FOURTH AMENDMENT – SEARCH AND SEIZURE – URINALYSIS DRUG SCREENINGS PERFORMED BY STATE HOSPITAL WITHOUT A WARRANT FALL WITHIN THE "SPECIAL NEEDS" EXCEPTION TO THE WARRANT REQUIREMENT – *FERGUSON V. CITY OF CHARLESTON*, 186 F.3D 469 (4TH CIR. 1999).

*Nicole F. DiMaria**

I. INTRODUCTION

It is self-evident that individuals who seek professional health care do so in order to receive diagnosis and medical treatment, or simply to maintain their health and prevent disease. In the Fourth Circuit's recent case, *Ferguson v. City of Charleston*,[1] many pregnant women sought medical care at a state hospital, but received much more than medical treatment and/or diagnosis. They were arrested, or were at least threatened to be arrested, based on the results of a drug urinalysis performed without a search warrant.[2] *Ferguson* is an unusual Fourth Amendment search and seizure case because the setting is a hospital, as opposed to the streets, and involves the unique pairing of health care professionals and law enforcement.[3] Consequently, the case, which was heard before the Supreme Court on October 4, 2000[4] and will likely not be decided until 2001,[5] presents many serious concerns with regard to the Fourth Amendment and the duties of the health care profession.

The Fourth Amendment[6] of the United States Constitution protects[7] against

---

* J.D., anticipated 2001. The author would like to thank the DiMaria family and Daniel Picciallo for all their support.

[1] 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1239 (Feb. 28, 2000) (No. 99-936).

[2] *Id.* at 474-75.

[3] Joan Biskupic, *'Crack Babies' and Rights*, WASHINGTON POST, Feb. 29, 2000 at A03.

[4] Linda Greenhouse, *Justices Consider Limits of the Legal Response to Risky Behavior by Pregnant Women*, N.Y TIMES, Oct. 5, 2000, at A26.

[5] Biskupic, *supra* note 3, at A03.

[6] The Fourth Amendment states

"The right of the people to be secure in their persons, houses, papers, and effects, against un-

unreasonable searches[8] and seizures.[9] The Supreme Court has generally inter-

---

reasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The Amendment was passed in a very direct response to the search practices in England prior to the revolutionary struggle. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(a) (2d ed. 1987). The Supreme Court has repeatedly noted that the primary concern of the Fourth Amendment is "the protection of the individual from arbitrary and oppressive official conduct" and "the right of a person to retreat into his or her own home and there be free from unreasonable government intrusion." JOHN WESLEY HALL, JR., SEARCH AND SEIZURE §1.18 (3d ed. 2000). The Amendment's principal protection lies with individual privacy, and not simply property. *Id.* The Fourth Amendment consists of two clauses, the unreasonable search clause and the warrant clause. *Id.* at §1.21. On its face, it can not be determined whether the clauses are to be read together or separately and thus, the Amendment has been characterized as possessing "'both the virtue of brevity and the vice of ambiguity.'" *Id.* (citation omitted).

[7] The Fourth Amendment protects individual privacy and not places. HALL, *supra* note 6, at § 1.17. The Amendment specifically protects "persons, houses, papers, and effects," U.S. CONST. amend. IV, which the Supreme Court has interpreted to be the "core values" covered by the Amendment. HALL, *supra* note 6, at § 1.17 The Court, however, has also interpreted the Fourth Amendment to be applicable to violations of "reasonable expectations of privacy." *Id. See infra* note 8 (providing further detail with regard to the reasonable expectation of privacy inquiry).

[8] The Supreme Court originally defined a search as "an intrusive 'quest by an officer of the law.'" *Id.* at § 1.8. Consequently, if a private party performs a search, it is not subject to the Fourth Amendment, even if found to be arbitrary. *Id.* If, however, the private party is acting as an agent or instrument of the Government, the Fourth Amendment applies. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989); *see also* New Jersey v. T.L.O, 469 U.S. 325 (1985) ("[T]his Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action' – that is, 'upon the activities of sovereign authority'" (citations omitted)).

The Court further articulated what constitutes a search after the formulation of the "expectation of privacy" standard in *Katz v. United States*, 389 U.S. 347 (1967). Under this standard, in order for a search to occur, "the conduct of the police must intrude or infringe on a legitimate expectation of privacy." HALL, *supra* note 6, at § 1.8. The Court has stated that the analysis of the existence of a constitutionally protected reasonable expectation of privacy under *Katz* requires a two-staged inquiry: "'first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?'" *Id.* at § 2.1 (citing *California v. Ciraolo* 476 U.S. 207, 211 (1986)).

preted the Amendment to require the issuance of a judicial warrant, which is based upon probable cause.[10] [11] The Court, however, has stated that the Amendment does not proscribe all searches and seizures performed without a warrant, but only those that are found to be unreasonable.[12] The Court has further determined that the absence of probable cause, or even some degree of individualized suspicion, does not mandate that the search be presumed to violate the

---

[9] A "seizure" can be a seizure of the person or a seizure of property. HALL, *supra* note 6, at §§ 1.10-1.13. A seizure of the person occurs where "a law enforcement officer meaningfully restricts a citizen's freedom of movement, however brief it might be." *Id.* at § 1.10. A seizure of property has occurred if "'there is some meaningful interference with an individual's possessory interests in that property'. . .There must be an intentional acquisition of physical control by agents of the government." *Id.* at § 1.13 (citation omitted).

[10] The Court has often stated its preference for warrants, noting that a warrant affords prior judicial approval of the search and thus reduces the risk of unnecessary intrusions. *Id.* at § 41.2. This prior judicial approval is provided by a "neutral and detached magistrate," who has the opportunity to make an impartial and objective determination with regard to "the value and substance of the officer's probable cause." *Id.*

While the Supreme Court's definition of probable cause differs slightly from case to case, John Wesley Hall offers that the result is the same: "Would a reasonable person conclude from the facts and circumstances that a crime occurred or that evidence of a crime is located in the place to be searched?" *Id.* at § 3.8. The existence of probable cause is determined through an objective analysis of the "totality of the circumstances." *Id.* at § 3.9-3.10. Probable cause can exist in two forms: probable cause to arrest and probable cause to search. *Id.* at § 3.2. There is an important distinction between the two: "One does not automatically arise from the other, and they often exist separately. Probable cause to believe a person is guilty of crime does not necessarily constitute probable cause to search the person's residence." *Id.*

[11] The Supreme Court has stated that "[e]xcept in certain well-defined circumstances, a search or seizure. . .is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

[12] *Id.* An additional ambiguity in the Fourth Amendment is the lack of the definition of the term "unreasonable." LAFAVE, *supra* note 6, at § 1.1(a). The Court, however, has explained,

What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. . .Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. . .In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. . . .

Skinner, 489 U.S. at 619 (citations omitted).

Constitution:[13] reasonableness has been found to be the "fundamental inquiry" or "touchstone" in the analysis of Fourth Amendment cases.[14] This threshold reasonableness requirement is examined by balancing the search's intrusion upon a person's Fourth Amendment rights against the search's advancement of legitimate governmental interests.[15] This balancing of interests is the approach adopted in the application of the "special needs" exception to the warrant requirement:[16] "[w]hen. . ."special needs" – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."[17]

---

[13] As the Supreme Court has stated,

Our cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law. . .When the balance of interests precludes insistence on a showing of probable cause, we have usually required 'some quantum of individualized suspicion' before concluding that a search is reasonable. . .We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. . .In limited circumstances. . .a search may be reasonable despite the absence of such suspicion.

Skinner, 489 U.S. at 624 (1989) (citations omitted).

[14] HALL, *supra* note 6, at § 1.19.

[15] Vernonia School District 47J v. Acton, 515 U.S. 646, 652-53 (1995).

[16] Other exceptions to the warrant requirement are stated in the following:

The Supreme Court has upheld warrantless searches incident to a lawful arrest. The Court has upheld warrantless searches where exigent circumstances, such as hot pursuit or imminent destruction of evidence, do not allow for an opportunity to obtain a warrant. The Court has also recognized an automobile exception, a plain view exception, and an exception based on consent from the person being searched. The Court, furthermore, has exempted from the warrant requirements the investigative stop and frisk, border searches, inventory searches, and administrative searches of closely regulated industries.

Loree L. French, Note, Skinner v. Railway Labor Executives' Association *and the Fourth Amendment Warrant-Probable Cause Requirement: Special Needs Exception Creating a Shakedown Inspection?*, 40 CATH. U.L. REV. 117, 126-128 (1990) (citations omitted).

