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Comment: What About My Right to Privacy? Where the Court Went Wrong in *Ferguson v. City of Charleston*

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COMMENT

WHAT ABOUT MY RIGHT TO PRIVACY? WHERE THE COURT WENT WRONG IN *FERGUSON V. CITY OF CHARLESTON**

INTRODUCTION

The Supreme Court has consistently found a constitutional right to privacy despite its lack of an explicit textual basis.¹ Characterized by Justice Brandeis in his celebrated defense simply as “the right to be let alone,”² the right to privacy is one of the most distinguishing and influential factors of life in the United States today. This right has taken on many different forms throughout history in the judicial system. In *Whalen v. Roe*,³ the Court discussed three facets of the right to privacy that have developed throughout case law: (1) the right of the individual to be free in his private affairs from government surveillance and intrusion; (2) the individual interest in avoiding disclosure of personal matters; and (3) the interest in independence in making certain types of

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¹ See generally *Paul v. Davis*, 424 U.S. 693, 712-14 (1976) (holding that a flyer which referred to the plaintiff as an “active shoplifter” did not deprive him of his right to privacy); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the right to privacy is broad enough to include a woman’s right to choose whether or not to terminate her pregnancy); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (finding a right to privacy in the penumbras of the Bill of Rights); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (holding that only rights which are “fundamental” or “implicit in the concept of ordered liberty” can be included in the right to privacy).

² *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

³ 429 U.S. 589 (1977).

decisions.⁴ Although the Supreme Court states that there is a substantial privacy interest in *Ferguson v. City of Charleston*,⁵ which serves to distinguish it from most of the cases in this area,⁶ the Court does little more to address any of the three facets of the constitutional right to privacy, which are clearly present in this case.⁷

The constitutional right of the individual to be free in his private affairs from government surveillance and intrusion is protected by the Fourth Amendment⁸ through its application to state law via the Fourteenth Amendment.⁹ In *Ferguson*, the Supreme Court held that searching the urine of unknowing patients for evidence of cocaine use violated the search and seizure clause of the Fourth Amendment.¹⁰ This Comment shows that although the Supreme Court's decision appears to protect privacy rights, the Court added an additional step that unnecessarily complicates the established special needs¹¹ analysis. In addition, the Court neglected to decide the important issue of what constitutes consent to a search or seizure, leaving open the question whether a similar drug-testing policy would be constitutional in the future. Moreover, the Medical University of South Carolina ("MUSC") policy could still be held constitutional if the Fourth Circuit finds on remand that the patients gave valid consent—effectively nullifying the importance of the Supreme Court's decision.

This Comment also argues that both the Supreme Court and the Fourth Circuit Court of Appeals were wrong in refusing to determine whether there actually was a privacy interest in medical records. The Supreme Court did not address the issue of medical records at all, while the Fourth

⁴ *Id.* at 599 n.24 (citations omitted).

⁵ 121 S. Ct. 1281, 1288 (2001) [hereinafter *Ferguson I*].

⁶ In other search and seizure cases involving urine testing, the court used the special needs balancing test and found that there was not a substantial privacy interest to outweigh the government need for performing the test.

⁷ Much has been written about the civil rights issues present in *Ferguson*. Therefore, as much as possible, this Comment will not discuss that aspect of this case. This Comment's focus will only be on the different elements of the right to privacy that exist in this case.

⁸ U.S. CONST. amend. IV.

⁹ U.S. CONST. amend. XIV. See generally *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating the Fourth Amendment).

¹⁰ *Ferguson I*, 121 S.Ct. at 1292-93.

¹¹ See *infra* Part II.C.

Circuit dismissed the issue by arguing that even if there was such a privacy interest, the government interest in this case outweighed the patient's interest in non-disclosure.¹² This Comment explores whether the women subjected to MUSC's policy had a legitimate privacy interest in their medical records.

In addition, the Supreme Court overlooked the important issue of mandated substance abuse treatment under penalty of arrest. The Supreme Court has ruled that there is a right to privacy involved with certain types of decision making, such as the right to decide the timing and method of one's medical treatment.¹³ This Comment explores how the right to refuse medical treatment was violated by the MUSC policy, which was coercive in nature and lacked informed consent.

In sum, this Comment finds that: the Court complicated the special needs analysis with their decision and left the search and seizure issue open by ignoring the question of consent; the MUSC policy violated the right to privacy in one's medical records; and the MUSC policy violated the right to make independent decisions regarding one's medical treatment.

I. BACKGROUND

In late 1989, MUSC implemented a policy ("Policy M-7") that required hospital personnel to test the urine of pregnant women, who met certain pre-determined indicia, for the presence of cocaine.¹⁴ The idea for MUSC's policy developed when an obstetrics nurse, Nurse Brown, approached the hospital's General Counsel about her concerns over what she perceived to be an increasing rate of pregnant mothers using

¹² *Ferguson v. City of Charleston*, 186 F.3d 469, 477-79 (4th Cir. 1999), *rev'd* 121 S. Ct. 1281 (2001) [hereinafter *Ferguson II*].

¹³ *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261 (1990).

¹⁴ In order to be tested, patients had to meet at least one of nine criteria established by MUSC:

- 1) Separation of the placenta; 2) Intrauterine death; 3) No prenatal care; 4) Prenatal care beginning after 24 weeks of pregnancy; 5) Fewer than five prenatal 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.

Ferguson I, 121 S. Ct. at 1285 n.4.

cocaine.¹⁵ MUSC then contacted the Solicitor General and, subsequently, a task force was formed.¹⁶ The Solicitor General informed the task force of a South Carolina law which could be interpreted to mean that a woman who used cocaine after her twenty-fourth week of pregnancy was guilty of distributing a controlled substance to a minor.¹⁷ Based on this law, the MUSC policy was developed to authorize testing the urine of all pregnant mothers who met one of nine indicia developed by the task force to indicate cocaine use.¹⁸ If the drug test results indicated the presence of cocaine, the patient was reported to the police department and was then arrested and charged with distribution of cocaine to a minor.¹⁹

In 1990, this policy was amended so that patients who tested positive for cocaine use had the option of being arrested or successfully completing MUSC's chosen inpatient substance abuse treatment program.²⁰ Patients who chose the treatment program were not arrested unless they tested positive for cocaine upon a second testing.²¹ Four women were subjected to this version of the policy. Policy M-7 was terminated around the time litigation began.²²

Following the 1990 amendment, positive drug screen results were recorded in medical charts and on Rolodex cards kept in Nurse Brown's office.²³ This information was then provided to law enforcement officials.²⁴ A patient could avoid having positive test results forwarded to the police by successfully completing a pre-chosen drug rehabilitation

¹⁵ *Id.* at 1284.

¹⁶ In addition to those already mentioned, the task force included the chief of police and MUSC physicians. *Id.* at 1282, 1284.

