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Ferguson v. City of Charleston, South Carolina: "fetal abuse," drug testing, and the Fourth Amendment.

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INTRODUCTION

In June 1991, Crystal Ferguson was tested for drag use during a routine prenatal checkup at the Medical University of South Carolina (MUSC) in Charleston, South Carolina. She never consented to be tested. Confronted by hospital staff after her drug screen came back positive, Ferguson agreed to attend substance abuse counseling. On August 4, 1991, when she delivered her child at MUSC, hospital staff again tested her without her consent and found traces of cocaine in her bloodstream. She was given an ultimatum: Enter a two-week residential treatment program or face arrest and prosecution. Unable to find childcare for her two older children, she requested a referral to an outpatient treatment program. Her request was rejected and she was arrested on August 7, 1991, for failing to comply with the order to receive drug treatment.

Ferguson was one of forty-two women arrested under a collaborative policy between law enforcement officials in Charleston and MUSC. All but one of the women were black. Her arrest for "fetal abuse" sparked national media attention, copycat prosecutions, and, ultimately, a class action lawsuit challenging the MUSC policy. That case, Ferguson v. City of Charleston, South Carolina,(1) is one of several Fourth Amendment cases before the United States Supreme Court this term. While the lawsuit was initially filed on behalf of Ferguson and one other woman, it eventually grew to include ten female patients arrested at MUSC. Depending on when they were tested, the women were arrested either before or after giving birth. Those who tested positive for cocaine before birth were arrested and sent to jail, brought to MUSC every week for checkups, and, in some cases, chained to their hospital beds during birth.(2) Some of those arrested after birth were dragged away from the delivery room in shackles, still bleeding.(3)

The MUSC policy, developed in 1989, was the brainchild of the then local Charleston solicitor, Charles Condon.(4) Elected Attorney General of South Carolina in 1994, Condon has continued on a statewide basis the "fetal abuse" prosecutions he began locally in Charleston. (5) In October 1993, nearly two years after Ferguson's arrest, the Center for Reproductive Law and Policy (CRLP) in New York filed a class action suit in federal district court in South Carolina against Condon, MUSC, the City of Charleston, and others.(6) The plaintiffs demanded three million dollars in damages for the violation of several constitutional rights, including "the right to privacy in medical information, the right to refuse medical treatment, the right to procreate, and the right to equal protection of the laws regardless of race."(7) The defendants prevailed on these issues in the lower courts. The surviving issue, which the Supreme Court will address this term, is whether the drug tests of Ferguson and her fellow plaintiffs were searches which violated the Fourth Amendment.

It is well established that the collection and testing of blood and/or urine are searches governed by the Fourth Amendment.(8) Traditionally, to be found reasonable under the Fourth Amendment, searches require either a warrant or probable cause. Notably, in none of the forty-two MUSC cases did MUSC obtain a warrant, nor did probable cause exist.(9) Moreover, while consent to a search may cure Fourth Amendment problems, neither Ferguson nor her fellow plaintiffs consented to their drug tests or to the release of the results to law enforcement.(10) Instead, defendants argued that the testing fell within the "special needs" exception to normal Fourth Amendment requirements. Pursuant to this exception, a court can excuse the warrant and probable cause requirements in situations in which the existence of "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable."(11) When "special needs" are deemed to exist, a court excuses the state actor from the regular requirements and instead conducts a reasonableness analysis, balancing the government interests at stake against the individual's privacy interests.(12)

In Ferguson's case, prosecutors argued that testing her for substance use without a warrant, probable cause, or consent was justified by the need to protect her fetus. The Fourth Circuit agreed, holding that the warrantless testing of pregnant women's urine when the indicia of possible cocaine use were present constituted reasonable "special needs" searches and therefore did not violate the Fourth Amendment.(13) The Supreme Court granted certiorari on this issue only. Specifically, the question Ferguson poses in her appeal is whether the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements was properly applied to a discretionary drug-testing program that targeted hospital patients and was created and implemented with police and prosecutors primarily for law enforcement purposes.(14) The Court has also agreed to hear another "special needs" case this term: City of Indianapolis v. Edmond,(15) a Seventh Circuit case which involves drug interdiction roadblocks set up by the Indianapolis Police Department. It appears that the Court is intent on articulating the scope of the "special needs" exception.

Like many of the judicially created exceptions to the Fourth Amendment--most articulated in the name of more effective crime fighting--the "special needs" exception is a remarkably modern doctrinal development. Despite its recent provenance, however, it has quickly swelled to an exception which threatens to undermine the Fourth Amendment's warrant and probable cause requirements.(16) Only once in the last twenty-five years has the Court put a stop to the expansion of the exception's scope.(17) In all other cases, the Court has approved the special need asserted by the government, allowing it to tromp the interest of the individual being searched. This note contends that the "special needs" exception threatens to swallow the warrant preference rule, and that the Supreme Court should take the opportunity in deciding both Ferguson and Edmond to both clarify and narrow the scope of the exception. Ideally, the Court should take its lead from Judge Posner's majority opinion in Edmond and hold that the purpose of the search--criminal or regulatory--is critical to the "special needs" analysis. As the exception is designed to address government needs other than those of regular law enforcement, the intent to use evidence gathered during the search as probable cause for arrest and prosecution should preclude the application of the "special needs" balancing test. In short, where the search is for "ordinary crime detection," the normal warrant and probable cause requirements should apply.(18)

Part I of this note attempts to put into context the late 1980s proliferation of prosecutions for "fetal abuse," while Part II outlines the development of the MUSC policy and Ferguson's arrest under that policy. Part III reviews the Supreme Court's articulations of the "special needs" exception. Part IV analyzes the Fourth Circuit's decision in Ferguson, focusing in particular on the dissent's argument that a search motivated primarily by a prosecutorial purpose does not fit within the exception. Lastly, Part V considers what the Court might do, evaluates Ferguson's arguments, and suggests that the Court seize the opportunity to narrow the scope of the exception.