[17] Chandler v. Miller, 520 U.S. 305, 313-14 (1997). The Court has implied that the government need is special if it does not involve the investigation for proof of a crime. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 25 (1991). The Court has tended to use this aspect, that crime detection is not involved, to diminish the individual privacy interest. *Id.*

II. STATEMENT OF THE CASE

In *Ferguson v. City of Charleston*,[18] the United States Court of Appeals for the Fourth Circuit applied the "special needs" exception to the warrant requirement.[19] The state hospital, Medical University of South Carolina ("MUSC"), and local law enforcement implemented a program whereby the urinalysis results of pregnant women, which revealed cocaine use, were turned over to the police.[20] The Court decided that the interest of the government in preventing

---

With respect to individual interests, the Court implies that because the purpose of the search is not directly prosecutorial, less protection is needed. On the government side, the Court expresses its concern about the impact a warrant requirement will have on the efficiency of government officials whose primary job is something other than law enforcement. Whereas the Court is willing to tolerate the inconvenience caused by judicial authorization when it distracts the police in their single-minded effort to "ferret out crime," it has resisted imposing the requirement when it compromises these other, "administrative" interests of the government. . .In short, the special needs exceptions suspend the warrant requirement when, because ordinary police investigation is not involved, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."

Id. (citations omitted); *see also* Jennifer Buffaloe, Note, *'Special Needs' and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. Rev. 529, 543 (stating that "'normal needs' presumably refer to those searches conducted by police for the purpose of gathering evidence in a criminal prosecution"). As much as the Court has "implied" that special needs are those not involving police, it certainly remains unclear as to whether that is the case, since one of the disagreements between the majority and dissenting judge in *Ferguson* is over that very issue. *See infra* notes 111-24 and accompanying text; *see also infra* notes 43-84 and accompanying text (presenting examples of special needs found in prior case history).

Since there is a lack of clarity as to the "precise contours" of the special needs exception, Slobogin, *supra* at 25, commentators have criticized the Court's special needs holdings, describing them as amorphous and overly broad. *Id.* at 3, 25; Eric B. Post, Comment, Chandler v. Miller: *Drug Testing Candidates for State Office Under the 'Special Needs' Exception*, 64 BROOK. L. REV. 1153, 1154 (1998) (stating that commentators often warn that the "amorphous special needs exception has created a slippery slope," which has lead to an erosion of Fourth Amendment protections); Buffaloe, *supra*, at 530-531 (describing the special needs exception as "so broad and far-reaching that it is poised to turn the warrant preference rule on its head"). Presumably as a result of the lack of clarity in special needs jurisprudence, lower court special needs decisions have been regarded as "sloppy." Buffaloe, *supra*, at 542.

[18] 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1239 (Feb. 28, 2000) (No. 99-936).

[19] *Id.* at 476.

[20] *Id.* at 474.

"crack babies" outweighed the invasion of the individual privacy interests.[21]

The program was instituted because of a perceived rise in cocaine use among pregnant women and the resulting harm to the children of mothers who use cocaine.[22] A task force was formed, which included the manager of the obstetrics department at MUSC, the Solicitor of the Ninth Judicial Circuit of South Carolina, the Chief of the City of Charleston South Carolina Police Department ("CCPD"), and physicians from various prenatal care departments at MUSC.[23]

Under South Carolina law, a viable fetus is considered a "person."[24] Due to this characterization, the Solicitor informed the participants of the task force that a woman who ingests cocaine subsequent to the 24th week is charged with distributing a controlled substance to a minor.[25]

The task force implemented the policy in the fall of 1989.[26] Urinalysis drug screens were performed when certain indicia of cocaine use were present.[27] If the drug tests were positive, the results were reported to the CCPD or a representative of the Solicitor's Office and the patient would be arrested.[28] The policy was apparently amended in early 1990 so that a patient was given the choice to either receive drug treatment or be arrested.[29] If drug treatment was elected, the results of the drug test were not forwarded to the CCPD, and the patient was only arrested if she failed to comply with the treatment for a second time.[30] In addition, a patient could avoid prosecution after being arrested if she enrolled in drug

---

[21] *Id.* at 479.

[22] *Id.* at 474.

[23] *Id.* at 474.

[24] *Ferguson*, 186 F.3d at 474 n.2 (citing State v. Horne, 282 S.C. 444 (1984) (holding that a viable fetus is considered a person under South Carolina law)).

[25] *Id.* at 474 (citing S.C. Code Ann. § 44-53-440 (Law.Co-op. Supp. 1997).

[26] *Id.* at 474.

[27] *Id.* at 474. The "indicia" were as follows: "(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." *Id.* at 474.

[28] *Id.* at 474.

[29] *Id.* at 474.

[30] *Ferguson*, 186 F.3d at 474.

treatment.[31] Subsequent to successful completion of the drug treatment program, the charges would be dismissed.[32]

The Appellants,[33] who had been subjected to the policy,[34] brought an action

---

[31] *Id.* at 474-75.

[32] *Id.* at 474-75. After a patient tested positive, she would be shown an "educational video" and be informed about MUSC's policy. *Id.* at 475. The patient was also informed of the need for substance abuse counseling and was given an appointment for such counseling. *Id.*

[33] The Fourth Circuit noted that of the ten Appellants, eight were African-American, one was Caucasian, and one was of "mixed race." *Id.* at 479 n.9.

[34] Judge Blake's dissent included the following summary of the circumstances surrounding the testing and arrest of the Appellants:

Sandra Powell, African-American, received prenatal care at MUSC from the end of her first trimester. In October 1989, she delivered her child at MUSC and tested positive for cocaine. She was arrested at the hospital the following day.

Lori Griffin, African-American, received prenatal care at MUSC beginning in July 1989. She was admitted to the hospital on July 1989. She was admitted to the hospital on October 7, 1989, with contractions. She tested positive for cocaine. She was arrested and taken to the county jail. She was returned to MUSC from jail on October 25, 1989, to deliver her child.

Ellen Knight, African-American, received prenatal care at MUSC prior to the fall of 1989. She arrived at the hospital on November 6, 1989, in labor. Although her cocaine test was negative, her child tested positive at birth. . .she was arrested at the hospital on November 8, 1989.

Laverne Singleton, African-American, delivered her child on November, 1989, in the ambulance on the way to MUSC. She tested positive for cocaine at the time of admission. She was arrested at the hospital the next morning.

Paula Hale, African-American, first arrived at MUSC in December 1990 in labor. She tested positive for cocaine at delivery and was referred to substance abuse counseling. She was arrested in March 1991 after failing to complete the drug treatment program.

Pamela Pear, African-American, arrived at MUSC in July 1990 with pre-term labor symptoms. She tested positive for cocaine during that visit. She was referred to substance abuse counseling. In August 1990, she was again admitted to MUSC for pre-term labor and tested positive for cocaine. She was arrested at the hospital and was released on bond the same day. She delivered her child at MUSC in September 1990.

Theresa Joseph, who was multi-racial, was first seen at MUSC on June 5, 1991, for a non-pregnancy related matter. She tested positive for cocaine at that time and was referred to the obstetrical clinic. She was admitted to the hospital again, for the same non-pregnancy com-

against Appellees,[35] and asserted the following: (1) a violation of their constitutional right to privacy; (2) an infringement of their Fourth Amendment right against unreasonable searches and seizures; (3) Title VI disparate impact discrimination; (4) and perpetration of the state-law tort of abuse of process.[36]

The district court granted Appellees judgment as a matter of law for the constitutional privacy and abuse of process claims, to the extent that damages were sought.[37] After rendering findings of fact based on the presented trial evidence, the district court ruled in favor of Appellees on the claims for disparate impact.[38]

---

plaint, on June 13, 1991. She again tested positive for cocaine and was referred to substance abuse counseling. . .She failed to complete the substance abuse program in July 1991. She was seen again in September 1991 and once more tested positive for cocaine. Finally, she arrived at MUSC in October 1991 in labor and tested positive for cocaine. Her child was born on October 18, 1991, and Ms. Joseph was arrested at the hospital.

Crystal Ferguson, African-American, tested positive for cocaine during a prenatal visit to MUSC in June 1991. She agreed to attend substance abuse counseling. On August 4, 1991, she delivered her child at MUSC. She tested positive for cocaine at that time. She was arrested on August 7, 1991, for failing to comply with the drug treatment program.