¹⁷ Any person eighteen years of age or over who . . . [distributes] a controlled substance classified in Schedule I (b) and (c) which is a narcotic drug or lysergic acid diethylamide (LSD) and in Schedule II which is a narcotic drug, or who . . . [distributes] crack cocaine to a person under eighteen years of age is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years or fined not more than thirty thousand dollars, or both . . .

S.C. CODE ANN. § 44-53-440 (Law. Co-op. 1997).

¹⁸ *Ferguson I*, 121 S. Ct. at 1285.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Petitioner's Reply Brief at 17-18, *Ferguson I* (No. 99-936), 2000 WL 1236043.

²³ *Id.* at 14-15.

²⁴ *Id.*

program.²⁵ Patients who were arrested could similarly avoid prosecution by attending a drug rehabilitation program.²⁶ If the patient successfully completed the treatment program, all charges would be dropped.²⁷ However, if a patient returned to the hospital and again tested positive, she would be arrested for distribution of a controlled substance to a minor.²⁸ Only one patient avoided arrest and prosecution by successfully completing the drug program, and none of the women arrested were ever prosecuted under the statute.²⁹

Ten patients subjected to this policy brought an action against the City of Charleston, MUSC, and various members of the hospital staff and police force alleging a Fourth Amendment violation, a civil rights violation based on the policy's racially disparate impact, a violation of their constitutional right to privacy, and a state law tort claim of abuse of process.³⁰

A. *The District Court Decision*

The South Carolina District Court granted judgment as a matter of law to the defendants on their claims of abuse of process and violation of the right to privacy.³¹ The Court ruled that the urine screens fell within the scope of the Fourth Amendment and submitted the question of whether the patients consented to the searches to the jury.³² The jury found that the patients had consented to the searches and thus there was no Fourth Amendment violation.³³ The plaintiffs asked the court for injunctive relief on their claim of violation of right to privacy, but were denied.³⁴ The South Carolina District Court also held for the defendants on the claim of disparate impact

²⁵ *Ferguson II*, 186 F.3d at 474. This program was an inpatient drug rehabilitation program located at MUSC. The women were given no options for an outpatient program that in many cases would have been a better fit for those women who were single parents, working, or had child-care responsibilities.

²⁶ *Id.*

²⁷ *Id.* at 474-75.

²⁸ *Id.* at 474.

²⁹ *Id.* at 475.

³⁰ *Ferguson II*, 186 F.3d at 475.

³¹ *Id.*

³² *Id.* at 475.

³³ *Id.* at 476.

³⁴ *Id.* at 475.

discrimination.³⁵ The plaintiffs appealed, challenging the sufficiency of evidence supporting the jury verdict, the court's decision on the civil rights claim, and the judgment as a matter of law regarding the abuse of process and right to privacy claims.³⁶

B. *The Fourth Circuit Decision*

On appeal, the Fourth Circuit held that testing without a warrant the urine of the pregnant women who met the pre-determined indicia of cocaine use did not violate the Fourth Amendment.³⁷ Ignoring the issue of consent, the court determined that MUSC's policy fell within the special needs exception to Fourth Amendment requirements because the search went beyond the needs of normal law enforcement.³⁸ Using the "special needs" balancing test,³⁹ the court upheld the policy finding that the government interest in reducing cocaine use by pregnant women outweighed the relatively minor intrusion imposed by the urine testing.⁴⁰ The Fourth Circuit also held that there was no violation of the patients' right to privacy.⁴¹ The court declined to address the issue of whether there was a right to privacy in the women's medical records. Instead, the court reasoned that even if such a right did exist, the compelling government interest in this case outweighed any such privacy right.⁴² The court specifically referred to the "nonpublic nature of the disclosure" in their reasoning.⁴³ In

³⁵ *Ferguson II*, 186 F. 3d at 476.

³⁶ *Id.*

³⁷ *Id.* at 479.

³⁸ *Id.* at 476-77.

³⁹ The special needs balancing test weighs the nature of the privacy interest intruded upon by the search (legitimacy) and the character of the intrusion (intrusiveness) against the nature and immediacy of the government issue and the efficacy of its means for meeting it. *Vernonia*, 515 U.S. at 654-61. See also *supra* Part II.B.

⁴⁰ *Ferguson II*, 186 F.3d at 477-79.

⁴¹ *Id.* at 483.

⁴² *Id.* at 482-83.

⁴³ *Id.* at 482.

addition, the Fourth Circuit held that patients failed to establish their civil rights claim of disparate impact discrimination⁴⁴ and the tort claim of abuse of process.⁴⁵

C. *The Supreme Court Decision*

Certiorari was granted by the Supreme Court on February 28, 2000, on the search and seizure issue.⁴⁶ The Court assumed, for the purposes of its decision, that the searches were conducted without the consent of the patients.⁴⁷ The Court first distinguished *Ferguson* from its previous Fourth Amendment special needs cases.⁴⁸ The Court also focused at length on the extent of law enforcement involvement in the development and daily implementation of Policy M-7. In doing so, the Court created an extra step in the special needs analysis: determining a policy's immediate versus its ultimate goal. The Court reasoned that although the policy's ultimate goal may have been to prevent maternal drug use and protect infants, the policy's obvious immediate goal was to collect evidence to use against the woman in criminal proceedings. The court held in a six to three decision that the searches violated the Fourth Amendment.

II. THE FOURTH AMENDMENT

The right of an individual to be free from government surveillance and intrusion is protected by the Fourth Amendment to the U.S. Constitution. The Fourth Amendment states in part, "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 . . ."⁴⁹ In order for a Fourth Amendment search to be reasonable, law enforcement must have probable cause and/or a warrant.⁵⁰ It is well established

⁴⁴ *Id.* at 482.

⁴⁵ *Ferguson II*, 186 F.3d at 483.

⁴⁶ *Ferguson v. City of Charleston*, 528 U.S. 1187 (2000).

⁴⁷ *Ferguson I*, 121 S.Ct. at 1287.

⁴⁸ *Id.* at 1288.

⁴⁹ U.S. CONST. amend. IV.

⁵⁰ *Id.*

by the Supreme Court that collection and testing of urine by the state constitutes a search protected by the Fourth Amendment.⁵¹ In *Ferguson*, the urine tests were performed without the patients' consent and without a warrant.⁵² Although the Supreme Court held that the searches violated the Fourth Amendment, its analysis ignored some important issues and complicated others. The Supreme Court assumed that no consent was given for the searches, dismissing the critical issue of whether these women gave valid consent. In addition, the court held that this was not a special needs search because the program's immediate objective was to "generate evidence for law enforcement purposes."⁵³ In contrast to prior Fourth Amendment cases, they did not use the special needs balancing test to make their decision.

A. *The Warrant Clause*

The Fourth Amendment states that in order for a search to be reasonable, law enforcement must first have a warrant or its equivalent, probable cause.⁵⁴ Courts have made exceptions to the warrant requirement when, under the circumstances, the process of obtaining a warrant would frustrate the purpose behind the search.⁵⁵ However, the Court in *Vernonia School District v. Acton* stated that "[t]he individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns."⁵⁶ When law enforcement officials are able to present with particularity

⁵¹ See *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (testing urine of candidates for public office is a Fourth Amendment search); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (testing urine of student athletes is a Fourth Amendment search); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (testing urine of U.S. customs officers is a Fourth Amendment search); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (testing urine of railroad employees is a Fourth Amendment search).

