A Decision without a Solution: Ferguson v. City of Charleston

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A DECISION WITHOUT A SOLUTION: 
FERGUSON v. CITY OF CHARLESTON

I. INTRODUCTION

The Fourth Amendment to the United States Constitution grants "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The language of this provision leaves a great deal of room for interpretation and has resulted in a tremendous amount of litigation. Courts have struggled with defining exactly what constitutes an "unreasonable" search or seizure. Many plaintiffs have petitioned the courts to apply some type of uniform standard to determine the limits of Fourth Amendment guarantees. However, this task has proved to be nearly impossible. As the United States Supreme Court noted in Bell v. Wolfish, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." Last year, the Court was called upon yet again to determine whether a violation of the Fourth Amendment had occurred.

In March 2001, the Court issued its ruling in Ferguson v. City of Charleston. This South Carolina case involved a claim by patients in the obstetrics ward of the Medical University of South Carolina (MUSC) hospital that their urine had been tested for the presence of illegal drugs with neither their knowledge nor consent. If the urine sample tested positive for drug use, the test results were turned over to the county substance abuse commission and were ultimately disclosed to law enforcement officials. The officials then used these results to prosecute the female patients. The Court disallowed this type of search, holding that it violated the Fourth Amendment. According to the Court, the dangers of allowing such searches without consent far outweighed any other rights at issue in the case, even the rights of the fetus that might be harmed by the mother's drug ingestion.

While there is undoubtedly a serious drug problem in the United States today, it cannot be overcome by police and other officials illegally intruding into people's private lives to obtain evidence with which to convict them. To combat the growing national drug problem, society must increase its efforts to make pregnant women aware of the dangers of drug use and its effects on an unborn child. Educational

1. U.S. CONST. amend. IV.
3. Id. at 539.
5. Id. at 69-70.
6. Id. at 70-72.
7. Id. at 72-73.
8. Id. at 86.
9. Id.
programs targeted to assist pregnant women should also be enhanced so that the
drug problem may be addressed and perhaps even eliminated before pregnancy ever
occurs.

However, the Court’s decision in Ferguson was not necessarily correct. This
Note will address both the beneficial and detrimental effects of the MUSC program
that the Court struck down. While most scholars have focused only on the negative
aspects of the drug-testing policy, this Note will also explore the often-overlooked
positive aspects of such a policy. Part II of this Note will offer a synopsis of case
law history regarding the subject of drug testing in relation to the Fourth
Amendment. Part III will provide an overview of Ferguson including a factual
summary, procedural history, and the Court’s reasoning. Part IV will then analyze
the Ferguson case and describe why the Court’s decision may not ultimately have
been correct. Part IV will also include a discussion of the problems both created and
solved by this decision as well as an analysis of Ferguson’s effects on Fourth
Amendment interpretations in South Carolina and throughout the nation.

II. BACKGROUND

A. Fourth Amendment Precedent

1. Drug Testing in the Workplace

Numerous drug-testing cases that entail Fourth Amendment violations exist
throughout the history of the United States. These cases tend to fall into one of the
following several categories: drug testing in the workplace, drug testing that
occurs in the context of criminal searches, and drug testing hospital patients. It
is not surprising that the largest body of case law centers around drug testing in the
workplace. Many employers attempt to impose mandatory drug testing on their
employees in order to ensure the safety of the work environment. However, in
some instances employees do not passively succumb to these tests, instead viewing
them as gross invasions of privacy.

10. See, e.g., Ford v. Dowd, 931 F.2d 1286, 1289 (8th Cir. 1991) (holding that urine tests to which
police officer was forced to submit were unreasonable under the Fourth Amendment); Everett v.
Napper, 833 F.2d 1507, 1511 (11th Cir. 1987) (discussing alleged Fourth Amendment violation when
city firefighter was forced to submit to a urinalysis); Div. 241 Amalgamated Transit Union v. Suscey,
538 F.2d 1264, 1266 (7th Cir. 1976) (challenging the constitutionality of mandatory blood and urine
tests for bus drivers that were conducted following serious accidents).
13. See infra Part III.
15. See, e.g., id. at 663 (challenging the constitutionality of mandatory urine tests for United States
Customs Officials); Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 606 (1989) (discussing
whether mandatory drug testing of railroad employees violated the Fourth Amendment); Penny v.
Kennedy, 915 F.2d 1065, 1066 (6th Cir. 1990) (challenging the constitutionality of mandatory urinalysis
for police officers and firefighters); McDonell v. Hunter, 809 F.2d 1302, 1304 (8th Cir. 1987) (attacking
Many workplace drug searches occur through urinalysis. In *Everett v. Napper*, the Eleventh Circuit Court of Appeals established three questions that courts must ask to determine if a Fourth Amendment violation has occurred.\(^{16}\) First, was there a search?\(^{17}\) Second, if there was a search, was it "justified in its inception"?\(^{18}\) Finally, was the search "reasonably related in scope to the circumstances which justified [it] in the first place"?\(^{19}\)

Virtually all courts agree that urine tests have Fourth Amendment implications,\(^{20}\) and "]urinalysis has been determined to be a search and seizure within the meaning of the [F]ourth [A]mendment."\(^{21}\) As a result, it is fairly simple to obtain an affirmative answer to the first question set out by the *Everett* court.