Patricia Williams, African-American, received prenatal care at MUSC beginning in January 1992. She tested positive for cocaine at the time of her first visit and was referred to substance abuse counseling. She did not complete the counseling program and returned for additional prenatal care three times, testing positive for cocaine each time. In March 1992, she arrived at the hospital in labor. She again tested positive for cocaine. Her baby was born on March 10, 1992, and on March 12, 1992, she was arrested at the hospital.

Darlene Nicholson, Caucasian, received regular prenatal care at MUSC. At her December 17, 1993 prenatal visit she tested positive for cocaine. At the time, she was told that she must voluntarily admit herself to the MUSC psychiatric unit for substance abuse treatment or she would be arrested. She entered the psychiatric unit and remained there until she was released after 30 days. She delivered her child at MUSC on February 21, 1994.

Id. at 485-86 (citations omitted) (emphasis added).

[35] *Id.* at 475. The complaint named the following defendants, who are referred to as "Appellees" in the text: "City of Charleston, South Carolina; the trustees of MUSC; CCPD Chief Reuben Greenberg; former Ninth Circuit Solicitor Charles Condon; Current Ninth Circuit Solicitor David Schwacke; Nurse Shirley Brown; Nurse Melesia Henry; and several physicians and MUSC officials involved in obstetrical and neonatal care at MUSC." *Id.* at 474 n.1.

[36] *Ferguson*, 186 F.3d at 475. This note focuses on the Fourth Amendment claim.

[37] *Id.* at 475. Subsequently, during a post-trial hearing, the appellants were denied injunctive relief on their constitutional privacy claims. *Id.* at 475.

[38] *Id.* at 475-76. The District Court determined that Appellants had not established a

The district court decided that the urine drug screens were within the scope of the Fourth Amendment and submitted to the jury the question of whether the Appellants had consented to the tests.[39] The jury submitted a verdict in favor of the Appellees for the Fourth Amendment claim.[40]

On appeal, the Appellants challenged the following: (1) the submission of the issue of consent to the jury, and alternatively, the sufficiency of the evidence supporting the verdict; (2) the District Court's decision in favor of the Appellees on the Title VI claim; and (3) the District Court's judgments as a matter of law on the constitutional privacy and abuse of process of claims.[41] The Fourth Circuit did not address these challenges because it affirmed the district court's decision on the grounds that the urine tests constituted "special needs searches"[42] under the Fourth Amendment.

III. PRIOR CASE HISTORY

The United States Supreme Court has applied the special needs exception to the warrant requirement in a variety of contexts. The first Supreme Court case to mention the exception was *New Jersey v. T.L.O.*[43] The case involved a vice prin-

---

prima facie case of discrimination with regard to any of their claims. *Id.* at 480. The court further concluded that (1) even if a prima facie case had been established, the Appellees had put forth a legitimate, non-discriminatory justification for the policy, and (2) the Appellants failed to establish the existence of equally-effective means that would have had less of a disparate impact. *Id.*

[39] *Id.* at 476. Judge Blake's dissent noted that the consent forms that the Appellants signed for the urinalysis "did not advise them that their drug test results would be disclosed to the police." *Id.* at 486.

[40] *Id.* at 475.

[41] *Id.* at 476.

[42] *Ferguson*, 186 F.3d at 476.

[43] 469 U.S. 325, 352 (1985) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers") (Blackmun, J., concurring). Judge Blackmun was the first to mention the consideration of "special needs." *See* Slobogin, *supra* note 17, at 25 (noting that the "special need" language was first enunciated in Judge Blackmun's concurring opinion in *New Jersey v. T.L.O.*). The Court has since used Judge Blackmun's terminology to apply the first step in the special needs analysis: the identification of the "special need." Buffaloe, *supra* note 17, at 538. *T.L.O.* has, therefore, come to be cited for the origin of the special needs exception. *See id.*

cipal's inspection of a high school freshman student's purse after the student was caught smoking in the school lavatory.[44] The Court determined that the search was reasonable[45] in light of the school's legitimate interest in maintaining its learning environment[46] and the vice principal's reasonable suspicion that the student was carrying cigarettes.[47] The Court noted that requiring a warrant in such a situation would unduly interfere with the "swift and informal disciplinary procedures needed in the schools."[48]

---

[44] *T.L.O.*, 469 U.S. at 328-29. The student had denied the accusation, whereupon the vice principle began to search the contents of her purse. *Id.* He then found cigarettes, as well as cigarette rolling paper, an item he believed to indicate marijuana use. *Id.* The vice principal further searched the student's purse and identified additional evidence of drug use, including a small amount of marijuana and notes that indicated the student was a drug dealer. *Id.* The vice principle then notified the student's mother and the police. *Id.*

[45] The Court explained that the Fourth Amendment's fundamental command is that a search be "reasonable." *Id.* at 341. The Court further noted that, although the existence of a warrant/probable cause bears on a search's reasonableness, it is not an irreducible requirement of the Fourth Amendment. *Id.* "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *Id.*

[46] The Court analyzed the school's interest in maintaining order in the classroom, finding that it was substantial and deserved flexibility. *Id.* at 339. The Court did acknowledge, however, that the search of a student's closed purse was "undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337-38.

[47] In countering the conclusions of the New Jersey Supreme Court, the United States Supreme Court found that the vice principal's search was based on reasonable suspicion. *Id.* at 344-346. The Court explained that the finding of cigarettes was relevant to the corroboration of the report that the student had been smoking, especially after the student denied that she smoked at all. *Id.* at 345. The Court further concluded that the continuation of the search for marijuana paraphernalia was based on the vice principle's unintended discovery of cigarette papers, which gave him reasonable suspicion that the student was involved in drugs. *Id.* at 345-46. The Court expounded "the requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty is the touchstone of reasonableness under the Fourth Amendment. . . .'" *Id.* (citing Hill v. California, 401 U.S. 797, 804 (1971)).

[48] *Id.* at 340. The Supreme Court applied the *T.L.O.* analysis in two subsequent cases: O'Connor v. Ortega, 480 U.S. 709 (1987), and Griffin v. Wisconsin, 483 U.S. 868 (1987). *See* STEPHEN A. SALTZBURG AND DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY (5th ed. 1996) 312 (noting that the *T.L.O.* analysis was employed in *O'Connor* and *Ortega*); Buffaloe, *supra* note 17, at 538 (commenting that the "first evocation" of the *T.L.O.* special needs terminology was in *O'Connor*). In *O'Connor*, the Court analyzed a state hospital's search of a suspended doctor's office and determined that the probable cause requirement was impracticable for "legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct." *O'Connor*, 480 U.S. at 725. In light of the government's interest in the "efficient and proper operation of the workplace," the Court con-

The Supreme Court applied the "special needs" analysis to two companion cases involving drug-testing: *Skinner v. Railway Labor Executives' Ass'n*, [49] and *Nat'l Treasury Employees Union v. Von Raab*.[50] *Skinner* involved the Federal Railroad Safety Act of 1970 (FRA) and the regulations prescribed pursuant to the FRA, which mandated blood and urine tests of employees involved in train accidents.[51] The Court engaged in a balancing inquiry to determine whether the government need justified the privacy intrusions, which were performed without a warrant or individualized suspicion.[52] The Court expressed that the "special

---

cluded that the hospital must be given "wide latitude to enter employee offices for work-related, noninvestigatory reasons" and, therefore, such a search should be analyzed in terms of reasonableness under the totality of the circumstances. *Id.* at 723.

Griffin involved the warrantless search of a probationer's home by probation officers pursuant to a Wisconsin statute that only required "reasonable grounds" to conduct such a search. *Griffin*, 483 U.S. at 870-71. The Court decided that the Wisconsin statute was valid because the "special needs" of the government in supervising probationers would be unduly hindered by requiring a warrant and/or probable cause. *Id.* at 877-880. Therefore, the Court determined that the search, which was conducted pursuant to the valid statute, was reasonable in terms of the Fourth Amendment. *Id.* at 880.

[49] 489 U.S. 602 (1989)

[50] 489 U.S. 656 (1989)

It has been commented that *Skinner* and *Von Raab* mark a crucial point in the line of special needs cases because in both cases the Court did not require individualized suspicion in order for the search to be deemed reasonable. *See* Buffaloe, *supra* note 17, at 539.

[51] *Skinner*, 489 U.S. at 606. The Court confidently concluded that such testing constituted a "search" under the Fourth Amendment. *Id.* at 617.

The Court also considered FRA regulations that authorized, but did not require, the administering of breath and urine tests to employees who violated certain safety codes. *Id.* at 606. Since the "mandatory" regulations (Subpart C) compelled action, the Court found that they were subject to the mandates of the Fourth Amendment. *Id.* at 614. The "permissive" regulations (Subpart D), however, were also found to be controlled by the Fourth Amendment due to evidence that the Government meant for the regulations to be more than "passive." *Id.* at 614-15 ("The Government has removed all legal barriers to the testing authorized by Subpart D, and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions").