⁵² Supreme Court Brief of Petitioner at 13, *Ferguson I* (No. 99-936) [hereinafter *Petitioner's Brief*].

⁵³ *Ferguson I*, 121 S. Ct. at 1291.

⁵⁴ U.S. CONST. amend. IV.

⁵⁵ See *Vernonia*, 515 U.S. at 679; *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985); *Camara v. Mun. Court*, 387 U.S. 523, 532-533 (1967).

⁵⁶ 515 U.S. at 678 (O'Connor, J., dissenting).

their reasons for the search, the person(s) to be searched, and the items to be searched for, then a warrant is preferred.⁵⁷ MUSC claims that their nine indicia of cocaine use provided the necessary individual suspicion.⁵⁸ However, these indicia were vague and overbroad. Many of the factors were more indicative of poverty and a lack of quality medical care than of cocaine use.⁵⁹ MUSC needed more than a hunch that these women had ingested cocaine and an alleged concern for the fetuses to justify their search. The Court will not sustain searches for which there is no demonstrated probable cause solely because the officers reasonably expect to find evidence of a crime.⁶⁰ The Supreme Court has held that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."⁶¹

In *Ferguson*, the MUSC staff and law enforcement were searching the urine of pregnant mothers who met certain criteria developed to indicate the presence of cocaine.⁶² This search was narrowly defined and therefore a warrant could have been obtained by law enforcement officials with little effort at any one of many stages between when the patient entered the clinic and the subsequent arrest. When a pregnant mother entered the medical center exhibiting specific symptoms of cocaine use, law enforcement could have been

⁵⁷ In *Katz v. United States*, 389 U.S. 347, 354 (1967), the Court held that wiretapping a telephone booth, without a warrant, violated the Fourth Amendment because the surveillance was so narrowly defined that a magistrate could have constitutionally authorized the limited search that took place.

⁵⁸ Supreme Court Brief of Respondents at 8, *Ferguson* (No. 99-936) [hereinafter Respondent's Brief].

⁵⁹ Cf. American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2668 (1990) (citations omitted).

The women most likely to be prosecuted for exposing their fetuses to harmful substances are those from lower economic levels. These women are more likely to lack access to both prenatal care and substance abuse treatment because of financial barriers. They are often uninsured or under insured. Even when Medicaid is available, women may still lack access to medical care because of inadequate system capacity.

Id.

⁶⁰ *Katz*, 389 U.S. at 356.

⁶¹ *Id.* at 357.

⁶² *Ferguson II*, 186 F.3d at 474.

contacted so that a warrant could be obtained before the urine was even collected.⁶³ Or, once a pregnant mother was suspected of drug use, the urine could have been collected first and then law enforcement contacted so that they could obtain a warrant before the urine was screened for cocaine.⁶⁴ Likewise, once the urine was screened for cocaine and the patient reported, law enforcement could have obtained a warrant before the patient's medical records and test results were seized. As the Court held in *Katz*,⁶⁵ this search was so narrowly defined that at many points during the process it could have, and therefore should have, been presented to a magistrate for constitutional authorization.

B. *Consent*

Valid consent can make a warrantless search reasonable. As mentioned earlier, the South Carolina District Court found that the patients had consented to the search of their urine and that, therefore, there was no Fourth Amendment violation.⁶⁶ The Fourth Circuit failed to address the issue of consent by affirming under the Fourth Amendment exception for a "special needs" search. The Supreme Court assumed that valid consent was not provided even before beginning their Fourth Amendment analysis. This was a critical "oversight" by the Supreme Court that not only ignored the coercive elements and deception present in a program such as Policy M-7, but also left open the possibility that the program will be held constitutional by the Fourth Circuit on remand.⁶⁷

⁶³ Cocaine can be detected in urine up to seventy-two hours after ingestion. Supreme Court Amicus Brief of the American Medical Association at 13, *Ferguson I* (No. 99-936).

⁶⁴ The Court in *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617-18, suggested that the actual urine collection and the subsequent analysis were two separate searches.

⁶⁵ *Katz*, 389 U.S. at 356.

⁶⁶ *Ferguson II*, 186 F.3d at 476.

⁶⁷ The Supreme Court remanded *Ferguson* to the Fourth Circuit for determination of the consent issue. *Ferguson I*, 121 S.Ct. at 1295-96.

The patients subjected to Policy M-7 did not give valid consent for their urine to be tested for the presence of cocaine. In order to be valid, consent must be voluntarily given and cannot be the result of coercion or duress.⁶⁸ Voluntariness is a question of fact to be determined after evaluating the totality of the circumstances.⁶⁹ In *Ferguson*, the weight of the evidence—including the scope of the consent given, the scope of the actual search, the consent forms used, the deceptive tactics, and the issue of emotional distress—indicates that consent was not freely and voluntarily given.

1. Scope of Consent

A person consenting to a search may place limits upon her consent, either expressly or implicitly, referring to time, duration, or purpose of the search.⁷⁰ The Court, in *Florida v. Jimeno*,⁷¹ limited the scope of a search to that which the person expressly authorized, as would be understood by a reasonable person. MUSC claims that all patients signed a consent form upon admission to the hospital authorizing hospital staff to conduct any necessary tests on the patients' urine, including drug tests.⁷² Although patients did sign a basic hospital consent form, the patients authorized searches of their urine for medical and prenatal treatment purposes; they did not authorize disclosure to law enforcement.⁷³ The patients had no knowledge that their results could be turned over to law enforcement and could potentially result in arrest. In 1999, the Georgia Supreme Court held that a defendant's consent was invalid when officials told him they were testing his urine in order to determine whether he was under the influence of drugs or alcohol, but, when in reality, the results were used as

⁶⁸ *Schneekloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

⁶⁹ *Id.* at 226.

⁷⁰ 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1 (3d ed. 1996).

⁷¹ 500 U.S. 248, 251 (1991).

⁷² Respondent's Brief at 38, *Ferguson* (No. 99-936).

⁷³ See *U.S. v. Lipshitz*, 132 F. Supp. 519 (E.D.N.Y. 1955) (holding that where law enforcement approaches a revenue agent conducting a regular audit with consent of defendant and instructs him to conduct a more extensive audit in order to obtain evidence of criminal wrongdoing, any evidence obtained is in violation of Fourth Amendment because defendant only gave consent for a limited routine audit.)

evidence in a drug possession charge.⁷⁴ This case is similar to the facts in *Ferguson* where the patients' urine was tested under the guise of medical necessity for prenatal treatment or delivery, but the results were used as evidence of the mothers' criminal wrongdoing. Even if the patients gave consent to have their urine tested, it was solely for medical reasons related to their pregnancy: any other test was outside the scope of their consent.