I. AMERICA'S WAR ON DRUGS AND THE RISE IN FETAL ABUSE PROSECUTIONS

To paint an accurate portrait of Ferguson's arrest and prosecution, it is important to understand the climate in which the MUSC policy was adopted. Most critically for Ferguson and her fellow plaintiffs, the late 1980s and early 1990s 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.(19) Over the last twenty-five years the "War on Drugs" has been characterized by a prohibitive policy of "zero tolerance" and increasingly harsh sanctions for those who are held criminally responsible for distribution or possession.(20) The policy has had disastrous results. Nearly one in every 150 Americans is in prison or in jail.(21) "A big reason [for the high prison population] is that so many of the new inmates are drug offenders. In the Federal system, nearly 60 percent of all people behind bars are doing time for drug violations; in state prison and local jails, the figure is 22 percent."(22) As a recent New York Times article points out:

> Americans do not use more drugs, on average, than people in other nations; but the United States, virtually alone among Western democracies, has chosen a path of incarceration for drug offenders. More than 400,000 people are behind bars for drug crimes--and nearly a third of them are locked up for simply possessing an illegal drug. "America's internal gulag" is what Gen. Barry McCaffrey, the nation's drug czar, calls the expanding mass of drug inmates.(23)

During the late 1980s, crack cocaine emerged as the most frightening enemy in the "War on Drugs." The media frenzy over the alleged crack epidemic was intense. A review of media reporting in 1986, when stories about crack reached their peak, concluded that six of the nation's biggest and most prestigious newspapers and newsmagazines had run more than one thousand stories about crack.(24) Time and Newsweek each ran seventy-four stories about crack cocaine in six months, and over fifteen million Americans watched CBS' prime-time report "48 Hours on Crack Street."(25) Three now-familiar characters took center stage in the media's racist presentation of the crack story: the crack whore, the welfare queen, and the crack baby. Politicians and the media warned that an entire generation--consistently portrayed as a frightening "biological underclass" of mainly black urban youth--would be born addicted and diseased.(26) Much of that alarmist reporting, however, was based on shoddy or incorrect scientific research; later research which showed that the risk was not nearly so great as was feared was not widely reported.(27)

It was in the midst of this turmoil that Ferguson came to MUSC for a prenatal checkup, was tested for cocaine without her consent, and was subsequently arrested. Ferguson was just one of approximately 200 pregnant women who were prosecuted around the country on various theories of "fetal abuse."(28) However, not a single state legislature passed a new statute specific to drug use during pregnancy. Instead, local prosecutors worked 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. This expansion was very much supported by the conservative religious right, a movement which was then enjoying great strides under Presidents Reagan and Bush in its battle against abortion. For this movement, these prosecutions, with their explicit recognition of fetuses as children and/or persons under the law, were a backdoor method of reversing Roe v. Wade.(29) Seen in this light, the prosecutions represented victory for a strategy which had sought for years to sponsor legislation and constitutional amendments declaring that the "unborn are constitutional persons."(30)

II. THE DEVELOPMENT OF THE MUSC POLICY

In August of 1989, MUSC Nurse Shirley Brown approached Condon about what she perceived as an increase in cocaine use among her pregnant patients. Condon responded immediately, holding meetings with MUSC staff, the police department, child protective services, and the Charleston County Substance Abuse Commission in order to "develop a policy as to possible prosecution."(31) Condon's law enforcement emphasis quickly overwhelmed whatever medical and treatment aims might have characterized the initiative's beginnings.(32) As the policy took shape, it developed a very simple approach: Intimidate women into getting treatment by threatening them with the very real possibility of prosecution. As Condon stated, "We all agreed on one principle: We needed a program that used not only a carrot, but a real and very firm stick."(33)

Within two months of those first meetings, MUSC instituted the Interagency Policy on Cocaine Abuse in Pregnancy, a series of internal memos that provided for nonconsensual drug testing of pregnant patients, reporting the results to law enforcement, and using arrest on drug or child abuse charges as intimidation or punishment. Condon maintained from the beginning that there were no doctor-patient confidentiality or Fourth Amendment problems, but MUSC bioethicists later criticized the pressure Condon wielded and the fact that the policy was implemented too quickly and without any study of the ethical issues involved.(34) Although the program was described as an attempt "to ensure appropriate management of patients abusing illegal drugs during pregnancy,"(35) critics claim it was designed to "supply Condon with defendants for his new prosecutorial crusade."(36) In practice, the punitive rather than palliative aims seemed to predominate. MUSC made no arrangements for childcare or transportation to treatment facilities. Moreover, at the time Ferguson was arrested, there was not a single in-patient residential drug treatment facility in the entire state designed specifically to treat pregnant drug users.(37)

Even more importantly, for the first few months of the policy's operation, women who tested positive for cocaine were given no second chances. Women who tested positive or whose infants tested positive after birth were immediately arrested and charged, depending on the stage of the pregnancy, with drug possession, child neglect, or distribution of drugs to a minor. Most women arrested under the program were hauled off to jail in handcuffs and leg shackles within hours of giving birth. Later, after some public resistance, an "amnesty" program was implemented: women were offered one chance to get treatment before facing arrest. The shackles and handcuffs remained, however. Patients who tested positive were handed two letters, usually by Nurse Brown. One set up an appointment with a substance abuse clinic and the other was from Condon:

> [I]f you fail to complete substance abuse counselling [sic], fail to cooperate with the Department of Social Services in the placement of your child and services to protect that child, or if you fail to maintain clean urine specimens during your substance abuse rehabilitation, you will be arrested by the police and prosecuted by the Office of the Solicitor.(38)

If patients refused or failed to stay clean, they were arrested.(39)