[52] *Id.* at 621. The Court looked toward the analysis in *Griffin* and *T.L.O.*, which prescribes that the Court balance "the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context" where special needs are presented. *Id.* at 619.

need" of the government was the interest in controlling the conduct of railroad employees to ensure safety[53] and determined that the privacy intrusions under the FRA were limited.[54] The Court found that a warrant would do little to further the specific aims of the warrant requirement[55] and concluded that requiring probable cause would "seriously impede" the Government interest.[56] Therefore, the Court decided that the regulations were reasonable for purposes of the Fourth Amendment.[57]

Nat'l Treasury Employees Union v. Von Raab *involved a policy of the United States Customs Service, which made drug tests a condition to employment and*

---

[53] *Id.* at 620. The Court expressed that the railroad employees covered by the FRA engaged in "safety-sensitive" tasks. *Id.* at 620. The Court further noted that "[t]he FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" *Id.* at 620-21 (citing 49 C.F.R. § 219.1(a) (1987)).

[54] *Id.* at 625. Ultimately, the Court determined that the invasion caused by the FRA testing was minimal due to the employment context in which they were performed, finding that an employee's expectations of privacy are reduced because the industry itself is pervasively regulated to ensure safety. *Id.* at 627. The Court, nevertheless, individually addressed the invasiveness of each type of testing. *Id.* at 625-26. The Court first reviewed past decisions regarding blood testing, where such testing was found not to "'constitute an unduly extensive imposition on an individual's privacy and bodily integrity.'" *Id.* at 625 (citing Winston v. Lee, 470 U.S. 753, 762 (1983)). Next, the Court noted that the breath tests authorized by Subpart D are even less intrusive than blood tests and only reveal alcohol level. Finally the Court addressed the urine testing, not finding it to be physically intrusive. *Id.* at 626. The Court expressed that although excretory functions have traditionally been shielded with great privacy, and such privacy concerns can not be deemed minimal, the FRA endeavors to reduce the psychological invasiveness of the testing. *Id.*

[55] The Court explained that the essential purpose of the warrant requirement is (i) to protect against arbitrary intrusions by narrowly limiting an intrusion's scope and objective and (ii) to provide "the detached scrutiny of a neutral magistrate." *Id.* at 621-22. The Court did not find that a warrant would further those aims in the situation at issue: first, the "permissible limits" of the intrusions are narrowly defined and second, the standardized nature of the intrusions provide virtually no facts for a neutral magistrate to evaluate. *Id.* at 622.

[56] The Court noted the "chaotic" scene of a serious rail accident. *Id.* at 631. The Court expressed, "Obtaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident." *Id.*

[57] *Skinner*, 489 U.S. at 634. The Court expounded, "The Government may take all necessary and reasonable regulatory steps to prevent or deter [ ] hazardous conduct, and since the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary, as in the case before us, to examine the body or its fluids to accomplish the regulatory purpose." *Id.* at 633.

placement.[58] *Frequently referring to the Court's decision in* Skinner, *the Court articulated that the Customs Service's interest in deterring drug use among those in "sensitive" positions*[59] *was beyond the normal needs of law enforcement and constituted "special needs."*[60] *The Court proceeded with a balancing inquiry of the privacy and government interests, finding that the nature of the*

---

[58] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 659-60 (1989). The Court noted that the Customs service is a federal agency "responsible for processing persons, carriers, cargo, and mail into the United States, collecting revenue from imports, and enforcing customs and related laws." *Id.* at 659-60. The drug-testing program was to apply to positions with one or more of the following characteristics: (i) "direct involvement in drug interdiction or enforcement of related laws;" (ii) the carrying of firearms; (iii) the handling of classified material. *Id.* at 660-61.

It has been commented that one of the most difficult issues for the Court in *Von Raab* was the absence of any record of a drug abuse problem. SALTZBURG AND CAPRA, *supra* note 48, at 314. This was unlike the circumstances in *Skinner*, where the risks arising from substance abuse and the underlying drug problem among railroad employees was well substantiated. *Id.* One of the primary arguments against the testing policy in *Von Raab* was that suspicionless drug-testing must be found unreasonable unless it is "responsive to and effective against a documented drug problem." *Id.* at 314-15.

[59] The Court explained that Customs Service employees are often exposed to drug traffickers' "seemingly inexhaustible repertoire of deceptive practices and elaborate schemes for importing narcotics" and are very vulnerable to violence. *Id.* at 669 ("'Customs officers have been shot, stabbed, run over, dragged by automobiles, and assaulted with blunt objects while performing their duties.'") (citation omitted). Thus, as the Court found readily apparent, "the Government has a compelling interest in ensuring that frontline interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 670.

The Court also found the same concerns to apply to those who must carry firearms, even if they are not directly involved with the interdiction of drugs, due to the disaster that can result from "a momentary lapse of attention." *Id.* at 670.

[60] *Id.* at 665-66. The Court articulated the special needs exception: "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.* at 665 (citing *Von Raab*, 489 U.S. at 619-20).

The Court concluded that the Government's purpose in its drug-testing program was beyond the ordinary needs of law enforcement. *Id.* at 666. The Court determined that the Government's interest in deterring "drug use among those eligible for promotion to sensitive positions within the Service" and in preventing "the promotion of drug users to those positions" constituted a special need that may justify a deviation from the general probable-cause and warrant requirements. *Id.*

"sensitive positions" that tested employees sought resulted in a reduced expectation of privacy.[61] *The Court concluded that the Government's compelling interest in "safeguarding our borders and the public safety" outweighed the employee's reduced expectation of privacy and the suspicionless search was therefore reasonable under the Fourth Amendment.*[62]

The Court further defined the special needs exception in a case involving random drug-testing, *Vernonia School District 47J v. Acton.*[63] In *Vernonia,* school officials instituted a program, which required students to submit to a urinalysis in order to participate in interscholastic athletics.[64] The program was initiated subsequent to an observation of a sharp increase in drug use.[65] The

---

[61] *Id.* at 671. While the Court noted that urine tests might substantially interfere with privacy interests under certain circumstances, the Court concluded that Customs employees had a reduced expectation of privacy due to the nature of the occupation: "Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms." *Id.* at 672.

[62] *Id.* at 677. The Court countered the petitioners' argument that the program was unreasonable due to the absence of any perceived drug problem. *Id.* at 673. The Court articulated the severity and extent of the societal drug problem and made the following conclusion:

In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.

The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. . .The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.

Id. at 674-75.

[63] 515 U.S. 646 (1995).

[64] *Id.* at 650. The students were required to sign, and have their parents sign, a consent form for the urinalysis. *Id.* The athletes were tested at the beginning of the playing season and 10% of the athletes were tested randomly each week. *Id.* The samples, which were sent to an independent laboratory, were routinely tested for amphetamines, cocaine and marijuana. *Id.*

[65] *Id.* at 649. School teachers and administrators were concerned with drug use in general, but were particularly concerned with the student athletes' prevalent use of drugs due to the increased risk of "sports-related injury." *Id.*

Court found the special needs analysis to be applicable and utilized a balancing inquiry, similar to that adopted in previous cases.[66] This time, however, the Court more clearly defined the stages of the inquiry.[67] The Court first considered the nature of the privacy interest, finding that students, especially student athletes, have a diminished expectation of privacy.[68] The Court then considered the "character of the intrusion," finding that the extent of invasion was negligible.[69] The Court next analyzed the "nature and immediacy" of the Government

---

[66] *Id.* at 653-665. The Court once again articulated, "A search unsupported by probable cause can be constitutional, we have said, 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Id.* at 653 (citing Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)). The Court explained that such special needs have been found to be present in the public school context, where the warrant requirement would "unduly interfere" with and undercut the school's substantial interest in maintaining order. *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 340, 341(1985)); *see also* Buffaloe, *supra* note 17, at 560 (noting that the *Vernonia* Court "did not attempt to demonstrate that a testing regime based on suspicion would be unworkable, only that it would be less desirable"). It has been suggested that the *Vernonia* Court "skipped" to the special needs inquiry without really explaining why the analysis was appropriate. Joy L. Ames, Note, Chandler v. Miller: *Redefining "Special Needs" for Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273, 281 n.50 (1997)

[67] *Vernonia*, 515 U.S. at 653-655 (articulating the "first," second," and "third" factors to be considered in the balancing inquiry).