2. Deception

Although it is true that under *Schneckloth v. Bustamonte*⁷⁵ a person does not need to be notified about the option to withhold consent,⁷⁶ this does not give law enforcement authorization to use any deception necessary.⁷⁷ The actual effect of the deception on the voluntariness of a person's consent is decided on a case by case basis.⁷⁸ However, courts have consistently held consent as involuntary when the deceptive tactics fail to inform the person of any suspicion of their criminal wrongdoing.⁷⁹ In *Ferguson*, patients did not receive any notice of the involvement of law enforcement until

⁷⁴ *Turpin v. Helmeci* 518 S.E.2d 887 (Ga. 1999). See also *State v. Frazier*, 494 S.E.2d 36 (Ga. Ct. App. 1997) (finding that consent to have one's urine tested for the presence of alcohol or drugs relating to a misdemeanor offense of operating a motor vehicle while under the influence is not voluntary consent to have urine tested for presence of cocaine related to a felony charge of drug possession); *State v. Gerace*, 437 S.E.2d 862 (Ga. Ct. App. 1993) (holding that consent given to have blood tested for presence of drugs and alcohol is not voluntary consent to have blood tested for DNA to be used as evidence in prosecution for rape); *Beasley v. State*, 419 S.E.2d 92 (Ga. Ct. App. 1992) (holding that consent given to have urine tested for alcohol or drugs in order to determine bond was not voluntary consent to have urine test used as evidence in felony possession charge).

⁷⁵ 412 U.S. 218 (1973).

⁷⁶ *Id.* at 231.

⁷⁷ LAFAYE, *supra* note 70, at § 8.2.

⁷⁸ *Id.*

⁷⁹ See *U.S. v. Phillips*, 497 F.2d 1131 (9th Cir. 1974) (illegal entry of DEA and local law enforcement under guise of investigating a fictitious robbery); *Arizona v. Petersen*, 604 P.2d 267 (Ct. App. 1979) (police asked to search defendant's new car to look for object left by previous owner, court deemed consent involuntary); *People v. Jefferson*, 43 A.D.2d 112, 350 N.Y.S.2d 3 (1st Dep't. 1973) (police violated the Fourth Amendment when they obtained entry into an apartment under the ruse of investigating a gas leak).

after the urine tests were performed.⁸⁰ In fact, it is questionable whether the potential for arrest was ever disclosed. After a patient's urine test came back positive, the patient received two documents, the Solicitor General's letter explaining MUSC's policy and a letter entitled "To Our Patients."⁸¹ Neither of these documents expressly stated that the test results would be turned over to law enforcement officials as evidence for arrest.⁸² Moreover, the women never realized that they were being tested by law enforcement officials—the hospital staff never made their relationship to law enforcement known to the patients.

3. Coercion

Respondents argued that the women subjected to the policy freely gave their urine for testing by choosing to have their treatment at MUSC.⁸³ This argument has obvious flaws. The women attended this high risk clinic for financial reasons. Their financial status, combined with the fact that most of them were in labor when tested, poses important questions about whether they were coerced to sign any consent form. Arguably it was coercive to even approach women who were in active labor, and expect them to understand to what they were actually "consenting," especially since many of the women had a limited educational background and no knowledge of legal forms. In addition, the deceptive tactics used by MUSC in obtaining consent were inherently coercive because patients might have felt that if they did not sign the hospital's consent forms that they would not be able to receive critically necessary medical services from the public clinic.⁸⁴

⁸⁰ Petitioner's Reply Brief at 15, *Ferguson* (No. 99-936).

⁸¹ *Id.*

⁸² *Id.*

⁸³ Respondent's Brief at 38, *Ferguson* (No. 99-936).

⁸⁴ *Cf. New York v. Jefferson*, 43 A.D.2d 112, 350 N.Y.S.2d 3 (1st Dep't 1973) (holding that police violated the Fourth Amendment when they obtained entry into an apartment under the ruse of investigating a gas leak because they deprived the defendant of free choice by implying that failure to allow entry would result in damage to person and/or property).

4. Individual Factors

Courts have also taken individual factors, such as maturity, education, intelligence, and emotional distress, into account when determining whether consent was voluntary.⁸⁵ Courts usually evaluate the nature of the events preceeding the consent and how those events might affect a person's ability to make a voluntary decision.⁸⁶ The current majority approach is that in order for emotional distress to be a determinative factor in whether consent is voluntary, it must be "so profound as to impair [a person's] capacity for self-determination or understanding" of what law enforcement was seeking.⁸⁷ Some courts have found that emotional trauma resulting from an accident is sufficient to determine that consent was involuntary.⁸⁸ Clearly, being in labor is an extremely stressful and emotional condition. Many of the women arrested under the policy at MUSC "consented" to the urine tests upon admission while they were in labor.⁸⁹ Moreover, as discussed in Part I.A. above, these women were financially unstable, often under-educated, and lacking knowledge in legal issues, and had nowhere else to turn for medical care. Looking at the totality of the circumstances, these consents could not have been deemed voluntary.

C. *Special Needs Exception*

Searches performed without a warrant or probable cause may be found reasonable when special needs, *beyond the*

⁸⁵ See LEFAVE, *supra* note 70, at § 8.2(e).

⁸⁶ *Id.*

⁸⁷ United States v. Duran, 957 F.2d 499, 503 (7th Cir 1992).

⁸⁸ Commonwealth v. Angivoni, 417 N.E.2d 422 (Mass. 1981) (explaining that consent given while in the emergency room with a dislocated hip was not voluntary because ability to reason may have been compromised by emotional trauma from having just been in an accident). See also People v. Lind, 18 N.E.2d 189 (Ill. 1938) (holding that consent given by defendant's wife was not valid because she was in a highly nervous state after husband and son returned home wounded in middle of night and were later arrested).

⁸⁹ Petitioner's Brief at 41, *Ferguson I* (No. 99-936). This Comment is in no way arguing that women who are pregnant, or in active labor, are not competent. However, the stress of labor in combination with other factors, in some women may lead to a impaired ability to give voluntary and knowledgeable consent.

normal need for law enforcement, make the process of getting a warrant or the requirement of individualized suspicion impractical.⁹⁰ In Fourth Amendment jurisprudence, the steps in a special needs analysis have been well established. The courts must first answer the threshold question of whether the search is a special need—whether it is “divorced from the State’s general interest in law enforcement.”⁹¹ If the answer is yes,⁹² the court must then conduct a balancing test in order to determine whether the special needs search is reasonable—balancing the nature of the privacy interest and the character of the intrusion against the nature and immediacy of the government interest and efficacy of the means chosen.⁹³

Although they arrived at different conclusions, both the District Court and the Fourth Circuit conducted the same well established special needs analysis. However, the Supreme Court did something different. With no explanation or foundation in case law or statutory law, the Court changed the special needs analysis by adding an unnecessary step, thus complicating an already difficult test. The Court began its discussion by stating that the “central and indispensable feature of [Policy M-7] from its inception was the use of law enforcement”⁹⁴ However, the Court did not stop here.⁹⁵ The Court goes on to look at the purpose of the policy, distinguishing between the policy’s ultimate and immediate purposes. This survey of a program’s purposes had only been done once before in a case decided earlier in the same term.⁹⁶

⁹⁰ The court has found “special needs” in a variety of circumstances. See, e.g., *Vernonia*, 515 U.S. at 652-53 (random urine testing of student athletes); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints for motorists); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (drug-testing U.S. Customs officers); *Skinner*, 489 U.S. at 617 (mandatory drug-testing of railroad employees).