Of the forty-two women arrested under the program between 1989 and 1994, all but one were black. The single white woman allegedly had a black boyfriend, a fact which was noted on her chart by Nurse Brown.(40) Given the patient pool at MUSC, these numbers are not surprising. As it is the only hospital that serves indigent patients in South Carolina's Greenville County, MUSC's patient population contains a disparate number of poor black women. However, a recent study shows that pregnant black and white women use drugs at a generally similar rate.(41) Despite this statistical similarity, black women are ten times more likely to be reported to government authorities for their drug use than white women.(42) Black women are statistically more likely to be poor, and, due to their resulting interactions with public hospitals, welfare case workers, and probation officers, generally subject to greater government supervision, making their drug use easier to detect.(43) They are also more likely to lack access to good prenatal care, a factor which correlates closely with race and income, and therefore more likely to be tested for drug use under policies such as MUSC's.(44) Lastly, they are also the face of the crack epidemic, and as such, easy targets. As Condon himself noted, "[T]here's not enough political will to move after pregnant women who use alcohol or cigarettes. There is, though, a political basis for this interagency program. Leaders can take a position against crack."(45) In short, dragging white women off to jail in shackles for alcohol use during pregnancy, despite the fact that fetal alcohol syndrome is by far the leading cause of mental retardation, is not politically feasible. Incarcerating poor black women for crack use is.

While the fact that alcohol and tobacco use is legal and drug use is not probably accounts for some of the political will to which Condon refers, it is also clear that the population involved makes a difference, too. In the traditional political calculus, poor black women, already demonized as promiscuous self-indulgent drug abusers and bad mothers, have few defenders and little political capital. The racially disparate impact of MUSC's policy, seen in this light, was not merely an unintended consequence. The fact that only MUSC's public Medicaid clinic, and not the hospital's private obstetric clinic, implemented the policy attests to this. Even more troubling, however, is the fact that the policy's consequences went far beyond the arrest of forty-two women. Critics warned at the time that the policy would drive poor black women away from the prenatal care and drug treatment which was the alleged goal of the program. This has sadly proved the case.(46) South Carolina has seen a significant drop in drug treatment program admissions by

pregnant women,(47) a result which indicates that however important the goal of improving infant health, the state cannot accomplish it by prosecuting mothers.

III. A REVIEW OF "SPECIAL NEEDS" CASE LAW

The question posed to the Supreme Court in Ferguson is what level of law enforcement participation is permissible before a search can no longer be justified by "special needs, beyond the normal need for law enforcement."(48) In order to predict how the Supreme Court might answer the question, it is important to understand the genesis and scope of the modern "special needs" doctrine. Unfortunately, this is not an easy task. The case law itself is a mess, and since the first explicit use of the exception in 1985, the Supreme Court has seen only one application of a "special needs" analysis it has not Liked.(49) In practice, given the low standard for the government interest required, the judicially created balancing test is so malleable that it almost always fails to protect the Fourth Amendment interests at stake.(50)

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.(51)

A "search" occurs when the government infringes upon an actual, subjective expectation of privacy if society recognizes that expectation as reasonable.(52) The purpose of the Fourth Amendment, then, is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."(53) This is why individualized suspicion is normally required for searches and seizures, even though the Fourth Amendment does not explicitly require it.

In general, warrantless searches are per se unreasonable, subject to only a few specifically delineated and well-recognized exceptions.(54) The "special needs" exception is one of these. Under the rule, when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable,"(55) the court may excuse a state actor from the requirements and instead determine, by comparing the importance of the government and individual interests at stake, whether the search was reasonable. Determining whether a search is reasonable requires "balancing the need to search against the invasion which the search entails."(56) On one side are the "individual's legitimate expectations of privacy and personal security" and on the other is the articulated governmental need.(57)

Although their genesis came earlier, the "special needs" cases officially began in 1985 with the issue of searches of students and their belongings in schools. The forerunner, New Jersey v. T.L.O.(58) involved a suit brought by a fourteen-year-old student caught smoking in the bathroom. She was brought to the principal's office where, after she denied she had been smoking, the principal searched her bag; evidence of alleged drug dealing from the purse was used against her in subsequent delinquency proceedings.(59)" The majority opinion by Justice White emphasized that schools needed to combat drug use and violent crime, and held that the normal warrant and probable cause requirements would frustrate "the swift and informal disciplinary procedures needed in the schools."(60) Schools, he seemed to suggest, were unique, governed by different rules and different needs. Accordingly, the principal's search would be governed by a reasonableness standard. The Court proceeded to balance the student's privacy interest in her purse against the principal's interest in maintaining discipline, concluding that the search, given reasonable suspicion that cigarettes or matches would be found in the bag, was legal.(61) It was in his concurrence that Justice Blackmun coined the term "special needs," emphasizing that "[o]nly 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."(62)

Blackmun's language was taken up two years later in O'Connor v. Ortega, a case which challenged the validity of a search of a public employee's office.(63) In O'Connor, the Court seemed willing to extend the uniqueness afforded schools to the workplace. The employee in question was a psychiatrist at a state-run mental hospital who was put on administrative leave pending possible disciplinary charges. While hospital staff justified the search on the grounds that they were simply acting to make sure hospital property was secure, several of the employee's personal items were seized, including some potentially relevant to the disciplinary matter. While the Court implied that the search might be a valid example of a "special needs" search, it made little headway in clarifying the scope of the exception. The Court did emphasize two factors, however: the context of the search and its purpose. The Court noted that the reasonableness of an individual's expectation of privacy may depend on the context of the search, and specifically on who is conducting it: a workplace supervisor or law enforcement official.(64) Here, the search was conducted by the employee's supervisor and, as such, the employee had no legitimate expectation of privacy recognized by the Fourth Amendment. The Court asserted that "at least when the search is not used to gather evidence of a criminal offense," supervisors, unlike law enforcement officials, should not have to learn the "subtleties of the probable cause standard."(65) The purpose of the search--whether routine or

investigatory--was the Court's second factor. Probable cause, the majority indicated, is for criminal investigations and bears little relevance to routine searches to secure state property like office files.(66) The Court concluded that the search here resembled the latter, and remanded for further evaluation, indicating that the lesser standard of reasonableness should be applied.(67)

