mother and her unborn child.¹⁹⁰ The opponents initially argued that the threat of

184. See Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problem of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 520-21 (1992).

185. ROBERTS, *supra* note 175, at 161.

186. *Id.* Roberts references a Florida case where the defendant was a pregnant addict who pleaded guilty to forging checks. *Id.* In sentencing the defendant to jail for the length of her pregnancy, the sentencing judge stated, “I’m going to keep her locked up until the baby is born She’s apparently an addictive personality, and I’ll be darned if I’m going to have a baby born that way.” *Id.*

187. Paltrow, *supra* note 181, at 1008.

188. See ROBERTS, *supra* note 175, at 162. In *State v. Johnson*, a Florida judge handed down America’s first conviction of a mother for prenatal drug use. *Id.*; *State v. Johnson*, No. E89-890-CFA, slip op. at 1 (Fla. Cir. Ct. July 13, 1989), *rev’d*, 602 So. 2d 1288 (Fla. 1992). Charged with delivering a controlled substance to a minor, the defendant received one year of residential drug treatment, fourteen years of probation, and continual monitoring of her activities. ROBERTS, *supra* note 175, at 164. Three years later, the Florida Supreme Court reversed the lower court decisions and held that prenatal drug exposure did not constitute delivery of a controlled substance to a minor. *Johnson*, 602 So. 2d 1288.

189. See Lynn M. Paltrow, *Punishing Women for Their Behavior During Pregnancy: An Approach that Undermines the Health of Women and Children*, in DRUG ADDICTION RESEARCH AND THE HEALTH OF WOMEN 467-501 (Cora Lee Wetherington & Adele B. Roman eds., 1998); see also LAURA E. GOMEZ, MISCONCEIVING MOTHERS 50-59, 75-91 (1997) (discussing other legislative attempts to deal with pregnant drug addicts).

190. American Civil Liberties Union Freedom Network, *Policing Pregnancy*: Ferguson v. City of Charleston, at <http://www.aclu.org/features/f100300a.html> (last modified July 24, 2001) [hereinafter ACLU Freedom Network]; see also ROBERTS, *supra* note 175, at 190. Roberts notes that this undermines the stated intent of prosecuting pregnant mothers for drug abuse. ROBERTS, *supra* note 175, at 190. “[O]verwhelming evidence shows that prosecuting addicted mothers will not achieve the government’s asserted goal of healthier pregnancies. Indeed, the prosecutions

prosecution significantly deterred women from seeking prenatal care.¹⁹¹ Studies indicated that the fear of going to jail and losing their children overwhelmingly kept pregnant women out of hospitals.¹⁹² As a result, both pregnant women and their unborn children suffered from a lack of prenatal and postnatal care.¹⁹³

Additionally, imprisoning pregnant women also prevented them from entering drug-treatment programs.¹⁹⁴ Critics of programs such as MUSC's policy argued that comprehensive drug treatment is necessary to help women overcome their addictions, as well as address the underlying issues that led to their initial drug use.¹⁹⁵ Moreover, critics argued that these policies prosecute women whose only crime is an addiction to illegal narcotics; something that many have long recognized as a disease requiring treatment, not incarceration.¹⁹⁶

Finally, medical practitioners argued that prosecuting pregnant women undermined the integrity of the doctor-patient privilege.¹⁹⁷ Doctors argued that they were required to relinquish their roles as caregivers to become an extension of law enforcement.¹⁹⁸ This breach

will have just the opposite effect The threat of criminal sanctions based on this reporting has already driven some pregnant drug users away from treatment and prenatal care." *Id.*

191. ROBERTS, *supra* note 175, at 192. Roberts quotes the U.S. General Accounting Office in its report to a Senate Committee investigating drug treatment for pregnant women which concluded that "[t]he threat of prosecution poses yet another barrier to treatment for pregnant women and mothers with young children." *Id.*

192. *See id.* Studies of urban health care centers indicated that a pregnant women's response ranges from distrust to choosing to deliver their babies at home in order to avoid prosecution. *See also* Brief for Petitioners at 17, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936).

193. *See* Brief for Petitioners at 17, *Ferguson II* (No. 99-936).

194. Mohammad N. Akhter, *APHA Applauds Supreme Court Decision to Protect Rights of Pregnant Women and Preserve Doctor-Patient Relationship*, American Public Health Association, at http://apha.org/news/press/2001/Ferguson_rls.htm (Mar. 21, 2000). Dr. Akhter argued that putting women in jail does not help the mother or the newborn child. *Id.* "In jail, a woman does not get treatment to help her beat her addiction, but what she does get is continued access to drugs, repeated exposure to violent behavior and inadequate prenatal care." *Id.*

195. *See* Brief of Amici Curiae NARAL Foundation et al. at 9-10, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936).

196. Brief of Amici Curiae American Medical Association et al. at 8, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936) (stating that drug use is a disease).

197. *See* American Medical Association, *Report of the Board of Trustees on Legal Interventions During Pregnancy: Court Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2666 (1990) [hereinafter AMA Report]. The American Medical Association was concerned that "a physician's knowledge of substance abuse . . . could result in a jail sentence rather than proper medical treatment." *Id.* at 2667.

198. *See* Brief of Amici Curiae The Rutherford Institute et al. at 18, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936). Although disclosures are permitted when required by law, such as reporting gun shots or knife wounds, these exceptions do not apply to reporting maternal drug abuse. *Id.* at 15-16.

of confidentiality compromised the doctor's ability to provide effective care because patients were less likely to divulge sensitive information if they felt threatened.¹⁹⁹ Thus, in light of these reasons, opponents contend that incarcerating pregnant drug abusers is both ineffective and dangerous to both the unborn child and the mother's health.²⁰⁰

D. MUSC's Policy

MUSC developed and implemented its policy under an umbrella of societal pressure to curb prenatal drug abuse and limit the number of infants addicted to crack cocaine.²⁰¹ MUSC is a state-operated facility that predominantly serves minorities of low socioeconomic status.²⁰² In April 1989, after concerns about an apparent increase in the number of patients using crack cocaine while pregnant, MUSC ordered drug tests of women suspected of using crack cocaine.²⁰³ If a patient tested positive, she was referred for counseling and treatment.²⁰⁴

In August of 1989, however, MUSC nurse Shirley Brown believed that the number of pregnant women using cocaine had grown to epidemic proportions.²⁰⁵ Brown initially discussed her concerns with MUSC's general counsel, who subsequently contacted then South Carolina Solicitor Charles Condon about the problem.²⁰⁶ Condon quickly convened meetings with MUSC staff, the Charleston police department, child welfare services, and the Charleston County Substance Abuse Commission to address the issue.²⁰⁷

199. See *Jaffe v. Redmond*, 518 U.S. 1, 9-10 (1997). The Court stated that "the mere possibility of disclosure [of patients' confidences] may impede development of the . . . relationship necessary for successful treatment." *Id.* at 10.

200. See *supra* notes 191-99 and accompanying text (discussing the ineffectiveness of laws designed to punish pregnant drug users).

201. Paul-Emile, *supra* note 2, at 331-33; *supra* notes 175-89 and accompanying text (discussing the history of the prenatal drug abuse problem, the public reaction, and efforts to combat the problem).

202. Paul-Emile, *supra* note 2, at 349-50. MUSC provided most of the publicly-funded care to indigent Charleston residents. *Id.* Seventy percent of MUSC's patients were African-American, a disproportionate number as Charleston's overall population was only thirty percent African-American. *Id.* at 350.

203. *Ferguson II*, 121 S. Ct. at 1284.

204. *Id.*

205. Paul-Emile, *supra* note 2, at 331. Brown became interested in the issue after hearing a report about the use of South Carolina's child abuse laws to arrest a woman who used drugs while pregnant. *Id.*

206. *Ferguson II*, 121 S. Ct. at 1284.

207. Barry Siegel, *In the Name of the Children: Get Treatment or Go to Jail, One South Carolina Hospital Tells Drug-Abusing Pregnant Women*, L.A. TIMES MAG., Aug. 7, 1994, at 14, available at 1994 WL 2332673. Condon stated that one of the purposes of the meeting was to "develop a policy as to possible prosecution." *Id.*

The task force's underlying goal was to encourage pregnant drug addicts to obtain treatment.²⁰⁸ To achieve this goal, the task force members agreed to test certain pregnant patients for drugs and to report positive screens to both the police department and Condon.²⁰⁹ Specifically, they developed a protocol for providing prenatal care to pregnant women at MUSC.²¹⁰ First, MUSC required a pregnant woman seeking prenatal care to provide written consent to comprehensive medical treatment, including a urinalysis.²¹¹ MUSC only performed urinalysis drug screens, however, on patients exhibiting one of nine pre-established indicators of illegal drug use.²¹² Most importantly, hospital officials did not obtain a search warrant prior to performing the drug screens or before giving positive test results to law enforcement.²¹³

Though MUSC officials implemented the policy on October 1, 1989, they waited eleven days before formally adopting it.²¹⁴ During the initial months of implementation, law enforcement officials immediately arrested patients if they or their newborn children tested positive for drugs.²¹⁵ These women were not offered drug treatment programs nor were they provided with the option of entering a drug rehabilitation program to avoid arrest.²¹⁶

MUSC revised its policy in 1990 to provide women who tested positive for drug use with treatment options.²¹⁷ If a patient tested positive, the policy required her to attend a film presentation outlining the dangers of drug use to her unborn child and sign a formal statement

208. *Ferguson v. City of Charleston*, 186 F.3d 469, 473 (4th Cir. 1999), *rev'd*, 121 S. Ct. 1281 (2001) [hereinafter *Ferguson I*].