⁹¹ *Ferguson I*, 121 S. Ct. at 1290.

⁹² But see *Griffin v. Wisconsin*, 483 U.S. 868 (1987). *Griffin* is the only special needs case which allowed significant law enforcement involvement. *Id.* at 880. However, this case is often rationalized because the searches were of probationers who have a diminished expectation of privacy. *Id.* at 873-874 (citations omitted). Pregnant mothers in no way compare to people on probation.

⁹³ *Vernonia*, 515 U.S. at 654-61.

⁹⁴ *Ferguson I*, 121 S. Ct. at 1290.

⁹⁵ See *infra* nn.95-107 and accompanying text.

⁹⁶ See generally *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (striking down an automobile checkpoint program because although the ultimate purpose of the program was to keep drugs out of the city, the program’s immediate purpose was to

The Court incorporated this new spurious step into their analysis in *Ferguson*. While determining that Policy M-7's ultimate purpose was to get pregnant women off drugs, the Court determined that the policy's immediate purpose was to "generate evidence for law enforcement purposes."⁹⁷ They rationalized this new step by reasoning that "law enforcement involvement always serves some broader social purpose or objective . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose."⁹⁸ Based on their interpretation of the policy's immediate purpose, the Court held that the search was not a special need and, therefore, was inconsistent with the Fourth Amendment.

This additional step of inquiring into both the ultimate and immediate purposes of a program is completely unnecessary. Fourth Amendment case law, and specifically special needs case law, provides a stable, well-tested framework for analyzing special needs questions. The earlier cases all begin with the threshold issue of the involvement of law enforcement. One element that the Court evaluated in these previous cases was whether information from the searches was turned over to law enforcement. In *Vernonia*,⁹⁹ the Court held that drug-testing the urine of student athletes for drugs was constitutional, but emphasized the significance that the test results were "not turned over to law enforcement authorities or used for any internal disciplinary function."¹⁰⁰

This lack of any law enforcement involvement was also a factor in *National Treasury Employees Union v. Von Raab*, where the Court held it constitutional to test the urine of U.S. Customs officers.¹⁰¹ The Court, in *Von Raab* explicitly stated, "It is clear that the . . . drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without

collect evidence for law enforcement purposes).

⁹⁷ *Ferguson I*, 121 S. Ct. at 1291 (emphasis omitted).

⁹⁸ *Id.* at 1291-92.

⁹⁹ 515 U.S. 646 (1995).

¹⁰⁰ *Id.* at 658.

¹⁰¹ 489 U.S. 656, 679 (1989).

the employee's consent."¹⁰² Another element the Court examined was whether there was a threat to public safety. In *Chandler v. Miller*,¹⁰³ the Court expressly stated that if "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."¹⁰⁴ The Court also looked at the amount of involvement by law enforcement in the development and administration of the program.¹⁰⁵

The involvement of law enforcement in the MUSC program is not disputed by the Court in *Ferguson*. The MUSC policy was developed by and for law enforcement. Law enforcement officials developed the MUSC policy on the basis of the South Carolina statute for distribution of narcotics to a minor.¹⁰⁶ In fact, the coercive approach of threatening to imprison someone was a commonly used tactic developed by South Carolina law enforcement to divert people into substance abuse treatment programs.¹⁰⁷ The law enforcement officials went so far as to formally implement the MUSC policy by sending out various memoranda to hospital staff setting guidelines, including which women would be tested and how the testing would be conducted.¹⁰⁸ Hospital staff was even trained by law enforcement to keep chain of custody with each urine sample. In the end, the MUSC policy was to turn over all positive test results to law enforcement, which ultimately resulted in arrest, and then use the threat of prosecution to force the women into substance abuse treatment.

Finally, there was no proven threat to public safety comparable to those found in other special needs cases.¹⁰⁹ The only danger in *Ferguson* was to the mother and the fetus, both

¹⁰² *Id.* at 666.

¹⁰³ 520 U.S. 305 (1997).

¹⁰⁴ *Id.* at 323.

¹⁰⁵ *Id.* at 321-22.

¹⁰⁶ S.C. CODE ANN. § 44-53-440 (Law. Co-op. 1997).

¹⁰⁷ Petitioner's Brief at 30, *Ferguson* (No. 99-936).

¹⁰⁸ *Id.* at 4.

¹⁰⁹ See generally *Chandler v. Miller*, 520 U.S. 305 (1997) (prevention of drug use by newly elected government officials); *Vernonia v. Acton*, 515 U.S. 646 (1995) (popular student athletes using drugs in epidemic proportions); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (prevention and deterrence of drunk drivers); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (prevention and deterrence of drugs use by train conductors); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (prevention of drug use by U.S. Customs officials who were responsible for firearms and stopping drug trafficking across the borders).

of whom were already harmed by the time MUSC searched the mother's urine. The seriousness of exposing an unborn fetus to cocaine cannot alone justify a warrantless search.¹¹⁰ The Court relied on this and other evidence in deciding that the policy was not divorced from the State's interest in law enforcement. The Court should have stopped the analysis here. Once the program cannot satisfy the threshold test, it is not a special need and, therefore, violates the Fourth Amendment. There is no need to continue the analysis.

The use of the Court's newly developed second step, analyzing the search's purpose, adds nothing to their analysis. The Court has already determined that the motive behind a search is irrelevant; thus, MUSC's alleged medical or treatment reasons cannot validate an otherwise unreasonable search.¹¹¹ This makes the Court's analysis into the hospital's claim that its purpose was to help pregnant women stop taking drugs extraneous. Moreover, as the Court briefly states, any search can be justified by relying only on its ultimate purpose. However, as Justice Kennedy argues in his dissent, "By very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence."¹¹² All of the Court's previous special needs cases were decided based on the policy's ultimate goal, and all could arguably be said to have had an immediate goal of collecting evidence.¹¹³ For example, the policy upheld in *Skinner* had the goal of ensuring railroad safety, but its immediate goal under the majority's analysis was to collect evidence of drug use by railroad employees.¹¹⁴ The policy upheld in *Vernonia* had the goal of deterring drug use by teens, whereas its immediate goal was to collect evidence of drug use by student athletes.¹¹⁵ Moreover, the policy upheld in *Von Raab* had the goal of deterring drug use in sensitive government positions, but the immediate goal was to collect

¹¹⁰ *Mincey v. Arizona*, 437 U.S. 385 (1978). "We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id.* at 394.