However, debate begins to occur when analysis of the particular searches commences. Courts have developed a framework that tends to balance governmental and private interests.\(^{22}\) In *Everett*, the Court held that in order to analyze the constitutionality of a workplace search, it was necessary to examine the "nature of the work involved; the danger to others, including the public; any governmental interest, legitimate business concerns by employers and the totality of the surrounding circumstances including the intrusiveness and reliability of the tests or examinations under consideration."\(^{23}\)

In cases involving employees who deal with the public in some way, this type of balancing test is the primary method for determining whether a search violates the Fourth Amendment. For example, in *Division 241 Amalgamated Transit Union v. Suscy*,\(^{24}\) bus drivers were required to submit to blood and urine tests if they were involved in a serious accident or if, at any time, they were suspected of being under the influence of drugs or alcohol.\(^{25}\) The Seventh Circuit Court of Appeals examined whether the individuals in this case had any reasonable expectation of privacy and then attempted to balance this expectation with the public's interest in employing bus drivers who were not under the influence of drugs or alcohol.\(^{26}\) The court ultimately held that "the CTA [Chicago Transit Authority] ha[d] a paramount interest in protecting the public by insuring that bus and train operators [were] fit to perform their jobs. In view of this interest, members of plaintiff Union [had] no

\(^{16}\) *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987).

\(^{17}\) *Id.* at 1511.

\(^{18}\) *Id.*

\(^{19}\) *Id.*

\(^{20}\) See, e.g., S. Cal. Gas Co. v. Util. Workers Union, Local 132, 265 F.3d 787, 796 (9th Cir. 2001); Lucero v. Gunter, 52 F.3d 874, 877 (10th Cir. 1995); Forbes v. Trigg, 976 F.2d 308, 312 (7th Cir. 1992).

\(^{21}\) *McDonell*, 809 F.2d at 1307.


\(^{23}\) *Everett*, 833 F.2d at 1511 n.5.

\(^{24}\) 538 F.2d 1264 (7th Cir. 1976).

\(^{25}\) *Id.* at 1266.

\(^{26}\) *Id.* at 1267.
reasonable expectation of privacy with regard to submitting to blood and urine tests."27 According to the court, as long as the conditions under which these tests were administered were reasonable, there was minimal intrusion, and the tests should be allowed in the interest of protecting the public.28

The Eighth Circuit Court of Appeals adopted a narrower view of this rather broad holding in its 1987 decision McDonell v. Hunter.29 In McDonell, Department of Corrections employees were subjected to searches of both their vehicles and their persons—including urinalysis, blood, and breath tests—in an attempt to detect the presence of illegal drugs.30 The court resorted to the same balancing principles articulated in Everett and Amalgamated Transit Union, analyzing both the individual workers’ privacy rights and the public’s interest in preventing drug use by prison employees.31 Here, the court found that prison employees, like the employees in Amalgamated Transit Union, had diminished expectations of privacy due to the nature of their work.32 In light of this diminution of prison employees’ privacy rights, the court found that the prison officials had a “legitimate interest in assuring that the activities of those employees who [came] into daily contact with inmates [were] not inhibited by drugs or alcohol and [that the employees were] fully capable of performing their duties.”33

Despite upholding the drug tests at issue, the McDonell court imposed more stringent requirements for the manner in which the tests were conducted than did the Amalgamated Transit Union court. No longer did the tests merely have to be “reasonable.”34 Instead, they had to be “performed uniformly or by systematic random selection of those employees who [had] regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons. Selection [could] not be arbitrary or discriminatory.”35 If testing was effected in a manner that was neither uniform nor systematic, it could be performed only “on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee [was] then under the influence of drugs or . . . ha[d] used a controlled substance within the twenty-four hour period prior to the required test.”36 Furthermore, the results of these tests had to be kept strictly confidential.37 Therefore, the purpose of the tests was not to punish or deter criminal conduct so much as it was to protect the security of the prison.38

27. Id. (citing United States v. Cogwell, 486 F.2d 823, 835 (7th Cir. 1973)).
28. Id.
29. 809 F.2d 1302 (8th Cir. 1987).
30. Id. at 1304.
31. Id. at 1308.
32. Id.
33. Id.
34. See supra note 28 and accompanying text.
35. McDonell, 809 F.2d at 1308.
36. Id.
37. Id. at 1309.
38. Id. at 1308.
In 1987, the Supreme Court articulated a new standard in *O’Connor v. Ortega.* At issue in this case was a search of the defendant’s office that was allegedly conducted to secure government property. The Court held that “[a] search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in [the defendant’s] office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification.”

