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Circumventing the Fourth Amendment Via the Special Needs Doctrine to Prosecute Pregnant Drug Users: Ferguson v. City of Charleston

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I. INTRODUCTION

In 1989 the Medical University of South Carolina (MUSC) implemented a policy, developed in conjunction with local law enforcement officials, that mandates testing the urine of pregnant women suspected of cocaine use.¹ If the drug test is positive, the policy requires the pregnant woman to either successfully complete a drug treatment program or face jail time.² In *Ferguson v. City of Charleston* ten women who were subjected to the urine drug tests challenged the policy in federal court, and the United States Court of Appeals for the Fourth Circuit ultimately upheld the policy.³ Before and after the Fourth Circuit's opinion, scholars attacked the drug-testing policy on the grounds that (1) the policy discriminates against indigent black women because they are more likely to visit a state hospital rather than a private hospital and because the policy only applies to cocaine use;⁴ (2) the policy threatens the reproductive freedom of women;⁵ and (3) the policy actually jeopardizes the health of fetuses exposed to cocaine because pregnant users will avoid seeking prenatal care out of fear of prosecution.⁶

This Note argues that the drug-testing policy violates the Fourth Amendment because it allows law enforcement officials to obtain maternity patients' positive drug tests without a warrant. Warrantless urine testing of pregnant women for cocaine use is a permissible search by state physicians and hospital staff under the special needs doctrine to the Fourth Amendment. Reporting the positive drug test results to law enforcement, however, overreaches the scope of the special needs doctrine, and therefore violates the Fourth Amendment because the special needs doctrine should not apply to searches that result in criminal prosecution.⁷ Although the Supreme Court has

1. *Ferguson v. City of Charleston*, 186 F.3d 469, 474 (4th Cir. 1999), cert. granted, 68 U.S.L.W. 3391 (U.S. Feb. 28, 2000) (No. 99-936).

2. *Id.*

3. *Id.* at 473-74, 479.

4. Kimani Paul-Emile, *The Charleston Policy: Substance or Abuse?*, 4 MICH. J. RACE & L. 325, 349 (1999).

5. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1005 (1999).

6. Michelle D. Mills, Comment, *Fetal Abuse Prosecutions: The Triumph of Reaction Over Reason*, 47 DEPAUL L. REV. 989, 1037 (1998).

7. See discussion *infra* Part III, Section A.

not clearly decided whether a special needs search can result in a criminal prosecution, this Note argues that such a result violates the Fourth Amendment.

This Note also argues, in the alternative, that the *Ferguson* case can be decided on the basis of a narrower principle than one barring all prosecutions arising from special needs searches. Specifically, law enforcement's receipt of the drug test results violated the Fourth Amendment in *Ferguson* because the women tested were unaware that the search could lead to prosecution. Furthermore, law enforcement's receipt of the test results also violated the Fourth Amendment because physicians and healthcare workers collaborated with law enforcement to design a policy that requires medical professionals to disclose confidential information to law enforcement.

Part II of this Note describes the facts and the procedural history of *Ferguson* and explains the Fourth Amendment's basic requirements and the elements of the special needs doctrine. Part II also discusses the Fourth Circuit's application of the special needs doctrine to the conduct of MUSC's physicians and staff in testing the maternity patients' urine samples. Part III argues that criminal prosecutions should not follow special needs searches. Alternatively, Part III argues that if courts allow criminal prosecutions to result from special needs searches, then those women tested should have notice that the special needs search might lead to prosecution. Moreover, prosecutions should not occur from special needs searches if a party to a confidential legal relationship, such as the physician-patient relationship, suffers a heightened intrusion due to law enforcement's involvement in the relationship.

II. BACKGROUND

A. *Ferguson v. City of Charleston*

In response to concerns about cocaine use among pregnant women, MUSC instituted a policy providing for the urine drug-testing of pregnant women that exhibited symptoms of cocaine use.⁸ The policy also required that the staff report any positive drug test results to law enforcement officials.⁹ The policy originated when a case manager in the obstetrics department at MUSC spoke with MUSC's general counsel about the possibility of creating a policy that would focus on drug use by pregnant women and the potential health risks to the user's children.¹⁰ The general counsel contacted the Ninth Circuit Solicitor, and a task force committee was formed that included the case manager, the Solicitor, the Chief of the City of Charleston Police Department (CCPD), and prenatal-care doctors at MUSC.¹¹ The Solicitor told the committee that because a viable fetus was considered a "person" under South

8. *Ferguson*, 186 F.3d at 474.

9. *Id.*

10. *Id.*

11. *Id.*

Carolina state law,¹² a woman who used cocaine after the twenty-fourth week of pregnancy was guilty of distributing a controlled substance to a minor.¹³

MUSC implemented the policy in the fall of 1989.¹⁴ Under the policy MUSC tested a maternity patient when any of the following signs of cocaine use were present:

- (1) separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care (beginning after 24 weeks); (5) incomplete prenatal care (fewer than five visits); (6) preterm labor without an obvious cause; (7) a history of cocaine use; (8) unexplained birth defects; or (9) intrauterine growth retardation without an obvious cause.¹⁵

Officials did not obtain warrants before the urine tests were taken, nor were any obtained before the hospital staff turned the positive tests results over to the police.¹⁶

When the policy was first implemented, a patient's positive drug test result was reported to the police or the solicitor's office.¹⁷ The patient was then arrested for distributing cocaine to a minor.¹⁸ In 1990 the policy was modified so that a patient that tested positive had a choice of either being arrested or receiving drug treatment.¹⁹ If the patient elected to receive drug treatment, the positive test results were not reported to the police unless the patient failed to complete treatment requirements or tested positive a second time.²⁰ A patient that was arrested could also complete a drug-treatment program to avoid prosecution.²¹

Ten women, all of whom were tested under the policy and nine of whom were arrested,²² brought an action in the district court in South Carolina claiming that the policy violated their Fourth Amendment right to be free of

12. *Id.* (citing *State v. Horne*, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (holding that a viable fetus was a person within the meaning of South Carolina criminal law)).

13. *Id.* (citing S.C. CODE ANN. § 44-53-440 (West Supp. 1999) (making the distribution of cocaine to a minor by a person the age of eighteen or over a felony); *Whitner v. State*, 328 S.C. 1, 4-15, 19, 492 S.E.2d 777, 778-84, 786 (1997) (upholding the conviction of a woman who used cocaine while pregnant with a viable fetus)).

14. *Ferguson*, 186 F.3d at 474.

15. *Id.*

16. *Id.* at 486; Paul-Emile, *supra* note 4, at 364.

17. *Ferguson*, 186 F.3d at 474.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 474-75.

22. *Id.* at 484.

unreasonable searches and seizures and infringed upon their right of privacy.²³ The women also claimed that the policy was racially discriminatory and that MUSC staff committed the state-law tort of abuse of process.²⁴ After hearing evidence the district court granted judgment as a matter of law for the defendants on the abuse-of-process and privacy claims.²⁵ The district court also found for the defendants on the race-discrimination claims.²⁶ The jury returned a verdict for the defendants on the Fourth Amendment claim.²⁷ The women then appealed to the Fourth Circuit.²⁸

The Fourth Circuit affirmed the district court on all claims.²⁹ At trial the district court judge ruled that the urine tests were "searches" within the meaning of the Fourth Amendment.³⁰ The court then sent to the jury the issue of whether the patients had consented to the searches, and the jury found that the patients had consented.³¹ On appeal the plaintiffs asserted that the judge should not have sent the issue of consent to the jury and, alternatively, asserted that the verdict was not supported by the evidence.³² The Fourth Circuit did not address those assertions. The court affirmed the judgment in favor of defendants on the Fourth Amendment claim because the warrantless searches were reasonable under the Fourth Amendment as "special needs searches."³³

B. The Special Needs Exception to the Fourth Amendment's Warrant and Probable Cause Requirement

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that "no Warrants shall issue, but upon probable cause . . ."³⁴ Thus, the Fourth Amendment applies when the government intrudes into privacy through the use of searches or seizures and guarantees that these searches or seizures must be reasonable.³⁵ Reasonableness is the "ultimate measure of the constitutionality of a governmental search . . ."³⁶

Generally, the reasonableness requirement prevents the government

23. *Id.* at 475.

