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Constitutional Law: Ferguson v. City of Charleston: A Victory for Fourth Amendment Rights, but Is It a Victory for Women

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CONSTITUTIONAL LAW: *Ferguson v. City of Charleston*: A Victory for Fourth Amendment Rights, but Is It a Victory for Women?

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I. INTRODUCTION

In *Ferguson v. City of Charleston*,[1] the Supreme Court declined to expand the scope of the "special needs" exception to the warrant and probable cause requirement for searches and seizures under the Fourth Amendment[2] to include drug tests on pregnant women in a public hospital. The Court's decision in *Ferguson* is important because it refused to permit the use in criminal prosecutions of urinalysis results that were obtained by a civil division of the government under a seemingly benign pretext.

In *Ferguson*, a public hospital in South Carolina adopted and implemented a policy whereby certain pregnant patients were drug-tested for cocaine. Patients testing positive for that specific drug were reported to the police and the Solicitor's office and were subsequently forced to choose between drug treatment or prosecution for child abuse. Ten women convicted under the policy filed suit in federal court claiming that the policy violated their Fourth Amendment rights. This Note focuses on the Court's refusal to apply the "special needs" exception to the Fourth Amendment in the *Ferguson* case. This Note will also address why *Ferguson* may be a hollow victory for women's rights and civil rights activists.

II. STATEMENT OF THE CASE

In 1989, the Medical University of South Carolina (MUSC) independently instituted a policy of drug testing pregnant women who were receiving obstetrical services at the state run hospital.[3] The hospital staff was concerned about the increase in the number of women who were using cocaine during pregnancy and the increase in the number of "crack babies" being delivered in the hospital.[4] The program was originally used to try to persuade those women testing positive for cocaine to enter a drug treatment program for the health and safety of themselves and their children.[5]

Shortly after the hospital initiated the program, the case manager for the obstetrics department at MUSC learned that women testing positive for cocaine during pregnancy were being arrested and charged with child abuse in Greenville, South Carolina.[6] The case manager discussed the policy with the hospital's general

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1. 532 U.S. 67 (2001).

2. 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.

3. *Ferguson*, 532 U.S. at 70.

4. *Id.* at 70 n.1.

5. *Id.* at 70.

6. *Id.* In South Carolina, a viable fetus is considered a person, and the South Carolina Supreme Court

counsel, who contacted Charleston Solicitor Charles Condon to offer hospital assistance in identifying and prosecuting pregnant cocaine users in the Charleston area.[7] Solicitor Condon began developing the procedure at issue here. He organized meetings, decided who would participate, and issued invitations to those chosen.[8]

The resulting group consisted of representatives from MUSC, the police, the County Substance Abuse Commission, and the Department of Social Services.[9] The policy, which created nine criteria[10] for MUSC staff to use in determining which patients to test, was then put into effect.[11] Charges were filed against those women who tested positive for cocaine a second time and those who failed to complete the treatment program.[12] Women who delivered while using cocaine were arrested immediately.[13] The threat of arrest was intended to provide an incentive for women to participate in the program.[14] Women who tested positive for other drugs, including heroin, were not arrested or coerced into treatment.[15]

The police and Solicitor's office were intimately involved in the day-to-day implementation of the policy.[16] Hospital personnel notified the police when women were being discharged from the hospital.[17] In addition, hospital personnel provided the police with any identifying information needed to process the patient in the city jail,[18] as well as copies of the urinalysis results, discharge papers, and other information that was needed to effectuate the arrest.[19] Finally, hospital personnel admitted to keeping at least one patient on the hospital premises beyond the time necessary to complete the discharge process so that the police would have sufficient time to arrive at the hospital to arrest her.[20]

Ten women who received obstetrical care at MUSC filed a 42 U.S.C. § 1983 action against the City of Charleston, a group of law enforcement officials, and hospital trustees and employees,[21] claiming, inter alia, that the drug test taken

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previously held that the use of cocaine during the third trimester of pregnancy constitutes criminal child abuse. *See* Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997), *cert. denied,* 523 U.S. 1145 (1998). Although the issue of viability is beyond the scope of this Note, viability must be determined by a licensed physician, based on numerous medical factors. *See* Webster v. Reprod. Health Services, 492 U.S. 490, 518 (1989) (holding that the trimester test instituted in *Roe v. Wade*, 410 U.S. 113 (1973), was "unsound in principle and unworkable in practice" and abandoning it in favor of a scientific determination of viability).

7. *Ferguson*, 532 U.S. at 70-71.

8. *Id.* at 71.