The Third Circuit Court of Appeals applied this “reasonable suspicion” standard to workplace drug tests in *Copeland v. Philadelphia Police Department.* In this case, petitioner Copeland, a police officer, had previously been suspended from the police force for “be[ing] off his beat in the company of a fellow officer, who was alleged to be selling drugs and who was dismissed for the use of illegal drugs.” He was subsequently accused by his girlfriend, a fellow police officer, of using illegal drugs and was ordered to submit to a urinalysis; the results of which were positive. The *Copeland* court amalgamated elements from several different opinions to create a general listing of what was now required to validate a search under the reasonable suspicion standard. First, according to the court, a determination of whether a search was valid under the Fourth Amendment “require[d] an objective evaluation of whether reasonable suspicion existed.” Once the existence of reasonable suspicion was established, that “suspicion [had to] be directed at a particular individual.”

The court proceeded to delineate other factors that might assist in determining the reasonableness of the suspicion, including the following: “(1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other facts contributing to suspicion or lack thereof.”

In 1989, the Supreme Court again addressed the matter of drug testing in the workplace and issued rulings in two landmark cases—*Skinner v. Railway Labor Executives’ Ass’n* and *National Treasury Employees Union v. Von Raab.* These cases have come to define the requirements for a valid Fourth Amendment search in the employment setting and have “cemented the Court’s shift away from a requirement of individualized suspicion . . . and toward a focus on

40. Id. at 712-13.
41. Id. at 728.
42. 840 F.2d 1139 (3d Cir. 1988).
43. Id. at 1142.
44. Id.
45. Id. at 1144 (citing O’Connor v. Ortega, 480 U.S. 709, 725-26 (1987)).
46. Id. (citing Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979)).
47. Id. (quoting Sec. & Law Enforcement Employees, Dist. Council 82 v. Carey, 737 F.2d 187, 205 (2d Cir. 1984) (discussing strip searches of prison guards)).
reasonableness." In *Skinner*, the Federal Railroad Administration established a set of regulations that mandated drug and alcohol testing for employees who were involved in train accidents. The railroad employees brought suit to challenge the constitutionality of this testing.52

The Court began its analysis with the general rule that for a search to be valid in criminal cases, a warrant must be issued upon probable cause.53 However, the Court outlined exceptions to this well-recognized rule. Most notably, "'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,'"54 a warrant will not be required to validate a search under the Fourth Amendment. In this case, the Court determined that "'[t]he Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison,'"55 presented such "special needs" circumstances.

In *Skinner*, the Court again employed the balancing test that has become so familiar throughout these employee drug-testing cases.56 In weighing the privacy rights of the individual workers, the Court observed the following:

Ordinarily, an employee consents to significant restrictions in his freedom of movement where necessary for his employment, and few are free to come and go as they please during working hours. Any additional interference with a railroad employee's freedom of movement that occurs in the time it takes to procure a blood, breath, or urine sample for testing cannot, by itself, be said to infringe significant privacy interests.57

The Court clearly upheld the testing primarily because of the relatively insignificant intrusion it imposed on the workers' private lives. The Court determined that the obtaining of these blood, breath, and urine samples was "'not unlike similar procedures encountered often in the context of a regular physical examination.'"58 Additionally, and more importantly, "the expectations of privacy of [the] employees [were] diminished by reason of their participation in an industry that [was] regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of [the] employees."59 Similar to *Amalgamated Transit*

52. Id. at 612.
53. Id. at 619.
54. Id. (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).
55. Id. at 620.
56. See supra notes 22-38 and accompanying text.
57. *Skinner*, 489 U.S. at 624-25 (citation omitted).
58. Id. at 627.
59. Id.
Union and McDonell, the Court gave heavy weight to the type of work in which these employees were engaged and determined that the interest in protecting the public from the dangers associated with employees' operating a train while under the influence of alcohol or drugs outweighed the workers' right to privacy.

The same type of issue was present in National Treasury Employees Union, decided the same day as Skinner. In this case, United States Customs Service employees brought a suit challenging the constitutionality of a drug-testing program that required a urinalysis test from employees who "applied for, or occupied, certain positions within the Service." The Court upheld the testing, but only for certain employees—those who were "directly involved in drug interdiction or [who were] required to carry firearms." However, the Court vacated the court of appeals' judgment as it applied to "applicants for positions requiring the [employee] to handle classified materials." Again, the Court's focus was on the governmental interest in ensuring that "front-line" Customs Service employees were not using drugs since it was primarily those persons who were responsible for monitoring both who and what was allowed to enter the United States.

The Sixth Circuit Court of Appeals interpreted the decisions in Skinner and National Treasury Employees Union in the 1990 case Penny v. Kennedy. In Penny, police officers and firefighters challenged a mandatory drug-testing program implemented by the city of Chattanooga. This program allowed drug testing "without reasonable cause or suspicion to believe that the employees so tested were using controlled substances." The Sixth Circuit condensed the Supreme Court's previous rulings and developed a new list of general presumptions to govern employee drug testing.

The court began with the presumption that "mandatory urinalysis testing, conducted pursuant to state action, infringes an employee's reasonable expectation of privacy and therefore constitutes a search under the [F]ourth [A]mendment." Next, the court discussed the necessary balancing of individual rights and governmental interests and concluded that the city "ha[d] a compelling interest in ensuring that the duties of fire fighters and police officers [were] performed free of any risk of impairment by the use of illegal drugs.