24. *Id.*

25. *Id.*

26. *Id.* at 475-76.

27. *Id.* at 475.

28. *Id.* at 476.

29. *Id.* at 474. Due to the focus of this Note, only the issues surrounding the Fourth Amendment claim are discussed.

30. *Id.* at 476.

31. *Id.*

32. *Id.*

33. *Id.*

34. U.S. CONST. amend. IV. The Fourth Amendment applies to the states through the Fourteenth Amendment. *Ferguson*, 186 F.3d at 476.

35. *Ferguson*, 186 F.3d at 476.

36. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

from conducting searches or seizures without individualized suspicion.³⁷ Whether a particular search is reasonable is “judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”³⁸ In most criminal cases, the Warrant Clause of the Fourth Amendment controls this balance.³⁹ Thus, unless a search fits into an exception to the Warrant Clause,⁴⁰ a search or seizure in a criminal case “is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.”⁴¹ Nonetheless, certain exceptional situations exist in which “neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness”⁴² The special needs exception falls under those circumstances in which not even individualized suspicion is required.

The special needs exception applies when a governmental intrusion “serves special governmental needs, beyond the normal need for law enforcement,”⁴³ and when those special governmental needs would make it impracticable for governmental officials to obtain a warrant or even comply with the probable cause requirement.⁴⁴ A balancing test, weighing privacy interests against the governmental need, is applied to determine if the governmental need would make the warrant requirement, probable cause, or any other level of individualized suspicion impracticable.⁴⁵ Three primary factors are taken into account under the special needs balancing test: (1) the importance of the governmental need; (2) the effectiveness of the governmental intrusion in furthering the governmental need; and (3) the degree of intrusion upon the individual, from both an objective and subjective viewpoint.⁴⁶ The governmental need must be an interest “important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”⁴⁷ The alleged governmental interest must also address a “concrete danger” and not just a

37. *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

38. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

39. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989).

40. See generally 2 DAVID M. O’BRIEN, *CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES* 802-09 (2d ed. 1995) (discussing various exceptions). Some exceptions in criminal cases in which a warrant does not have to be obtained include searches incident to an arrest, searches after an individual is taken into custody, consent searches, open field searches that allow police to search items in open public view, stop and frisk searches of suspicious individuals, and searches conducted within hot pursuit and other exigent circumstances to prevent the destruction of evidence. *Id.*

41. *Skinner*, 489 U.S. at 619.

42. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

43. *Id.*

44. *Skinner*, 489 U.S. at 619.

45. *Von Raab*, 489 U.S. at 665-66; *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

46. *Ferguson v. City of Charleston*, 186 F.3d 469, 476 (4th Cir. 1999).

47. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995).

problem with a slight probability of actually occurring.⁴⁸ The effectiveness prong of the special needs balancing test focuses on the extent that the governmental search promotes the governmental need.⁴⁹ Courts only need to consider whether the governmental search was an effective one, not whether the government officials chose the most reasonable alternative technique for the search.⁵⁰ Finally, the degree of intrusion into the privacy of the individual must be minimal.⁵¹ The intrusion can be measured both objectively and subjectively,⁵² although the Fourth Amendment will not protect "subjective expectations of privacy that are unreasonable or otherwise 'illegitimate.'"⁵³ An intrusion is measured objectively by the duration of the seizure and the intensity of the search, while an intrusion is measured subjectively by looking at whether the search method increases or decreases the level of fear and surprise felt by the individual searched.⁵⁴

C. *The Fourth Circuit's Application of the Special Needs Doctrine in Ferguson*

The Fourth Circuit should have held that only the search conducted by state hospital workers of the patients' urine samples for cocaine was permissible under the special needs doctrine.⁵⁵ The dissemination of the positive test results to law enforcement by the hospital workers, which then led to the arrests of maternity patients, violated the Fourth Amendment. Before analyzing why the special needs doctrine was misapplied by permitting law enforcement to obtain the positive test results without a warrant, this section will explain the Fourth Circuit's reasoning in applying the special needs doctrine to the conduct of the medical staff at MUSC.

Before applying the special needs doctrine, the Fourth Circuit noted that both parties to the litigation conceded that MUSC is a state hospital, and thus the MUSC employees are governmental actors.⁵⁶ In its opinion the court also accepted the district court's factual finding that the MUSC staff conducted the urine drug tests for medical purposes and not for the purpose of aiding law

48. *Chandler v. Miller*, 520 U.S. 305, 318-19 (1997).

49. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453 (1990).

50. *Id.* at 453-54.

51. *Ferguson*, 186 F.3d at 479.

52. *Id.*

53. *T.L.O.*, 469 U.S. at 338.

54. *Ferguson*, 186 F.3d at 479; *see also Sitz*, 496 U.S. at 452 (referring to the test for the degree of subjective intrusion).

55. The Fourth Circuit based its analysis on the assumption that testing the urine of maternity patients constituted a search under the Fourth Amendment. *Ferguson*, 186 F.3d at 477 n.6.

56. *Ferguson*, 186 F.3d at 477. The Fourth Amendment only provides protection against governmental action. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 33-34 (5th ed. 1996).

enforcement.⁵⁷ In light of this finding, the question becomes whether the medical purpose underlying the policy was a "special need."

The Fourth Circuit correctly concluded that the governmental interest of MUSC personnel could justify a special needs search.⁵⁸ The staff at MUSC noticed an increase in the number of pregnant women using cocaine.⁵⁹ The staff was also worried about the potential harm to the users' children because cocaine use by pregnant women can cause "low birth weight, premature labor, birth defects, and neurobehavioral problems."⁶⁰ Further, cocaine can damage developing organs in a fetus, and the most harmful damage usually occurs to the developing brain.⁶¹ The court also identified the cost of caring for cocaine-exposed infants as another reason to justify the state's important interest in conducting urine drug tests.⁶² At trial one defense expert testified that he had previously estimated the costs of maternal cocaine use might exceed three billion dollars annually over the next ten years.⁶³ For the above reasons, sufficient evidence existed for the court to conclude that MUSC had an important governmental interest in conducting urine drug tests.⁶⁴

The governmental interest in *Ferguson* is similar in strength to other interests that the Supreme Court has found sufficient to support other suspicionless drug-testing programs.⁶⁵ For example, in *Vernonia School District 47J v. Acton*, the Supreme Court held that the school district had an

57. *Ferguson*, 186 F.3d at 477.

58. *Id.* at 478.

59. *Id.* at 477-78.

60. *Id.* at 478.

61. Carol Gosain, Note, *Protective Custody for Fetuses: A Solution to the Problem of Maternal Drug Use? Casenote on Wisconsin Ex Rel. Angela v. Kruzicki*, 5 GEO. MASON L. REV. 799, 801-02 (1997). Some researchers now argue that the effects of maternal cocaine use are not as great as previously thought:

'[D]ozens of studies now indicate that (1) the pharmacological impact of cocaine has been greatly exaggerated, (2) other factors are responsible for many of the ills previously associated with cocaine use, and (3) political and legal responses have done more to exacerbate than alleviate the situation of poor and/or drug-using pregnant women and their stigmatized children.'

Paltrow, *supra* note 5, at 1018 (quoting The Lindesmith Center's and Women's Law Project's Amicus Curiae Brief, *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), *cert. denied*, 523 U.S. 1145 (1998), *reprinted in* Daniel N. Abrahamson et al., *Amicus Curiae Brief: Cornelia Whitner v. The State of South Carolina*, 9 HASTINGS WOMEN'S L.J. 139 (1998)). However, even if maternal cocaine use does not cause as many complications as previously thought, the undisputed effects are sufficiently harmful to justify state intrusion.

62. *Ferguson*, 186 F.3d at 478.