9. *Id.*

10. The nine criteria are as follows: "1) No prenatal care; 2) Late prenatal care after 24 weeks gestation; 3) Incomplete prenatal care; 4) *Abruptio placentae*; 5) Intrauterine fetal death; 6) Preterm labor 'of no obvious cause'; 7) IUGR [intrauterine growth retardation] 'of no obvious cause'; 8) Previously known drug or alcohol abuse; and 9) Unexplained congenital anomalies." *Id.* at 71 n.4.

11. The policy created selection criteria for women to be tested and the chain of custody procedures and provided for education and referrals for substance abuse counseling. *Id.* at 71-72.

12. *Id.* at 72.

13. *Id.*

14. *Id.*

15. Petitioner's Opening Brief at 18-19, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99-936).

16. *Id.* at 5.

17. *Id.*

18. *Id.* at 4-5. "At the time of arrest, hospital personnel also provided the arresting officer with the patient's address, date of birth, social security number, and aliases, if any." *Id.*

19. *Id.* at 5.

20. *Id.* at 17.

21. The policy at issue here provided three different charges depending on the circumstances of a particular

pursuant to hospital policy was warrantless, nonconsensual, and conducted for "criminal investigatory purposes" and, therefore, violated the Fourth Amendment.[22] The city defended the policy claiming that the women had consented to the tests and that, even without consent, the tests were lawful because they were used for special non-law-enforcement purposes.[23]

The District Court rejected the argument that the searches were reasonable because the searches "were not done by the medical university for independent purposes."[24] The judge submitted only the issue of consent to the jury.[25] The jury found that the women had consented to the search and each was convicted. The Fourth Circuit Court of Appeals affirmed the convictions but reversed the District Court's finding that the searches were unreasonable, finding instead that the search was reasonable as a matter of law under the "special needs" exception to the probable cause requirement.[26] The Appeals Court did not reach the issue of consent.[27] The Supreme Court granted certiorari[28] and reversed the Court of Appeals.[29]

III. BACKGROUND

A. *Procedural History*

At the trial court level, the City of Charleston raised two defenses to the defendants' argument that warrantless, nonconsensual searches for primarily law enforcement purposes violated the Fourth Amendment.[30] The first argument was that the searches were consensual and second, even if the searches were not consensual, they fit within the special needs exception to the warrant requirement.[31] The trial court rejected the second argument as a matter of law, and the jury found that the women had consented to the searches.[32]

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case. A woman was charged with simple possession if she was 27 weeks pregnant or less, possession and distribution to a person under the age of 18 if she was more than 28 weeks along, and an additional charge of unlawful neglect of a child was added if she tested positive for cocaine during delivery. *Id.* at 73.

22. Petitioner's Brief at 1, *Ferguson* (No. 99-936). 42 U.S.C. § 1983 allows citizens to file a suit for money damages against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws....

42 U.S.C. § 1983 (1994).

23. *Ferguson*, 532 U.S. at 73.

24. *Id.*

25. *Id.* at 74.

26. *Id.*

27. *Id.*

28. The writ of certiorari is the device used by which a party to an action may petition to be heard by the United States Supreme Court. 28 U.S.C. § 1254 (1993).

29. *Ferguson*, 532 U.S. at 76.

30. *Id.* at 73.

31. *Id.*

32. *Id.* at 74.

Defendants appealed the jury decision, arguing that there was insufficient evidence for the jury to find that the women consented to the searches.[33] The Court of Appeals, however, reversed the lower court, ruling instead that the program did meet the special needs exception to the warrant requirement.[34] The court based its opinion on the understanding "that the MUSC personnel conducted the urine drug screens for medical purposes wholly independent of an intent to aid law enforcement efforts."[35] Applying the balancing test set out in *Treasury Employees v. Von Raab*,[36] the court found that the search fit within the special needs exception and, therefore, it never reached the question of consent. The Supreme Court granted certiorari on the special needs issue and, in order to answer that question, began from an assumption that the defendants had not consented to the searches.[37]

B. The Fourth Amendment Generally

In order for the Fourth Amendment[38] to be implicated, law enforcement officials must first be engaged in a search.[39] A warrant is generally required for a search to be lawful and the fruits of that search to be admissible in court.[40] In the absence of a warrant, probable cause[41] and exigent circumstances are required.[42]

The Fourth Amendment applies to any action taken by a government actor.[43] Here, the hospital policy triggers Fourth Amendment protections because MUSC is a state hospital and, therefore, its staff members are state actors under the

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33. *Id.*

34. *Id.* at 74-75.

35. *Id.* at 75.

36. 489 U.S. 656, 668 (1989) ("in certain limited circumstances, the Government's need...is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion").

37. A finding that the women had consented to the searches would render the search valid. The Fourth Amendment provides protection from nonconsensual searches absent a warrant or probable cause. Once a person effectively waives this protection by consenting, the only defense available is an attack on the validity of the waiver. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

38. The Fourth Amendment is applicable to the states via the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961). In *Wolf v. Colorado*, the Court applied the Fourth Amendment to the states via the Fourteenth Amendment but refused to apply the exclusionary rule to state prosecutions. In *Mapp*, the Court applied the exclusionary rule to the states.