209. Paul-Emile, *supra* note 2, at 332. Critics of the proposed tests derided Condon's law enforcement goals and felt that medical and treatment options were overwhelmed by the prosecutorial nature of the program. Gagan, *supra* note 42, at 497.

210. Paul-Emile, *supra* note 2, at 332. The protocol would later become MUSC's official policy. However, the protocol did not apply to private patients. *Id.*

211. *Id.* at 332-33.

212. *Ferguson II*, 121 S. Ct. 1281, 1285 (2001). The nine indicators were: no prenatal care, late prenatal care after the second trimester, incomplete prenatal care, *abruptio placentae*, intrauterine fetal death, pre-term labor of no obvious cause, intrauterine growth retardation, previously known drug or alcohol abuse, and unexplained congenital abnormalities. *Id.* at 1285 n.4. Under South Carolina law, illegal drugs included heroin, crack/cocaine, amphetamines, and any other narcotic that threatened the life or development of the fetus. S.C. CODE ANN. § 44-53-370 (West 1985 & West Supp. 2000); Philip H. Jos et al., *The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale*, 23 J.L. MED. & ETHICS 120, 121 (1995).

213. *Ferguson I*, 186 F.3d at 486; Paul-Emile, *supra* note 2, at 364.

214. Paul-Emile, *supra* note 2, at 334.

215. Brief for Petitioners at 5-6, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936).

216. *Id.*

217. ACLU Freedom Network, *supra* note 190; Paul-Emile, *supra* note 2, at 371.

indicating she understood the risk of continuing to use drugs while pregnant.²¹⁸ The patient was also required to complete a series of appointments at MUSC's obstetrics clinic.²¹⁹ Finally, the patient received a written statement from Solicitor Condon's office, which indicated the patient had been offered rehabilitative services.²²⁰ The written statement also emphasized that the patient would be subject to arrest if she failed to attend treatment sessions and obtain prenatal care.²²¹

A second positive test resulted in the patient's arrest immediately following her discharge from the hospital.²²² The Charleston Police Department did not need an arrest warrant prior to taking the patient into custody.²²³ Similarly, if the child tested positive for drugs at birth, the Department of Social Services took custody of the child.²²⁴ An incarcerated patient, however, could avoid prosecution by successfully completing an in-patient treatment program.²²⁵ Upon completion of the program, the charges were subsequently dismissed.²²⁶

218. Jos, *supra* note 212, at 121.

219. *Id.*

220. *Id.* The relevant text of Condon's letter reads,

[i]f you fail to complete substance abuse counselling [sic], fail to cooperate with the Department of Social Services in the placement of your child and services to protect that child, or if you fail to maintain clean urine specimens during your substance abuse rehabilitation, you *will* be arrested by the police and prosecuted by the Office of the Solicitor.

Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 942-43 (1997) (quoting Plaintiff's Memorandum in Support of their Partial Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment at 16, *Ferguson v. City of Charleston*, No. 2:83-2624-2 (D. S.C. Oct. 1995)). However, throughout the policy's duration, MUSC officials failed to provide childcare or transportation for women obligated to participate in drug treatment. Gagan, *supra* note 42, at 498.

221. Jos, *supra* note 212, at 121.

222. *Id.* If the fetus was at twenty-seven weeks or less, the patient was charged with possession of an illegal substance. Paul-Emile, *supra* note 2, at 333-34; *see* S.C. CODE ANN. § 44-53-370 (West 1985 & West Supp. 2000) (stating that possession of cocaine is a felony carrying a maximum five-year sentence). If the fetus was at least twenty-eight weeks old, the patient was charged with distribution of an illegal substance to a minor. Paul-Emile, *supra* note 2, at 334; *see also* S.C. CODE ANN. § 44-53-440 (West 1985 & West Supp. 2000) (stating that illegal narcotics to a minor carries a sentence of twenty years).

223. Paul-Emile, *supra* note 2, at 333.

224. *Id.* The patient was subsequently charged with unlawful neglect of a child. *Id.*; *see generally* S.C. CODE ANN. § 20-7-50 (West 1985 & West Supp. 2000) (defining what constitutes unlawful neglect of a child).

225. *Ferguson I*, 186 F.3d 469, 474-75 (4th Cir. 1999), *rev'd*, 121 S. Ct. 1281 (2001).

226. *Id.*

Although MUSC's initial goal was "'to ensure the appropriate management of patients abusing illegal drugs during pregnancy,'"²²⁷ opponents condemned the policy and argued that it was designed to help Condon prosecute women for harming their unborn children.²²⁸ First, MUSC was the only hospital in the Charleston area where law enforcement officials arrested patients who tested positive for drug use.²²⁹ Second, the policy did not provide any second chances for women who tested positive a second time or gave birth to an addicted baby.²³⁰ Finally, the overtly prosecutorial nature of the policy appeared to dominate any efforts to treat and rehabilitate women who tested positive for drugs.²³¹

In 1994, five years after the policy was implemented, MUSC officially ended the program.²³² MUSC terminated the policy in response to the Civil Rights Division of the United States Department of Health and Human Services investigation of possible civil rights

227. Gagan, *supra* note 42, at 498 (quoting Jos, *supra* note 212, at 120).

228. *See id.* Condon justified his decision to prosecute pregnant drug users because he believed that the definitions of "child" and "person" under South Carolina law included viable fetuses. *See* Rick Bragg, *Defender of God, South, and Unborn*, N.Y. TIMES, Jan. 13, 1998, at 10. Condon's interpretation was adopted by the South Carolina Supreme Court in *Whitner v. State*. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998) (finding that ingesting cocaine during the third trimester constitutes criminal child neglect). However, every other jurisdiction to consider the issue has generally concluded that "child" does not encompass a "viable fetus." *See, e.g., State v. Ashley*, 701 So. 2d 338, 342 n.13 (Fla. 1997); *Wisconsin ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 731 (Wis. 1997). For additional discussion of failed attempts to prosecute women who give birth to drug addicted babies, see Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1404-18 (1990).

229. Brief for Petitioners at 11, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936).

230. Gagan, *supra* note 42, at 498. Instead, these women were immediately arrested. *Id.*

231. *Id.* The collaboration of Solicitor Condon, the Charleston police department, and medical personnel, combined with the possibility of arrest, led opponents of the policy to draw this conclusion. *See id.* Moreover, the personal stories of the women arrested pursuant to the policy also cast doubt as to whether the goal of the policy was to help addicted women and children. *See* Brief for Petitioners at 7, *Ferguson II* (No. 99-936).

For example, Petitioner Lori Griffin was eight months pregnant when she tested positive for drugs. *Id.* She was immediately arrested for distribution of cocaine to a minor, handcuffed, and sent to prison for three weeks. *Id.* Although she was given prenatal care, she was transported to the hospital in handcuffs and shackled to the bed during examinations. *Id.* Petitioner Sandra Powell was tested when she arrived at MUSC in labor. *Id.* at 8. After giving birth, Powell was told that she tested positive for cocaine, charged with unlawful neglect of a child, and immediately arrested. *Id.* She was handcuffed and transported to jail wearing only a hospital gown and still bleeding from childbirth. *Id.* At no point was she offered drug counseling or treatment. *Id.*

232. Paul-Emile, *supra* note 2, at 329.

violations of its African-American patients.²³³ MUSC's policy ultimately resulted in thirty arrests.²³⁴

III. DISCUSSION

The Supreme Court's decision in *Ferguson* was the culmination of ten women fighting to protect their Fourth Amendment right against unreasonable searches. The United States District Court for South Carolina, as well as the Fourth Circuit Court of Appeals, initially rejected their claims.²³⁵ After successfully petitioning the Court for certiorari, however, their final appeal led to a 6-3 decision against MUSC and the City of Charleston.²³⁶ The decision was accompanied by Justice Kennedy's reluctant concurrence²³⁷ and Justice Scalia's strong dissent.²³⁸

A. Facts

In June 1991, MUSC tested Crystal Ferguson for drugs during a prenatal physical examination at MUSC without her knowledge or

233. *Id.* The National Institutes of Health also placed the hospital on probation because its research on tracking the results of the policy violated federal law prohibiting experimentation on humans. The Lindesmith Center-Drug Policy Foundation, *U.S. Supreme Court Agrees That Searching and Arresting Pregnant Women at Hospital Violates United States Constitution* (Mar. 21, 2001), at <http://www.drugpolicy.org/lindesmith/news/pr-march21-01.html>. It is also noteworthy that the prosecution of pregnant women predominantly focused on African-American women of low socioeconomic status. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1436 (1991). Despite research that demonstrates substance abuse is prevalent across all ethnic, race, and income barriers, African-American women are overwhelmingly the focus of punitive responses to prenatal drug abuse. ROBERTS, *supra* note 175, at 172-83. As such, they are disproportionately reported to service organizations and increasingly subject to arrest. Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 741-43 (1991); Paltrow, *supra* note 181, at 1023.