63. *Id.*

64. *Id.*

65. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661-63 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989).

important interest in drug-testing student athletes because of an immediate crisis of increased drug use among student athletes and an associated increase in discipline problems among the whole student body.⁶⁶ The Court also considered the safety risks involved with student athletes' drug use, such as increased sports injuries.⁶⁷ In *Skinner v. Railway Labor Executives' Ass'n*, the Court also addressed safety concerns in finding an important governmental interest.⁶⁸ The Court upheld random drug-testing of railway engineers in light of the dangerous risks of a railway accident caused by an employee using drugs.⁶⁹ In addition to safety concerns, the Court has also found an important government interest when drug-testing is used to ensure that employees in certain high-risk and safety-sensitive jobs are not themselves drug users.⁷⁰ Thus, in *National Treasury Employees Union v. Von Raab*, the government had an important interest in ensuring that United States Customs Service employees remained drug-free because their positions involve the intervention of drugs and firearms into the United States, and because these employees are often subject to bribes.⁷¹

In comparison to the above cases, the Supreme Court in *Chandler v. Miller*⁷² rejected the alleged important governmental interest in drug-testing candidates for public office. In *Chandler*, no evidence was offered to show that an immediate drug problem existed among public officials or that suspicionless drug-testing was necessary to prevent that problem from arising.⁷³ The Court stated that "public safety is not genuinely in jeopardy" by possible drug use of candidates for public office.⁷⁴

The governmental interest in *Ferguson* closely resembles the interests in *Vernonia*, *Skinner*, and *Von Raab* rather than the alleged interest in *Chandler*. Evidence in *Ferguson* demonstrated an immediate concern of fetal drug use because drug use was actually occurring and, indeed, was increasing. Evidence also demonstrated that drug use threatened the safety of fetuses.⁷⁵ Therefore, the Fourth Circuit was justified in finding that the governmental interest in *Ferguson* was a special need.

The Supreme Court has also stated that public school teachers can conduct certain searches without a warrant because "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of

66. 515 U.S. at 662-63.

67. *Id.* at 662.

68. 489 U.S. at 628.

69. *Id.* at 628, 634.

70. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670-71 (1989).

71. *Id.* at 669-71.

72. 520 U.S. 305 (1997).

73. *Id.* at 318-19.

74. *Id.* at 323.

75. 186 F.3d 469, 477-78 (4th Cir. 1999).

the swift and informal disciplinary procedures needed in the schools.”⁷⁶ Similarly, with physicians a warrant requirement would unduly interfere with providing patients immediate healthcare, especially in circumstances where the health of a fetus may be at stake. Therefore, physicians need to have the ability to conduct warrantless searches to further their important interest in preventing prenatal drug abuse.

The *Ferguson* court also found that the testing of maternity patients’ urine for the presence of cocaine was an effective method of identifying and treating maternal cocaine use.⁷⁷ The court remarked that “prenatal testing was the only effective means available to accomplish the primary policy goal of persuading women to stop using cocaine during their pregnancies in order to reduce health effects on children exposed to cocaine in utero.”⁷⁸ Judge Blake in his dissent argued that the policy implemented by MUSC failed the effectiveness prong of the special needs balancing test.⁷⁹ He argued that because seven of the plaintiffs were arrested after giving birth, then any harmful effects of their cocaine use would have already occurred.⁸⁰ In fact, some women were even tested during delivery or after they had given birth.⁸¹ However, the majority stated that the focus of the effectiveness test is not on whether the arrests advance the government’s interest, but on whether the urine tests advance the interest.⁸² Even though the effectiveness of the policy remains debatable, the Fourth Circuit’s finding is comparable to other special needs cases in which drug-testing was found to be effective.⁸³

Finally, the court found that testing maternity patients’ urine was minimally intrusive.⁸⁴ The court noted that, while normally privacy interests are not minimal during the collection and testing of urine,⁸⁵ the testing of the patients’ urine by MUSC staff was conducted in the normal course of a routine

76. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985); see *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

77. *Ferguson*, 186 F.3d at 478.

78. *Id.*

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

80. *Id.*

81. *Id.* at 485. At least three plaintiffs were tested during or after the delivery of their children. *Id.*

82. *Id.* at 478 n.8.

83. *Cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) (contending that urine drug-testing is effective because it is “self-evident that a drug problem largely fueled by the ‘role model’ effect of athletes’ drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs”); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 629-30 (1989) (finding random drug testing of railway employees effective because the tests will serve as a deterrent against drug use for employees that know they can be subject to a drug test at anytime).

84. *Ferguson*, 186 F.3d at 479.

85. *Skinner*, 489 U.S. at 626 (stating that tests which require employees to “perform an excretory function” are traditionally not minimal, although procedures can be used to reduce the intrusiveness of collecting urine samples).

medical examination.⁸⁶ Because these exams were routine, the duration and intensity of the search were objectively minimal.⁸⁷ The court also found that the tests were subjectively minimal because the urine drug tests were performed only when one of the signs of cocaine use was present.⁸⁸ Because the doctors had no discretion in deciding whom to test, the process was regular and neutral, thus minimizing the fear and surprise factor.⁸⁹ When the court balanced the importance of the government interest, the effectiveness of the urine drug tests, and the minimal amount of intrusion suffered by the patients, the court correctly concluded that the searches conducted by MUSC staff were reasonable under the special needs doctrine and thus did not violate the Fourth Amendment.⁹⁰

III. ANALYSIS

A. *Special Needs Searches Should Not Result in Criminal Prosecution*

A fundamental principle of the special needs exception to the Fourth Amendment's warrant requirement is that it applies to governmental searches that advance governmental needs beyond the normal needs of law enforcement.⁹¹ The primary problem with the policy implemented by MUSC is that it is hardly clear how the arrest and prosecution of pregnant cocaine users serves a need other than normal law enforcement needs.

The special needs doctrine was created to apply to law enforcement needs other than crime-detection concerns.⁹² In his dissent in *New Jersey v. T.L.O.*,⁹³ Justice Brennan stated that "[t]he undifferentiated governmental interest in law enforcement is insufficient to justify an exception to the warrant requirement."⁹⁴ Further, some governmental need beyond a "need merely to apprehend lawbreakers" is necessary to justify an exception to the warrant requirement.⁹⁵ Therefore, probable cause and a warrant are still required for most criminal searches, while lesser standards may be used for noncriminal searches, such as administrative searches.⁹⁶

86. *Ferguson*, 186 F.3d at 479.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

92. *See Chandler v. Miller*, 520 U.S. 305, 314 (1997).

93. 469 U.S. 325 (1985).

94. *Id.* at 356 (Brennan, J., dissenting).

95. *Id.*

96. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667-68 (1989).

In *Ferguson* the majority and the dissent disagreed over whether the MUSC policy constituted a criminal or noncriminal search.⁹⁷ While the majority did not believe that any part of the implemented policy was meant to be punitive, Judge Blake in his dissent disagreed entirely.⁹⁸ In actuality, MUSC's drug-testing policy appears to have both a medical purpose and a punitive purpose. This contention becomes an important factor when analyzing the scope of the search at MUSC because searches under a warrant exception must be limited to the circumstances that trigger the exception.⁹⁹ Therefore, in *Ferguson* the medical concerns for cocaine-exposed fetuses triggered the special needs exception.¹⁰⁰ The special needs exception to the warrant requirement can thus be used only to address the medical concerns. MUSC physicians and staff are justified in conducting urine tests for medical purposes

97. See *Ferguson v. City of Charleston*, 186 F.3d 469, 484 (4th Cir. 1999) (Blake, J., dissenting).

98. See *id.* at 475 n.3. Judge Blake believed that the record of the case showed "an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers, either before or after they had given birth to the children presumably affected by the cocaine use." *Id.* at 484. Judge Blake cited a letter written by MUSC's general counsel to the Charleston City Solicitor, which stated:

I read with great interest in Saturday's newspaper accounts of our good friend, 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.

Judge Blake also relied on a letter by the general counsel to a senior assistant attorney in which the general counsel stated that MUSC's drug testing policy was developed from the suggestions of law enforcement. *Id.* A statement by Condon also suggested that the policy was driven by law enforcement goals: "We all agreed on one principle: We needed a program that used not only a carrot, but a real and very firm stick." Dorthy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 942 (1997) (quoting former Ninth Circuit Solicitor Charles Condon).