39. The Court has adopted a two-prong test to determine if police activity constitutes a "search": (1) the person has "exhibited an actual (subjective) expectation of privacy" and (2) society is willing to recognize that expectation as reasonable. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

40. A warrant is issued by a magistrate upon sworn testimony or an affidavit by the police officer that satisfactorily establishes probable cause in the independent judgment of the magistrate. A search or arrest made pursuant to a warrant is given more deference by a reviewing court than a search or arrest made pursuant to an officer's independent judgment. *See* Illinois v. Gates, 462 U.S. 213, 236 (1983).

41. Probable cause for a search exists only when the officer has reason to believe it is more probable than not that the specific items, which are the object of the search, will likely be found in the location and at the time of the search. *See* Berger v. State of New York, 388 U.S. 41, 55 (1967) (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

42. *See Katz*, 389 U.S. at 357 ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

43. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

Constitution.[44] Moreover, the Court has previously held that drug tests such as the ones performed here constitute "searches" under the Fourth Amendment.[45]

C. *Special Needs Exception to the Warrant Requirement*

The Court established an exception to the warrant and probable cause requirements where there is a "special need."[46] In those cases, the Court held that "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification."[47] In each case there was an administrative need for the testing and law enforcement was specifically denied use of the test results.[48]

Here, the active involvement of the Charleston Solicitor and the police in the program, and the threat of arrest against women who failed to successfully complete a substance abuse program, provided a law enforcement basis for the program.[49] Since the Court found that there was a regular law enforcement need for the testing, the special needs exception did not apply and, absent consent, probable cause was required for the search.[50]

IV. RATIONALE OF THE *FERGUSON* COURT

A. *The Court's Opinion*

In *Ferguson*, the United States Supreme Court refused to extend the "special needs" rule to permit drug-testing of pregnant women when the primary purpose of the drug-testing was to assist local authorities in the arrest and prosecution of women testing positive for cocaine use. The Court held that the drug tests were searches under the Fourth Amendment and, therefore, probable cause or a warrant was required.[51]

Prior decisions allow mandatory drug tests to be performed in certain situations—so called "special needs" cases.[52] However, the Court allowed those tests on the

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44. *Ferguson*, 532 U.S. at 76.

45. *See T.L.O.*, 469 U.S. at 335-37; *see also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989).

46. *See, e.g., Skinner*, 489 U.S. at 634 (approving drug testing of railroad workers without probable cause when tests were performed by FRA to prevent accidents in railroad operations resulting from drug and alcohol use); Treasury Employees v. Von Raab, 489 U.S. 656, 670 (1989) (allowing drug testing of Customs Service agents who were seeking promotion because the Treasury Department has a vested interest in insuring that employees hired to prevent drug trafficking are not using illegal drugs themselves); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661-63 (1995) (allowing drug testing of high school athletes because drug use could result in greater injuries to the using athlete or his colleagues).

47. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987). In *Griffin*, the Court permitted a parole officer, with the assistance of a police officer, to search a parolee's home for illegal firearms. The majority in *Ferguson* distinguished *Griffin* on the basis that parolees have a lesser expectation of privacy than do ordinary citizens. *Ferguson*, 532 U.S. at 81 n.15.

48. *Ferguson*, 532 U.S. at 81 n.16.

49. *Id.* at 84.

50. *Id.*

51. *Id.* at 86.

52. *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (approving drug testing of railroad workers without probable cause when tests were performed by FRA to prevent accidents in railroad

basis of the special need and did not hold that the Fourth Amendment was not implicated.[53] The "special needs" exception allows mandatory drug testing that would otherwise require a warrant or probable cause to be conducted without the consent of the citizen being tested. In *Ferguson*, the Court distinguished those cases from this one on the grounds that MUSC was attempting to "justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients...."[54]

1. The Fourth Amendment Generally

The Court began with an analysis of the search pursuant to the Fourth Amendment. It held that the urine tests "were indisputably searches within the meaning of the Fourth Amendment."[55] Moreover, the Court looked to the findings of both the trial court and the court of appeals, noting that neither court made a finding that the criteria used as a basis of the search provided either probable cause for the search or the lesser standard of reasonable suspicion.[56]

2. "Special Needs" Exception

After determining that the tests were searches that implicate the Fourth Amendment, the Court analyzed them in terms of their prior decisions in the "special needs" cases. First, the Court acknowledged that "invasion of privacy in this case [*Ferguson*] is far more substantial than in those cases [the prior special needs cases]...[because in the other cases] there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties."[57] The Court found that using the test results to disqualify a person for some benefit was less intrusive than sharing the test results with a third party.[58] This is especially true in medical situations where

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operations resulting from drug and alcohol use); Nat'l Treasury Employees Labor Union v. Von Raab, 489 U.S. 656 (1989) (allowing drug testing of Customs Service agents who were seeking promotion because the Treasury Department has a vested interest in insuring that employees hired to prevent drug trafficking are not using illegal drugs themselves); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (allowing drug testing of high school athletes because drug use could result in greater injuries to the using athlete or his colleagues).