234. Brief for Petitioners at 13, *Ferguson II* (No. 99-936). It is also noteworthy that twenty-nine of the thirty women arrested were African-American. *Id.* The petitioners argued that this disparity implies that low-income African-American women were singled out for prosecution. *Id.* at 12. This was confirmed by the appellate court which found that these percentages were sufficient to establish a prima facie case of disparate impact discrimination. *Ferguson I*, 186 F.3d 469, 481 (4th Cir. 1999), *rev'd*, 121 S. Ct. 1281 (2001). Moreover, the policy only affected MUSC's public Medicaid clinic, which was overwhelmingly utilized by indigent African-American women, and not its private obstetric clinic. Gagan, *supra* note 42, at 499-500.

235. *Ferguson II*, 121 S. Ct. 1281, 1286 (2001). The district court's decision is unpublished.

236. *Id.* at 1293; *see infra* notes 283-307 and accompanying text (discussing the majority opinion).

237. *Ferguson II*, 121 S. Ct. at 1293-96 (Kennedy, J., concurring); *see infra* notes 308-22 and accompanying text (discussing the concurring opinion).

238. *Ferguson II*, 121 S. Ct. at 1296-1302 (Scalia, J., dissenting); *see infra* notes 323-48 and accompanying text (discussing the dissenting opinion).

consent.²³⁹ When the test results came back positive for cocaine, hospital personnel confronted her with MUSC's policy.²⁴⁰ Ferguson subsequently entered substance abuse counseling for her addiction.²⁴¹ Two months later, after delivering her child at MUSC, hospital officials again tested Ferguson's urine without her knowledge and found evidence of cocaine use.²⁴² Because it was her second offense, Ferguson could only avoid prosecution by immediately entering a residential treatment program.²⁴³ After her request to attend outpatient counseling was rejected, police officers immediately arrested Ferguson for failing to comply with her treatment obligations.²⁴⁴

B. The Lower Court Decisions

In an attempt to challenge the MUSC policy, Crystal Ferguson and nine other women, all but one of whom were arrested after testing positive, filed a lawsuit in the federal district court in South Carolina.²⁴⁵ Four of the women were immediately arrested pursuant to the 1989 version of MUSC's policy.²⁴⁶ The other five women were arrested after the policy was modified in 1990 for either failing to attend drug treatment or testing positive for a second time.²⁴⁷

The women alleged that MUSC's policy violated their Fourth Amendment right to be free of unreasonable searches and seizures, as well as their constitutional right to privacy under the Fourteenth Amendment's Due Process Clause.²⁴⁸ In response to the Fourth

239. *Ferguson I*, 186 F.3d at 485 (Blake, J., dissenting).

240. Gagan, *supra* note 42, at 491.

241. *Id.*

242. *Id.*

243. *Id.* Ferguson refused in-patient treatment because she was unable to find long-term care for her older children.

244. *Id.* at 491-92; *Ferguson I*, 186 F.3d at 485 (Blake, J., dissenting).

245. *Ferguson II*, 121 S. Ct. 1281, 1286 (2001). The plaintiffs were Crystal M. Ferguson, Theresa Joseph, Darlene M. Nicholson, Paula S. Hale, Ellen L. Knight, Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and Laverne Singleton. Brief for Petitioners at i, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936). Darlene M. Nicholson was the only petitioner who was not arrested pursuant to MUSC's policy. *Id.* at 10. Upon giving birth, she was required to immediately enter an in-patient drug treatment program, where she remained until her insurance expired. *Id.* The complaint named as defendants the City of Charleston, South Carolina, the Chief of the Charleston Police Department, former Solicitor Condon, current Solicitor David Schwacke, Nurse Shirley Brown, and several other MUSC medical personnel involved in prenatal and obstetrical care. *Ferguson I*, 186 F.3d at 474 n.1.

246. *Ferguson II*, 121 S. Ct. at 1286.

247. *Id.*

248. *Ferguson I*, 186 F.3d at 475. The Due Process Clause's guarantee of liberty includes the right to bodily integrity. *Rochin v. California*, 342 U.S. 165 (1952). While this right is not

Amendment claim, the defendants asserted that, as a matter of fact, the women had consented to the urine tests.²⁴⁹ Furthermore, as a matter of law, the defendants claimed that the searches were reasonable because they came within the special needs exception.²⁵⁰

The United States District Court of South Carolina rejected the defendant's contention that the searches did not qualify for the special needs exception because MUSC did not use the test results to provide prenatal care, but rather for prosecutorial purposes.²⁵¹ The factual question of consent, however, was submitted to the jury.²⁵² After determining that the women had given valid consent for the urine screen, the jury found that MUSC's policy did not violate the plaintiffs' rights.²⁵³ Accordingly, the district court entered judgment for the defendants and upheld the constitutionality of the searches.²⁵⁴

The Fourth Circuit affirmed the district court's finding on appeal and on July 13, 1999 determined that MUSC's policy did not violate the Fourth Amendment.²⁵⁵ Disagreeing with the District Court, however, the Fourth Circuit held that MUSC's policy of testing pregnant women

absolute, the Court recognizes reproductive decisions as unique. *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

The petitioners also claimed the policy discriminated against African-American women and that MUSC personnel committed the state-law tort of abuse of process by arbitrarily administering drug screens. *Ferguson I*, 186 F.3d at 475. Regarding the racial discrimination claim, the plaintiffs' charged that MUSC's policy had a disparate impact on African-American women in violation of Title VI of the Civil Rights Act of 1964. *Id.* at 475-76.

249. *Ferguson II*, 121 S. Ct. at 1286. The defendants claimed that consent was given because the plaintiffs consented to the drug screens and "freely and voluntarily" sought medical treatment. Brief for Respondents at 38, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936). The defendants also claimed that the plaintiff's gave consent by signing a treatment form authorizing MUSC to conduct all necessary tests including drug screens. *Id.*

250. *Ferguson II*, 121 S. Ct. at 1286. Because the defendants' claimed that the searches were reasonable under the special needs exception, whether the plaintiffs' consented to the drug tests was irrelevant.

251. *Id.* at 1286-87; *Ferguson I*, 186 F.3d at 477 n.7. The district court granted summary judgment for the defendants as a matter of law on the privacy and abuse of process claims. The court then made a finding of fact and ruled in favor of the defendants on the race-discrimination claims. *Ferguson I*, 186 F.3d at 475-76.

252. *Ferguson II*, 121 S. Ct. at 1286. The judge instructed the jury to render a verdict in favor of the defendants if they found that the patients had consented to the drug screens. *Id.*

253. *Id.* The jury found that by signing MUSC's forms and consenting to medical treatment, the plaintiffs had waived their right to privacy. Gagan, *supra* note 42, at 506.

254. *Ferguson II*, 121 S. Ct. at 1287.

255. *Ferguson I*, 186 F.3d at 479. Although the appellate court decision discusses the validity of all four claims, the Supreme Court only granted certiorari as to whether the search was unreasonable under the Fourth Amendment. *Ferguson II*, 121 S. Ct. at 1286. This section will therefore only focus on the appellate court's decision that MUSC could test women without warrants or probable cause.

for drug use was reasonable under the special needs exception.²⁵⁶ Specifically, the court found that the increase in positive drug tests among MUSC's pregnant patients, as well as the public health issues associated with maternal drug use, constituted a special need beyond normal law enforcement goals.²⁵⁷ As such, MUSC's policy did not violate the Fourth Amendment.²⁵⁸

Following this determination, the appellate court applied the reasonableness balancing test.²⁵⁹ Under that test, the court initially found that the State had a legitimate interest in protecting unborn children from the hazardous effects of prenatal drug use.²⁶⁰ Second, the court held that a urine screen is the only effective method of identifying women who used drugs during their pregnancy, given the time constraints of pregnancy and limited resources of a publicly funded hospital.²⁶¹ Finally, the Fourth Circuit determined that the patients only suffered a minimal invasion of privacy because the collection and testing of urine is a normal part of a medical exam,²⁶² and MUSC personnel did not arbitrarily administer the drug tests.²⁶³ Accordingly, the Fourth Circuit held that the government's interests outweighed the patients' rights to privacy.²⁶⁴

Judge Blake, in dissent, disagreed with the majority's conclusion that the urine tests qualified as a special needs exception to the Fourth Amendment's warrant and probable cause requirements.²⁶⁵ From the policy's inception, Judge Blake noted, the search was not conducted to

256. *Ferguson I*, 186 F.3d at 479. Although the appellants argued that the district court incorrectly allowed the jury to consider the issue of consent, the appellate court found it unnecessary to consider this claim because the searches were reasonable under the special needs doctrine. *Id.* The issue of consent was therefore irrelevant. *Id.*

257. *Id.* The Fourth Circuit also relied on the district court's finding that MUSC only implemented the policy for medical purposes and did not conduct the drug tests to criminally prosecute patients for drug use. *See id.* at 477.

258. *Id.* at 479.

259. *Id.* at 477-79. The Fourth Circuit balanced the government's interest in conducting the search, the effectiveness of the search, and the level of intrusion of the search on the patient. *Id.* Although these are not the same factors used in the *Skinner* line of cases, it appears that the second factor, the effectiveness of the search, is similar to determining whether the underlying purpose of the search would be limited by requiring a warrant. *See id.* at 478.