99. See *Michigan v. Tyler*, 436 U.S. 499 (1978). In *Tyler* the fire department responded to a fire at a furniture store. *Id.* at 501. The fire chief called in police detectives to investigate the possibility of arson. *Id.* at 502. The police detectives did not obtain warrants or consent to conduct the search in which the detectives seized evidence. *Id.* The police left and returned to the scene four hours later and also returned to the scene the next morning to conduct warrantless searches. *Id.* Approximately three weeks after the fire, the police returned again to seize evidence without a search warrant. *Id.* at 503. The Court held that the warrantless searches conducted on the same day or the day after the fire did not violate the Fourth Amendment because "[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry." *Id.* at 509. The Court found that this exigency included the right of the police officers to investigate for arson and seize evidence in plain view. *Id.* at 510. However, the Court held that the warrantless search, conducted three weeks after the fire, violated the Fourth Amendment because the initial exigency had ended. *Id.* at 511. The search was too far removed from the initial exigency, and therefore a warrant was required. *Id.*

100. *Ferguson*, 186 F.3d at 477-78.

because they remain within the bounds of the circumstances that triggered the special needs exception. However, law enforcement's warrantless receipt of the positive drug tests oversteps the bounds of the special needs search because a prosecutorial motive is not a circumstance that can trigger the special needs exception.

The Court has not been clear on whether a search permissible under the special needs doctrine can then lead to criminal prosecution.¹⁰¹ In both *Von Raab* and *Vernonia*, the Court seemed to justify drug tests under the special needs exception partly because the results of the tests were not used in criminal prosecutions.¹⁰² In *Von Raab* the Court upheld the suspicionless urine drug-testing of United States Customs employees who were applying for positions that prohibited the use of illegal drugs or that required the employee to carry a firearm.¹⁰³ The Court stated that it was clear that "the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent."¹⁰⁴ Thus, the *Von Raab* Court cited the nondissemination of test results to law enforcement as indicating that the testing program was designed to serve a special need.¹⁰⁵ In *Vernonia* the Court used similar language, although for a different rationale, stating that the student athletes who are subject to random drug tests suffer a minimal level of privacy intrusion because "the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function."¹⁰⁶ In *Vernonia*, however, the Court used that factor as a means of judging the level of intrusiveness of the search.¹⁰⁷ The *Von Raab* opinion offers stronger support for the proposition that a special needs search should not lead to criminal prosecution because prosecution in itself is not a special need. The *Vernonia* opinion would suggest that a criminal prosecution would not necessarily prevent a warrantless search under the special needs exception, especially if the governmental interest greatly outweighed the intrusiveness aspect of the dissemination of the information to law enforcement.

However, the Fourth Circuit did not even consider the intrusiveness aspect of law enforcement's receipt of the maternity patients' positive drug test results in the balancing test.¹⁰⁸ If this factor had been considered, the balancing test would have likely shifted against the conclusion that law enforcement

101. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989); *Griffin v. Wisconsin*, 483 U.S. 868, 870, 873 (1987).

102. *Vernonia*, 515 U.S. at 658; *Von Raab*, 489 U.S. at 666.

103. *Von Raab*, 489 U.S. at 679.

104. *Id.* at 666.

105. *Id.*

106. *Vernonia*, 515 U.S. at 658.

107. *Id.*

108. See *Ferguson*, 186 F.3d at 479.

could obtain the positive test results without warrants because subsequent arrests and prosecutions usually become a matter of public record. Because law enforcement's warrantless receipt of information that should have been obtained pursuant to a warrant is highly intrusive, the governmental interest will likely be outweighed by the intrusiveness aspect of the search. Thus, the criminal prosecution consequence of the search will cause the special needs doctrine to not apply in these cases.¹⁰⁹

While the Supreme Court has indicated that a search is permissible under the special needs doctrine because the search will not lead to a criminal prosecution, the Court has upheld some criminal prosecutions following a special needs search.¹¹⁰ In *Griffin v. Wisconsin* the Court upheld the warrantless search of a probationer's home by probation officers under the special needs exception even though the probationer was later convicted for possessing a firearm discovered during the search.¹¹¹ In *Michigan Dep't of State Police v. Sitz*, the Court also upheld, under the special needs doctrine, the use of highway sobriety checkpoints that could result in the arrests of intoxicated drivers.¹¹² However, courts should not misapply the special needs doctrine in order to uphold criminal prosecutions that result from warrantless searches lacking probable cause. When courts allow this type of usurpation of the special needs doctrine, they are jeopardizing the protections guaranteed by the Fourth Amendment.

A comparison of the special needs doctrine with the doctrine of administrative searches is instructive. The Supreme Court has said that administrative searches should not be used as a pretext for a criminal prosecution.¹¹³ Usually, in administrative searches officials other than police conduct the searches.¹¹⁴ These types of searches are usually for housing inspections, welfare visitations, or inspections searching for violations of government regulations, such as environmental or safety regulations.¹¹⁵ The Supreme Court has allowed warrantless administrative searches based upon a

109. Judge Blake, in his dissent, also found that the privacy intrusion upon the maternity patients was not minimal because the positive drug test results were reported to "law enforcement officials with no medical reason for receiving the information." *Id.* at 488 (Blake, J., dissenting).

110. See *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

111. 483 U.S. at 870, 880.

112. 496 U.S. at 455 (1990). In Part III.B, *Ferguson* will be distinguished from *Griffin* and *Sitz* on the basis of whether notice is available to the individual that a special needs search may result in a criminal prosecution.

113. See *Michigan v. Clifford*, 464 U.S. 287, 294 (1984); *Frank v. Maryland*, 395 U.S. 360, 367 (1959), *overruled in part by* *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967).

114. See O'BRIEN, *supra* note 40, at 858. In *New York v. Burger*, plainclothes police officers conducted an administrative search of an automobile junkyard. 482 U.S. 691, 693 (1987).

115. O'BRIEN, *supra* note 40, at 858.

balancing of the governmental interest against an individual's privacy interest.¹¹⁶ In one of the first administrative search cases, *Frank v. Maryland*, the Court upheld a warrantless housing inspection search.¹¹⁷ In justifying the warrantless search, the Court noted that the inspector was only looking for housing code violations; the inspector was not looking for evidence to be used in a criminal prosecution.¹¹⁸ The Court also remarked that an "[i]nspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and *not as a means of enforcing the criminal law*, has antecedents deep in our history."¹¹⁹ This statement suggests that if the inspection had been used as a means of also enforcing the criminal law, then a warrant would have been required.

In *Michigan v. Clifford*¹²⁰ the Supreme Court also stated that an administrative search should not be the basis of a criminal prosecution unless a warrant was obtained by a showing of probable cause to a neutral judicial officer.¹²¹ In *Clifford* a couple was arrested and charged with arson in connection with a fire at their home.¹²² The couple was out of town during the fire,¹²³ and fire investigators searched the area of the house that the fire destroyed.¹²⁴ When they discovered incriminating evidence of arson, investigators then searched, without a warrant, other parts of the house that were not affected by the fire and discovered more evidence of arson.¹²⁵ The Court held the following:

[I]f the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched. If evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the "plain view" doctrine. . . . Fire officials may not, however, rely on this evidence to expand

116. *Id.*

117. 359 U.S. at 373.

118. *Id.* at 366. The plaintiff was arrested, but not for housing code violations resulting from the administrative search. *Id.* at 362. Rather, the plaintiff was arrested for resisting the inspection of his house without a warrant. *Id.*

119. *Id.* at 367 (emphasis added).

120. 464 U.S. 287 (1984).

121. *Id.* at 294.

122. *Id.* at 289.

123. *Id.*

124. *Id.* at 290.

125. *Id.* at 290-91.

the scope of their administrative search without first making a successful showing of probable cause to an independent judicial officer.¹²⁶

Clifford is in apparent tension with *New York v. Burger*.¹²⁷ In *Burger* Justice Brennan urged, in his dissent, that “[i]n the law of administrative searches, one principle emerges with unusual clarity and unanimous acceptance: the government may not use an administrative inspection scheme to search for criminal violations.”¹²⁸ The majority of the Court in *Burger*, however, upheld a conviction made pursuant to an administrative search.¹²⁹ Even so, the majority recognized in principle that administrative searches cannot be used as a pretext for criminal searches.¹³⁰ The conflicting views in *Burger*, as well as the apparent tension between *Burger* and *Clifford*, illustrate the struggle of the Court to decide whether a criminal prosecution resulting from a warrantless administrative search is a violation of the Fourth Amendment. Likewise, this principle is unclear in the area of special needs searches.