[68] *Id.* at 654-657. The Court explained: "Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination. . .They are subject, even as to their physical freedom, to the control of their parents or guardians." *Id.* at 654. The Court noted that while in *T.L.O* it rejected the notion that schools were not subject to constitutional restraints because they exercise "parental" control over children, *T.L.O.* also emphasized "that the nature of [the school's power over children] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 655. The Court therefore concluded that students in the school environment have a lesser expectation of privacy than those in the general population. *Id.* at 656-57 (citing *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)).

The Court determined that student athletes had even less privacy expectations due to the nature of the activities that athletes must take part in: "School sports are not for the bashful. *Id.* at 657. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." *Id.*

[69] *Id.* at 658-660. While the Court noted that a urinalysis invades upon an "excretory function" traditionally protected with substantial privacy, the circumstances in which the test was performed in this situation caused the invasion to be negligible. *Id.* at 658. The Court explained that the circumstances under which the test was performed were very similar the experience in a public restroom: "male students produce samples at a urinal along a wall. *Id.* They remain fully clothed and are only observed from behind, if at all. *Id.* Female students produce samples in a enclosed stall, with a female monitor standing outside listening only for

concern,[70] as well as the efficacy of the Government's means in addressing the perceived problem.[71] The Court determined that the Government interest was, no doubt, important, if not compelling.[72] The Court also concluded that the program, which employs the "role model" effect by making an example of athletes' drug use in order to deter further drug abuse, effectively addressed the Government concern.[73] In balancing all the above factors, the Court found the program to be reasonable under the Fourth Amendment.[74]

With this line of cases, the Supreme Court had arguably created a substantial exception to the warrant requirement.[75] The Court, however, declined to extend the exception to fit the circumstances of one of its most recent "special needs"

---

sounds of tampering." *Id.* The Court also determined that privacy invaded by the information the urinalysis would disclose was not substantial due to the limited aspect of the testing, which was for drugs only, and the fact that the screenings would not vary according to the student's identity. *Id.*

[70] *Id.* at 660-661. The Court warned:

It is a mistake. . .to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *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.

Id. at 661.

[71] *Id.* at 663-64.

[72] *Id.* at 661. The Court determined that the nature of the Government concern was at least important, if not compelling. *Id.* The Court emphasized that the effects of drug use are most severe during school years and that student drug use affects the entire student body and faculty, as opposed to just the user. *Id.* at 661-62. Finally, the Court noted that the program is narrowly directed toward student athlete drug use where the risk of immediate injury to the drug user and other players is particularly high. *Id.* at 662.

[73] *Id.* at 663. The Court did not accept the argument that the means employed were unreasonable because a less intrusive method could have been employed, such as testing only upon suspicion. *Id.* The Court noted that the Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Id.*

[74] *Id.* at 664-65.

[75] *See supra* note 17 (discussing the breadth of the special needs exception).

cases, *Chandler v. Miller*.[76] *Chandler* involved the requirement of candidates for certain state offices to certify that they had taken a urinalysis drug test for which the result was negative.[77] The proffered "special need" was that "the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials." [78] While, again, the Court found the urinalysis itself to be relatively non-invasive,[79] the Court did not find the government interest to be substantial enough to override the individual's privacy interest.[80] The Court explained that there was no evidence that the concerns, which the Government asserted, were more than hypothetical.[81] The Court also doubted the efficacy of the testing, noting that the policy was not well designed to identify those who violate drug laws.[82] Additionally, the Court explained that it was not presented with any reasons why ordinary law enforcement measures would be insufficient to address the dangers

---

[76] 520 U.S. 305 (1997). *Chandler* marks an important point in special needs jurisprudence in that it was the first time that the Court concluded that the government interests did not override the individual's privacy rights. Buffaloe, *supra* note 17, at 564 n.*.

[77] *Id.* at 308-09. The certification had to be approved by the Secretary of State, who would report that the that the test had been performed within thirty days prior to candidate's qualification for nomination and that the results were negative. *Id.*

[78] *Id.* at 318.

[79] *Id.* The Court discussed the Eleventh Circuit's analysis of the drug tests. *Id.* at 312. The Appellate Court emphasized that the candidate's personal physician could conduct the urinalysis. *Id.* (citing *Miller v. Chandler*, 73 F. 3d 1543, 1547 (1996)). Among other considerations, the Eleventh Circuit noted that the tests would only reveal the use of particular drugs, and not any other information regarding the candidate's health. *Id.*

[80] *Id.* at 318-19. The Court explained that "the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. . .Georgia has failed to show. . .a special need of that kind." *Id.* at 318. This requirement for a showing of an actual special need can be regarded as a "threshold" inquiry, one that transforms the "special need" from a simple label to a judicial standard. Ames, *supra* note 66, at 288.

[81] *Id.* at 319-20. As the Court stated, "[t]he statute was not enacted, as counsel for respondents readily acknowledged at oral argument, in response to any fear or suspicion of drug use by state officials. . . ." *Id.* at 319.

[82] *Chandler*, 520 U.S. at 319-20. The Court did not find the testing to deter drug use because candidates could simply abstain from drug use thirty days prior to the tests. *Id.*

the Government described.[83] Noting that elected officials do not typically perform "high-risk, safety sensitive tasks," the Court concluded that the need was "symbolic," and not "special." [84]

IV. *FERGUSON V. CITY OF CHARLESTON*: URINALYSIS DRUG SCREENINGS PERFORMED BY STATE HOSPITAL CONSTITUTTE "SPECIAL NEEDS" SEARCHES

In the recent decision of *Ferguson v. City of Charleston,* [85] the Fourth Circuit analyzed the warrantless drug screening policy conducted by the Medical University of South Carolina (MUSC).[86] Judge Wilkins, writing for the majority, held that the policy was permissible under the special needs exception to the warrant requirement.[87] The judge first explained the development and the particulars of the policy.[88] The court then analyzed the guiding precedent in the area of warrantless, special needs searches.[89]

Judge Wilkins briefly discussed the history and purpose of the Fourth Amendment.[90] The judge noted that a search performed without a warrant is *per se* unreasonable unless it falls into a limited exception to the warrant requirement.[91] The court then proceeded to discuss the special needs exception.[92]

---

[83] *Id.* at 320.

[84] *Id.* at 321-22. It has been suggested that *Chandler* Court presented a more exacting special needs inquiry than it had in prior cases. Post, *supra* note 17, at 1162.

[85] 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1239 (Feb. 28, 2000) (No. 99-936).

[86] *Id.*

[87] *Id.* at 474.

[88] *Id.* at 473-76.

[89] *Id.* at 476-77.

[90] *Id.* at 476.

[91] *Ferguson*, 186 F.3d.at 476.

[92] *Id.* at 476. The court noted that the parties had evidently agreed throughout the litigation that MUSC was a state hospital and thus MUSC employees were state actors. *Id.* at 477. In addition, as the Judge Wilkins noted, the district court made a factual finding that the urine tests were done in the course of medical examinations, independent of an intent to supply the results to law enforcement. *Id.*

Judge Wilkins explained that under the particular exception, the court must balance the following factors in a context-specific inquiry: (i) the government's interest, (ii) the extent to which the government interest is advanced by the intrusion, or the effectiveness of the intrusion, and (iii) and the degree of the intrusion, from both an objective and subjective perspective.[93] The judge then analyzed the MUSC policy with respect to each of these factors.[94]

The court decided that MUSC had a substantial interest in "taking steps" to decrease cocaine use by pregnant women in light of the resulting health hazards and public expense.[95] With respect to the effectiveness of the MUSC procedures, the judge asserted that there was little doubt that the prenatal testing was effective.[96] Judge Wilkins explained that in reviewing the effectiveness factor, the court should not interfere with the government's decision to employ a certain technique among reasonable alternatives, in light of the government's "unique understanding" and responsibility with respect to limited public resources. [97] The court expressed that prenatal testing was the "only effective means available" to dissuade pregnant women from cocaine use.[98]

The court dismissed the Plaintiff's arguments that the policy was both underinclusive and overinclusive.[99] The judge reasoned that the fact that other drugs such as alcohol and nicotine, which pose risks to unborn fetuses, were not addressed fails because it only questions the wisdom of the policy.[100] The judge further concluded that the fact that certain criteria, such as inadequate prenatal care, may be more accurately related to poverty than to cocaine use did not have

---

[93] *Id.* at 476 (citing Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990)).

[94] *Id.* at 476.