In Griffin v. Wisconsin,(68) also decided in 1987, the Court held that the "special needs" of the probation system also justified warrantless searches. Here, a probation officer, acting on a tip, searched petitioner's house and found a gun, leading to the petitioner's conviction as a felon in possession of a firearm.(69) The probation system, the majority emphasized, had "special needs" beyond ordinary crime detection, namely ensuring compliance with probation requirements and protecting public safety.(70) While the "special needs" exception may not extend to workplace searches "when the search is ... used to gather evidence of a criminal offense,"(71) it does apply to such a search when the needs of the probation system are at stake. Therefore, the fact that evidence seized during the search resulted in petitioner's conviction did not offend the Fourth Amendment. The majority emphasized that petitioner's status as a felon on probation meant that he was still undergoing punishment for his crime and consequently enjoyed a lesser expectation of privacy than ordinary individuals.(72) As such, a search by a probation officer who had both petitioner's interest and public safety in mind, rather than a regular police officer, did not violate the Fourth Amendment.(73) Just as in O'Connor, then, the Griffin majority concluded that the identity of the state actor conducting the search matters, as does the context of the search.

The 1988-89 term saw the high-water mark of "special needs" searches. While the searches in T.L.O. and O'Connor were based on individualized suspicion, the next two cases rejected the idea that such suspicion was required and instead permitted random searches to qualify for the exception.(74) Skinner v. Railway Labor Executives' Association(75) and National Treasury Employees Union v. Von Raab(76) were decided on the same day; both involved blanket drug testing of employees involved in highly regulated industries. In Skinner, the Railway Labor Executives Association challenged the constitutionality of new regulations implemented by the Federal Railroad Administration (FRA) which mandated blanket drug and alcohol testing for railroad employees. The Court upheld the regulations, finding that, in the pervasively regulated railroad industry, employees had a lesser expectation of privacy which was offset by the compelling state interest in public safety.(77) The Court noted:

> [t]here are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.(78)

However, data on the role drugs and alcohol played in railway accidents, the number of lives lost, and the clean up and liability costs convinced the court that such expectations of privacy, particularly when testing employees after crashes would be difficult or impossible, were outweighed by the "special needs" of public safety.(79)

Von Raab involved similar testing for Immigration and Naturalization Services (INS) employees who applied for promotions to positions that involved drug interdiction or required the employee to carry a firearm. Unlike the FRA in Skinner however, the INS provided no data on employee drug problems. Nevertheless, the Court upheld the testing, noting that INS employees in such positions are often the "first line of defense" against immigration smugglers and drug traffickers, and are therefore subject to trickery, bribes, temptation, and extreme physical danger.(80) Considering the nature of their duties on the front lines, employees "reasonably should expect effective inquiry into their fitness and probity."(81) These reduced expectations of privacy were clearly trumped by the government's compelling interest in ensuring effective prevention of drug smuggling and illegal immigration. The Court emphasized, however, that test results could not be turned over to law enforcement without the employee's written consent.(82)

In the next "special needs" case, the Court returned to school, upholding random urinalysis for student athletes in Vernonia School District v. Acton.(83) Relying in part on T.L.O., the Court held that students, who suffer many other minimal invasions at school such as vaccinations and scoliosis testing, have a lesser expectation of privacy than adults.(84) Student athletes, because they change in communal locker rooms and participate in athletic events organized and regulated by school officials, have even less.(85) The Court first noted that school officials had noticed a growing problem with drug use and disciplinary problems, though school officials failed to present any hard data on the increase in drug use or drug use by student athletes in particular.(86) Balancing the school's interest in preventing student-athletes from injuring themselves when playing while on drugs against the students' reduced expectations of privacy, the Court concluded that the "special needs" exception applied and that the random urinalysis did not violate the Fourth Amendment. As in Von Raab, the Court emphasized that test results were made available to school officials only.(87) They were not turned over to law enforcement, and the most severe sanction a student-athlete faced was suspension from the team.(88)

It was not until 1997 that the Court struck down a "special needs" search as a violation of the Fourth Amendment. Chandler v. Miller(89) involved a challenge by several nominees of Georgia's Libertarian Party to a state statute which required drug testing for all candidates running for state office. The nominees sought declaratory and injunctive relief barring enforcement of the statute, claiming that it violated their First, Fourth, and Fourteenth Amendment rights. The district court and the Eleventh Circuit found for the state, justifying their decision on the special trust the public places in government officials, the fact that state officials deal with state drug

policy, and the necessity for honest and clear-thinking public servants.(90) In addition, the courts found that state officials have a reduced expectation of privacy because voters expect to know information about their physical, emotional, and mental fitness for the position.(91)

The Supreme Court reversed, stating that when "special needs" beyond ordinary "crime detection" are cited, courts need to make a context-specific inquiry, looking carefully at competing private and public interests.(92) Here, the Court said, there was no demonstrated drug problem, nor could testing prove effective as candidates could simply abstain during the period they knew they would be tested. Furthermore, the need was merely symbolic, not "special," and as such the situation did not fit within the "closely guarded category" of constitutionally permissible suspicionless searches.(93) By explicitly cautioning lower courts that Yon Raab was "[h]ardly a decision opening broad vistas for suspicionless searches, [and] must be read in its unique context,"(94) the Court seemed to be reining in the "special needs" exception. Whether it will ultimately be successful in doing so will become clear when the decisions in both Ferguson and Edmond are issued this term.