As previously mentioned, the Court has sometimes upheld criminal prosecutions that resulted from special needs searches.¹³¹ However, as discussed further below, the *Ferguson* case can be distinguished from those cases in which the Court has upheld a prosecution, because in those cases the prosecuted individuals were on notice that the special needs search could lead to a prosecution.¹³² Furthermore, the special needs doctrine should not have justified the seizure and subsequent use of the positive drug test results in a criminal prosecution when a physician was allowed to reveal to law enforcement, without a warrant, information that a patient would have likely believed was confidential.

B. *Comparison Between Ferguson and Special Needs Cases in Which a Criminal Conviction was Upheld: The Notice Difference*

In *Griffin* and *Sitz*, the Court upheld criminal convictions that were the result of special needs searches.¹³³ The petitioner in *Griffin* had been convicted

126. *Id.* at 294 (citation omitted).

127. 482 U.S. 691 (1987).

128. *Id.* at 724 (Brennan, J., dissenting).

129. In *Burger* the owner of an automobile junkyard was convicted of possession of stolen property after an inspection of his junkyard. *Id.* at 695-96.

130. *Id.* at 712-16.

131. See *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990); *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

132. See Part III.B.

133. See *Sitz*, 496 U.S. at 455; *Griffin*, 483 U.S. at 880.

of a state law weapons offense after a probation officer searched his home without a warrant and found a gun.¹³⁴ The Court found the search to be reasonable under the special needs exception because the supervision of probationers is an important governmental interest.¹³⁵ The Court dispensed with the warrant requirement in this case because probation officers would be at a disadvantage in responding quickly to misconduct if they had to obtain a warrant first.¹³⁶ The conviction was thus upheld.¹³⁷

Sitz centered on whether highway sobriety checkpoints violated the Fourth Amendment.¹³⁸ Under the checkpoint scheme, checkpoints were set up at various locations on state roads.¹³⁹ All vehicles were stopped briefly to check for intoxication.¹⁴⁰ If a motorist showed signs of intoxication, the motorist would be directed out of the traffic flow where more sobriety tests would take place.¹⁴¹ If all the tests suggested that the motorist was intoxicated, then the motorist would be arrested.¹⁴² The Court upheld the program, noting that the checkpoint program advanced the special need of preventing drunken driving.¹⁴³

However, these cases are distinguishable from *Ferguson* in that, even though the special needs searches in *Griffin* and *Sitz* led to arrests and prosecutions, the individuals arrested and prosecuted were on notice that they could be subject to arrest. In *Sitz* the checkpoint tests were conducted by police officers.¹⁴⁴ Any citizen at a checkpoint sight would realize that the search was being used as a method of arresting intoxicated individuals. Likewise in *Griffin*, although police officers were not actually conducting the search, the probationer in the case was still on notice that his misconduct could lead to an arrest if the probation officer discovered the misconduct while supervising the probationer.¹⁴⁵ Although a probation officer is not a police officer, a probation officer is sufficiently connected with law enforcement to place a probationer on notice that a probation officer may be able to use evidence of the probationer's misconduct against the probationer in a criminal prosecution.¹⁴⁶

134. *Griffin*, 483 U.S. at 870.

135. *Id.* at 875-76.

136. *Id.* at 876.

137. *Id.* at 880.

138. *Sitz*, 496 U.S. at 447.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 455.

144. *Id.* at 447.

145. *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987). Three plainclothes policemen accompanied the probation officers, but did not participate in the search. *Id.*

146. The reasonableness of inferring notice in *Griffin* was buttressed by the fact that Wisconsin regulations at the time permitted a probation officer to search a probationer's home without a warrant as long as "reasonable grounds" to believe contraband would be found were present. *See id.* at 870-71. Probationers also violated the terms of their probation if they refused

However, the notice available in both of these cases is not present in the *Ferguson* case.

In *Ferguson* the maternity patients were not aware that their urine drug tests were going to be reported to law enforcement if their urine tested positive for cocaine.¹⁴⁷ The consent forms giving the hospital staff the right to test the patients did not disclose to the patients that their results would be reported to the police.¹⁴⁸ Unlike the situations in *Griffin* and *Sitz*, in *Ferguson* the staff at MUSC conducted the urine drug test searches.¹⁴⁹ A physician or other healthcare worker is not sufficiently connected to law enforcement to provide a patient with notice that positive results of a drug test could be used in a criminal prosecution against the patient.

Notice is an important factor under the special needs doctrine because notice of a possible criminal prosecution reduces the subjective level of intrusion, or the “surprise factor.”¹⁵⁰ In roadblock cases, the Supreme Court has focused on the notice available in fixed roadblock cases versus the lack of notice in roving roadblock cases.¹⁵¹ Fixed roadblocks decrease the level of surprise felt by motorists because “they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere.”¹⁵² A roving roadblock, or even a random stop,¹⁵³ frightens motorists because a roving stop

to consent to a probation officer’s search of their home. *Id.* at 871.

147. *Ferguson v. City of Charleston*, 186 F.3d 469, 486 (4th Cir. 1999) (Blake, J., dissenting).

148. *Id.* One issue in *Ferguson* was whether the maternity patients had consented to the disclosure of their test results to law enforcement. *Id.* at 488-89. The district court found that the consent forms signed by the maternity patients, which did not inform the patients that their test results were to be reported to law enforcement, did not establish consent. *Id.* at 488. However the jury still found that consent was present. *Id.* Judge Blake in his dissent disagreed with the jury verdict. *Id.* He did not find the evidence sufficient to uphold the verdict. *Id.* At trial the defendants presented letters that accompanied the consent forms and a public service announcement made by the solicitor’s office in 1990, which indicated that pregnant cocaine users could be subject to prosecution, as evidence that the patients consented. *Id.* at 488-89. Judge Blake did not find this evidence sufficient to show that the patients consented to the use of their drug tests in possible criminal prosecutions against them. *Id.* For purposes of this Note, the assumption is that consent was not given since the consent forms did not advise the patients that their drug tests could be disclosed to law enforcement. If the patients had validly consented, then they would have been put on notice that the special needs search could result in a criminal prosecution.

149. *Id.* at 474.

150. See *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 452-53 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976).

151. See *Sitz*, 496 U.S. at 452-53; *Delaware v. Prouse*, 440 U.S. 648, 657 (1979); *Martinez-Fuerte*, 428 U.S. at 558-59.

152. *Martinez-Fuerte*, 428 U.S. at 559 (upholding suspicionless stops at permanent checkpoints for the purpose of detaining illegal aliens).

153. In *Prouse* the issue was whether a patrolman could stop an automobile to check the motorist’s license and registration when neither probable cause nor reasonable suspicion existed to believe that the motorist or the other occupants were violating applicable laws. *Prouse*, 440 U.S. at 650. The Court held that this was an impermissible seizure, in part due to the “unconstrained discretion” given to officers in deciding which automobiles to stop. *Id.* at 661,

does not provide the same notice as a fixed roadblock, in that with a fixed roadblock, the motorist can see that other automobiles are also being stopped.¹⁵⁴

The concept of notice operates similarly in cases such as *Ferguson*. If a maternity patient is put on sufficient notice that the positive test results may be disclosed to law enforcement and possibly used in a criminal prosecution, then the element of surprise is eliminated. If notice were available to the maternity patients, then under this Note's alternative analysis of the special needs doctrine, law enforcement's warrantless receipt of the test results would not violate the Fourth Amendment, even though the test results were used in criminal prosecutions.¹⁵⁵ Therefore, even though the primary contention of this Note is that special needs searches should never lead to criminal prosecutions, if courts are going to allow a special needs search to result in a criminal prosecution, the individual should have notice that the search results could be used to criminally convict her.¹⁵⁶ Therefore, the special needs searches conducted by MUSC hospital staff should not have led to the conviction of maternity patients at MUSC.

C. *Physician-Patient Relationship: Legitimacy of Privacy Expectations That Increase the Level of Intrusion Under the Special Needs Doctrine*

One component of the *Ferguson* case that raises concerns regarding the arrests of maternity patients at MUSC is that the patients' physicians and other healthcare workers at MUSC turned over the results of the urine tests to

663.