[95] *Id.* at 478. The court related that the pregnancy complications resulting from cocaine use include "low birth weight, premature labor, birth defects, and neurobehavioral problems." *Id.* The court also noted that the costs related to the care of infants who have been exposed to cocaine *in utero* might have exceeded three billion dollars nationwide as of the late 1980's. *Id.*

[96] *Id.* The court noted that the "effectiveness" of a search is "the degree to which [it] advances the public interest." *Id.* (citing *Sitz*, 496 U.S. at 453).

[97] *Ferguson*, 186 F.3d at 478 (citing *Sitz*, 496 U.S. at 453-54).

[98] *Id.* at 478.

[99] *Id.* at 478.

[100] *Id.* at 478.

any bearing on the "effectiveness" of the policy.[101]

Judge Wilkins then decided that the degree of intrusion resulting from the policy was minimal.[102] The judge determined that, although courts have held that urine testing does not result in "minimal" implications to privacy interests, the context of the situation caused MUSC's urine testing to be distinguishable.[103] First, from an objective perspective, the court observed that the tests were done as part of a routine medical examination.[104] Second, from a subjective standpoint, the court commented that the treating physician did not have discretion to decline to order the tests when at least one of the listed triggering criteria was present.[105] The Court therefore found that the policy was neutral in its administration.[106] Based on these conclusions, Judge Wilkins determined that the intrusions the Appellants suffered were not substantial.[107] In sum, the court found that, in balancing all the factors, the performed searches were reasonable and did not violate the Fourth Amendment.[108]

---

[101] *Id.* at 478.

[102] *Id.* at 479.

[103] *Ferguson*, 186 F.3d at 479.

[104] *Id.* at 479.

[105] *Id.* at 479.

[106] *Id.* at 479.

[107] *Id.* at 479.

[108] *Id.* at 479. The court proceeded to discuss the Appellants Title VI claims for disparate impact. *Id.* 479-482. The Appellants maintained that the MUSC policy had a disproportionate effect on African-Americans because of the following circumstances: (1) the policy was only in effect at MUSC; (2) the policy was only practiced in certain MUSC departments; (3) the policy concerned cocaine use only. *Id.* at 480. In addition, it was asserted that the factors used as "indicia" of cocaine use disproportionately affected African-Americans. *Id.* The court declined to consider Appellant's first point because there was no evidence suggesting that MUSC could have forced other hospitals to participate in the program. *Id.* Thus, the judge concluded that this factor did not demonstrate that there was a less discriminatory, viable option. *Id.*

The court then discussed the Appellant's third point. *Id.* While Judge Wilkins noted that the statistical evidence was adequate to establish a prima facie case of disparate impact (90 percent of the women who tested positive for cocaine use were African-American), the judge determined that the Appellants did not demonstrate the availability of reasonable alternatives in order to lessen the discriminatory impact. *Id.* at 481-82. First Judge Wilkins noted that MUSC had justified its decision to target cocaine with an articulation of "legitimate, non-

Judge Blake wrote a separate opinion dissenting in part.[109] The judge did not agree with the majority that MUSC's warrantless urine testing fell under the "special needs" exception to the warrant requirement, and therefore would have reversed the judgment as to the Fourth Amendment claim.[110]

The judge began by providing additional factual background concerning the focus of the policy.[111] The judge asserted that the "initial and continuous focus" of MUSC's policy was the arrest and prosecution of pregnant mothers, either before or after they gave birth.[112] Judge Blake cited examples of evidence within the record to support this contention, such as a letter between MUSC General Council and the Charleston City Solicitor.[113] The judge also listed the individual

---

discriminatory" reasons, which Appellants did not refute. *Id.* at 481. Second, the court did not accept the Appellants suggestions for reasonable alternatives, which included the (1) reporting the use of all illegal drugs, including alcohol, and (2) testing all pregnancy patients. *Id.* The judge expressed that there was a district court finding concerning the prohibitive expense of those alternatives, which the Appellants had not challenged on the grounds of clear error. *Id.* at 481-82. As a result, the court did not find that the Appellants made a showing of reasonable, less discriminatory means of accomplishing the goals of the MUSC policy. *Id.* at 482.

Judge Wilkins next addressed the Appellants additional claims regarding the violation of the constitutional right to privacy and the state-law tort of abuse of process. *Id.* at 482-83. The court noted that there is no comprehensive recognition of a right to privacy of medical records. *Id.* The judge declined to consider the issue, however, because even if such a right was acknowledged, it was outweighed by the government interest in disclosure. *Id.* at 483. Finally, the court rejected Appellants' abuse of process claim, finding that the Appellees had not acted in a manner not authorized by the process. *Id.* The court stated, "That maternity patients who tested positive for cocaine use could avoid criminal prosecution by obtaining treatment does not render the implementation of the policy abusive." *Id.*

[109] *Ferguson*, 186 F.3d at 484 (Blake, J., dissenting in part).

[110] *Id.* 484. In addition, Judge Blake did not agree with the majority that the Appellants failed to demonstrate a less discriminatory alternative to the policy, and therefore, would have reversed the ruling on the Title VI claim of disparate impact. *Id.*

[111] *Id.* at 484-86 (Blake, J., dissenting in part).

[112] *Id.* at 484 (Blake, J., dissenting in part).

[113] *Id.* at 484. The letter 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

factual circumstances under which each of the Appellants was subjected to the policy.[114]

Judge Blake first addressed the precedent regarding the special needs exception.[115] The judge asserted that the exception can not be applied in a case where the warrantless search is to be used for the purpose of law enforcement.[116] The judge noted that, with the exception of the sobriety checkpoint and probation cases, *Sitz* and *Griffin,* the majority failed to cite to cases where the results of the search were to be used in criminal prosecution.[117] Furthermore, Judge Blake distinguished *Sitz* and *Griffin.*[118] The judge explained that *Sitz* involved the analysis of the initial stop and associated preliminary questioning during a sobriety checkpoint, which the court deemed a "slight" intrusion and where the court specifically noted that more extensive field sobriety tests may require a standard of individualized suspicion.[119] The judge also distinguished *Griffin* on the grounds that it narrowly applied to the state's strong interest in the supervision of probation, which is a form of criminal sanction and only exercised subsequent to a finding of guilt.[120] Judge Blake emphasized the *Griffin* Court's finding of the

---

Medical Center needs to do to assist you in this matter.

Id. (citation omitted).

[114] *Id.* at 485-86 (Blake, J., dissenting in part); *see also supra* note 34 (providing Judge Blake's detailed description of Appellants). Judge Blake emphasized that the consent forms that the Appellants signed did not inform them as to the possibility of their medical records being disclosed to the police. *Id.* at 486 (Blake, J., dissenting in part).

[115] *Ferguson*, 186 F.3d at 486 (Blake, J., dissenting in part).

[116] *Id.* at 486. Judge Blake, quoting *Chandler v. Miller*, stated the following:

When such "special needs –concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.

Id. at 486 (citing Chandler v. Miller, 520 U.S. 305, 314 (1997)); *see also id.* at 477 n.7 (refuting the claims of the dissent regarding the inapplicability of the special needs exception).

[117] *Id.* at 487 (Blake, J., dissenting in part).

[118] *Id.*

[119] *Id.*

[120] *Id.*

probable unconstitutionality of such a process "if applied to the public at large."[121]

Judge Blake concluded that *Sitz* and *Griffin* could not be read so broadly so as to employ the special needs exception in the current situation.[122] The judge remarked that in all previous special needs cases, criminal prosecution was at most an "incidental possibility" and not a direct consequence of the warrantless search.[123] Accordingly, Judge Blake did not believe that the special needs exception could be applied where, as in the case of MUSC, the warrantless search was intended, from its inception, to directly result in an arrest and potential prosecution.[124]

Even if the special needs exception applied as the majority held, however, Judge Blake found that the MUSC policy failed in terms of effectiveness.[125] Assuming that the government's interest in preventing cocaine use by pregnant mothers was substantial, the judge did not find the policy to advance the public interest because of the timing of the government intervention.[126] The judge explained that seven out of the nine Appellants were arrested subsequent to giving birth, after any possible adverse effects to the fetus had already occurred.[127] Judge Blake also disagreed with the majority in reasoning that the intrusion was "minimal," noting that, unlike in the case of *Von Raab*, the MUSC test results were reported to law enforcement having no medical reason to receive the information.[128] Consequently, Judge Blake found that the warrantless search violated the Fourth Amendment.[129]

---

[121] *Ferguson*, 186 F.3d at 487 (Blake, J., dissenting in part).