The court then proceeded to disregard the previously established principle that reasonable suspicion was required and determined that "drug-testing of these employees . . . based upon particularized suspicion . . . would seriously impede the
employer's ability to obtain information needed to advance the established compelling interest. 72 As a result, the court held that the "district court's conclusion that [the] employer must [articulate] a reasonable and particularized suspicion as a precondition to any such testing" was incorrect. 73 Therefore, the court upheld the tests as minimal intrusions on individual privacy rights and argued that even though the tests might reveal personal physical conditions other than drug use, they were really no different from "tests taken as part of a routine physical." 74

In the 1991 case Ford v. Dowd, the Eighth Circuit Court of Appeals, contrary to the Sixth Circuit in Penny, refused to eliminate the reasonable suspicion standard. 75 In Ford, the court noted both the Supreme Court and its own precedent had held that there were two instances in which drug testing in the workplace was constitutional. 76 First, "where the testing [was] carried out under a specific plan and [was] applied either randomly or routinely to Government employees, . . . tested in satisfaction of Government regulations, who occup[ied] particularly sensitive positions," it was acceptable. 77 Secondly, the testing was upheld even absent a specific plan "where the employer ha[d] reasonable, articulable grounds to suspect an employee of illegal drug involvement. This second standard require[d] individualized suspicion . . . ." 78 Although the Sixth Circuit eliminated the requirement of reasonable suspicion, both the Supreme Court and the Eighth Circuit have maintained that reasonable suspicion is necessary to validate drug testing in the workplace under the Fourth Amendment.

2. Drug Testing in the Context of Criminal Searches

Drug testing often occurs during an arrest or detainment of a suspect, particularly when the suspect is believed to be driving while under the influence of drugs or alcohol. Drug testing in this context also implicates the Fourth Amendment right to be free from unreasonable searches and seizures.

In Schmerber v. California, the Supreme Court upheld a blood test performed on the plaintiff without his permission in an attempt to discern his blood alcohol level. 79 The Court noted the well-recognized "exigent circumstances" exception to the general rule that no search can proceed except when a warrant has been issued. 80 If a court determines that "[t]he officer in the present case . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the

72. Penny, 915 F.2d at 1067.
73. Id.
74. Id. at 1068 n.3.
75. Ford v. Dowd, 931 F.2d 1286, 1289 (8th Cir. 1991).
76. Id. at 1289.
77. Id. (citation omitted).
78. Id.
80. Id. at 770.
destruction of evidence," the exigent circumstances exception applies.\textsuperscript{81} In \textit{Schmerber}, if the officer had waited until a warrant could be obtained to determine whether the destruction of evidence was likely, the evidence would not have been nearly as conclusive since so much time would have already elapsed.\textsuperscript{82}

The Court was also satisfied that the test was reasonable in light of what the officers were trying to obtain.\textsuperscript{83} In this case, the suspect was believed to be driving while intoxicated, and by the time a warrant could have been executed, his blood alcohol level would have significantly decreased.\textsuperscript{84} The Court proceeded to explain that the effectiveness of blood testing for determining a person's blood alcohol level coupled with the minimal pain or risk involved made this test reasonable under these circumstances; thus, the test did not constitute an intrusion upon the plaintiff's privacy rights.\textsuperscript{85} However, the Court was careful to limit its holding, emphasizing that although "the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions [this] in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."\textsuperscript{86}

Similarly, in \textit{New York v. Burger}, the Court upheld a warrantless inspection of the plaintiff's automobile based upon a regulatory scheme providing for inspection of junkyards in order to ensure that title to all of the vehicles was properly registered.\textsuperscript{87} Upon inspecting the plaintiff's junkyard, the police determined that he was "in possession of stolen vehicles and parts."\textsuperscript{88} The Court upheld the search and emphasized the State's significant interest in regulating this type of industry.\textsuperscript{89} Furthermore, the Court held that there was no significant intrusion upon privacy rights because "the 'time, place, and scope' of the inspection [was] limited, . . . , to place appropriate restraints upon the discretion of the inspecting officers."\textsuperscript{90} In both \textit{Schmerber} and \textit{Burger}, the Court applied the same types of balancing requirements as with all of the previously discussed cases in order to determine the validity of a particular search under the Fourth Amendment.\textsuperscript{91}

\textsuperscript{81} Id. (quoting Preston v. United States, 376 U.S. 364, 367 (1964)).
\textsuperscript{82} Id. at 770-71.
\textsuperscript{83} Id. at 771.
\textsuperscript{84} Schmerber, 384 U.S. at 770.
\textsuperscript{85} Id. at 771-72.
\textsuperscript{86} Id. at 772.
\textsuperscript{88} Id. at 695.
\textsuperscript{89} Id. at 708.
\textsuperscript{90} Id. at 711 (quoting United States v. Biswell, 406 U.S. 311, 315 (1972)) (citation omitted).
\textsuperscript{91} See supra Part II.A.1.
III. FERGUSON v. CITY OF CHARLESTON