154. *Martinez-Fuerte*, 428 U.S. at 558.

155. The principal argument of this Note contends that the special needs doctrine should not be used to permit a warrantless search when a criminal prosecution followed the search. Under this standard, notice to the maternity patients would not be sufficient to justify disclosing the positive tests results to law enforcement officials. *See infra* Part III, Section A.

156. Cases exist in the school context in which a special needs search led to a conviction or when courts have indicated that these searches could lead to a conviction. *See New Jersey v. T.L.O.*, 469 U.S. 325, 329, 347-48 (1985) (upholding a juvenile delinquency adjudication of a student based on a warrantless search in which her school principal found marijuana in her purse); *Todd v. Rush County Schs.*, 983 F. Supp. 799, 802 (S.D. Ind. 1997) (indicating that urine drug test results on students participating in extracurricular activities could be subpoenaed in criminal or juvenile proceedings). Even though an adjudication of delinquency in juvenile court is not technically a conviction, the two are substantially equivalent. *See In re Winship*, 397 U.S. 358, 365-66 (1970). These types of school cases could also be distinguished on the basis of notice. Even though school officials are not as connected with law enforcement as probation officers, school officials often stand in disciplinary positions, which might serve notice to students that their conduct at school is subject to special needs searches which could lead to criminal prosecutions. *See T.L.O.* 469 U.S. at 339-40. These distinctions may seem strained, which is one reason supporting a more categorical rule that disallows the use of special needs searches in criminal arrests and convictions. Maintaining probable cause and warrant requirements for criminal cases would better ensure that Fourth Amendment protections still exist in today's society.

law enforcement. These were tests that the patients and private physicians would consider confidential. Because the Fourth Circuit analyzed these tests as special needs, the court should have evaluated the physician-patient relationship when analyzing the intrusiveness factor.¹⁵⁷ The intrusion on privacy is increased when doctors violate their trust with their patients by reporting medical-tests results to law enforcement. While doctors certainly have the right to test the urine of their patients under the special needs doctrine, doctors should not collaborate with law enforcement to share confidential information about their patients in such a way that law enforcement is able to evade the warrant requirement in obtaining evidence that is later used in a prosecution.

The relationship between the physician and the patient creates an expectation by the patient that the doctor will not reveal information to third parties not authorized to receive such information.¹⁵⁸ The significance of the relationship between the physician and patient increases the level of intrusion suffered from both objective and subjective viewpoints when law enforcement forms a partnership with the physicians.¹⁵⁹ From an objective standpoint, society legitimately expects privacy in medical records, and thus presumably expects physicians to respect the duty of confidentiality.¹⁶⁰ Because the Fourth Circuit in *Ferguson* only evaluated the intrusiveness of the urine tests themselves in terms of duration and intensity,¹⁶¹ the court failed to account for the objective nature of the privacy interest in the physician-patient relationship. The Supreme Court in *Vernonia* analyzed the nature and expectations of privacy involved in the teacher-student relationship, and the Fourth Circuit should have done the same with the physician-patient relationship.¹⁶²

From a subjective viewpoint, MUSC maternity patients suffered an increased intrusion on privacy when the physicians reported the positive drug test results to law enforcement officials. While the Fourth Circuit also failed to analyze the level of intrusion which occurred through the dissemination of the test results, the court stated: “[T]he subjective level of intrusion is measured by the extent to which the method chosen minimizes or enhances fear and

157. See *Ferguson v. City of Charleston*, 186 F.3d 469, 479 (4th Cir. 1999). The court only analyzed the intrusiveness of the method by which the urine samples were collected. *Id.*

158. See Paul-Emile, *supra* note 4, at 367-69.

159. In *Vernonia* the Court stated: “[T]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as ‘legitimate’ In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual’s legal relationship with the State.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (citation omitted).

160. Peter H.W. van der Goes, Jr., Comment, *Opportunity Lost: Why and How to Improve the HHS-Proposed Legislation Governing Law Enforcement Access to Medical Records*, 147 U. PA. L. REV. 1009, 1011 (1999) (stating that many studies confirm that Americans consider the privacy of medical records extremely important).

161. *Ferguson*, 186 F.3d at 479.

162. See *Vernonia*, 515 U.S. at 654-57 (finding that students have a lesser expectation of privacy due to the nature of the teacher-student relationship).

surprise on the part of those searched or detained.”¹⁶³ The patients were surprised that the positive test results were reported to police because the patients were never informed that the urine testing method would be used in such a way.¹⁶⁴

When objectively analyzing an individual’s legitimate expectations in privacy, the Supreme Court has focused on the importance of relationships between parties in several special needs cases.¹⁶⁵ In *O’Connor v. Ortega*¹⁶⁶ public hospital officials searched an employee’s office, desk, and file cabinets when the employee was suspected of violations in managing a hospital residency program.¹⁶⁷ In analyzing the employee’s privacy expectations, the Court noted that the “operational realities of the workplace . . . may make *some* employees’ expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official The employee’s expectation of privacy must be assessed in the context of the employment relation.”¹⁶⁸ The Court also compared the employer’s use of the gathered information found in the search to law enforcement’s use of such information: “[W]hile police, and even administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct.”¹⁶⁹

In *Griffin v. Wisconsin*¹⁷⁰ the Court, in upholding the warrantless search of a probationer’s home by a probation officer, remarked that the supervision aspect of the relationship between the probationer and the probation officer permitted a greater degree of intrusion into privacy than if this same search had been conducted on the public at large.¹⁷¹ The reasoning in *O’Connor* and *Griffin* suggests that a greater degree of intrusion is allowed by physicians than law enforcement because of the nature of the physician-patient relationship and because physicians perform medical tests for health-related purposes, not for law enforcement objectives.

The Court in *Vernonia*, while upholding random drug tests for school

163. *Ferguson*, 186 F.3d at 479 (citation omitted).

164. See Paul-Emile, *supra* note 4, at 369. “The women [arrested under MUSC’s policy] did not know that their medical providers would disclose information about their drug addiction to the police.” *Id.* The women were “stunned by the discovery that their health care providers were working in conjunction with the police.” *Id.*

165. See *Vernonia*, 515 U.S. at 665 (discussing the teacher-student relationship); *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (discussing the supervision aspects of the probation officer-probationer relationship); *O’Connor v. Ortega*, 480 U.S. 709, 712-13 (1987) (discussing an employer-employee relationship).

166. 480 U.S. 709 (1987).

167. *Id.* at 712-13.

168. *Id.* at 717.

169. *Id.* at 721.

170. 483 U.S. 868 (1987).

171. *Id.* at 875.

athletes, warned:

[W]hen the government conducts a search in its capacity as employer . . . the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in; so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.¹⁷²

Therefore, in *Ferguson* the relevant question is whether a reasonable physician would pass on information that a patient considered confidential to law enforcement. Because most patients would not expect this type of conduct by physicians and because physicians might consider this a breach of their confidential duty to patients, reasonable physicians would likely not engage in this conduct.

Asking the question of whether a reasonable physician would report patient information to law enforcement focuses on the concept of physician-patient confidentiality and the privacy expectations in medical records, such as urine tests. Every physician in the United States today must take the Hippocratic oath that declares :

I will keep this Oath and this Covenant to the best of my ability and judgement
Whatever I see or hear concerning the lives of men during the practice of my profession, or even outside of it, I will not divulge, guarding these things as religious secrets.¹⁷³

Further, "[t]he physician's duty to protect the confidences of his or her patients is an ancient and time-honored tradition, essential to the well-being of the patient and the integrity of the profession."¹⁷⁴ However, this duty of confidentiality is in jeopardy due to the failure of courts to recognize the protection of confidential patient information.¹⁷⁵ This duty of physician-patient confidentiality has also weakened because of the law enforcement exception,

172. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (citation omitted).

173. Stephen Aaron Silver, Note, *Beyond Jaffee v. Redmond: Should the Federal Courts Recognize a Right to Physician-Patient Confidentiality?*, 58 OHIO ST. L.J. 1809, 1810 (1998).

174. *Id.* at 1809.