53. *Skinner*, 489 U.S. at 617 ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.").

54. *Ferguson*, 532 U.S. at 77.

55. *Id.* at 76.

56. *Id.* at 76. Reasonable suspicion is a lower standard than probable cause. The lower standard is used to justify an officer's stop of a person in a public place and is defined as the "quantum of knowledge sufficient to induce [an] ordinarily prudent and cautious man under [the] circumstances to believe criminal activity is at hand....It must be based on specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant intrusion." BLACK'S LAW DICTIONARY 1266 (6th ed. 1990).

57. *Ferguson*, 532 U.S. at 78.

58. *Id.*

the patient's reasonable expectation of privacy[59] includes the belief that medical information will not be shared with a third party.[60]

The Court then stated the balancing test[61] used to determine whether or not the urine tests fell within the "special needs" exception. In analyzing *Ferguson* within that balancing test, the Court first compared the circumstances of those urine tests to the circumstances in *Ferguson*. In the other "special needs" cases, the need was "one divorced from the State's general interest in law enforcement."[62] Here, the stated purpose of the program was to provide police and prosecutors with the test results so that criminal charges could be filed against any woman who refused to submit to drug counseling. The Court also distinguished *Ferguson* from cases involving mandatory reporting by medical personnel (*e.g.*, gunshot wounds).[63]

The Court did not accept the State's stated goal of the policy as "protecting the health of both mother and child" at face value.[64] Instead, it placed the stated goal under closer scrutiny[65] and determined that the purpose of the policy was "ultimately indistinguishable from the general interest in crime control."[66] The Court looked specifically to the policy itself, at the references to chain of custody issues and the discrete list of possible criminal charges, as well as the omission of any reference to medical treatment for mother or child, aside from drug rehabilitation for the mother.[67] The Court used these specific facts to distinguish *Ferguson* from the "special needs" cases and held that the use of the criminal justice system in the Charleston program required the application of traditional Fourth Amendment analysis of the searches. Since the issue of consent had not been determined, however, the Court remanded the case for a determination as to whether or not the women had consented to the drug tests.[68]

B. Justice Scalia's Dissent

Justice Scalia's first argument in the dissent was that the urine tests were not searches. In the dissent, Justice Scalia takes the position that the objection to the MUSC policy was not the testing itself, but the use of the test results by the police.[69] Justice Scalia next reached the conclusion that turning the results over to the police was not a search.[70] Moreover, Justice Scalia concluded that the Fourth Amendment only protects against searches of "persons, houses, papers, and effects," and, therefore, testing of urine does not qualify as a search implicating the Fourth

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59. The test for a reasonable expectation of privacy is (1) the person exhibits an actual expectation of privacy (subjective) and (2) that expectation is one that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

60. *Ferguson*, 532 U.S. at 78.

61. The balancing test weighs the "intrusion on the individual's interest in privacy against the 'special needs' that supported the program." *Id.*

62. *Id.* at 79.

63. *Id.* at 80-81.

64. *Id.* at 81.

65. *Id.* at 82.

66. *Id.* at 81 (quoting Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)).

67. *Id.* at 82.

68. *Id.* at 86.

69. *Id.* at 92.

70. *Id.* at 92-93.

Amendment.[71] However, in the prior "special needs" cases, the Court held that urine tests are searches subject to the Fourth Amendment.[72]

V. ANALYSIS

A. The Fourth Amendment Generally

Before the Fourth Amendment is implicated, the defendant must have a reasonable expectation of privacy.[73] After that expectation is established, the Fourth Amendment proscribes only searches that are unreasonable.[74] Generally, the Fourth Amendment has been interpreted to require a warrant to meet this reasonableness requirement.[75] In certain limited circumstances,[76] probable cause can replace the warrant requirement.[77] Both warrants and probable cause must be based on specific, articulable facts about the person or place to be searched.[78]

B. Special Needs Exception

Despite the general rule requiring probable cause, the Court has established an exception through a line of cases permitting the government to conduct so-called "regulatory" searches without violating the Fourth Amendment.[79] In the few cases in which these searches have been allowed, the Court has used a balancing test to determine if the government's interest outweighs the individual's Fourth Amendment interests.[80] These cases meet the special needs exception that the City of Charleston was trying to meet in *Ferguson*.