[122] *Id.*

[123] *Id.* at 488 (Blake, J., dissenting in part).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Ferguson*, 186 F.3d at 488 (Blake, J., dissenting in part).

[128] *Id.*

[129] *Id.* Judge Blake also disagreed with the trial court's decision denying the motion for judgment under Fed. R. Civ. P. 50(b), finding that the jury's verdict regarding the lack of informed consent was not supported by the evidence. *Id.* at 488-89 (Blake, J., dissenting in part).

The judge then refuted the majority's findings with regard to the Appellant's Title VI claims.

V. CONCLUSION

As stated previously, the United States Supreme Court granted certification in the case of *Ferguson v. City of Charleston*,[130] and on October 4, 2000, arguments were heard.[131] There is extensive support on the side of Petitioners: amicus briefs were filed by The American Public Health Association,[132] The American Civil Liberties Union,[133] The NARAL Foundation,[134] and The American Medical Association.[135] This is not surprising due to the questionable nature of the

---

Id. at 489 (Blake, J., dissenting in part). The judge asserted that the Appellants had articulated reasonable, less discriminatory alternatives. *Id.* Judge Blake explained that since the conducted urine tests contained results as to all illegal drugs, there would be no additional cost in testing for other drugs. *Id.* The judge stated that the district court's finding of the "prohibitive expense" was not supported by the record. *Id.* Judge Blake further concluded that the majority's interpretation of the extent of the district court's finding was erroneous, noting that the district court only addressed the cost of testing, and not the tracking or reporting of the testing. *Id.* Consequently, Judge Blake found that Appellant's met their burden and would, accordingly, reverse the court's judgment as to the Title VI claims. *Id.*

[130] 120 S. Ct. 1239 (2000) (Feb. 28, 2000) (No. 99-936).

[131] Greenhouse, *supra* note 4, at A26.

[132] Joined by the American Public Health Association were the South Carolina Medical Association, American College of Obstetricians and Gynecologists, and American Nurses Association. Brief of Amici Curiae American Public Health Association, et al., Ferguson v. City of Charleston, 120 S. Ct. 1239 (2000) (Feb. 28, 2000) (No. 99-936).

[133] Joined by the American Civil Liberties Union were NOW Legal Defense and Education Fund, National Organization for Women Foundation, Inc., African-American Women Evolving, Americans for Democratic Action, Inc., Center for Constitutional Rights, Center for Women Policy Studies, Chicago Abortion Fund, Choice, Connecticut Women's Education and Legal Fund, Hawaii State Coalition Against Domestic Violence, Hawaii Women Lawyers, Iowa Coalition Against Domestic Violence, Medical Students For Choice, National Association of Women Lawyers, National Center for Pro-Choice Majority, National Network of Abortion Funds, National Society of Genetic Counselors, Northwest Women's Law Center, South Carolina Coalition Against Domestic Violence and Sexual Assault, South Dakota Coalition Against Domestic Violence and Sexual Assault, Women's Law Center of Maryland, Inc., and Wider Opportunities for Women. Brief of Amici Curiae American Civil Liberties Union, et al., Ferguson v. City of Charleston, 120 S. Ct. 1239 (2000) (Feb. 28, 2000) (No. 99-936).

[134] Brief of Amici Curiae NARAL Foundation, et al., Ferguson v. City of Charleston, 120 S. Ct. 1239 (2000) (Feb. 28, 2000) (No. 99-936).

[135] Although the American Medical Association filed an amicus curiae brief is support of neither party, its arguments questioned the decision of the Fourth Circuit. Brief of Amici Curiae American Medical Association, Ferguson v. City of Charleston, 120 S. Ct. 1239 (2000)

Fourth Circuit's decision.

The Fourth Circuit failed to consider several points.[136] In evaluating the individual privacy interest at stake, the court only analyzed the physical invasion of the test.[137] This seemed to go against clear precedent that established a much broader inquiry through an analysis of both the "nature of the privacy interest" and the "character of the intrusion."[138] *Vernonia* demonstrated the factors to be considered in a special needs analysis.[139] The first factor is the "nature of the privacy interest."[140] In *Vernonia*, this entailed a thorough analysis of the privacy expectations of children in the school environment.[141] The Supreme Court then discussed the "character of the intrusion," which involved an inquiry into the physical invasion, or the collection and testing of urine, and the other "privacy-invasive aspect" of a urinalysis: the information the test discloses.[142]

The *Ferguson* court did not analyze the MUSC patient's privacy interests in this manner.[143] Not only did the Fourth Circuit leave the analysis of the "degree of intrusion" for last,[144] the court completely avoided a more complete analysis of the nature of the privacy interest by entirely focusing on the physical test,[145]

(Feb. 28, 2000) (No. 99-936).

[136] While there are many arguments against the Fourth Circuit's decision, this conclusion will be addressing the health/public policy-type concerns that the court failed to consider.

[137] Ferguson v. City of Charleston, 186 F. 3d 469, 477-78 (1999), *cert. granted* 120 S. Ct. 1239 (2000) (Feb. 28, 2000) (No. 99-936). *See supra* notes 102-104 and accompanying text.

[138] Vernonia School District 47J v. Acton, 515 U.S. 646, 654-60 (1995).

[139] *Id.*

[140] *Id.* at 654.

[141] *Id.* at 654-58.

[142] *Id.* at 658-60.

[143] It should be noted that the Fourth Circuit cited *Sitz*, a highway checkpoint case, for its analysis, as opposed to *Vernonia*, which was decided more recently and seems to be more on-point in terms of special needs jurisprudence. *See, e.g.*, Chandler v. Miller, 520 U.S. 305, 314 (1997) (describing *Skinner*, *Von Raab*, and *Vernonia* as the "precedents most immediately in point").

[144] *Ferguson*, 186 F.3d at 479.

[145] *Id.* at 479. The Fourth Circuit only considered the objective and subjective physical

or as *Vernonia* termed it, the "character of the intrusion."[146] Furthermore, the Fourth Circuit did not discuss the privacy-invasive aspect of the information the urinalysis discloses, and thus did not give a thorough evaluation of the character of the intrusion.

One of the points the Fourth Circuit made was that a urinalysis is not "invasive" when performed during the course of a medical exam.[147] The court, however, completely disregarded the entire context in which the test was performed by overlooking the increased privacy interests of a patient who obtains medical services at a hospital. Extremely personal and private test results were turned over to police by the very people patients trust not to divulge personal medical information. The court made no mention of the physician-patient privilege or a

---

intrusion of the test. *Id.* The Court discussed the test's minimal "duration and intensity" for the objective analysis, and the physician's lack of discretion in ordering the urinalysis for the subjective analysis. *Id.* The court defined the subjective level of intrusion as "the extent to which the method chosen minimizes or enhances fear and surprise on the part of those searched or detained." *Id.* While psychological effects seem to be included in the subjective analysis, the court only considered the "fear" or "surprise" resulting from the actual urinalysis. *Id.* This mischaracterizes what the intrusion was. The search did not only occur when the urinalysis was performed: the search was also the act of giving confidential information to the police, who would normally not have a right to the information without a warrant. This situation seems to be unique, in that it is not the search, or urinalysis, itself that constitutes the ultimate breach of privacy. This is because the patients did not realize or expect that their confidential records would be placed into the hands of anyone other than their doctors and for any other reason than to diagnose and/or treat. It is only after the test was performed, and the patient is made aware that law enforcement was given the information, that the psychological effects of the intrusion take place. The Fourth Circuit took a very narrow and limited view of the intrusion, and thus, disregarded these key issues.

[146] Vernonia School District 47J v. Acton, 515 U.S. 646, 658 (1995).

[147] *Ferguson*, 186 F.3d at 479. It might be true that the physical invasion is minimal because a urinalysis is a common test performed during the course of medical treatment. For example, the same might be said for a routine checkup, where clothing may have to be removed. A person expects these procedures to occur when a patient forms a contract with a physician to provide medical care for the purposes of diagnosis and treatment. It is interesting, however, that the court used this fact to present the intrusion in a "minimal" light. It is the fact that the patient did *not* expect her medical information to be used in the way that is was that causes the intrusion to be offensive and much more than minimal. It is what happened after the urinalysis that extended the intrusion beyond that of the physical test. *See* Brief of Amici Curiae American Public Health Association at 26, *supra* note 132 ("There is a fundamental difference between a patient's allowing a single doctor or nurse to perform an examination or conduct a test in connection with medical treatment, and having the same procedure conducted or observed, or test results known, by police, prosecutors, and a multitude of others."). Again, this displays the Fourth Circuit's misleading and narrow view of the intrusion. *See supra* note right above.

breach of patient confidentiality[148] when analyzing the intrusion.[149] The court did not analyze the patients' "expectation of privacy," which appears to be a crucial step in the special needs exception inquiry.[150] By doing so, the court ignored hundreds of years of medical ethics and one of the principal foundations of the medical profession.[151] In turn, the court disregarded Supreme Court precedent by failing to consider these types of factors within the "nature of the privacy interest" stage of the special needs exception analysis.[152]

In upholding MUSC's policy, the Fourth Circuit overlooked the practical ef-

---

[148] Maintaining patient confidentiality is recognized as one of the most important obligations of medical professional. BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS, 380 (1997). Approximately forty-three states have recognized a physician-patient privilege by statute. *Id.* at 381. Although the physician-patient privilege represents a testimonial privilege and not a general obligation to preserve confidentiality, *id.* at 380, states' general recognition of the privilege represents the acknowledgment of the importance of maintaining patient confidences.