175. *Id.* at 1811.

in which physicians may be statutorily required to report confidential information to law enforcement.¹⁷⁶ Physicians are often given a wide range of discretion in revealing confidential information to law enforcement.¹⁷⁷

Despite the decline in the physician-patient duty of confidentiality, support exists for upholding this duty. In *Alexander v. Knight*¹⁷⁸ the Superior Court of Pennsylvania addressed the actions of a physician who was employed by defense attorneys to interview physicians of injured plaintiffs and to secure reports from these physicians about the plaintiffs.¹⁷⁹ The court opined:

[M]embers of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients. They owe their patients more than just medical care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation.¹⁸⁰

One federal district court expressed similar concerns in *Hammonds v. Aetna Casualty & Surety Co.*¹⁸¹ In that case the defendant insurance company induced the plaintiff's physician to reveal confidential patient information.¹⁸² The court asserted that, in litigation matters concerning a patient's illness, a patient's physician should testify on behalf of his patient as required by the physician's total duty of care.¹⁸³ The court agreed with other courts that a physician should not ordinarily disclose a patient's confidential information without the patient's consent, unless disclosure is needed to advance a public interest or a private interest of the patient.¹⁸⁴ The court relied on the fact that the information a patient gives a physician is often very intimate.¹⁸⁵ The information may be "embarrassing, disgraceful or incriminating."¹⁸⁶ Therefore, whenever a physician discloses a patient's confidential information to third

176. See van der Goes, Jr., *supra* note 160, at 1046-47.

177. *Id.* at 1063.

178. 177 A.2d 142 (Pa. Super. Ct. 1962).

179. *Id.* at 146.

180. *Id.*

181. 243 F. Supp. 793 (N.D. Ohio 1965).

182. *Id.* at 795.

183. *Id.* at 799.

184. *Id.* at 800.

185. *Id.* at 801.

186. *Id.*

parties, the patient suffers an intrusion of privacy.¹⁸⁷ The court stated that the duty of physician-patient confidentiality should not only be an ethical duty on the part of the physician, but also a legal duty.¹⁸⁸

In South Carolina, courts have also implied a physician duty of confidentiality. Although South Carolina does not recognize a physician-patient evidentiary privilege, South Carolina does recognize a qualified duty of confidentiality by a physician to the patient. In *South Carolina State Board of Medical Examiners v. Hedgepath*,¹⁸⁹ the Board of Medical Examiners disciplined a physician for revealing confidential information through a voluntary affidavit at a divorce proceeding of one of his patients.¹⁹⁰ The physician revealed patient information that he received while acting as a family therapist for the patient and the patient's spouse.¹⁹¹ The Board disciplined the physician under an ethical code provision which states the following:

A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.¹⁹²

The South Carolina Supreme Court upheld the Board's decision.¹⁹³

In *McCormick v. England*¹⁹⁴ the South Carolina Court of Appeals held that a physician's breach of the duty of confidentiality, in the absence of a compelling public interest or other justification for disclosure, is an actionable tort.¹⁹⁵ In that case the plaintiff brought an action against her physician for revealing confidential information about her emotional health during a divorce

187. *Id.*

188. *Id.* at 801-02.

189. 325 S.C. 166, 480 S.E.2d 724 (1997).

190. *Id.* at 168, 480 S.E.2d at 725.

191. *Id.*

192. *Id.* (quoting 26 S.C. CODE ANN. REGS. 81-60(I) (1976)); see also 26 S.C. CODE ANN. REGS. 81-60(D) (West Supp. 1999) (amended regulation).

193. *Hedgepath*, 325 S.C. at 169, 480 S.E.2d at 726. The court distinguished the concepts of a physician-patient privilege, which South Carolina does not recognize, and the duty of confidentiality. *Id.* The court stated that a physician's duty of confidentiality is independent from whether he can be "legally compelled to reveal some or all of those confidences, that is, whether those communications are privileged." *Id.* Therefore, a physician should maintain a patients' confidences within the limitations of the law, even though the physician may later be forced to reveal confidences because no physician-patient privilege exists. *Id.*

194. 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).

195. *Id.* at 640, 494 S.E.2d at 437.

proceeding.¹⁹⁶ The court of appeals looked at what they saw as a modern trend of recognizing the importance of protecting the physician-patient relationship, and the court noted that public policy favors maintaining the duty of confidentiality.¹⁹⁷

Thus, South Carolina has recognized a limited physician duty of confidentiality, a duty that "must give way when disclosure is compelled by law or is in the best interest of the patient or others."¹⁹⁸ The MUSC policy requiring disclosure of patients' positive test results to law enforcement officials is inconsistent with the physician duty of confidentiality. At first glance, the public interest exception to the duty of confidentiality appears to permit the MUSC policy to override the duty of confidentiality because the state can present evidence of a need to protect the health of pregnant drug users' fetuses.¹⁹⁹ However, public policy can arguably support the conclusion that physicians should not report this information to law enforcement.²⁰⁰ Specifically, it may be in the best interest of the fetus exposed to maternal cocaine use for this information to go unreported. Pregnant women that are using cocaine may withhold pertinent information relating to the health of their unborn children from their physicians if they fear their physicians will turn over the information to law enforcement.²⁰¹ Furthermore, some pregnant women using cocaine may avoid prenatal care altogether in order to avoid prosecution,²⁰² thus preventing the start of healthcare that could possibly treat prenatal exposure to cocaine.²⁰³ Thus, even when looking at the public's interest in protecting the health of cocaine-exposed fetuses, the correct conclusion appears to be to uphold the physician-patient confidential relationship by not allowing physicians to voluntarily reveal a patient's

196. *Id.* at 630-31, 494 S.E.2d at 432-33.

197. *Id.* at 636, 639, 494 S.E.2d at 435, 437. The court also relied on the Physicians' Patient Records Act, *see* S.C. CODE ANN. §§ 44-115-10 to -150 (West Supp. 1999), for its holding. *Id.* at 639, 494 S.E.2d at 437.

198. *McCormick*, 328 S.C. at 644, 494 S.E.2d at 439.

199. *See Ferguson v. City of Charleston*, 186 F.3d 469, 477-78 (4th Cir. 1999). Disclosure of confidential patient information in the *Ferguson* case is not required by any statute enacted by the South Carolina General Assembly, but is rather a policy developed by state hospital personnel and law enforcement officials. *Id.* at 474. Therefore, for the disclosure of confidential patient information to be permissible, it should comply with the public interest exception to the duty of confidentiality.

200. *See Mills*, *supra* note 6, at 1037; Paul-Emile, *supra* note 4, at 367-68.

201. *See Mills*, *supra* note 6, at 1037 (stating that mandatory reporting requirements make a woman's physician an informant against her, thus creating an "environment of mistrust in the physician-patient relationship which makes the patient withhold information," which then decreases the effective level of healthcare for the mother and the fetus); Paul-Emile, *supra* note 4, at 367-68.

202. *See Gosain*, *supra* note 61, at 817.

203. *See Roberts*, *supra* note 98, at 953 (stating that medical studies have shown that the "harmful effects of prenatal crack exposure may be temporary and treatable").

confidential information.²⁰⁴

Another factor to consider when answering the question of whether a reasonable physician should report a patient's urine drug test results to law enforcement is whether urine tests are confidential information at all. No clear doctrine exists regarding whether medical records are confidential information that a physician should never reveal, unless required by law or by a strong public interest.²⁰⁵ Because there is no clear doctrine on whether medical records are confidential, the problem arises, as in the *Ferguson* case, when law enforcement is able to obtain a patient's positive urine drug test results without following any Fourth Amendment procedures.