260. *Id.* at 477-78. The Court relied on studies that documented the health effect of maternal drug abuse as well as the financial cost of treating drug-exposed infants. *Id.*

261. *Id.* at 478.

262. *Id.* at 479; *see also* *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996) (finding that "[i]n today's world, a medical examination that does not include either a blood test or urinalysis would be unusual").

263. *See Ferguson I*, 186 F.3d at 479.

264. *Id.*

265. *Id.* at 484 (Blake, J., dissenting).

serve a special need beyond normal law enforcement.²⁶⁶ She believed, instead, that MUSC's initial and ultimate goal was to arrest and prosecute pregnant drug users, either before or after they gave birth.²⁶⁷ Unlike the Supreme Court's decisions in *Skinner*,²⁶⁸ *Von Raab*,²⁶⁹ and *Vernonia*,²⁷⁰ Judge Blake found that the consent forms did not advise the patients that their results would be given to law enforcement officials.²⁷¹ Finally, the positive drug tests were turned over to the Charleston Police Department for prosecutorial purposes.²⁷²

In addition, Judge Blake disagreed with the weight afforded to the effectiveness of the urine tests when applying the balancing test.²⁷³ Although the alleged purpose of the drug screen was to diminish any adverse effects that maternal drug use would have on the fetus, seven of the plaintiffs were arrested after the child was born, not during pregnancy when eliminating drug use would have a greater impact.²⁷⁴ Moreover, Judge Blake found that the degree of intrusion was very high because positive results were given to police officers with no medical reason for having access to the information.²⁷⁵ Accordingly, Judge Blake found that the search did not come within the special needs exception and voted to reverse the district court's decision.²⁷⁶

266. *Id.* at 487 (Blake, J., dissenting).

267. *Id.* at 484 (Blake, J., dissenting). For example, Judge Blake relied on a letter that MUSC General Counsel Joseph C. Good sent to Solicitor Condon prior to the policy's implementation:

I read with great interest in Saturday's newspaper accounts . . . the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter.

Id. (Blake, J., dissenting).

268. *See supra* notes 101-13 and accompanying text (discussing the *Skinner* decision).

269. *See supra* notes 114-22 and accompanying text (discussing the *Von Raab* decision).

270. *See supra* notes 130-48 and accompanying text (discussing the *Vernonia* decision).

271. *Ferguson I*, 186 F.3d at 486 (Blake, J., dissenting); *see also* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989) (finding that positive drug tests may not be used to prosecute employees without consent).

272. *See Ferguson I*, 186 F.3d at 484-86 (Blake, J., dissenting). Judge Blake argues that in previous special needs cases, "arrest was at most an incidental possibility and not a direct result of the warrantless Fourth Amendment intrusion sought to be justified." *See id.* at 487-88 (Blake, J., dissenting).

273. *Id.* at 488 (Blake, J., dissenting).

274. *Id.* (Blake, J., dissenting). Judge Blake reasoned that if the policy's real purpose was to effectively prevent mothers from continuing to abuse drugs while pregnant, the hospital would have taken more protective measures during earlier stages of pregnancy. *Id.* (Blake, J., dissenting).

275. *Id.* (Blake, J., dissenting).

276. *Id.* at 484 (Blake, J., dissenting). Although beyond the scope of this Note, Judge Blake also found that the policy was discriminatory toward African-American women and violated Title VI. *Id.* at 489 (Blake, J., dissenting).

Unhappy with the Fourth Circuit's decision, Ferguson and the nine other women petitioned the Supreme Court for certiorari. The Court granted the writ on February 28, 2000.²⁷⁷ Approximately fourteen months later, the Supreme Court decided whether MUSC's policy violated the Fourth Amendment's prohibition against unreasonable searches.²⁷⁸

C. The Supreme Court Decision

In an opinion written by Justice Stevens, the Supreme Court decided by a 6-3 margin to reverse the Fourth Circuit.²⁷⁹ The majority found that MUSC's drug screens did not fall under the special needs exception to the Fourth Amendment, and thus unfairly infringed upon a patient's right to privacy.²⁸⁰ Justice Kennedy's concurrence, however, left open the possibility that adherence to strict Fourth Amendment procedures would allow prosecution of pregnant drug abusers.²⁸¹ Moreover, Justice Scalia's critical dissent argued that the government has a legitimate interest in protecting the health of its citizens, as well as minimizing the role of law enforcement in the development and implementation of MUSC's policy.²⁸²

1. The Majority Opinion

The majority opinion held that MUSC's drug searches did not fall under the special needs exception because law enforcement permeated every aspect of MUSC's policy and the hospital excessively infringed upon patient privacy.²⁸³ Specifically, the Court reasoned that the underlying goal of MUSC's policy is indistinguishable from normal law enforcement purposes and thus can not qualify under the special needs exception to the Fourth Amendment.²⁸⁴ The Court also reasoned that MUSC's policy of ordering urinalysis tests to obtain evidence of a

277. *Ferguson II*, 121 S. Ct. 1281, 1287 (2001). Oral arguments were heard on October 4, 2000. United States Supreme Court Official Transcript at 1, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936).

278. *Ferguson II*, 121 S. Ct. at 1287.

279. *Id.* at 1293.

280. *Id.* at 1288-93; *see also infra* notes 283-307 and accompanying text (discussing the majority opinion).

281. *Ferguson II*, 121 S. Ct. at 1295; *see also infra* notes 308-22 and accompanying text (discussing the concurring opinion).

282. *Ferguson II*, 121 S. Ct. at 1296-1302; *see also infra* notes 323-48 and accompanying text (discussing the dissenting opinion).

283. *Ferguson II*, 121 S. Ct. at 1288-90, 1293. The Court reversed the Fourth Circuit and remanded the case to decide whether the patients had provided consent. *Id.* at 1293.

284. *Id.* at 1290 (citing *Indianapolis v. Edmond*, 121 S. Ct. 447, 458 (2000)).

patient's drug use for law enforcement purposes violated the patient's right to privacy and was an unreasonable search absent patient consent.²⁸⁵

The initial focus of the majority's opinion was MUSC's use of law enforcement officials to develop and implement the policy.²⁸⁶ After reiterating that urine tests qualified as searches under the Fourth Amendment,²⁸⁷ the majority initially distinguished this case from previous special needs decisions that determined whether comparable drug tests violated the Fourth Amendment.²⁸⁸ According to the Court, the essential difference was the "special need" asserted by the hospital to justify its warrantless search.²⁸⁹ Unlike the present case, the government's special need for a warrantless search in *Skinner*, *Von Raab*, *Vernonia*, and *Chandler* did not involve any law enforcement involvement or prosecutorial goals.²⁹⁰ Conversely, a crucial component of MUSC's policy was the threat of arrest and prosecution if a patient did not comply with her drug treatment obligations.²⁹¹

After evaluating all available evidence, the majority identified four examples where law enforcement initiatives overshadowed MUSC's asserted goal of protecting the health of unborn children.²⁹² First, the majority noted that the policy documented police measures that are only associated with the preservation of criminal evidence.²⁹³ Second, law enforcement officials were intimately involved in administering each

285. *Id.* at 1292. For the purposes of analysis of the search under the special needs exception, Justice Stevens assumed that the urine screens were conducted without the patient's informed consent. *Id.* at 1287.

286. *Id.* at 1289-90.

287. *Id.* at 1287 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989)). Responding to the dissent's contention that taking a patient's urine sample was not a search, the majority noted that the previous four special needs cases all considered urine screens taken by government officials as searches within the meaning of the Fourth Amendment. *Id.* at 1287 n.9.

288. *Id.* at 1288.

289. *Id.* at 1289.

290. *Id.* The Court noted that in its most recent special needs case, the Chief Justice argued that "[t]he 'special needs' doctrine, which has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing." *Id.* at 1289 n.15 (citing *Indianapolis v. Edmond*, 121 S. Ct. 447, 461 (2000) (Rehnquist, C.J., dissenting)).

291. *Id.* at 1292. Although the majority acknowledged that maternal drug abuse was a serious problem, the pervasiveness of law enforcement involvement negates the state's special need. *Id.* at 1293.

292. *Id.* at 1290-91.

293. *Id.* at 1290. Examples included detailing a proper chain of custody, listing possible criminal charges, how to notify police, and proper arrest procedures. *Id.*

aspect of the policy.²⁹⁴ Third, the majority found that the immediate purpose of the drug screen was completely “indistinguishable from the general interest in crime control.”²⁹⁵ Although it was possible that MUSC was only utilizing the threat of arrest to insure that pregnant women stopped abusing drugs, the policy’s immediate effect was to punish pregnant addicts.²⁹⁶

Finally, the majority determined that releasing positive drug test results directly to the police compels compliance with the Fourth Amendment.²⁹⁷ While the Court recognized that certain situations require hospital employees to provide the police with evidence, this exception only arises when the evidence is *discovered during the course of a routine examination*.²⁹⁸ The Court determined, however, that MUSC had a responsibility to inform patients of their constitutional rights prior to obtaining informed consent because the testing occurred “for the specific purpose of incriminating those patients.”²⁹⁹ Thus, because of the widespread involvement of law enforcement officials,

294. *Id.* at 1290-91. Particularly noteworthy to the majority were the Solicitor and police department’s active involvement in coordinating arrests with hospital staff as well as determining the drug screen protocol. *See id.*

295. *Id.* at 1290 (quoting *Edmond*, 121 S. Ct. at 458). The majority relied on Judge Blake’s dissent in the appellate court’s decision: “[I]t . . . is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers.” *Id.* (quoting *Ferguson I*, 186 F.3d 469, 484 (4th Cir. 1999) (Blake, J., dissenting)). Despite the respondents’ assertion that protecting the health of unborn children was the policy’s ultimate goal, the majority made a clear distinction between this alleged goal and the policy’s immediate effect of prosecuting women. *Id.* at 1291.