¹¹¹ In *Whren v. United States*, 517 U.S. 806, 811-13 (1996), the Court held that illegal motives cannot invalidate an otherwise reasonable search.

¹¹² *Ferguson I*, 121 S. Ct. at 1294 (Kennedy, J., dissenting).

¹¹³ *Id.* at 1293 (Kennedy, J., dissenting).

¹¹⁴ *Id.* (referring to *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989)).

¹¹⁵ *Id.* (referring to *Vernonia v. Acton*, 515 U.S. 646 (1995)).

evidence of drug use by people applying for those positions. What distinguishes *Ferguson* from the Court's previous special needs cases is not its immediate purpose for searches, but the integral involvement of law enforcement.

The Court did use its analysis to ultimately come to the correct decision, that the MUSC policy was an unconstitutional search. However, this case has altered the well-established special needs test for future cases in this area. The additional step of evaluating a program's purpose not only lacks foundation based on previous case law, but is unnecessary and, in most cases, will not change the final outcome of a case.

III. THE INTEREST IN AVOIDING DISCLOSURE OF PERSONAL MATTERS

The Supreme Court in *Ferguson* did not address the right to privacy of personal matters, in particular the right to medical privacy. However, in a bold step, the Court did briefly discuss the substantial invasion of privacy involved in the unauthorized dissemination of medical test results to third persons.¹¹⁶ It even went so far as to say that the reasonable expectation of privacy for a typical patient undergoing testing in a hospital is that those test results will not be shared with any non-hospital personnel without her consent.¹¹⁷ Unfortunately, the Court did not go further and find an actual right to privacy in the drug test results collected at MUSC.

The right to privacy has been limited by the Court to those personal rights "which are 'fundamental' or 'implicit in the concept of ordered liberty.'"¹¹⁸ Historically, those personal rights have been limited to the areas of marriage, family, procreation, education, and child-rearing.¹¹⁹ The right to privacy has been interpreted broadly enough to include the decision to terminate one's pregnancy.¹²⁰ In *Whalen v. Roe*, the Supreme Court interpreted the constitutional right to privacy broadly to include an "interest in avoiding disclosure of

¹¹⁶ *Ferguson I*, 121 S. Ct. at 1288 (referring to Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)).

¹¹⁷ *Id.*

¹¹⁸ *Paul*, 424 U.S. at 713 (citations omitted).

¹¹⁹ *Id.*

¹²⁰ See generally *Roe v. Wade*, 410 U.S. 113 (1973).

personal matters."¹²¹ This right has been interpreted by subsequent case law to include a right to privacy in one's medical records.¹²²

However, this right is not absolute. In *Whalen*, the Court held that the government's interests in record-keeping and mandated reporting of vital information, such as venereal disease and child abuse, outweighed the individual interest in avoiding disclosure of personal matters.¹²³ The factors that the Court considered included the state's responsibility for the health of the community,¹²⁴ security provisions for the personal information,¹²⁵ potential for harm through disclosure,¹²⁶ and whether the disclosure occurred as a result of a statutory scheme.¹²⁷

Other cases have looked specifically at the privacy interest in avoiding disclosure of one's medical records. In *United States v. Westinghouse Electric Corp.*,¹²⁸ the Third Circuit declared that "[t]here can be no question that . . . medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."¹²⁹ The Court in *Westinghouse* further expanded the balancing test enunciated in *Whalen* to include seven factors: (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent non-consensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and

¹²¹ 429 U.S. 589, 599 (1977).

¹²² See *Doe v. Southeastern Pa. Transp. Auth.*, 72 F.3d 1133 (3rd Cir. 1995); *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3rd Cir. 1980). But see *Jarvis v. Wellman*, 52 F.3d 125 (6th Cir. 1995) (Court held that disclosure of plaintiff's medical records did not rise to the level of a breach of a right recognized as "fundamental" under the constitution).

¹²³ *Whalen*, 429 U.S. at 602.

¹²⁴ *Id.*

¹²⁵ *Id.* at 605-06.

¹²⁶ *Id.* at 604 n.32.

¹²⁷ *Id.* at 603.

¹²⁸ 638 F.2d 570 (1980).

¹²⁹ *Id.* at 577.

(7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward that access.¹³⁰

The Supreme Court dismissed the issue of consent in *Ferguson* by assuming that the patients did not give valid consent to the searches.¹³¹ The Fourth Circuit also declined to visit the issue of a privacy right in one's medical records by stating that "even if Appellants possess a constitutional interest in the nondisclosure of their medical records, that interest is outweighed by the interest of the government in disclosure."¹³² However, as illustrated below, when using the established *Westinghouse* test, the patients' privacy interests in *Ferguson* outweigh the government's interest.

The first two factors to consider are the type of record requested and the information it might contain.¹³³ Instead of simply releasing the drug test results, MUSC turned over the full medical records of women with positive urine test results to the prosecutor and other law enforcement without the patients' knowledge.¹³⁴ In fact, law enforcement officials were allowed to freely browse the medical records kept in Nurse Brown's office while unattended by hospital staff.¹³⁵ Those records not only contained personal medical information related to the patient's pregnancy and drug use, but also any other illnesses including sexually transmitted diseases and HIV status.¹³⁶

The third and fourth *Westinghouse* factors to consider are the potential for harm in any subsequent disclosure and the injury of such a disclosure to the relationship in which the record was generated.¹³⁷ The potential for harm to the pregnant mothers and to the physician-patient relationship from the disclosure of patient medical records was great. Once a disclosure was made, the women were often arrested immediately after childbirth, some while still bleeding and in

¹³⁰ *Id.* at 578.

¹³¹ *Ferguson I*, 121 S. Ct. at 1287.

¹³² *Ferguson II*, 186 F.3d at 483.

¹³³ *Westinghouse*, 638 F.2d at 578.

¹³⁴ Petitioner's Brief at 14-15, *Ferguson I* (No. 99-936).

¹³⁵ *Id.* at 14-15.

¹³⁶ *Id.* at 15.

¹³⁷ *Westinghouse*, 638 F.2d at 578.

pain, and taken to jail.¹³⁸ One patient was arrested during her ninth month of pregnancy, spent that last month in jail, and was released only to give birth.¹³⁹

Other potential harms from this policy of disclosure are more indirect. It is the opinion of the American Medical Association ("AMA") that MUSC's policy will irreparably damage the physician-patient relationship, resulting in pregnant mothers avoiding medical treatment and prenatal care.¹⁴⁰ The AMA stated, "Drug-testing regimens like the Charleston policy drive a wedge between physicians and pregnant patients."¹⁴¹ In fact, some patients who were arrested did express hesitation in seeking out medical treatment in the future.¹⁴² In its amicus brief, the AMA stated that "[w]ithout 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."¹⁴³ This avoidance of medical treatment could be dangerous for both the mother and her unborn fetus. The AMA expressed strong concerns about the unreliability of urine screens and the need for voluntary disclosure by the patient in order to effectively treat both the mother and newborn infant.¹⁴⁴

The fifth factor to consider is the adequacy of the safeguards in place to prevent an unauthorized disclosure.¹⁴⁵ There were no reported security provisions or guidelines in MUSC's policy to ensure that personal medical information, such as HIV status, was not being disseminated. In fact, it was often the case that law enforcement would come to Nurse Brown's office to peruse patients' medical records.¹⁴⁶ Moreover, the information was also reported to social services agencies

¹³⁸ Petitioner's Brief at 7-8, *Ferguson I* (No. 99-936).