A. Background

A third type of search implicated by the Fourth Amendment occurs with hospital patients. Ferguson v. City of Charleston centered around a policy implemented by MUSC which provided "a patient should be tested for cocaine through a urine drug screen if she met one or more of nine criteria." These criteria included the following: "No prenatal care, [l]ate prenatal care after 24 weeks gestation, [i]ncomplete prenatal care, [a]bruptio placentae, [i]ntrauterine fetal death, [p]retterm labor 'of no obvious cause,' IUGR [intrauterine growth retardation] 'of no obvious cause,' [p]reviously known drug or alcohol abuse, [or] [u]nexplained congenital anomalies." The initial policy called for the results of the tests to be given to law enforcement officials so that they "could be used in subsequent criminal proceedings" against the female patients. However, the original policy was modified to enable patients who tested positive to enter a treatment program and thereby avoid arrest. Under this modified policy, the "police were to be notified (and the patient arrested) only if the patient tested positive for cocaine a second time or if she missed an appointment with a substance abuse counselor." Out of the ten petitioners in this case, four were arrested when the original policy was in effect and were not offered the opportunity to enter a rehabilitation program. The other six were arrested under the modified policy after they either failed to enter or complete the drug treatment program or tested positive for cocaine a second time.

The petitioners argued that the tests were performed without their consent and hence violated the Fourth Amendment. The respondents countered that the petitioners had in fact consented to the searches and "as a matter of law, the searches were reasonable, even absent consent, because they were justified by special non-law-enforcement purposes." The United States District Court for the District of South Carolina entered judgment for the respondents. On appeal, the Fourth Circuit affirmed, holding that the searches were not unreasonable under the Fourth Amendment. The Supreme Court granted certiorari and reversed and remanded the case, holding that the reporting of positive test results to the police

93. Id. at 71 n.4.
94. Id. at 72.
95. Id.
96. Id.
97. Id. at 73.
98. Ferguson, 532 U.S. at 73.
99. Id.
100. Id.
101. Id. at 74.
102. Id.
was unreasonable without the patients’ consent. The issue of whether or not the patients consented was a question of fact for the jury to decide.

B. The Court’s Reasoning

The Court began its analysis with a discussion of precedent, including *Skinner* and *National Treasury Employees Union*. Next, the Court delineated the balancing test employed in these cases that “weighed the intrusion on the individual’s interest in privacy against the ‘special needs’ that supported the program.” The Court then acknowledged that “the invasion of privacy in this case [was] far more substantial than in those cases. . . . [in which] there was no misunderstanding about the purpose of the test or the potential use of the test results, and [in which] there were protections against the dissemination of the results to third parties.” In this case, there existed not only an increased invasion of privacy, but also an increased expectation of privacy. In contrast to a police officer or a bus driver, hospital patients expect a very high degree of privacy, especially since they reveal personal and often confidential matters to their caregivers.

The Court also discussed the special needs exception to the requirement that a warrant be obtained for all searches. The Court delineated three primary factors to consider under the special needs balancing test: (1) the importance of the governmental objective; (2) the effectiveness of the governmental intrusion in furthering the governmental objective; and (3) the degree of intrusion upon the individual from both an objective and subjective viewpoint.

While the Court did not disagree that there existed a governmental need to “get the women in question into substance abuse treatment and off of drugs,” the testing did not immediately lead to this result. Only after criminal charges were threatened against the patients would substance abuse treatment be considered as an option. MUSC’s policy was merely a “means to an end” to ensure that these drug users were being criminally prosecuted. The Court concluded that the central feature of the policy was the “generation of evidence for law enforcement

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103. *Id.* at 76.
104. *Ferguson*, 532 U.S. at 74.
105. *Id.* at 76; *see supra* notes 48-65 and accompanying text.
106. *Ferguson*, 532 U.S. at 78.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 78-84.
111. *Id.*
112. *Id.* at 82-83.
113. *Ferguson*, 532 U.S. at 72.
114. *Id.* at 83-84.
purposes." In other words, there was simply not a substantial enough governmental interest to justify such a gross invasion of privacy.

In his concurring opinion, Justice Kennedy agreed with the majority that the search occasioned by the testing violated the Fourth Amendment. He pinned his analysis not on any consent issues that might be present, but rather on the proposition that "[n]one of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives." In Justice Kennedy's view, this type of search clearly had a "penal character" and could not be upheld as it was too closely linked to law enforcement to fall under the special needs rationale.

In his dissenting opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that the special needs doctrine was completely inapplicable "since it operate[d] only to validate searches and seizures that [were] otherwise unlawful." The dissenters opined that the urine samples were obtained in a constitutional manner. Furthermore, the tests originally began "neither at police suggestion nor with police involvement." The tests existed for the purpose of detecting drug use in pregnant women and treating them to ensure the health of their babies. The tests' underlying motives were benign, and the threat of arrest was used only "as a strong incentive for [the] addicted patients to undertake drug-addiction treatment." As a result, the dissenters believed that the testing should have been upheld.