[149] The court did discuss a patient's right to privacy with regard to medical records, but this short analysis was not employed for the special needs portion of the decision, rather it was done in order to evaluate the patients' separate claim for a violation of their constitutional right to privacy. *Ferguson*, 186 F. 3d at 482-83.

[150] Chandler v. Miller, 520 U.S. 305, 314-316 (1997) (discussing the key elements of previous decisions in *Skinner*, *Von Raab*, and *Vernonia*, one of them being the finding of a diminished expectation of privacy); Vernonia School District 47J v. Acton, 515 U.S. 646, 654-58 (1995) (analyzing the expectation of privacy in order to consider the "nature of the privacy interest" at issue); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 671 (1989) ("We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty. . .have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test."); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627 (1989) (noting subsequent to an analysis of the physical privacy invasive aspects of a urinalysis: "More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.").

[151] The Hippocratic Oath states: "Whatever, in connection with my professional practice, or not in connection with it, I may see or hear in the lives of men which ought not to be spoken abroad I will not divulge, as reckoning that all such should be kept secret." OATH OF HIPPOCRATES, *reprinted in* JAY KATZ, EXPERIMENTATION WITH HUMAN BEINGS 311 (1972).

[152] It can also be argued that the Fourth Circuit simply did not adequately perform the "context-specific" inquiry that Supreme Court precedent requires. *See Chandler*, 520 U.S. 305, 314 (1997). As the Court stated, "When. . .'special needs' – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a *context-specific inquiry*, examining closely the competing private and public interests advanced by the parties." *Id.* (emphasis added).

fects of the search and did not consider public health concerns. One of the reasons for acknowledging a confidential relationship between the patient and physician is so that patients will feel very comfortable in providing all the information necessary for the doctor to give a full and accurate medical assessment.[153] It is logical that women may be given the disincentive to get prenatal care if a breach of their privacy and medical confidentiality occurs.[154] Women may also not seek post-natal care as a result of their experience at MUSC.[155] This would pose harm to both the mother and child, thus violating the supposed public health purpose of the policy.[156]

The invasion that occurred at MUSC is not simply the invasion of a "private excretory function:" the invasion is one that pervades the patient-physician relationship, for which the effects will likely have an unknown duration.[157] The bottom line is that no person expects the results of his or her medical tests to be released to law enforcement by the very people on which society has bestowed its trust to maintain medical confidentiality. These considerations greatly increase the privacy interest and make the character of the intrusion much more offensive. In all likelihood, the court's acknowledgement of these considerations would have substantially altered the dynamics of the balancing test: the privacy interest is so high in this situation that the government should have had a much stricter burden in order to overcome it.

The Fourth Circuit's decision regarding the effectiveness of the policy is also debatable. As mentioned above, the practical and logical effects of the policy are to give women a disincentive to seek both pre-natal and post-natal care, thus jeopardizing the well being of the mother and child. It can not be said that this is

---

[153] *See* Brief of Amici Curiae American Medical Association at 11, *supra* note 135 (stating that "[m]eaningful medical care depends on a successful physician/patient relationship. . .Without complete faith in the sanctity of discussions with their physicians, patients will be reluctant to disclose potentially incriminating behaviors, even if such disclosures are necessary to receive diagnosis or treatment").

[154] Brief of Amici Curiae American Medical Association at 10-12, *supra* note 135. As the American Medical Association's Amicus Brief stated, "Drug-testing regimens like the Charleston policy drive a wedge between physicians and pregnant patients. Once they know that urinalysis may lead to arrest, pregnant women will be motivated to conceal any drug use, or, more likely, will avoid medical treatment completely." *Id.* at 11-12.

[155] *Id.* at 11-12.

[156] *See id.*

[157] *See id.* at 12 (discussing the far-reaching ramifications of the avoidance of medical treatment for both pre and post-natal care)

"effective" in protecting public health.[158]

In addition, as the dissent noted, the administrators of the policy often "intervened" subsequent to the birth of the child.[159] Late intervention can not be seen as "effective" in terms of a policy's goal to prevent birth defects. Also, many of the "indicia," which determined whether the urinalysis would be administered, were characteristics that would be present only after nothing could be done to protect the fetus, such as intrauterine fetal death and unexplained birth defects.[160] Other indicia were very broad in that they could simply be indications of poverty, as opposed to cocaine use, such as no prenatal care, late prenatal care, and incomplete prenatal care.[161] These facts indicate the more punitive purpose of the policy, as well as the policy's ineffectiveness.[162]

---

[158] *Id.* at 10-11 ("By turning the doctor/patient relationship into a potentially hostile encounter, any possible effectiveness of the drug-testing plan in lost."). *See also* Brief of Amici Curiae American Public Health Association at 23, *supra* note 132 (noting that the consequences of giving the disincentive to seek prenatal care "are calamitous for both mother and fetus, as are the costs of evading detection through dishonesty to a treating physician.").

[159] Ferguson v. City of Charleston, 186 F.3d 469, 488 (1999) (Blake, J., dissenting in part), *cert. granted* 120 S. Ct. 1239 (2000) (Feb. 28, 2000) (No. 99-936) ("It is undisputed that seven of the plaintiffs were arrested after giving birth (indeed, several were taken into custody at the hospital wearing only their hospital gowns), rather than during the prenatal period."); *see supra* note 34 (providing Judge Blake's detailed description of Appellants).

[160] *See Ferguson*, 186 F.3d at 474 (listing the indicia of cocaine use used to determine whether a urinalysis would be performed).

[161] *See* Brief of Amici Curiae American Civil Liberties Union at 6, *supra* note 133 (noting that there was a lack of individualized suspicion and that "a number of the criteria [which determine whether a urinalysis will be administered] are far more indicative of poverty than of cocaine use; poor women often lack ready access to prenatal care and suffer from health and nutritional deficiencies that may have adverse consequences for their pregnancies.").

[162] *Ferguson*, 186 F.3d at 488 (1999) (Blake, J., dissenting in part) ("By [the time the plaintiffs were arrested], any adverse effect of maternal cocaine use on the developing fetus had already occurred, and the arrest could only have had a punitive rather than a preventive purpose."). *See supra* note 34 (providing Judge Blake's detailed description of Appellants).

Another argument against the policy's effectiveness is the existence of scientific evidence that proves that intervention by law enforcement is unproductive. Brief of Amici Curiae American Medical Association at 6-10, *supra* note 135; Brief of Amici Curiae American Public Health Association at 22, *supra* note 132. As the American Medical Association noted,

Addiction is a disease, not a reflection of poor discipline. The hallmark of addiction is an inability to cease drug use, despite the possibility of adverse consequences. Thus, by resorting to arrest as the ultimate enforcement of its policy, Charleston authorities failed to acknowledge an elemental tenet of medical science and endorsed a response to drug abuse that the medical

It is hopeful that the Supreme Court will discuss these flaws. It is also hopeful that the Supreme Court will address some of the more difficult questions regarding the special needs exception, especially whether the exception applies in a situation where law enforcement is involved in the policy formation and execution of a warantless search. Despite the Court's decision regarding these issues, it seems to be clear that the health profession's involvement in this type of policy presents many serious concerns. Perhaps hospitals and physicians should concentrate on providing health care as opposed to being police officers.

---

community has found to be fundamentally flawed.

Brief of Amici Curiae American Medical Association at 6, *supra* note 135; *see also* Brief of Amici Curiae American Public Health Association at 22, *supra* note 132 ("The decision below did not advert to this remarkable scientific and professional consensus that police-centered and prosecution-based approaches cause more harm than good for the children exposed to drugs *in utero*.").