In *Whalen v. Roe*²⁰⁶ the Court, while not holding that medical records are confidential, did address the idea that medical records are protected somewhat by privacy interests.²⁰⁷ In this case New York recorded in a computer file the names and addresses of all persons who obtained, through a physician's prescription, certain drugs for which both a legal and an illegal market existed.²⁰⁸ While the Court upheld the state's actions, the Court recognized that there were privacy concerns involved that had to be balanced against the state's interest.²⁰⁹ Conceivably, *Whalen* opened the door for a future court to find that a privacy right in highly sensitive medical records, such as the urine tests in *Ferguson*, could outweigh the governmental interest in their disclosure to law

204. Child abuse statutes in many states, including South Carolina, usually require a physician to report evidence of child abuse to law enforcement. See S.C. CODE ANN. § 20-7-510 (West Supp. 1999). In South Carolina, because the Court in *Whitner v. State*, 328 S.C. 1, 4, 492 S.E.2d 777, 778 (1997), held that the term "child" in S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1976), included a viable fetus, a physician has a duty to report cocaine use by a maternity patient when the fetus is viable. See S.C. CODE ANN. § 20-7-510 (West Supp. 1999) (requiring physicians to report information which led them to believe a child had been abused). However, some scholars and other courts argue that this reading of child abuse statutes is unconstitutional. See Mills, *supra* note 6, at 1020. They contend that pregnant women would not have been aware that their conduct could fall under these statutes because the statutes only mentioned child abuse and not fetal abuse. *Id.* Lack of notice of possible criminal prosecution raises constitutional due process concerns. See *id.* Because these child abuse reporting statutes seem questionable, they should not be used conclusively as a means to justify overriding the physician-patient confidentiality present between the physicians and patients at MUSC. Furthermore, the statutes should not be used as a justification for the MUSC policy because the MUSC policy actually requires a physician to do more than the child abuse statutes do. The child abuse statutes only require a physician to report evidence of abuse that they find during the course of a regular medical examination, while the MUSC policy imposes affirmative duties upon physicians by requiring physicians to conduct drug tests on maternity patients. See S.C. CODE ANN. § 20-7-510 (West Supp. 1999).

205. See van der Goes, Jr., *supra* note 160, at 1036.

206. 429 U.S. 589 (1977).

207. *Id.* at 605-06; see van der Goes, Jr., *supra* note 160, at 1033.

208. *Whalen*, 429 U.S. at 591.

209. *Id.* at 599-604. Using a type of balancing test, the Court stated that the New York program of "[r]equiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy." *Id.* at 602.

enforcement.²¹⁰ In his concurrence Justice Brennan warned: "Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests."²¹¹ Furthermore, in *Whalen* a harder constitutional question for protecting the privacy of medical records was presented than in *Ferguson* because the right of privacy claimed in that case was not tied to any specific provision in the Constitution, but rather to a general "zone of privacy" claim.²¹² In *Ferguson* the Fourth Amendment served as the basis for an unreasonable intrusion on privacy.²¹³

Ferguson presents a case of a certain type of medical record in a certain circumstance which should perhaps be protected as private, confidential information. In *Vernonia* the Court was concerned with the nature of urine tests, in that urine tests also can disclose other private information which is not the subject of the search, such as signs that an individual is epileptic, pregnant, or diabetic.²¹⁴ While the Court in *Vernonia* did not find that the urine tests were sufficiently private to prohibit random drug testing for student athletes in light of other factors in the case, such as the reduced expectation of privacy for students,²¹⁵ in *Ferguson* a stronger case is present for protecting the privacy of urine tests because the tests are conducted by physicians and healthcare workers, which creates a higher expectation of privacy.²¹⁶

Cases in lower courts since *Whalen* have decided both for and against a reasonable expectation of privacy in medical records, and while there has been no consensus on whether certain types of medical records should be private, support clearly exists for privacy in certain medical records in particular circumstances.²¹⁷ Furthermore in *Yin v. California*,²¹⁸ the Ninth

210. van der Goes, Jr., *supra* note 160, at 1033.

211. *Whalen*, 429 U.S. at 606 (Brennan, J., concurring).

212. *See id.* at 598-99.

213. *Ferguson v. City of Charleston*, 186 F.3d 469, 476 (4th Cir. 1999).

214. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) ("It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic."). In *Vernonia*, however, the Court concluded that the drug tests were not used for disclosing whether a student was epileptic, pregnant, or diabetic, thus reducing the intrusiveness aspect of the tests. *See Vernonia*, 515 U.S. at 658.

215. *Vernonia*, 515 U.S. at 659-60.

216. *Ferguson*, 186 F.3d at 474.

217. *See, e.g., Doe v. Southeastern Pa. Trans. Auth.*, 72 F.3d 1133, 1138, 1140 (3d Cir. 1995) (finding that the public interest in maintaining employee health programs free of fraud outweighed the privacy interests of an employee's prescription records); *People v. Perlos*, 462 N.W.2d 310, 316 (Mich. 1990) (finding no reasonable expectation of privacy in blood alcohol test results that are obtained by the police from the hospital after the defendants involved in automobile accidents were suspected of driving while intoxicated); *State v. Copeland*, 680 S.W.2d 327, 330 (Mo. Ct. App. 1984) (finding a reasonable expectation that hospital would keep blood tests private and not turn results over to police without patient's consent); *State v. Dyal*, 478 A.2d 390, 391, 394 (N.J. 1984) (determining from legislative intent that blood tests were

Circuit stated that “[m]edical examinations and medical tests that are not conducted as part of a criminal investigation are generally subject to the balancing test, not the warrant/probable cause requirement.”²¹⁹ This comment implies that in *Ferguson*, because the urine tests were used in a criminal prosecution, law enforcement should have complied with the warrant requirements of the Fourth Amendment.

Even though courts are undecided on whether medical records are confidential information, there still remains sufficient support for the proposition that medical records should be confidential. Moreover, society has a reasonable and legitimate expectation in the confidentiality of medical records.²²⁰ Therefore, when analyzing the question of what reasonable physicians do and should do, society’s expectations should be taken into account. Patients are expecting that their physicians will maintain the duty of confidentiality, and patients expect that all medical records will be confidential, including urine tests. The physicians and other healthcare workers in *Ferguson* should have preserved the confidential relationship that patients expect by not collaborating with law enforcement and voluntarily reporting positive drug test results.

IV. CONCLUSION

Ferguson illustrates an attempt to find a quick solution to a problem by circumventing constitutional protections. The government, and society as a whole, has a strong interest in preventing maternal cocaine use. MUSC’s policy of testing the urine of suspected pregnant cocaine users would have provided a constitutional means toward alleviating the problem by detecting maternal cocaine users and placing the users into treatment, but only if the positive drug test results had not been reported to law enforcement. That further

subject to the physician-patient privilege; thus, in a death-by-auto case, police had to apply for a subpoena duces tecum to obtain the results); *Commonwealth v. Riedel*, 651 A.2d 135, 137, 139 (Pa. 1994) (finding that, even though there is a reasonable expectation of privacy in medical records, a police officer had probable cause to request from the hospital, without a warrant, the blood results of a suspected drunken driver involved in an accident); *Commonwealth v. Hipp*, 551 A.2d 1086, 1090 (Pa. Super. Ct. 1988) (stating that, while an individual has a reasonable expectation of privacy in blood tests, if a police officer has probable cause to obtain the blood test results, the hospital has an affirmative duty to turn over the results to the police); *State v. Jenkins*, 259 N.W.2d 109, 113 (Wis. 1977) (finding no reasonable expectation privacy in blood tests); see also van der Goes, Jr., *supra* note 160, at 1037-38 (discussing the lack of uniformity in how courts access expectations of privacy in medical records).

218. 95 F.3d 864 (9th Cir. 1996).

219. *Id.* at 869, 873 (holding that the state could request an employee, who had been excessively absent from work, to submit to an independent medical examination because the governmental interests outweighed the employee’s privacy interests).

220. See van der Goes, Jr., *supra* note 160, at 1011. “[I]t seems reasonable to assume that individuals might expect that a higher level of privacy will be afforded to their medical history.” *Id.* at 1040.

step exceeded the boundaries of the special needs doctrine, and hence the Fourth Amendment. The Fourth Circuit's erosion of the special needs doctrine has lessened the Fourth Amendment's protections by allowing law enforcement to ignore its requirements in criminal cases. Furthermore, patients in the *Ferguson* case were let down, not just by the criminal justice system, but by their own physicians and nurses. Sacrificing the Fourth Amendment protections and the value of trusted relationships will not eliminate fetal cocaine abuse, but will only lead to more distrust and suspicion in the government. Treatable social ills, such as fetal cocaine abuse, will never diminish if those individuals afflicted are not able to seek help from the government without fear of punishment.

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