¹³⁹ *Id.*

¹⁴⁰ AMA's Amicus Brief at 10, *Ferguson I* (No. 99-936).

¹⁴¹ *Id.* at 11.

¹⁴² "The patients testified that their experience in being arrested based on searches conducted by the hospital according to the Search Policy has caused them permanently to distrust medical providers." Petitioner's Brief at 15, *Ferguson I* (No. 99-936).

¹⁴³ AMA's Amicus Brief at 11, *Ferguson I* (No. 99-936) (citation omitted).

¹⁴⁴ *Id.* at 13-18.

¹⁴⁵ *Westinghouse*, 638 F.2d at 578.

¹⁴⁶ Petitioner's Brief at 14-15, *Ferguson I* (No. 99-936).

and was discussed with third parties in Suspected Child Abuse & Neglect meetings.¹⁴⁷

The sixth factor to consider is the degree of need for access.¹⁴⁸ The disclosure in *Ferguson* was in no way meant for public health record-keeping, reporting, research, or statistical purposes. The hospital was not trying to determine rates of cocaine use in pregnant women in the community, risk factors, treatment options, or injury to the infant. The policy's sole purpose was to arrest pregnant women who used cocaine.

The final *Westinghouse* factor to consider is whether there is an express statutory, public policy, or public interest that justifies the access.¹⁴⁹ MUSC defended its policy on the state statutory basis.¹⁵⁰ However, the statutes that the policy are based on say nothing about an unborn fetus, viable or not.¹⁵¹ The specific statute on which the hospital policy is based states that it is a felony to distribute controlled substances or crack cocaine to "a person under eighteen years of age."¹⁵² In South Carolina case law, this statute has been interpreted to include a viable fetus.¹⁵³

The Court in *Whalen* established a constitutional right to avoid disclosure of personal matters.¹⁵⁴ The Third Circuit interpreted this right to include privacy in one's medical records.¹⁵⁵ The MUSC policy violated the patients' right to privacy in their medical records by turning them over to law enforcement officials. Applying the balancing test established in *Westinghouse*,¹⁵⁶ the patients' privacy interests outweighed the government's interest in disclosure.

¹⁴⁷ Patients who tested positive for cocaine were tracked through Suspected Child Abuse & Neglect ("SCAN") meetings. The hospital forwarded confidential medical records to all meeting participants on each patient being tracked. *Id.* at 15.

¹⁴⁸ *Westinghouse*, 638 F.2d at 578.

¹⁴⁹ *Id.*

¹⁵⁰ S.C. CODE ANN. § 44-53-440.

¹⁵¹ The MUSC policy was the first time that S.C. Code Ann. § 44-53-440 was applied to a pregnant woman with a viable fetus. Petitioner's Brief at 16, *Ferguson* (No. 99-936).

¹⁵² S.C. CODE ANN. § 44-53-440.

¹⁵³ *Ferguson II*, 186 F.3d at 474 n.2.

¹⁵⁴ 429 U.S. at 599.

¹⁵⁵ *Westinghouse*, 638 F.2d 570, 577 (3rd Cir. 1980).

¹⁵⁶ *Id.* at 578.

IV. INTEREST IN INDEPENDENCE IN DECISION MAKING

The courts have ruled that there is a right to privacy in certain types of decision making.¹⁵⁷ The most obvious example of protected decision making is the act of giving consent. In *Ferguson*, the act of giving consent becomes important in two different contexts: the patients' ability to consent to search or seizure¹⁵⁸ and the patients' right to informed consent for medical procedures and/or treatment. The courts have more commonly addressed decision making in the context of medical care. The courts have given people the right to independently decide to refuse even life-sustaining medical treatment.¹⁵⁹ And, especially relevant in this case is the right to make personal behavior decisions without government interference. Both the Supreme Court and the Fourth Circuit neglected to address any of the above privacy issues, therefore failing to reinforce one's right to privacy in personal decision making.

A. *Informed Consent*

Although not addressed by the Supreme Court, there is an informed consent issue in this case. Informed consent is a fairly recent phenomenon in the medical profession, emerging with the strong movement for increased patient autonomy.¹⁶⁰ The leading case in this area is *Canterbury v. Spence*,¹⁶¹ which established that doctors have a duty to inform their patients of all information necessary for them to make an intelligent decision. Although jurisdictions vary on the specifics, *Canterbury* set the basic standards for an informed consent claim. A patient must show that the physician or other

¹⁵⁷ See generally *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261 (1990) (discussing the right to decide to refuse medical treatment); *Paul v. Davis*, 424 U.S. 693 (1976) (outlining the right to privacy in personal decision-making areas such as family relationships, marriage, procreation, and child-rearing.); *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) (holding that a physician has a duty to disclose all material risks necessary for a patient to make an informed consent to medical treatment).

¹⁵⁸ See *supra* Part II.B.

¹⁵⁹ See generally *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261 (1990).

¹⁶⁰ Marsha Garrison & Carl E. Schneider, *Law and Bioethics: Individual Autonomy and Social Regulation* (2000) (unpublished manuscript) (on file with author).

¹⁶¹ 464 F.2d 772 (D.C. Cir. 1972).

healthcare professional failed to disclose a material risk and that the patient would not have chosen to continue with the treatment if the risk(s) had been disclosed.¹⁶² Most importantly, the undisclosed risk must have resulted in an injury.¹⁶³

This is a relevant issue in *Ferguson*. The mothers who received prenatal care from MUSC signed a general consent form for medical treatment.¹⁶⁴ However, this form did not disclose that a patient's laboratory results may be turned over to law enforcement as evidence against that patient which could result in their arrest.¹⁶⁵ This is clearly a material risk of receiving medical treatment at MUSC that, had it been disclosed, might have resulted in a patient refusing treatment. In addition, many women did experience an injury as a result of this undisclosed information in that they were arrested and taken to jail, some while still pregnant, and some immediately after birth.¹⁶⁶

B. *Right to Refuse Medical Treatment*

The Supreme Court recognized that there is a liberty interest in the ability of a competent adult to refuse medical treatment, even life-sustaining treatment as in *Cruzan v. Director Missouri Dep't of Health*.¹⁶⁷ However, the right to refuse medical treatment is not absolute; state intervention may be justified when state interests outweigh patient interests.¹⁶⁸ In *Ferguson*, this right becomes even more complicated by the issues of substance abuse treatment and pregnancy.