Justice Blackmun coined the term "special needs" in his concurring opinion in *New Jersey v. T.L.O.*[81] and applied it to those cases in which the Court found a government need other than regular law enforcement functions. In *T.L.O.*, a public school principal searched a student's purse for cigarettes after she denied

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71. *Id.*

72. *See, e.g., Skinner*, 489 U.S. at 617; *Nat'l Treasury Employees Union*, 489 U.S. 665.

73. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

74. *See* United States v. Sharpe, 470 U.S. 675, 682 (1985).

75. *See* United States v. Place, 462 U.S. 696, 701 (1983).

76. *See* Mincey v. Arizona, 437 U.S. 385, 390 (1978).

77. *See* Agnello v. United States, 269 U.S. 20, 33 (1925).

78. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 16 (1968).

79. *See* Delaware v. Prouse, 440 U.S. 648, 660 (1979) (refusing to allow random stops of vehicles to check for license and registration where there was no reasonable suspicion that the law was being violated); *see also* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 455 (1990) (permitting a sobriety checkpoint because of the brief nature of the detention, the relatively slight intrusion into an individual's privacy, and the lack of discretion allowed in deciding who was stopped); United States v. Martinez-Fuerte, 428 U.S. 543, 561-62 (1976) (permitting fixed checkpoints within the border to check for illegal aliens).

80. *See, e.g., Prouse*, 440 U.S. at 657, 670 (holding that the "physical and psychological intrusion" experienced by motorists who are stopped at random is significant because of the "possibly unsettling show of authority" outweighs the state's interest in insuring that drivers on public highways possess proper license and registration); *see also Sitz*, 496 U.S. at 455 (finding that the government's substantial interest in insuring that intoxicated drivers are removed from public roads outweighs the invasion of privacy and slight inconvenience that is experienced by motorists stopped at a sobriety checkpoint); *Martinez-Fuerte*, 428 U.S. at 562 (holding that the government's interest in stopping the influx of illegal aliens into the country outweighs any invasion of privacy and inconvenience experienced by motorists stopped at a fixed checkpoint).

81. 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

accusations that she was smoking in the school bathroom.[82] During his search, he also found marijuana and other evidence of drug use.[83] The principal notified both the student's parents and the police; juvenile proceedings followed.[84]

In *T.L.O.*, the Court held that the Fourth Amendment does apply to searches and seizures conducted by school officials.[85] The Court further held, however, that the search of the student's purse did not violate the Fourth Amendment because it was reasonable.[86] In its analysis, the Court rejected the State of New Jersey's argument that the Fourth Amendment only applied to searches conducted by the police and cited a string of cases in which the Fourth Amendment was applied to civil authorities.[87]

Despite the application of the Fourth Amendment to public school officials, the Court further stated that reasonableness is to be determined within the context of the situation.[88] While noting that "[a] search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy,"[89] that expectation of privacy must be weighed against the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[90] The Court found that this "special need" of teachers and principals, together with the impracticability of obtaining search warrants to carry out the day-to-day discipline of the school, outweighed the diminished expectations of privacy that schoolchildren have while on school property.[91]

In later cases, the Court held that, in certain circumstances, drug testing also met this special needs exception to the warrant requirement. First, in *Skinner v. Railway Labor Executives' Association*,[92] the Court approved the use of urine and blood tests of certain classes of employees following major train accidents and other incidents, pursuant to Federal Railroad Administration (FRA) regulations.[93] The Court held that urinalysis was a search under the Fourth Amendment because it does intrude on a reasonable expectation of privacy.[94] The Court approved the drug-testing policy, in part, because those administering the program had little discretion to determine who was tested and under what circumstances the tests were administered.[95] Moreover, the Court held that requiring a warrant would not further the purposes of the warrant requirement because "both the circumstances justifying toxicological

82. *Id.* at 328.
83. *Id.*
84. *Id.* at 328-29.
85. *Id.* at 333.
86. *Id.* at 340, 342 (balancing the student's reasonable expectation of privacy and the school's need to "maintain an environment in which learning can take place" and holding that a search of a student is "permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction").
87. *Id.* at 335.
88. *Id.* at 337.
89. *Id.* at 337-38.
90. *Id.* at 339.
91. *Id.* at 340-41.
92. 489 U.S. 602 (1989).
93. *Id.* at 634.
94. *Id.* at 617.
95. *Id.* at 622.