IV. ANALYSIS

A. The Supreme Court's Application of the "Special Needs" Doctrine

1. The Governmental Interest at Stake

The standard established by preceding case law requires balancing of private rights with governmental interests when the constitutionality of a search is at issue. Additionally, there exists a special needs exception to the Fourth Amendment allowing searches in the absence of a warrant. The special needs

115. Id. at 83.
116. Id. at 84-85.
117. Id. at 86 (Kennedy, J., concurring).
118. Id. at 88 (Kennedy, J., concurring).
119. Ferguson, 532 U.S. at 88-89 (Kennedy, J., concurring).
120. Id. at 98 (Scalia, J., dissenting).
121. Id. (Scalia, J., dissenting).
122. Id. at 99 (Scalia, J., dissenting).
123. Id. (Scalia, J., dissenting).
124. Id. at 103 (Scalia, J., dissenting).
125. Ferguson, 532 U.S. at 104 (Scalia, J., dissenting).
126. See supra note 106 and accompanying text.
exception applies to situations in which there is a large governmental interest at stake. One commentator observed as follows:

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. 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 Supreme Court disallowed the searches in Ferguson based on the rationale that the governmental need was less significant than the individual hospital patient’s right to privacy. The Court determined that law enforcement officials’ need to obtain convictions or even to find treatment programs for these suspected drug users was secondary to the patients’ individual Fourth Amendment rights. Furthermore, the Court determined that there was no significant public interest at stake in this case. In cases like Skinner and Schmerber, the interest in preventing persons under the influence of alcohol or drugs from operating trains or driving automobiles seems clear. Other human lives will be endangered if this type of behavior goes undetected. Therefore, in the interest of prevention, it is only logical that drug tests in these types of situations be performed, if possible, before an accident or injury occurs. In Ferguson, despite the government’s objection that there existed a special need to protect the health of the mother and the fetus by preventing drug use by pregnant women, the Court ultimately concluded that this was not the policy underlying MUSC’s regulations. Instead, the Court found that MUSC’s primary concern was with crime control, not with patient or infant health; as a result, the Court disallowed the search.

2. Individual Rights at Stake

Undoubtedly, the individual’s interest in each of these situations is great. However, a patient in a hospital does not relinquish the same types of expectations of privacy that an employee or a criminal does. Although the activity the tests in Ferguson sought to prevent was criminal in nature, there existed no nondiscriminatory basis for identifying which patients were likely to be drug users. The

128. Id. at 620.
129. Vaughn, supra note 22, at 866 (footnote omitted).
130. See supra notes 107-16 and accompanying text.
132. See supra note 116 and accompanying text.
133. See supra notes 51-61, 79-87 and accompanying text.
134. See supra notes 112-15 and accompanying text.
135. See supra notes 114-15 and accompanying text.
136. See Vaughn, supra note 22, at 872, 875.
mere fact that a woman had no prenatal care or was a previous drug user was insufficient to subject her to this invasive policy. This was particularly true when the women were hospital patients, seeking treatment of their own accord, in a setting where they had every right to believe their liberties were secure.

These women did not relinquish the safeguards guaranteed to them under the Fourth Amendment simply by entering a hospital in which a drug-test policy was in effect. They should not have to worry about the results of their private laboratory tests being disclosed to law enforcement officials or to anyone else. In Skinner, the Court upheld similar testing of railroad employees due in large part to the nature of their work. The Court believed that it was more beneficial for the employees to relinquish some portion of their privacy rights than it was to force the public to bear the risks associated with train operators who might be under the influence of drugs or alcohol.

However, the regulations at issue in Skinner required that the employees be informed of the results and given the opportunity to respond in writing before any final report was prepared. Similarly, in National Treasury Employees Union, the Court held that the tests at issue were valid, but the results they produced could not be turned over to criminal prosecutors absent written consent from the tested employee. In Ferguson, the petitioners were given no such opportunity. In addition, the supposedly confidential test results were not only shared with law enforcement officials, but were subsequently used in criminal proceedings against the patients.

There is a heated debate concerning the privacy of medical records as many patients argue that their records should remain strictly confidential. In Ferguson, the patients were completely unaware of the possibility that the results of their tests could be turned over to law enforcement officials if they tested positive for drug use. Even though the patients signed consent forms, nowhere did the consent forms disclose that the results would be reported to the police. The Court even set out the general principle that there is a "reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital . . . that the results of those tests will not be shared with nonmedical personnel without her

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138. See Vaughn, supra note 22, at 875.
139. See id.
141. Id.
142. Id. at 610.
145. Id. at 71-72.
147. See Vaughn, supra note 22, at 872.
148. Id.
Therefore, reporting the results of these usually confidential tests seems to be a gross violation of privacy.

A. Was Ferguson Correctly Decided?

1. The Beneficial Effects of the Decision

Most scholars seem to agree with the Court's decision in this case.\textsuperscript{150} At first glance, the Ferguson case appears to be a clear victory for Fourth Amendment rights. An invasive search was struck down, and fundamental liberties were upheld. There now exists one fewer reason to worry that the "Court has started down a 'slippery slope' eventually leading to a flurry of special needs in which the government will be able to engage in suspicionless searches."\textsuperscript{151}

Optimists likely believe that the Court's decision in this case is significant in that it makes a bold statement regarding discriminatory application of the law. Ferguson was originally brought as a Title VI Civil Rights case\textsuperscript{152} since "fetal abuse prosecutions disparately affect poor and minority women by singling out cocaine use."\textsuperscript{153}