IV. AN ANALYSIS OF THE FOURTH CIRCUIT DECISION IN FERGUSON

In October 1993, Lynn Paltrow and CRLP filed the class action lawsuit now known as Ferguson against MUSC, Condon, the City of Charleston, the state police, and various MUSC medical personnel. The suit alleged that the policy of testing patients' urine for evidence of cocaine use violated both the Fourth Amendment and Title VI of the Civil Rights Act of 1964, that disclosure of medical information to law enforcement personnel violated their constitutional right to privacy, and that medical personnel committed the state-law tort of abuse of process in administering the policy. The district court entered judgment for the defendants on all issues.(95) On the Fourth Amendment issue specifically, the jury found that the plaintiffs, by signing MUSC's consent to medical treatment forms, had waived their right to privacy.

Ferguson appealed to the Fourth Circuit, arguing that the district court erred in submitting the issue of consent to the jury and, alternatively, that the verdict was not supported by the evidence. The Fourth Circuit, which affirmed the judgment on July 13, 1999, dodged the issues of consent and possible district court error, holding instead that there was no need to consider them because the searches were reasonable as "special needs" searches.(96) The court said that MUSC's warrantless testing of pregnant women when possible indicia of cocaine use were present constituted reasonable "special needs" searches and thus did not violate the Fourth Amendment.(97) According to the court, the rising use of cocaine by MUSC's pregnant patients and the public health problems associated with maternal cocaine use created "a special need, beyond normal law enforcement goals."(98) Additionally, the method chosen to address that need effectively advanced the public interest while the intrusion suffered by tested patients was minimal.(99)

The Fourth Circuit reached this conclusion by presuming that the MUSC program was primarily intended to encourage women to get treatment. The court stated specifically that nothing in the record indicated the program was designed with prosecutorial intent or resulted in vindictive prosecution.(100) Accordingly, the searches were motivated by concerns other than the normal need for law enforcement. Citing Chandler, the Fourth Circuit stated, "`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.'"(101) Moreover, "[t]his balancing requires consideration of the governmental interest prompting the invasion; the effectiveness of the intrusion, i.e., the degree to which the intrusion reasonably is thought to advance the governmental interest; and the magnitude of the intrusion upon the individuals affected, from both a subjective and objective stand point."(102)

In conducting this balancing test, the Fourth Circuit started by accepting the district court's finding of fact that "MUSC personnel conducted the urine drug screens for medical purposes wholly independent of an intent to aid law enforcement."(103) At the same time, it rejected the district court's refusal to entertain the "special needs" analysis because law enforcement was involved in formulating the policy, citing Griffin(104) and Michigan Department of State Police v. Sitz(105) to back up its argument that law enforcement participation did not preclude the "special needs" analysis.(106) Rejecting the dissent's argument that the "special needs" exception cannot be applied to searches motivated in part (or in full) by the desire to gather evidence to establish probable cause, the majority viewed Griffin and Sitz as dispositive, arguing that if the dissent was correct then the two cases would have come out differently.(107) This is the crux of the case--does the formulation "special needs, beyond the need for normal law enforcement" preclude searches that involve law enforcement in any way? Given the existing precedent offered by Griffin and Sitz, the Fourth Circuit is probably right when it says that the mere fact that search results are turned over to law enforcement or used in prosecution does not preclude the "special needs" analysis. However, neither Griffin nor Sitz endorse the principle that searches with the primary purpose of gathering evidence of a crime qualify for the "special needs" exception.

Furthermore, Griffin can be distinguished on the basis of the unique nature of the probation system, and the diminished expectation of privacy granted to convicted felons and probationers. Sitz is not quite so easy to dismiss, but it is important to note that the Court did not specifically identify Sitz as a "special needs" case. Instead, it merely held that Michigan's highway sobriety checkpoint program, which involved stops, not seizures, comported with the Fourth Amendment. In fact, by failing to cite to any "special needs" cases and

stating that the seminal "special needs" case Von Raab "was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways.(108) the Court seemed to indicate that highway checkpoints occupy a unique area of Fourth Amendment doctrine. Moreover, the Court in Sitz used the balancing test only to justify a motorist's brief initial detention. Any subsequent drunk driving prosecution would derive from evidence gathered from extensive field sobriety tests, which the Court noted may require individualized suspicion.(109)

In Ferguson, given its acceptance of the "fact" that MUSC personnel conducted the urine tests wholly independent of any intent to aid law enforcement, the Fourth Circuit avoided the question of the acceptable level of law enforcement involvement. Instead it applied the balancing test and identified the question before it as:

> whether a balancing of MUSC's interest in protecting the health of children whose mothers use cocaine during pregnancy, the effectiveness of the policy to identify and treat women who use cocaine during pregnancy, and the degree of intrusion experienced by women whose urine was tested for evidence of cocaine use results in a conclusion that the searches violated the Fourth Amendment.(110)

The court's explanation of the first factor, the government interest, was driven by the assumption that the MUSC program aimed to treat pregnant women, not arrest them.(111) The government need, the court stated, need not be compelling in the absolute sense, but it must be "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."(112) Moreover, the need must be concrete, not merely hypothetical.(113) The court noted, without citing to any data, that MUSC staff had noticed a rise in pregnancies affected by cocaine use, resulting in both health complications and increased medical costs.(114) It then concluded, "[i]n light of the documented health hazards of maternal cocaine use and the resulting drain on public resources, MUSC officials unquestionably possessed a substantial interest in taking steps to reduce cocaine use by pregnant women."(115)

The court said that the second factor, the effectiveness of the search, depended on "the degree to which [the search] advances the public interest."(116) It concluded that "there can be little doubt that testing of urine of maternity patients when certain indicia of possible cocaine use were present was an effective way to identify and treat maternal cocaine use while conserving the limited resources of a public hospital."(117) The court cited to no data indicating the effectiveness of the MUSC policy, nor did it consider statistics on the lack of available drug treatment programs for pregnant women in South Carolina. The court also ignored the possibility, raised by Ferguson, that the threat of prosecution would scare women away from seeking both prenatal and drug treatment--the ultimate goals of the policy as articulated by Condon and MUSC.(118)