296. *Id.*

297. *Id.* at 1292.

298. *Id.* The majority argued that MUSC’s policy was distinguishable from situations where medical personnel, during the course of providing treatment, are legally or ethically obligated to report information about the patient’s condition or behavior. *Id.* at 1290 (citing COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMERICAN MEDICAL ASSOCIATION, POLICYFINDER, CURRENT OPINIONS E-5.05 (2000) (reporting is mandatory when “a patient threatens to inflict serious bodily harm to another person or to him or herself if there is a reasonable probability that the patient may carry out the threat”)); *see also* ARIZ. REV. STAT. ANN. § 13-3620 (West 2001) (authorizing mandatory reporting of suspected child abuse and neglect); ARK. CODE ANN. § 12-12-602 (Michie 1999) (requiring physicians to report knife or gun shot wounds).

299. *Ferguson II*, 121 S. Ct. at 1292. The Court noted that the dissent “mischaracterized our opinion as holding that ‘material which a person voluntarily entrusts to someone else cannot be given by that person to the police and used for whatever evidence it may contain.’” *Id.* at 1292 n.24 (quoting *Ferguson II*, 121 S. Ct. at 1297 (Scalia, J., dissenting)). The majority, however, reiterated that it must assume that the patients did not authorize the hospital to give the test results to the police. *Id.* at 1292. Because the search did not fall within the special needs exception, the Court remanded the case to decide whether the patients consented, which will determine if the search is unconstitutional. *Id.* at 1293.

the majority concluded that the search did not qualify under the special needs exception.³⁰⁰

Although applying the balancing test was unnecessary because the search did not fall within the special needs exception, the Court also held that the patients' privacy interests were substantially higher than in previous special needs cases.³⁰¹ The Court noted that in the *Skinner* line of cases, each individual knew why the drug test was given, who would have access to the results, and the consequences of a positive test.³⁰² Given that a patient reasonably expects test results to remain confidential, the majority found that none of the previous special needs cases rose to this level of intrusion.³⁰³

Accordingly, the majority held that the searches were not excluded from the Fourth Amendment's warrant and probable cause requirements.³⁰⁴ The fundamental purpose of the policy was obtaining evidence of criminal drug use that could be used in subsequent prosecutions.³⁰⁵ Although the respondents argued that their desire to protect unborn children was a special need that justified the searches, the majority determined that the policy's immediate purpose was to promote law enforcement goals.³⁰⁶ Under these circumstances, the majority found that MUSC personnel cannot conduct warrantless searches without individualized suspicion.³⁰⁷

2. The Concurring Opinion

The concurrence, written by Justice Kennedy, also found that MUSC's search procedure violated the Fourth Amendment.³⁰⁸ However, he disagreed with the majority's distinction between the "ultimate goal" of the policy and its "immediate purpose" when analyzing whether the government had established a special need

300. *Id.* at 1292.

301. *Id.* at 1287; *see also supra* Part II.B (discussing the Court's development of the special needs doctrine).

302. *Ferguson II*, 121 S. Ct. at 1287. As such, the majority found that testing in those situations involved a significantly less invasion than "the unauthorized dissemination of such results to third parties." *Id.*; *see also* Brief of Amici Curiae American Medical Association et al. at 11, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936); Brief of Amici Curiae American Public Health Association et al. at 6, 17-19, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936).

303. *Ferguson II*, 121 S. Ct. at 1289.

304. *Id.* at 1292.

305. *Id.* at 1293.

306. *Id.*

307. *Id.*

308. *Id.* (Kennedy, J., concurring).

beyond normal law enforcement.³⁰⁹ Citing the lack of precedent in previous special needs cases to support this bifurcated approach, Justice Kennedy argued that the special needs analysis is only based on the government's "ultimate" need to conduct the search.³¹⁰ The immediate purpose of any search is to collect evidence, thus making it impossible to identify the particular special need which justifies the search.³¹¹

Under a traditional special needs analysis, however, Justice Kennedy still found that MUSC's ultimate goal of improving the health of mothers and children was overshadowed by the substantial law enforcement involvement in MUSC's policy.³¹² Although the drug testing program had legitimate objectives that were unrelated to law enforcement, Justice Kennedy argued that successful special needs searches never involve active police participation.³¹³ The prosecutorial component of the policy effectively turned the hospital into an agent of law enforcement in order to successfully implement the policy.³¹⁴

Justice Kennedy, however, limited that conclusion's applicability to MUSC's policy.³¹⁵ He noted that the State had a legitimate interest in protecting unborn children from the hazards of maternal drug abuse and should have the ability to punish pregnant mothers abusing drugs.³¹⁶

309. *Id.* (Kennedy, J., concurring).

310. *Id.* (Kennedy, J., concurring). Justice Kennedy argued that "[a]ll of our special needs cases have turned upon what the majority terms the policy's ultimate goal," and not the immediate effect or purpose of the drug testing policy. *Id.* (Kennedy, J., concurring). In *Skinner*, for example, the Court focused on the FRA's ultimate goal of regulating employee conduct to ensure railroad safety. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989). If the Court had focused on the immediate purpose of the policy, the special need would be the collection of evidence of employee drug and alcohol use. *Ferguson II*, 121 S. Ct. at 1293 (Kennedy, J., concurring).

311. *Ferguson II*, 121 S. Ct. at 1294 (Kennedy, J., concurring).

312. *Id.* (Kennedy, J., concurring).

313. *Id.* (Kennedy, J., concurring). Justice Kennedy reiterated the majority's conclusion that "as a systematic matter, law enforcement was a part of the implementation of the search policy in each of its applications." *Id.* (Kennedy, J., concurring).

314. *Id.* (Kennedy, J., concurring).

315. *Id.* (Kennedy, J., concurring).

316. *Id.* (Kennedy, J., concurring). In recognizing the State's interest, Justice Kennedy acknowledged medical research which indicated the harmful effects that drug use can have on viable fetuses. *See, e.g.,* Robert Arendt et al., *Motor Development of Cocaine-exposed Children at Age Two Years*, 103 PEDIATRICS 86, 90-91 (1999) (concluding that prenatal exposure to cocaine caused delays in gross motor development); Ira J. Chasnoff et al., *Prenatal Exposure to Cocaine and Other Drugs: Outcome at Four to Six Years*, 846 ANNALS N.Y. ACAD. SCI. 314, 319-20 (J. Harvey & B. Kosofsky eds., 1998) (finding that drug-exposed babies experience higher levels of depression, anxiety, and attention problems in childhood); Claudia A. Chiriboga et al., *Dose-Response Effect of Fetal Cocaine Exposure on Newborn Neurologic Function*, 103 PEDIATRICS 79, 83-84 (1999) (finding that newborns exposed to prenatal drug use suffer greater physical and mental abnormalities).

Justice Kennedy supported hospitals adopting suitable testing criteria, but reiterated that the policy cannot extend beyond rehabilitation and treatment.³¹⁷ Prosecution is only an option if traditional warrant and probable cause requirements are followed when obtaining the drug samples.³¹⁸

Finally, Justice Kennedy considered the majority's assumption that the patients did not consent to the drug tests.³¹⁹ He believed that a critical component of every special needs case was that the individual consented to the search.³²⁰ Justice Kennedy argued that the majority, by simply concluding that the patients did not consent to the tests, decided the case under false pretenses.³²¹ Nevertheless, Justice Kennedy concurred in the judgment, but concluded that the outcome might be different if the majority made a different assumption.³²²

3. The Dissenting Opinion

The dissent, written by Justice Scalia,³²³ found it unnecessary to consider the applicability of the special needs exception because collecting urine samples did not constitute a search under the Fourth Amendment.³²⁴ However, even if the drug screens were a search, Justice Scalia believed they fell under the special needs exception.³²⁵ Justice Scalia opined that because law enforcement only played a supplemental role in the policy's implementation and MUSC had a

317. *Ferguson II*, 121 S. Ct. at 1295 (Kennedy, J., concurring).

318. *Id.* (Kennedy, J., concurring).

319. *Id.* (Kennedy, J., concurring).

320. *Id.* (Kennedy, J., concurring). Although the voluntariness of a special needs search is always objectionable due to the adverse consequences that may result from refusal, consent has a fundamental role in determining the reasonableness of the search. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 615 (refusal would result in dismissal); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 650-51 (refusal would deny athlete the opportunity to participate in after school sports).

321. *Ferguson II*, 121 S. Ct. at 1295 (Kennedy, J., concurring).

322. *Id.* (Kennedy, J., concurring).

323. *Id.* at 1296 (Scalia, J., dissenting). Although Justice Scalia authored the dissent, Chief Justice Rehnquist and Justice Thomas only joined the section regarding the application of the special needs doctrine.