Specifically:

During the first eight months of the Policy, all of the women reported by MUSC to the Solicitor's Office and subsequently arrested and incarcerated by the [Charleston Police Department (CDP)] were [b]lack. In fact, during the entire period that the Policy was enforced, all but one of the women reported to the CPD and arrested were [b]lack . . .\textsuperscript{154}

Even though the plaintiffs were not successful with their civil rights claim, the end result was the same—the testing of female obstetric patients for illegal drug use was held to be unconstitutional.\textsuperscript{155}

If the testing had been upheld, there would have been a risk that fewer pregnant women would seek prenatal care for fear that they would be prosecuted for drug

149. Ferguson, 532 U.S. at 78.
150. See infra notes 151-59 and accompanying text.
155. See Harvard Law Review, supra note 152, at 1248; see supra note 103 and accompanying text.
use. It seems logical that "the prospect of criminalization as a deterrent to fetal abuse [through drug use] often succeeds in discouraging pregnant women from seeking prenatal care entirely, and undermines the resolve of women considering treatment." If a pregnant woman who uses drugs knows that she will be arrested and imprisoned if she seeks treatment at a hospital, it becomes highly unlikely that she will do so; thus, her baby is presumably further endangered.

Aside from the health risks associated with inadequate or non-existent prenatal care, assuming a woman does seek treatment at the hospital and is subsequently sent to prison, "[m]ost experts will agree that fetuses and pregnant women are not under healthy conditions in prison" either. A pregnant woman in prison often faces more hazardous conditions than she does in society, and prisons usually provide little or no prenatal care to the inmates. Then, one must wonder why a woman would seek medical care when simply failing to go to the hospital for checkups during pregnancy would enable her to avoid incarceration.

2. The Detrimental Effects of Ferguson

Despite its beneficial effects, the Court’s decision in Ferguson is not an impenetrable defense of Fourth Amendment rights. This decision ultimately creates more problems than it resolves. First, the decision can be characterized merely as a response to society’s changing views and morals. The MUSC policy was promulgated at a time that ‘marked both the height of America’s ‘War on Drugs’ and the beginning of the conservative pro-life movement’s shift in strategy from a focus on opposing abortion to an embrace of fetal rights.’ Crack cocaine was just beginning to emerge as the newest dangerous illegal drug, and society was becoming alarmed at the number of babies who were being born already addicted to this drug due to their mothers’ ingestion of it during pregnancy. Both law enforcement and the legal community reacted. Many prosecutors made efforts to "expand the reach of the criminal laws on the books, reinterpreting statutes criminalizing child abuse, drug delivery, manslaughter, homicide, and assault with a deadly weapon" in an effort to bring charges against mothers who used drugs during their pregnancies. Society appeared supportive of these tactics, and many prosecutions ensued.

The courts were acquiescing to society’s demands that pregnant women who used

157. Id.
159. Id.
161. Id. at 496.
163. See Gagan, supra note 160, at 497-98.
drugs not be spared from the nationwide crackdown on narcotics. It was in this environment that the policy at issue in Ferguson was implemented. However, if one thing is certain, it is that courts' rulings follow changes in societal viewpoints. By the time that Ferguson was decided in 2001, there was no longer such a frenzied concern with illegal drugs as was evidenced by decreased funding for drug investigations and prosecutions and a decline in media attention to the entire topic of illegal drug use.164 Society had found different focal points, and the "War on Drugs" had waned.165 In essence, this decision was not so much a victory for Fourth Amendment rights as it was a reflection of both the Supreme Court's and society's changing concerns.

Furthermore, and perhaps more significantly, the Ferguson decision does nothing to solve the problem of illegal drug use among pregnant women in this country today. Although the "War on Drugs" is not as vehemently fought today as it was in the 1980s and early 1990s, many infants are still born suffering from the effects of exposure to drugs or alcohol in utero.166 With the outlawing of the tests in Ferguson, there exists no satisfactory method prior to delivery for determining when a pregnant woman is using drugs. The health of the mother and her child is once again dependent upon the mother's voluntarily seeking treatment.

However, the Court was correct in its determination that this problem is not one that can be solved with punitive measures:

The time has come for states to accept the failure of their punitive policies and reexamine and reclassify the problem. For in reality, substance abuse by pregnant women is not so much a criminological problem, but rather a public health dilemma. Once states accept this classification, as has been done by the vast majority of legal, medical and sociological scholars who have examined it, they can begin to refocus their priorities, enact legislation and support programs to effectively deal with the problem.167

Sending these pregnant women to prison is not a beneficial solution for anyone. In addition, the financial burden associated with their period of incarceration falls on the state and ultimately on the individual taxpayers.168 However, by completely eliminating MUSC's policy, the Court has only buried the root of the problem deeper. The key to solving the drug problem in this nation

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165. Id.
167. Id. at 244.
168. Id. at 247-48.
is education.\textsuperscript{169} This education will undoubtedly involve a “realloca
tion of monies previously spent for law enforcement and corrections,” but it is an investment that
would be well worth the expenditure.\textsuperscript{170} The only way to solve the still-growing
drug problem in the United States is to attack it proactively through increased
educational programs for pregnant women. These women need to be made aware
that there is help available to them that does not necessarily involve a prison sentence.\textsuperscript{171}