Ferguson also argued that MUSC's policy could not be considered effective because it was both under and overinclusive. The program was underinclusive, she argued, because it did not screen for other substances which could harm the fetus, such as nicotine or alcohol.(119) The program was also overinclusive because one of the indicia triggering testing was inadequate prenatal care, a factor which correlates more closely with poverty than with cocaine use.(120) The dissent vigorously objected to the majority's easy rejection of this argument, noting that the policy could also be considered ineffective because some patients were arrested after giving birth when the harm to the fetus had presumably already been done.(121) The majority rejected this argument, too, stating that the issue was not whether the arrests were an effective means of advancing the identified government interest, but whether the urine screens of infants shortly after their birth were effective in doing so.(122) Under this formulation, the tests told medical personnel whether a baby needed treatment for exposure and therefore advanced the government interest in treating affected infants; the arrests of Ferguson and others like her were merely an indirect result.

The court concluded that the third factor, the degree of objective and subjective intrusion experienced by the women tested, was minimal.(123) Objective intrusion, the court noted, is "measured by the duration of the seizure and the intensity of the investigation."(124) Acknowledging that generally the privacy interests affected by the collection and testing of urine are not minimal,(125) the court stated that the context of collection matters. In this case, urine was given in the course of a routine medical exam and thus the intrusion was objectively minimal.(126) Subjective intrusion is measured by "the extent to which the method chosen minimizes or enhances fear and surprise on the part of those searched or detained."(127) Here, provided one of the criteria was met, a treating physician had no discretion to decline a test.(128) The court concluded that this lack of discretion, combined with the routine medical exam context, meant that the invasion was minimally intrusive on both the objective and subjective levels.(129) The majority did not address the role of the subsequent arrests and prosecutions. Presumably, it felt that such consequences have no place in the intrusiveness analysis.

> The dissent chided the majority for dodging the law enforcement issue: [A]ssuming that concern for the health of fetuses being carried by pregnant women using crack cocaine was a motivating force in the development of the MUSC policy, it nevertheless is clear from the record that an initial and

> continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers, either before or after they had given birth....(130)

It noted the prosecutorial purpose of the policy and the substantial involvement of law enforcement from its earliest stages, citing a letter from the MUSC General Counsel to Condon offering assistance in whatever way necessary to aid the prosecution of hospital patients.(131) It also pointed to operational guidelines issued by the Charleston police force and distributed to hospital staff which referred to positive drug tests as "probable cause" for the arrest of the patient on charges of possession if the pregnancy was 27 weeks or less, and on charges of both possession and distribution to persons under 18 if the pregnancy was 28 weeks or more.(132) The dissent argued that these were just a few of the examples in the record indicating both prosecutorial intent on the part of MUSC and substantial participation by law enforcement officials in developing the policy.(133) Relying mainly on Von Raab, where there was no release of test results to law enforcement without a customs employee's consent, the dissent concluded that "the `special needs' exception does not apply where the governmental intrusion is intended to be used for law enforcement purposes."(134) In none of the arguably "special needs" cases, except the sobriety checkpoint and probation supervision cases, did the state use search results for prosecution.(135) "In all the other special needs cases cited by the majority," the dissent noted, "arrest was at most an incidental possibility and not a direct result of the warrantless Fourth Amendment intrusion sought to be justified."(136)

In addition to rejecting the majority's conclusion that there was no prosecutorial intent on the part of MUSC, the dissent also objected to the way the majority conducted the balancing test. In particular, the dissent argued that the policy failed the effectiveness prong.(137) As several of the plaintiffs were arrested after birth, the dissent concluded that the policy could have only a punitive rather than preventative purpose.(138) Moreover, the fact that the testing occurred during a routine hospital exam did not necessarily render it minimally intrusive. Consequences of the search, particularly the release of medical records and test results to law enforcement without consent, were factors to be considered as well.(139) In this case, results were released directly to the local prosecutor's office, and consent was nonexistent. Neither the general medical consent form nor the general knowledge that the use of cocaine is illegal was sufficient to establish the plaintiffs' voluntary and knowing consent to the government's use of their test results in a criminal prosecution.(140) Moreover, the dissent questioned whether consent could truly be "voluntary in a constitutional sense, when given by an indigent, uninsured woman in labor, who is dependent on medical care provided by the state's public hospital."(141)

V. WHAT THE SUPREME COURT SHOULD DO: PREDICTIONS AND SUGGESTIONS

It is hard to predict what the Supreme Court will do with Ferguson and the "special needs" exception, though the fact that it has accepted two "special needs" cases in one term suggests that it is intent on tackling the issue. It is tempting to hope that the Court has finally recognized that the "special needs" exception threatens to swallow the warrant preference rule, and will take the opportunity to narrow the scope of the exception. While the exception itself is certainly not going to disappear, perhaps Chandler, Ferguson, and Edmond will ultimately be viewed as the first steps in a return to the spirit of Justice Blackmun's concurrence in T.L.O., which called for an exception to the normal warrant and probable cause requirements only in truly "exceptional circumstances."(142) The critical question in Ferguson involves the appropriate role of law enforcement in the "special needs" search. What level of law enforcement participation transforms a search from one motivated by "special needs, beyond the normal need for law enforcement"(143) to one motivated by ordinary "crime detection?"(144) More importantly, what role does the purpose of the search play in the "special needs" analysis? Is the search valid so long as evidence gathered in the search is used only as an afterthought against the individual whose Fourth Amendment rights are at stake? Or does proof of prosecutorial intent and substantial participation by law enforcement officials preclude the "special needs" analysis altogether?