testing and the permissible limits of such intrusions are narrowly and specifically defined by the regulations and doubtless are well known to covered employees,"[96] and "since there are virtually no facts for a neutral magistrate to evaluate...."[97] Finally, the Court noted that requiring a warrant would likely frustrate the purposes of the regulations because evidence of drug or alcohol use may be eliminated from the bloodstream in the interim period.[98] In making its determination that the government had a substantial interest in regulating drug and alcohol use by certain railroad employees, the Court looked at the following factors: (1) train accidents can cause substantial loss of human life and property damage and (2) evidence supports the finding that many train accidents are caused by the use of drugs and alcohol.[99] Finally, the Court held that under the circumstances, the urine testing procedure established by FRA was a reasonable intrusion into the employees' expectations of privacy.[100]

Similarly, in *National Treasury Employees Union v. Von Raab*,[101] the Court upheld urinalysis of certain classifications of Customs employees. The United States Customs Service implemented regulations requiring urine samples to be obtained from any employee being hired or promoted to a position having "direct involvement in drug interdiction," "a requirement that the incumbent carry firearms," or "a requirement...to handle 'classified' material."[102] The applicants were notified in writing that they were required to submit to the drug test before being hired or promoted.[103] Only those applicants who were otherwise selected were required to submit to the test.[104] Finally, the results of the drug test were shared with only a limited number of administrators and the results were not provided to the police and no criminal charges were filed.[105]

The Court held that the limitations on the scope of the testing (*i.e.*, which employees were tested) and the use of the tests, together with the governmental interest in insuring that employees charged with enforcing the nation's drug trafficking laws were not engaging in the illegal behavior they are charged with preventing, were sufficient to justify the suspicionless searches.[106] The Court permitted drug testing of employees involved in drug interdiction and those carrying firearms but remanded for a determination of the reasonableness of requiring the tests for those privy to "classified" information.[107]

In *Vernonia School District v. Acton*,[108] the Court also upheld drug testing of high school athletes. Noting the limited scope and use of the tests,[109] together with the

96. *Id.* (quoting United States v. Biswell, 479 U.S. 311, 316 (1972)).
97. *Id.* (quoting Colorado v. Bertine, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring)).
98. *Id.* at 623.
99. *Id.* at 607.
100. *Id.* at 634.
101. 489 U.S. 656 (1989).
102. *Id.* at 660-61.
103. *Id.* at 672 n.2.
104. *Id.*
105. *Id.* at 663.
106. *Id.* at 679.
107. *Id.*
108. 515 U.S. 646 (1995).
109. *Id.* at 658.

diminished expectation of privacy public school students have at school,[110] the Court held that the testing was reasonable under the circumstances.[111]

Finally, in *Chandler v. Miller*[112] the Court overturned a Georgia statute requiring candidates for certain offices to submit to urinalysis before running for office.[113] The Court found that the state did not have a need sufficient to meet the requirements for the warrant exception.[114] Holding that the statute interfered with the individual's reasonable expectations of privacy, the Court overruled the statute in an eight-to-one decision.[115]

In applying the above controlling cases to the facts in *Ferguson*, the Court was correct in overturning the City of Charleston's urine-testing policy. Unlike the cases where urinalysis was permitted, the City of Charleston was using the tests for law enforcement purposes. It was stated in the policy that the threat of arrest would be used as leverage to coerce women into treatment.[116] Moreover, it is impossible to ignore the significant contributions the police and the prosecutor made in drafting the policy.[117]

The other cases permitted government actors in a purely civil capacity to test individuals for a limited purpose. Each case provided strict guidelines for the testing and did not allow administrative discretion. Moreover, each of the approved tests served a specific purpose that could not be met in any other manner and did not frustrate the purposes of the warrant requirement.

In *Ferguson*, however, the medical personnel at MUSC were essentially acting as agents of the police.[118] Because of the criteria used, there was wide discretion in determining who was tested.[119] Finally, it was possible to obtain a warrant where probable cause existed to believe that a patient was using cocaine.[120]

Moreover, the policy adopted by the City of Charleston did not meet its stated goals.[121] Many criteria used to determine who would be tested were not specific to

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110. *Id.* at 657. (citing *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)).

111. *Id.* at 665.

112. 520 U.S. 305 (1997).

113. *Id.* at 313.

114. *Id.* at 318.

115. *Id.* at 322.

116. Respondent's Brief at 8, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99-936).

117. *See* Respondent's Brief at 6-7, *Ferguson* (No. 99-936) (acknowledging the participation of the Charleston County Solicitor's Office and the City of Charleston Police in establishing the policy and that the Solicitor's Office was notified if a woman testing positive for cocaine failed to enter a substance abuse program, at which point an arrest was made); *see also* Petitioner's Opening Brief at 4-6, *Ferguson* (No. 99-936) (citing the Solicitor's Office and the Police Department's significant contributions to the establishment and enforcement of the policy, including coordinating arrests with hospital personnel).

118. *Ferguson*, 532 U.S. at 83 n.21.

119. *Id.* at 72 n.4. The nine criteria adopted by the task force do not lack discretion because they rely on a physician's subjective assessment of a patient's individual case.