The Court struck down a policy in Ferguson that attempted to solve the
problem of drug use by pregnant women retroactively, subjecting these women to
prison and “treatment” after they were already pregnant and determined to continue
using drugs. While prison and mandatory treatment programs may assist in the
short term, it is quite likely that these women will leave prison without being
completely rehabilitated.\textsuperscript{172} Many of these women must be taught the concept of
self-worth. Addiction usually stems from psychological factors such as low self-
esteeem, non-nurturing familial environments, and other depressive factors.\textsuperscript{173}
Therefore, “the goal of minimizing harmful behavior like prenatal drug use can
only be attained if communities provide nurturing environments that encourage
responsible and protective behavior.”\textsuperscript{174}

The typical argument against increased funding for educational or community-
assistance programs is just that—it entails increased funding. However, there will
be costs in a situation like this; that much is unavoidable.\textsuperscript{175} By declaring the tests
in Ferguson unconstitutional, the Court ensured that the costs of supporting these
women while they were in prison would not fall on the state or on the taxpayer.
However, someone will still have to pay for the babies who are born addicted to
alcohol and drugs. It has been determined that the “average cost of neonatal care
for a drug-exposed infant [is] $5,500 compared to $1,400 for non-exposed infants.”\textsuperscript{176} These costs only escalate as the drug-addicted children enter school and
later the workforce with disabilities requiring special attention resulting from their
early exposure to drugs.\textsuperscript{177}

All the Court achieved with its ruling in Ferguson was a deferral of these
inevitable costs. Instead of the taxpayers shouldering the financial burden of a
prison sentence, they are now being required to pay for a lifetime of problems
resulting from the undetected drug abuse of these women. The Court erred in
favoring the latter position over the former. Neither one of these options is
satisfactory. The answer lies in treatment of the drug problem, not in incarceration

\textsuperscript{169} Id. at 267.
\textsuperscript{170} Id. at 244.
\textsuperscript{171} Id.
\textsuperscript{172} Brody & McMillin, supra note 166, at 248.
\textsuperscript{173} Id. at 257.
\textsuperscript{174} Kubasek & Hinds, supra note 153, at 2.
\textsuperscript{175} See Bell, supra note 158, at 658.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
of the drug user. 178 Oregon, a state that has “recognized the benefits of treatment and rehabilitation” over incarceration of pregnant drug users, has implemented a “progressive approach” to this problem. 179 Oregon’s legislature realized that drug and alcohol abuse is a dependency illness rather than a crime and chose to treat “offenders” accordingly. 180 The legislature’s findings revealed that the costs of providing services to children born addicted to drugs or alcohol over the course of their lives would rapidly surpass the costs of providing treatment to the mothers before they damaged their children. 181 While the plan is too new to furnish any concrete results, it seems to be a step in the right direction.

However, treatment should not be viewed as the ideal way to prevent illegal drug use by pregnant women. After all, the term “treatment” itself implies that the women are addicted to drugs before they enter the program. Additionally, treatment facilities are often overcrowded and are unable to meet women’s unique needs because “they were originally designed for men.” 182 Furthermore, many treatment centers flatly refuse to admit or treat pregnant women at all. 183 The goal should therefore be increased educational programs in schools and community centers to target children regarding the dangers of drug abuse. If society targets children and young adults early in their lives, there is a better chance that they will avoid becoming addicted to drugs or alcohol. Unfortunately, the Ferguson Court never weighed this idea into its analysis.

V. CONCLUSION

The Court’s decision in Ferguson will impact Fourth Amendment protections in both South Carolina and the rest of the nation. While Ferguson makes clear that courts will continue to apply a balancing test to these types of cases, it is no longer clear which side will prevail. While it is certainly beyond argument that the government has a significant interest in preventing illegal drug abuse by pregnant women, the Ferguson decision suggests that the Court seems loath to decide unequivocally that any means necessary to achieve this goal should be used.

Those who agree with the Court’s opinion in this case would argue that the government must not be allowed to resort to methods clearly in violation of individual rights in the name of eradicating drug use. Individual liberties are simply too precious. However, as one examines the Ferguson opinion more carefully, it seems that perhaps in this case, the cost of protecting these beloved liberties was too great. After all, the allegedly unconstitutional tests enabled MUSC workers to detect drug use in pregnant women easily and efficiently. The problem arose when the test results were used to incarcerate the female patients. Nevertheless, the Court

178. Id.
179. Id. at 664.
180. Id.
181. Bell, supra note 158, at 665.
182. Id. at 662-63.
183. Id.
could have easily upheld the testing and mandated that pregnant women found to be using illegal drugs be offered adequate treatment and prenatal care in a professional facility—not a prison.

The Court instead opted to strike down the entire policy—a policy that had at its heart the protection of the health of both the mother and child. In so doing, the Court accomplished a goal it most likely never intended. In its endeavor to protect the individual rights of these female patients, the Court also stripped away the most easily accessible avenue they may have had toward freedom from drug addiction.

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