What makes predicting how the Court will answer this question so difficult is the sharp disagreement over the facts in this case, particularly the purpose behind MUSC's policy. Ferguson argues that the purpose of the MUSC drug testing was prosecutorial, and that it therefore cannot be said to satisfy "special needs, beyond the normal need for law enforcement."(145) She argues that her prosecution was not an incidental possibility of the search; it was the goal of MUSC's policy and Condon's own "very firm stick."(146) In contrast, MUSC and its co-defendants argue that the primary purpose behind the policy was not punishment, but treatment of pregnant users and their possibly affected fetuses and infants. While the Fourth Circuit accepted the district court's finding of fact that the drug tests were administered independently of any intent to aid law enforcement, the Court may not necessarily view the searches solely through the prism of medical prevention and public health. Whatever the ultimate characterization of the policy, one can only assume that the Court intends to consider an issue it has dodged for some time: the permissible role of law enforcement in "special needs" searches.

Hopefully, the Court will take direction from Judge Posner's well-reasoned opinion in Edmond, the Seventh Circuit case also before the Supreme Court this term. Edmond involves the Indianapolis Police Department's operation of a dragnet roadblock designed to stop the flow of drugs through the city. Under the program, police sought to detain motorists for no more than five minutes. The police made drug-related arrests in five percent of the stops, and arrests for conduct unrelated to drags, such as expired licenses, in nine percent of the stops.(147) While the district court upheld the checkpoints, the Seventh Circuit reversed, holding that they violated the Fourth Amendment.(148) Emphasizing that "special needs" constitute a limited exception to the ordinary individualized suspicion requirement, Posner noted that although precedent provided no clear definition of "special needs," the Supreme Court has made it

clear that general law enforcement interests do not count.(149) "IT]he purpose behind the program is critical to its legality" because "[i]nquiry into purpose is one method of identifying and banning the most flagrantly abusive governmental conduct without handcuffing government altogether."(150) Only if the purpose is related to "primarily civil regulatory programs," rather than "general criminal law enforcement," should courts move past the threshold question of purpose and on to the balancing test.(151) Those searches that "operate as an adjunct to general criminal law enforcement" do not fit within the narrow category of exceptions to the warrant requirement.(152) In illustration, Posner compared the Indianapolis roadblocks, aimed at catching and prosecuting drug offenders, with regulatory immigration checkpoints "which seek to exclude and deport illegal immigrants rather than just prosecute them for criminal violations of the immigration laws."(153)

Posner directly addressed the question that the Fourth Circuit dodged in Ferguson: the level of acceptable law enforcement participation in "special needs" searches. He acknowledged that the Court has upheld random searches of jockeys, customs officials, and parolees, and that some of these cases have resulted in criminal prosecutions.(154) Posner squared these prosecutions with the principle that the requirement of individual suspicion may be relaxed only on the basis of "concerns other than crime detection"(155) by concluding that "the concern which lies behind" the random searches that have survived Fourth Amendment challenges "is not primarily with catching crooks, but rather with securing the safety or efficiency of the activity in which the people who are searched are engaged."(156) Posner, then, ultimately draws the line between regulatory and criminal searches, justifying the former on "special needs" even if prosecution is an indirect consequence.

Posner's position is much like that of the Ferguson dissent. Both focus on the government need, arguing that a threshold inquiry into purpose is necessary before moving on to the balancing test. Both attempt to draw the line at the direct participation of law enforcement, arguing that searches for the purpose of gathering evidence to establish probable cause in a criminal investigation do not fit within the "special needs" exception. The case law supports this argument. In O'Connor, the Court made very clear that both the purpose and the context of the search matters.(157) The Court considered the state actor conducting the search and stated that workplace supervisors, unlike law enforcement officials, should not be responsible for learning the "subtleties" of the probable cause standard, "at least when the search is not used to gather evidence of a criminal offense."(158) In Ferguson's case, state hospital employees conducted her drug tests. While these individuals were not law enforcement officials familiar with the probable cause standard, there is ample evidence that the tests were designed to gather evidence of a criminal offense. Ferguson's urinalysis was not a routine search to secure state property like the search in question under O'Connor; it was a search designed to gather evidence to establish probable cause for her arrest. The fact that operational guidelines distributed to MUSC staff referred to positive drug tests as "probable cause" for a patient's arrest attests to the evidence gathering purpose. Moreover, the MUSC policy originally did not give women who tested positive a second chance for amnesty through drug treatment; this seems problematic for a program alleged to be non-prosecutorial and treatment-oriented. In short, Ferguson has a strong argument that her drug test was clearly a search motivated, at least in large part, by concerns for ordinary crime detection--the very purpose rejected in Chandler.(159)

Additionally, unlike the scenario in several other recent special needs cases, including Von Raab, Vernonia School District, and Chandler, the MUSC policy provided that test results were turned over to law enforcement. While results were turned over to law enforcement in some cases, both Judge Posner and the Ferguson dissent point out that this was mainly an afterthought: The purpose of the search was not to gather such evidence. Moreover, both Griffin and Sitz, two cases that seem to indicate that the government's intent to use the search results as probable cause does not preclude the "special needs" analysis, can be distinguished. Griffin involved the "special needs" of the probation system and the reduced expectation of privacy accorded probationers who are still technically serving out their punishment. In Sitz the Court was careful to note that the "special needs" exception applied only to the brief, initial seizure of each motorist; any detention of individual motorists for field sobriety tests might require a higher standard of individualized suspicion.(160)

Even if the government's interest presents a valid special need and the balancing test applies, Ferguson has a second argument. Given her status as a pregnant woman and the unique privacy interest that accompanies that status, Ferguson can argue that the Fourth Circuit conducted the balancing test incorrectly. Specifically, she can argue that the court failed to adequately weigh her interest against the state's. In Edmond, Posner noted that tests justified under the "special needs" exception "usually make only limited inroads into privacy, because a person can avoid being searched or seized by avoiding the regulated activity."(161) He pointed out that the drivers facing Indianapolis' roadblocks could turn off the highway before coming face to face with the police. Ferguson, and other pregnant women in her position, could not avoid being searched quite so easily. Moreover, these women had a very different privacy interest at stake than drivers on public roads or INS officials on the job. First, they were in the hospital under a doctor's care and therefore entitled to medical privacy.(162) Their consent to medical treatment forms nowhere indicated that medical records and test results would be released to the local prosecutor. Since they could not afford treatment at MUSC's private obstetric clinic where the staff did not screen patients, they were dependent on MUSC for necessary prenatal and medical treatment. Can it really be the case that pregnant women on Medicaid have a lesser expectation of medical privacy than wealthier pregnant women who can afford private medical care?