324. *Id.* (Scalia, J., dissenting). Justice Scalia disagrees with the majority's conclusion that urine tests taken by government officials are searches under the Fourth Amendment. *Id.* at 1296 n.1 (Scalia, J., dissenting). He notes that unlike the present case, the urine samples in the previous special needs cases were obtained involuntarily. *Id.* (Scalia, J., dissenting). However, in his concurring opinion, Justice Kennedy argues that the distinguishing aspect of the special needs cases is that the individual actually *provided* consent. *Id.* at 1295 (Kennedy, J., concurring).

325. *Id.* at 1299 (Scalia, J., dissenting).

special need to protect the health of unborn children, the drug tests were constitutional.³²⁶

Justice Scalia initially concluded that testing the patient's urine was not a search because the Fourth Amendment only protects against searches of citizens' "persons, houses, papers, and effects."³²⁷ First, he stated that urine cannot be regarded as a person's effect, or part of one's property, especially since it is "passed and abandoned."³²⁸ Second, Justice Scalia argued that urine screens are not afforded Fourth Amendment protection because the samples are given voluntarily.³²⁹ To prove that urine samples are obtained without patient consent, Justice Scalia maintained that the petitioners must prove (1) that hospital officials coerced patients to give consent, (2) that patients were not told that their urine would be screened for drugs, or (3) that consent was uninformed because the patients did not know that positive results would be turned over to the police.³³⁰

As for the last two methods of proof, Justice Scalia opined that it is not unconstitutional to use "lawfully (but deceptively) obtained material for purposes other than those represented," and then give any information derived from the search to the police.³³¹ Despite the deceitful nature of the transaction, the patient still consented to the initial search and cannot rely on the Fourth Amendment for protection.³³² Justice Scalia also found it extremely unlikely that the hospitals coerced patients into giving urine samples under the guise of receiving medical treatment.³³³ Additionally, he stated that if the patient felt coerced, it was due to her own beliefs, not as a result of pressure applied by the government via hospital personnel.³³⁴ Therefore, Justice Scalia concluded that giving consent precluded the

326. *Id.* at 1299-1302 (Scalia, J., dissenting).

327. *Id.* at 1296 (Scalia, J., dissenting); *see also* U.S. CONST. amend. IV; *supra* note 9 and accompanying text (discussing the Fourth Amendment).

328. *Ferguson II*, 121 S. Ct. at 1296 (Scalia, J., dissenting).

329. *Id.* (Scalia, J., dissenting).

330. *Id.* at 1296-97 (Scalia, J., dissenting).

331. *Id.* at 1297 (Scalia, J., dissenting); *Hoffa v. United States*, 385 U.S. 293 (1966). In *Hoffa v. United States*, the Court held that "the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa*, 385 U.S. at 302. The dissent argued that any information obtained through a breach of trust, including a positive urine screen, is still obtained consensually and therefore not a search under the Fourth Amendment. *Ferguson II*, 121 S. Ct. at 1297 (Scalia, J., dissenting).

332. *Ferguson II*, 121 S. Ct. at 1296 (Scalia, J., dissenting).

333. *Id.* at 1299 (Scalia, J., dissenting).

334. *Id.* (Scalia, J., dissenting).

patients from claiming the hospital unlawfully obtained their urine samples.³³⁵

Assuming the special needs doctrine was applicable, however, Justice Scalia would still find the search constitutional.³³⁶ First, he objected to the majority's determination that protecting the health of pregnant women and their unborn children is simply a "pretext" for hiding the law enforcement purposes of the search.³³⁷ Justice Scalia supported the medically-related goal of the policy by noting that MUSC began the drug testing program on its own volition, without the instruction or involvement of law enforcement officials.³³⁸ Because the program was designed to promote maternal and infant health care in both the short and long term,³³⁹ Justice Scalia questioned why the additional presence of law enforcement would change the policy's goal from improving health to incriminating pregnant women who used drugs.³⁴⁰ Moreover, he noted that police involvement only began *after* the testing had been conducted for reasons independent of prosecution.³⁴¹

Justice Scalia then criticized the majority for assuming that the "addition" of a law-enforcement related purpose to a legitimate health-related purpose prevents the applicability of the special needs exception.³⁴² Here, the physicians only "searched" patients suspected

335. *Id.* (Scalia, J., dissenting).

336. *Id.* (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia in this part of his dissent. In order to apply the special needs exception, however, Justice Scalia argued that he would be forced to assume that the patients did not consent to the drug tests nor understand that the results would be given to the police. *Id.* (Scalia, J., dissenting). He would also have to assume, contrary to "common sense," that testing the urine constituted a search under the Fourth Amendment. *Id.* (Scalia, J., dissenting).

337. *Id.* (Scalia, J., dissenting).

338. *Id.* at 1300 (Scalia, J., dissenting). Justice Scalia also pointed to the district court's finding that the policy's goal was "not to arrest patients but to facilitate their treatment and protect both the mother and the unborn child." *Id.* at 1299 (Scalia, J., dissenting). Under the Federal Rules of Civil Procedures, Rule 52(a), Justice Scalia argued that the lower court's finding is binding unless clearly erroneous, which in his opinion, it is not. *Id.* at 1299-1300; *see also* FED. R. CIV. P. 52(a).

339. *Ferguson II*, 121 S. Ct. at 1300 (Scalia, J., dissenting).

340. *Id.* (Scalia, J., dissenting).

341. *Id.* at 1302 (Scalia, J., dissenting). Justice Scalia argued that while prosecution may have been threatened at an earlier stage, i.e. in the Solicitor's letters, actual law enforcement involvement did not occur until after test was positive. *Id.* (Scalia, J., dissenting). Moreover, it would be impractical to not have some police involvement at earlier stages of testing, specifically regarding preservation of evidence. *Id.* (Scalia, J., dissenting).

342. *Id.* (Scalia, J., dissenting). The special needs exception was initially developed to allow certain searches by law enforcement officials, who would normally only have a prosecutorial objective. *See id.* at 1300 (Scalia, J., dissenting). As precedent, Justice Scalia relied on *Griffin v. Wisconsin* where the Court found that the State's special need to ensure compliance with

of prenatal drug abuse in order to protect the health of the mother and the child.³⁴³ The fact that the physicians also preserved the evidence for law enforcement purposes did not change the underlying medical purpose of the policy.³⁴⁴ Justice Scalia argued, therefore, that the majority's conclusion that law enforcement was involved in every aspect of the policy is misguided.³⁴⁵

Ultimately, Justice Scalia revealed his belief that the policy's initial goal of protecting mothers and their children qualified as a special need beyond normal law enforcement purposes.³⁴⁶ Although the hospital gave positive tests to the police, Justice Scalia accepted that the policy only intended to provide addicted patients with a strong incentive to enter drug rehabilitation programs.³⁴⁷ Justice Scalia therefore concluded that the searches were reasonable under the Fourth Amendment and were not required to adhere to the traditional warrant and probable cause requirements.³⁴⁸

IV. ANALYSIS

The majority correctly held that testing pregnant mothers at a public hospital, and then giving positive test results to law enforcement officials without the patient's consent, violated their Fourth Amendment rights against unreasonable searches.³⁴⁹ This section first demonstrates why the all-encompassing involvement of law enforcement in the development and implementation of the MUSC policy prohibits

probation requirements justified a warrantless search of the probationer's house. *Id.* (Scalia, J., dissenting); see also *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987).

343. *Ferguson II*, 121 S. Ct. at 1301 (Scalia, J., dissenting).

344. *Id.* (Scalia, J., dissenting).

345. *Id.* (Scalia, J., dissenting).

346. *Id.* (Scalia, J., dissenting).

347. *Id.* at 1300 (Scalia, J., dissenting). Only thirty out of 253 patients that tested positive for drug use were arrested, leading the dissent to conclude that the police only used the results for the "benign" purpose of enticing addicted mothers to receive treatment. *Id.* at 1302 (Scalia, J., dissenting).

348. *Id.* (Scalia, J., dissenting). Justice Scalia did not find it necessary to apply the balancing test to determine if the search was reasonable. *Id.* (Scalia, J., dissenting). However, he did note that the patients had a lower expectation of privacy because the tests were conducted as part of a routine medical examination. *Id.* at 1301 (Scalia, J., dissenting). Moreover, patients are aware that South Carolina requires physicians to break confidentiality if necessitated by public policy. *Id.* (Scalia, J., dissenting).

349. See *supra* Part III.C.1 (discussing the majority's holding and reasoning for determining that the searches violated the traditional warrant and probable cause requirements of the Fourth Amendment).

utilizing the special needs exception.³⁵⁰ The analysis then turns to the disturbing possibility that Justice Kennedy's concurring opinion left room for future prosecution of women who abuse drugs during pregnancy.³⁵¹ Finally, this section discusses the dissenting opinion's mistaken argument that law enforcement officials were only involved after a patient tested positive for drug use.³⁵²

A. Pervasive Law Enforcement Involvement Precludes the Application of the Special Needs Exception

The majority correctly found that the special needs exception to the Fourth Amendment does not apply to a policy that is intimately linked to law enforcement goals.³⁵³ Although previous special needs cases were different from the *Ferguson* decision in a variety of respects,³⁵⁴ the primary distinction is the lack of interrelation between social policy and prosecutorial concerns.³⁵⁵ In previous cases, the government's special need to reduce drug use among student athletes or to reduce fatal railroad accidents was clearly divorced from any general law enforcement goal.³⁵⁶ For example, while positive drug tests may have resulted in dismissal from school or loss of employment, the drug testing policies clearly stated that the results would not be turned over to the police.³⁵⁷ Moreover, the administrators informed the individuals

350. See *supra* Part IV.A (discussing the involvement of law enforcement officials in every aspect of MUSC's policy).

351. See *supra* Part IV.B (discussing the issues left open as noted in Justice Kennedy's concurrence); *Ferguson II*, 121 S. Ct. at 1294-95 (Kennedy, J., concurring).