120. The hospital staff coordinated the arrest of discharged patients with the Charleston Police. In one case, the patient was detained beyond the time needed to complete the discharge process in order to effectuate an arrest. This same time could have been used to obtain a warrant to test the patient for cocaine use. Petitioner's Opening Brief at 16-17, *Ferguson* (No. 99-936).

121. *See* Petitioner's Opening Brief at 17-18, *Ferguson* (No. 99-936) (citing Respondent's witness who testified that there was no increase in the number of babies exposed to cocaine after the program was stopped because of pending litigation).

cocaine use and were as likely associated with poverty.[122] Also, only patients testing positive for cocaine were reported to police.[123] Finally, there was no evidence that babies born to these patients were given any special services because of their exposure to cocaine.[124]

The policy itself undermines the City of Charleston's stated goals in implementing it. There was no policy regarding expectant mothers who were using alcohol, tobacco, or other drugs during pregnancy.[125] If there was a legitimate concern for fetal and maternal health, there seemingly would have been procedures incorporated into the policy to address these health issues. Finally, the use of the threat of prosecution made the policy one in which the primary purpose was law enforcement. If the policy was permitted because the stated primary purpose of the policy was medical care, the Fourth Amendment could always be subverted by finding a compelling civil reason for the search and a civil government actor to conduct it.[126]

C. Justice Scalia's Dissent

Justice Scalia also wrote a dissenting opinion in *Von Raab*.[127] Noting that providing a urine sample is a search under the Fourth Amendment, he found it "obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity."[128] Finding that there was no evidence that the tested employees were engaged in drug trafficking, and that there was no evidence of widespread illegal drug use within the Customs Service, Justice Scalia rejected the government's argument that there was a compelling interest in obtaining the samples.[129] This contradicts his dissent in *Ferguson*,[130] in which he found that obtaining the urine sample was not a search under the Fourth Amendment and, therefore, the Fourth Amendment was not implicated.[131]

IV. IMPLICATIONS

It is as important to understand what the Court did not do in *Ferguson* as to understand what it did do. The Court did not say that reporting pregnant patients' drug use to the authorities is per se unconstitutional; it said that the City of Charleston's policy, as it was written, is unconstitutional. It is possible to have a legitimate mandatory reporting policy; in fact, the Court provided some examples of policies that probably would pass Fourth Amendment analysis.[132]

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122. *Ferguson*, 532 U.S. at 77 n.10.

123. Petitioner's Brief at 11, *Ferguson* (No. 99-936) (citing Respondent's witness who testified that the policy was designed "to focus on cocaine to the exclusion of other illegal or legal drugs that could harm the fetus").

124. *Ferguson*, 532 U.S. at 81.

125. Petitioner's Opening Brief at 41, *Ferguson* (No. 99-936).

126. *Ferguson*, 532 U.S. at 84.

127. Nat'l Treasury Employees Labor Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting).

128. *Id.*

129. *Id.* at 682.

130. *Ferguson*, 532 U.S. at 91 (Scalia, J., dissenting).

131. *Id.* at 92 (Scalia, J., dissenting) (comparing urine "passed and abandoned" to garbage left on the curb, in which an individual has no legitimate expectation of privacy); *see* California v. Greenwood, 486 U.S. 35 (1988).

132. *Ferguson*, 532 U.S. at 90.

The Court distinguished the facts in *Ferguson* from mandatory reporting laws, which mandate that health care professionals must report suspected child abuse that is discovered in the normal course of providing medical treatment. Government action would be permissible in that instance because states have the authority to require individuals to report suspected child abuse. If the suspected child abuse is discovered in the normal course of medical treatment, there is no search and the Fourth Amendment is not implicated.

Justice Kennedy, in his concurring opinion, was the most adamant in his discussion of the possible implications of the *Ferguson* opinion. He first stated the following:

> We must accept the premise that the medical profession can adopt acceptable criteria for testing expectant mothers for cocaine use in order to provide prompt and effective counseling to the mother and to take proper medical steps to protect the child. If prosecuting authorities then adopt legitimate procedures to discover this information and prosecution follows, that ought not to invalidate the testing.[133]

Justice Kennedy then pointed out that "[o]ne of the ironies of the case, then, may be that the program now under review, which gives the cocaine user a second and third chance, might be replaced by some more rigorous system."[134] Justice Kennedy acknowledged that the decision to include protection for fetuses in child abuse statutes belongs to the states.[135] Similarly, mandatory reporting statutes also are the domain of the states; therefore, it is possible for pregnant cocaine users in some states to be in a worse position after the *Ferguson* decision because states prosecuting pregnant women strictly under a child abuse statute probably do not have the option of drug treatment in lieu of prosecution written into the statute.