Second, these women were not simply patients entitled to medical privacy; they were pregnant women who enjoyed a broader right to privacy implied from the due process clause's guarantee of liberty. This due process guarantee includes the right to bodily

integrity.(163) The Supreme Court stated in Terry v. Ohio that every individual has a right to "possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."(164) More importantly, under Griswold v. Connecticut(165) and Roe v. Wade,(166) these women also enjoy the right to reproductive autonomy. First discussed in Griswold, the right to privacy in the reproductive sphere has been extended to the use of contraceptives,(167) pregnancy,(168) and abortion.(169) While the right to bodily integrity is not absolute, the Court has continually recognized pregnancy and reproductive decisions as unique. Most critical for Ferguson's argument, government intrusion into these decisions must be based on a compelling government interest, and state regulation of abortion may not place an undue burden on a woman's decision to continue or terminate a pregnancy.(170) Ferguson may argue that by conditioning arrests on an infant's positive toxicology screen, the state effectively penalizes drug-addicted women for choosing to carry their pregnancies to term, and places an undue burden on their constitutionally protected right to bear children.(171)

Arguments involving the right to privacy, however, do run into problems. As it plays into Fourth Amendment jurisprudence, the right to privacy involves the public's reasonable expectations of privacy. How do we describe the privacy expectations of women who use drugs during pregnancy? Much depends on how we frame the question and the rights at stake. Clearly, individuals have no fundamental right to use cocaine. Several courts that have upheld "fetal abuse" prosecutions have taken this tack, finding that the use of cocaine during pregnancy is not encompassed within the constitutionally recognized right to privacy.(172) Lynn Paltrow argues that such a formulation, while appealingly simple, deliberately misconstrues the right at issue. Drug use per se is rarely criminalized; instead, drug laws focus on distribution or possession with the intent to sell. And while there is no constitutional right to use drugs, the Supreme Court has made clear that it is unconstitutional to punish people for having the status of a drug user.(173) In Robinson v. California,(174) the Court overturned a California statute which treated drag addiction as a misdemeanor punishable by imprisonment. The Court held that the statute criminalized an individual's status as a drug addict, a result which constituted cruel and unusual punishment in violation of the Eighth Amendment. Citing Linder v. United States,(175) which recognized narcotic addiction as an illness requiring medical treatment, the Court compared punishing someone because of an addiction to punishing someone "for the `crime' of having a common cold."(176)

Robinson stands for the proposition that the state can only punish citizens for an act, not their status. Ferguson can argue that she was punished for her status--as drug user, pregnant woman, or both--and that her arrest violated both the Eighth Amendment and her constitutional rights to bodily integrity and reproductive autonomy. She can claim that her unique privacy interest as a pregnant woman should not be underestimated when weighed against the government's interest. In short, her interests are very different from the interests of probationers, Michigan freeway drivers, and INS employees, and should not be automatically trumped by South Carolina's interest in preventing drug use and protecting fetal health.

However, given the heated political rhetoric that surrounds all abortion cases, it is highly unlikely that the Supreme Court will entertain such arguments from Ferguson and her fellow plaintiffs. After all, when Ferguson tries to distinguish herself as a pregnant woman, she raises the specter of fetal rights. While the drug testing of students and probationers implicated only their privacy interests, the testing of Ferguson involves both her privacy interest and the potentially competing interests of her fetus. While student athletes on drugs risk harm only to themselves, Ferguson risks harm to her fetus--an entity the Court has been unwilling to recognize as a constitutional person, but also reluctant to deem without any interests at all. This is hardly a thicket into which the Court will want to wade unnecessarily. In fact, given the way Ferguson has framed the question presented as whether the "special needs" exception was applied erroneously to a discretionary drug-testing program that was created primarily for law enforcement purposes, the Court might be able to avoid such controversial arguments altogether. The focus on the purpose of the search and the substantial law enforcement involvement could be highly outcome-determinative, allowing the Court both to hold the "special needs" exception inapplicable to MUSC's policy and to dodge the abortion bullet.

CONCLUSION

Ferguson and Edmond present the perfect opportunity for the Supreme Court to rein in the "special needs" exception. While the result in Ferguson may depend on the Court's characterization of the MUSC policy's purpose, the Court will likely clarify the meaning of "special needs, beyond the normal need for law enforcement."(177) Ideally, it will move one step beyond Chandler and hold that the "special needs" analysis requires a threshold inquiry into the government's purpose. Only if the purpose of the search is clearly related to concerns other than ordinary crime detection, such as the enforcement of civil regulatory programs suggested by Posner, should courts move on to the balancing test. Under this rubric, searches with a prosecutorial intent and substantial law enforcement participation do not fall within the "special needs" exception. For Ferguson, her access to relief under this rule would depend on her ability to convince the Court of the prosecutorial purpose of the MUSC policy. If she can show that MUSC and the other defendants intended to use evidence gathered during her drug test as probable cause for her arrest, then MUSC's policy would be deemed to have violated the Fourth Amendment. Even more importantly, her case would mark the return of the "special needs" exception to the original spirit of Justice Blackmun's concurrence in T.L.O.--an exception available solely for truly exceptional circumstances.