352. See *supra* Part IV.C (discussing why the dissenting opinion incorrectly concluded that the drug screens were reasonable); *Ferguson II*, 121 S. Ct. at 1301 (Scalia, J., dissenting). Justice Scalia argued that doctors are "supposed to have in mind the welfare of the [mother and child]. That they have in mind in addition the provision of evidence to the police should make no difference." *Ferguson II*, 121 S. Ct. at 1301 (Scalia, J., dissenting).

353. *Ferguson II*, 121 S. Ct. at 1290.

354. See *supra* notes 101-60 and accompanying text (discussing the *Skinner*, *Von Raab*, *Vernonia*, and *Chandler* decisions).

355. See *supra* Part III.C.1 (discussing the majority opinion); *Ferguson II*, 121 S. Ct. at 1292 n.20. The majority argued that despite the appearance of a medical purpose, MUSC's policy was completely predicated on the goals of law enforcement officials. *Ferguson II*, 121 S. Ct. at 1291. According to the Court, "[w]hat matters is that under the new policy developed by the solicitor's office and MUSC, law enforcement involvement was the means by which [the] therapeutic purpose was to be met." *Id.*; see also *Buffaloe*, *supra* note 41, at 531 (noting that while the special needs exception is applicable to numerous situations, all special needs cases are "linked by virtue of the fact that in each case the government actor is someone other than a police officer searching for evidence to support a criminal prosecution").

356. *Ferguson II*, 121 S. Ct. at 1290 n.15.

357. *Id.* at 1288.

submitting urine samples that the results could not be used for criminal prosecution.³⁵⁸

The *Ferguson* majority recognized the pretextual nature of MUSC's purported goal of protecting mothers and their children from the hazards of drug abuse.³⁵⁹ Though the Court may have reached a different result if the true objective of the policy had been health-related, the pervasive police involvement made the needs of women secondary to that of law enforcement objectives.³⁶⁰ Simply put, MUSC's special need to prevent prenatal drug abuse does not elevate the policy beyond its law enforcement goals.³⁶¹

Specifically, MUSC's policy was crafted with law enforcement input from the very beginning.³⁶² First, the policy's implementation took place four months prior to drug treatment and rehabilitation measures being added to the program.³⁶³ Second, despite the purported goal of insuring fetal protection, MUSC's policy did not provide for future medical treatment for the newborn child.³⁶⁴ Finally, the policy primarily threatened arrest in order to deter women from using drugs during pregnancy, not to encourage women to obtain prenatal care to protect their unborn children.³⁶⁵ In these ways, MUSC's policy failed to accomplish its principle goal and instead subjected the mother and her child to greater health risks because addicted patients feared arrest upon their attempts to receive prenatal care.³⁶⁶

B. The Possibility of Future Prosecution for Prenatal Drug Abuse

In his concurring opinion, Justice Kennedy opened the door to future legislation that provides for fetal abuse prosecution. Justice Kennedy

358. *Id.* at 1288 n.12. All previous special needs cases employed protections against releasing information to third parties. See *Chandler v. Miller*, 520 U.S. 305, 312, 318 (1997); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 658 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 621 n.5 (1989); *Nat'l Treasury Employees v. Von Raab*, 489 U.S. 656, 663, 666-67 (1989).

359. See *supra* Part III.C.1 (discussing the majority opinion); see also *supra* notes 265-76 (discussing Judge Blake's dissent).

360. See *supra* Part III.C.1 (discussing the majority opinion).

361. *Ferguson II*, 121 S. Ct. at 1293.

362. See *supra* Part II.D (discussing the development and implementation of MUSC's policy).

363. See *supra* notes 203-26 (discussing the differences between the 1989 and 1990 versions of MUSC's policy).

364. *Ferguson II*, 121 S. Ct. at 1285.

365. *Ferguson I*, 186 F.3d 469, 488 (Blake, J., dissenting), *rev'd*, 121 S. Ct. 1281 (2001). The policy was not a deterrent to prenatal drug use as the majority of the women were arrested *after giving birth*. *Id.* (Blake, J. dissenting). Judge Blake argued that "[b]y that time, any adverse effect of maternal cocaine use on the developing fetus had already occurred, and the arrest could only have had a punitive rather than preventive purpose." *Id.* (Blake, J., dissenting).

366. Akhter, *supra* note 194, at 1; see also Paltrow, *supra* note 181, at 1028-29.

initially agreed that the MUSC searches did not fall within the special needs exception to the Fourth Amendment.³⁶⁷ Reiterating the majority's concerns, he noted that previous special needs cases never involved active law enforcement participation in the development or implementation of the drug-testing program.³⁶⁸

Justice Kennedy, however, made it very clear that South Carolina had a legitimate interest in protecting the health of mothers and unborn children from prenatal drug abuse.³⁶⁹ In order to further that interest, Justice Kennedy's concurrence provided a blueprint that would allow state officials to draft legislation criminalizing a woman's behavior during pregnancy.³⁷⁰ As such, South Carolina and the remaining forty-nine states could impose punishment on pregnant drug addicts as long as the legislation provided traditional Fourth Amendment protections.³⁷¹ Instead of recognizing that drug addiction is a medical disease, Justice Kennedy concluded that the women who place their child at risk for prenatal exposure deserve punishment for their action, especially given that the fetus is an innocent victim.³⁷²

C. MUSC's Policy Does Not Distinguish Between Medical Treatment and Law Enforcement Goals

Despite evidence to the contrary, the dissenting opinion incorrectly minimized the role of law enforcement in MUSC's policy by noting that the police only became involved *after* a woman tested positive for drug use.³⁷³ In fact, the dissent's attempt to divorce the law enforcement component of MUSC's policy is contrary to the text of the policy itself.³⁷⁴ It is impossible to ignore the prominent role that law enforcement played in every aspect of the policy, even though the stated

367. See *supra* Part III.C.2 (discussing the concurring opinion); *Ferguson II*, 121 S. Ct. at 1293 (Kennedy, J., concurring).

368. *Ferguson II*, 121 S. Ct. at 1294 (Kennedy J., concurring); see also *supra* note 313 and accompanying text (discussing how special needs searches should not involve law enforcement).

369. *Ferguson II*, 121 S. Ct. at 1294-95 (Kennedy J., concurring); see also *supra* notes 316-18 and accompanying text (discussing South Carolina's interest in protecting unborn children from prenatal drug exposure).

370. *Ferguson II*, 121 S. Ct. at 1295 (Kennedy, J., concurring). Although Justice Kennedy struck down MUSC's policy in its current form, he left open the possibility that prosecution is an option if constitutional procedures are followed: "If prosecuting authorities . . . adopt legitimate procedures to discover this information and prosecution follows, that ought not to invalidate the testing." *Id.* (Kennedy, J., concurring).

371. *Id.* (Kennedy, J., concurring).

372. *Id.* (Kennedy, J., concurring).

373. *Id.* at 1302 (Scalia, J., dissenting).

374. See *supra* notes 292-300 and accompanying text (discussing the involvement of law enforcement in implementing MUSC's policy).

goal of the policy may have been to facilitate the treatment of drug addicted mothers and their children.³⁷⁵ Contrary to the dissenting opinion, MUSC clearly predicated the implementation and effectiveness of its policy on medical personnel and law enforcement officials cooperating to identify and prosecute pregnant drug users.³⁷⁶ Because of this cooperation, the search did not fall within the special needs exception and is therefore unconstitutional.

V. IMPACT

The Supreme Court's ruling in *Ferguson* is a victory for pregnant women and health care professionals. The Court achieved the stated goal of MUSC's policy by insuring that pregnant drug abusers will continue to receive prenatal and postnatal care.³⁷⁷ The Court, however, left two unanswered questions because of the limited nature of this decision.³⁷⁸ First, the decision leaves open the possibility that a pregnant woman could be prosecuted for legal activities that negatively impact her unborn child.³⁷⁹ Second, the decision fails to clarify what constitutes a "special need" for the purposes of qualifying for this exception to the Fourth Amendment's traditional requirements.³⁸⁰

A. Insuring that Pregnant Drug Users Will Obtain Prenatal Care

Although the Court struck down the MUSC policy as a violation of the Fourth Amendment,³⁸¹ its decision actually achieved the policy's goal of protecting the health of mothers and their unborn children. First, research has shown that when women think obtaining prenatal care results in criminal prosecution, they are reluctant to seek

375. See *supra* notes 292-300 and accompanying text (discussing the involvement of law enforcement in implementing MUSC's policy). For example, police officers developed the policy's operational guideline for preserving evidence, notification of positive drug tests, and arrest procedures. *Ferguson II*, 121 S. Ct. at 1290. They also had access to confidential hospital records regarding positive tests and received copies of patients' progress reports. *Id.* at 1291.