The Court clearly stated that the problem with the policy in *Ferguson* was the inextricable link between the hospital policy and police involvement.[136] The policy did not qualify for the special needs exception because the policy was based on the use of the criminal justice system to force compliance by the women who tested positive for cocaine. The reliance on the threat of criminal charges, in addition to the

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

134. *Id.*

135. South Carolina is the only state to date that has afforded protection to fetuses under that state's Children's Code. *See* Whitner v. State, 492 S.E.2d 277 (S.C. 1997). Several states have explicitly refused to extend protection for fetuses under their Children's Codes. *See In re* Unborn Child of Starks, 18 P.3d 342, 348 (Okla. 2001) (refusing to allow state to take temporary emergency custody of fetus pursuant to state Children's Code); *see also* State *ex rel.* Angela M. W. v. Kruzicki, 561 N.W.2d 729, 731 (Wis. 1997) (holding that viable fetus is not included in the definition of "child" under the Children's Code); Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992) (holding that statute prohibiting delivery of a controlled substance to a minor does not apply to pregnant woman passing it to an unborn child); Commonwealth v. Welch, 864 S.W.2d 280, 285 (Ky. 1993) (holding that criminal child abuse does not extend to pregnant woman's use of drugs during pregnancy); State v. Gray, 584 N.E.2d 710, 713 (Ohio 1992) (holding that a mother may not be prosecuted for child endangerment on the basis of cocaine use prior to childbirth); Reyes v. Superior Court, 75 Cal. App. 3d 214, 219 (1977) (holding child endangerment statute did not apply to substance abuse during pregnancy because definition of "child" did not include unborn child or fetus); State v. Luster, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992) (holding that a fetus was not a "person" under the delivery and distribution of controlled substances statute).

136. *Ferguson*, 532 U.S. at 84-85.

presence of law enforcement concerns throughout the policy,[137] made the policy more like "normal law enforcement"[138] than like a regulatory search. It was difficult for the City of Charleston to argue the tests were for medical purposes when the policy repeatedly discussed chain of custody issues and the charges that could be brought rather than the medical justifications for the policy.[139]

Ferguson is important to civil rights jurisprudence because of the implication that, but for the police involvement from the inception of the program, the policy would have been permissible. In a state with either a statute or judicial holding applying state child abuse laws to viable fetuses and mandatory reporting laws, a doctor could be required to turn over evidence of drug use by expectant mothers. However, the evidence would have to be obtained independently of the police and for medical purposes. There is no requirement, however, that individualized suspicion be present. In a hospital that has a policy of drug-testing all expectant mothers receiving care, the Court implies that the State could require that such evidence be provided to the police under a mandatory reporting law. In such a circumstance, the Fourth Amendment is not implicated because the patient is assumed to have consented to blood and urine tests conducted for medical purposes.

The real problem with such a policy is the effect it may have on pre-natal care. Many women who use drugs may refuse to go to a facility that is known for drug-testing if it is also known that positive results are reported to criminal authorities.[140] Since pre-natal care is a significant factor in fetal and neo-natal health,[141] it would seem that a more reasonable policy might be to build a trust relationship with pregnant women and then encourage those using drugs to enter a substance abuse program of their own volition.

VII. CONCLUSION

Ferguson was a victory for proponents of a limited scope for the special needs exception to the Fourth Amendment. The Court, in refusing to extend the exception, refused to allow state civil authorities to act in concert with police and prosecutors to find evidence of illegal activity to be used in a subsequent criminal trial. It was also a victory for patients' rights advocates because the Court refused to permit the use of confidential medical information, when acquired without the patient's consent, to be used in the prosecution of the patient. *Ferguson* may be a short-lived

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137. Petitioner's Opening Brief at 41, *Ferguson* (No. 99-936).

138. *Ferguson*, 532 U.S. at 78 n.13.

139. *Id.* at 81-82.

> In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose....Tellingly, the document codifying the policy incorporates the police's operational guidelines. It devotes its attention to the chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests. Nowhere, however, does the document discuss different courses of medical treatment for either mother or infant, aside from treatment for the mother's addiction.

140. Petitioner's Opening Brief at 18, *Ferguson* (No. 99-936) (citing "numerous studies [that] have shown that punitive programs drive women away from prenatal care").

141. *See, e.g.*, Utah Home Page, *Maternal and Child Information Internet-Query Module (MatCHIIM), at* http://hlunix.hl.state.ut.us/matchiim/main/PRENCARE/whyimp.htm (last visited Jan. 12, 2002) ("Prenatal care can improve birth outcomes and prevent medical complications and their costs associated with low birth weight infants.").

victory, however, because the Court did allow for situations in which disclosure of medical records to law enforcement officials, when required by state law, would be permissible.