376. *Ferguson II*, 121 S. Ct. at 1291.

377. See *infra* Part V.A (discussing the positive implications resulting from the *Ferguson* decision).

378. See *infra* Part V.B-C (discussing the uncertainty that remains following the *Ferguson* decision).

379. See *infra* Part V.B (examining the breadth of possibilities that may trigger fetal abuse prosecutions under the reasoning of the concurrence).

380. See *infra* Part V.C (discussing the questions that still remain in special needs jurisprudence).

381. *Ferguson II*, 121 S. Ct. at 1293. If MUSC's policy actually reduced the number of drug-exposed children, there should have been an increase in the number of drug-exposed children after the policy was terminated. Brief for Petitioners at 17, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936). This increase did not occur. *Id.*

treatment.³⁸² Fortunately, the *Ferguson* decision will allow pregnant drug users to obtain needed prenatal care because hospitals must implement safeguards to protect their privacy. Specifically, hospital personnel must obtain their patients' informed consent if positive drug test results will be given to law enforcement officials.³⁸³ More importantly, health care providers will recognize that their primary responsibility is to treat pregnant drug abusers with medical care and treatment, not with punitive responses such as criminal prosecution.³⁸⁴

Second, the *Ferguson* decision reassures pregnant women that they have an equal right to a confidential relationship with their physicians.³⁸⁵ Because they are no longer forced to act as an extension of law enforcement agencies, health care providers can now focus on providing quality medical care in a confidential environment.³⁸⁶ Because this guarantee of confidentiality will encourage pregnant women to be completely honest with their physicians, both the mother and the unborn child will continue to receive the best medical care possible.³⁸⁷ The MUSC policy, however, did not promote either of these goals and was fortunately declared unconstitutional by the Court.³⁸⁸

382. See *supra* notes 190-93 and accompanying text (discussing why the threat of arrest deters women from seeking prenatal care). More importantly, MUSC's own research concluded that the policy deterred pregnant women from seeking prenatal care at the hospital. Paul-Emile, *supra* note 2, at 372.

383. *Ferguson II*, 121 S. Ct. at 1292. This decision has been applauded by several pro-choice organizations who argued that consent is a critical component of insuring women obtain prenatal care. For example, CARAL believed that "treating women like second-class citizens by testing them without their knowledge . . . serv[ed] to deter women from seeking needed medical care." CARAL, *A Pro-Choice Victory in the U.S. Supreme Court*, at http://www.caral.org/alert_ferguson.html (last modified Mar. 30, 2001).

384. See Brief of Amici Curiae The Rutherford Institute at 9, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936). In view of the multiple obligations that physicians have to their patients, "counseling patients against drug use is recommended as a standard intervention." *Id.* This view is supported by the American Medical Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and the U.S. Preventative Systems Task Force. *Id.*

385. Associated Press, *Court: Consent Needed to Drug-Test Pregnant Women* (Mar. 21, 2000), at <http://www.cnn.com/2001/LAW/03/21/scotus.drug.test.03/index.html>. Priscilla Smith, one of the attorneys who represented the petitioners, proclaimed that "[i]t reaffirms that pregnant women have that same right to a confidential relationship with their doctors." *Id.*

386. See also Akhter, *supra* note 194, at 1.

387. Brief of Amici Curiae American Medical Association et al. at 11, *Ferguson II*, 121 S. Ct. 1281 (2001) (No. 99-936). The American Medical Association states that "meaningful medical care depends on a successful physician/patient relationship." *Id.*

388. *Ferguson II*, 121 S. Ct. at 1293.

B. Prosecuting Pregnant Women for Using Alcohol, Caffeine, or Tobacco Use?

Despite the triumph for pregnant women in *Ferguson*, questions remain. The Court's holding in *Ferguson* requires health care providers to obtain informed consent before giving positive drug tests to law enforcement officials.³⁸⁹ Justice Kennedy's concurring opinion, however, left open the possibility that MUSC's policy could be constitutional if traditional warrant and probable cause requirements are followed.³⁹⁰ As such, women could be prosecuted if the searches were conducted in compliance with the Fourth Amendment.³⁹¹ Although South Carolina is the only state that applies child abuse laws to viable fetuses, it is possible that other states may soon consider the possibility of proposing similar legislation.³⁹²

A more disturbing trend is the possible expansion of prosecutions beyond women who abuse drugs during pregnancy.³⁹³ If protecting fetal health is considered a legitimate state interest, law enforcement officials could eventually test pregnant women to determine if they are maintaining a healthy diet and exercising regularly.³⁹⁴ Positive tests for alcohol, caffeine, or tobacco, all of which have been shown to harm fetal development, could eventually lead to arrest and prosecution for child abuse or neglect.³⁹⁵ Even if the substances are legal, it appears that these searches would be upheld if they conformed to the Fourth Amendment's safeguards.

389. *Id.* at 1292.

390. *Id.* at 1295 (Kennedy, J., concurring); *see also supra* notes 315-18 and accompanying text (discussing the possibility of upholding MUSC's policy if it conformed to Fourth Amendment safeguards). Justice Kennedy argued that "[t]here should be no doubt that South Carolina can impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing him or her lifelong damage and suffering." *Ferguson II*, 121 S. Ct. at 1295 (Kennedy, J., concurring).

391. *Ferguson II*, 121 S. Ct. at 1295 (Kennedy, J., concurring); *see also supra* notes 315-18 and accompanying text (discussing the possibility of upholding MUSC's policy if it conformed to Fourth Amendment safeguards).

392. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1995), *cert. denied*, 523 U.S. 1145 (1998); *see also supra* notes 187-89 and accompanying text (discussing the decision to criminalize prenatal drug abuse).

393. Ellen Goodman, *Cause To Be Wary of Justice Kennedy's Warning*, STATE-JOURNAL REGISTER (Springfield), Mar. 26, 2001, *available at* <http://www.sj-r.com>.

394. *Id.*

395. Wilkins, *supra* note 228, at 1427-28 (arguing that "[b]ecause the link between drinking alcohol and fetal harm is so strong, states may be able to regulate the alcohol intake of pregnant women.") For additional research demonstrating the effects of tobacco on prenatal development, *see* Barry Zuckerman, *Marijuana and Cigarette Smoking During Pregnancy: Neonatal Effects*, in *DRUGS, ALCOHOL, PREGNANCY AND PARENTING* 73 (Ira J. Chasnoff ed., 1988); *see also* AMA Report, *supra* note 197, at 2666.

C. Application of the Special Needs Exception Remains Uncertain

Finally, the Court failed to clarify the confusion surrounding what constitutes a “special need” for the purposes of Fourth Amendment jurisprudence.³⁹⁶ The *Ferguson* majority reaffirmed its commitment to use a context-specific analysis to determine whether government officials have demonstrated a special need to conduct a warrantless search.³⁹⁷ This analysis, however, leaves lower courts without clear guidelines to follow.³⁹⁸ Different rulings on the same issue will naturally result because each court will conduct its own inquiry based on its perception of the government’s interest.³⁹⁹

In addition, legislatures will lack the confidence to develop legislation to serve a legitimate special need for fear that it will be found unconstitutional. While this indecision may force government officials to act with greater caution when formulating policies that involve the Fourth Amendment, there are still situations where it is impractical to obtain a warrant prior to conducting a search.⁴⁰⁰ As a result, legal challenges to warrantless searches will grow unless the Supreme Court clearly defines what constitutes a special need and further clarifies the weight afforded to each side of the reasonableness balancing test.⁴⁰¹

VI. CONCLUSION

The majority correctly decided that MUSC’s policy of testing pregnant women for evidence of drug use without a warrant or patient consent violates the Fourth Amendment’s prohibition against unreasonable searches. While the majority’s opinion left important questions unanswered, it correctly chose a patient’s right to confidential medical treatment over MUSC’s alleged goal of protecting the health of pregnant women and their unborn children. Although MUSC had an

396. See *supra* notes 167-72 and accompanying text (discussing the lack of clear standards for applying the special needs doctrine).

397. *Ferguson II*, 121 S. Ct. 1281, 1290 (2001). The Court relied on its reasoning in *Chandler* to “carry out a ‘close review’ of the scheme at issue before concluding that the need in question was not special.” *Id.*; see also *supra* notes 149-60 and accompanying text (discussing the *Chandler* decision).

398. Smiley, *supra* note 58, at 825-26. Smiley notes that “[t]he contradictory outcomes reached . . . illustrate the practical impossibility of applying the doctrine in a consistent manner.” *Id.*

399. See *supra* notes 167-72 and accompanying text (discussing the lack of clear standards for applying the special needs doctrine).

400. *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 533 (1967).

401. See *supra* notes 167-72 and accompanying text (discussing the lack of clear standards for applying the special needs doctrine); see *supra* notes 45-46 and accompanying text (discussing the special needs balancing test).

opportunity to develop a policy that would achieve this goal, the pervasive use of law enforcement created a situation where the privacy rights of patients were unconstitutionally infringed. As such, the *Ferguson* decision affirms that the special needs exception may only be applied when the government's interest in conducting the search is divorced from any law enforcement purpose. Moreover, it solidifies the confidential relationship between physicians and their patients and insures that pregnant drug abusers will continue to receive prenatal care without fear of prosecution.