¹⁶² *Id.* at 786-90.

¹⁶³ *Id.* at 790.

¹⁶⁴ Petitioner's Brief at 14, *Ferguson I* (No. 99-936).

¹⁶⁵ *Id.*

¹⁶⁶ One petitioner, Lori Griffin, was told that she was being released to go home, only to be arrested in her hospital room. At eight months pregnant Ms. Griffin was handcuffed, shackled, and taken to jail where she remained until she gave birth three weeks later. Another petitioner, Sandra Powell, was arrested immediately after giving birth and was handcuffed and taken to jail while still bleeding and in her hospital gown. Petitioner's Brief at 7-8, *Ferguson I* (No. 99-936).

¹⁶⁷ 497 U.S. 261 (1990).

¹⁶⁸ *Id.* at 280-282.

1. Substance Abuse Treatment

Although there is an established right for an adult of sound mind to refuse medical treatment,¹⁶⁹ there are currently no cases that address the right to refuse substance abuse treatment. Because substance abuse treatment often includes more psychotherapy and mental health counseling than medical treatment, mandatory drug treatment can be analogized to civil commitment. In fact, substance abuse treatment is included in the definition of mental health treatment in the South Carolina statute governing the rights of mental health patients.¹⁷⁰ Mandated inpatient substance abuse treatment involves a patients' liberty interests and, therefore, should be evaluated as an involuntary civil commitment. The Court set the basic standard for involuntary civil commitment in *O'Connor v. Donaldson*,¹⁷¹ stating that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."¹⁷² South Carolina has included this dangerousness requirement in its state statute governing emergency alcohol and drug abuse commitment.¹⁷³ This standard has evolved into a three part test for involuntary civil commitment. First, the person must have a diagnosable mental illness. Second, because of that mental illness, the person must be proven a danger to himself and/or others. Third, there must be no less restrictive alternative.¹⁷⁴

This civil commitment standard can be applied in *Ferguson* where the patients who tested positive for cocaine were mandated to attend inpatient substance abuse treatment and could not leave under penalty of immediate arrest. Addiction to alcohol and/or illegal drugs is a diagnosable mental disorder.¹⁷⁵ However, it is not clear whether that mental

¹⁶⁹ *Id.* at 278.

¹⁷⁰ S.C. CODE ANN. § 44-22-10.

¹⁷¹ 422 U.S. 563 (1975).

¹⁷² *Id.* at 576.

¹⁷³ S.C. CODE ANN. § 44-52-50.

¹⁷⁴ ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 26-36 (American Civil Liberties Union 1996).

¹⁷⁵ AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF*

disorder causes the mother to be a danger to others. Moreover, there are obvious, less restrictive alternatives available, such as outpatient drug treatment or individual psychotherapy.

A 1995 case in New York directly addressed this issue of using involuntary commitment to protect a fetus from the mother's substance abuse. The issue in *In re Tanya P.*¹⁷⁶ was whether a New York psychiatric facility could involuntarily commit pregnant mothers based on the potential for fetal endangerment caused by the mother's possible cocaine use during her third trimester.¹⁷⁷ The New York Supreme Court ruled that the physician's fear that the patient would resume a life of drug use upon release was inadequate to meet the clear and convincing standard required to prove dangerousness.¹⁷⁸ Moreover, the judge emphasized that there was an absence of conclusive evidence of a direct connection, beyond correlation, between cocaine use and harmful effects on a fetus once it is born.¹⁷⁹ Very few courts have directly addressed this issue. However, it is an important issue for the patients in *Ferguson*. Using the civil commitment standards, *Ferguson* presents insufficient evidence of the requisite dangerousness requirement, in addition to insufficient proof of the absence of a less restrictive alternative treatment.

2. Pregnancy

The fact that a mother's refusal of medical treatment may potentially harm her fetus complicates this issue even further. In *Planned Parenthood v. Casey*,¹⁸⁰ the Court emphasized the uniqueness of the experience of a pregnant mother:

The liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . Her suffering is too intimate and

MENTAL DISORDERS: DSM IV-R 176 (4th ed. rev. 1994).

¹⁷⁶ Cerisse Anderson, *Commitment Order to Protect Fetus Denied*, N.Y.L.J., Feb. 27, 1995, at 1.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 505 U.S. 833 (1992).

personal for the State to insist, without more, upon its own vision of the woman's role.¹⁸¹

However, the Court also made clear that when a fetus reaches viability, the state's interest in preservation of a potential life becomes compelling and can outweigh the mother's interests.¹⁸² When evaluating a mother's medical decision, the question becomes whether the mother's rights of bodily integrity and privacy outweigh the rights of the fetus.¹⁸³ The Supreme Court first looked at the issue of parental versus fetal rights in *Thornburgh v. American College of Obstetricians and Gynecologists*.¹⁸⁴ Evaluating various provisions of the Pennsylvania Abortion Control Act, the Court ruled that the mother's health should always be the "paramount consideration."¹⁸⁵

The reasoning used in *Thornburgh* was relied on in the first federal case that addressed a pregnant mother's right to refuse medical treatment. Decided in 1987, *In re A.C.*¹⁸⁶ involved a mother who was six months pregnant and terminally ill with cancer.¹⁸⁷ The physicians believed that as the mother's health worsened, the only chance to save the baby was to perform a cesarean section.¹⁸⁸ It was unclear in this case what the mother's true wishes were, although her last indication before becoming permanently unconscious was that she did not want the surgery.¹⁸⁹ The hospital obtained a court order and performed the cesarean section; both mother and child died shortly after.¹⁹⁰ The Court held that a competent woman's decision should control in almost all cases.¹⁹¹ Other courts have followed this decision.¹⁹² Applying this decision to

¹⁸¹ *Id.* at 852.

¹⁸² *Id.* at 869-870.

¹⁸³ An in-depth discussion of the debate of fetal rights is beyond the scope of this paper.

¹⁸⁴ 476 U.S. 747 (1986).

¹⁸⁵ *Id.* at 768-69.

¹⁸⁶ 573 A.2d. 1235 (D.C. Cir. 1990).

¹⁸⁷ *Id.* at 1238.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1241.

¹⁹⁰ *Id.* at 1238.

¹⁹¹ *In re A.C.*, 573 A.2d. at 1249.

¹⁹² See *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997) (holding that a state cannot override a competent woman's refusal of blood transfusions even if the

Ferguson would suggest that the mother's decision whether to seek treatment for her drug use should control, despite any potential impact to the fetus.

C. *Personal Behavior Decisions*

In cases that involve pregnant mothers using illegal drugs, the debate often centers on whether the mother is harming her fetus with her behavior or whether she is simply not aiding the fetus. There is no common law duty to aid a third party.¹⁹³ However, the relationship between a mother and her unborn child is a parent-child relationship that has been deemed by the courts a "special relationship."¹⁹⁴ This legal duty should not apply in the case of a pregnant mother.¹⁹⁵ Courts have held that even in special relationships, the rescuer cannot be required to endanger himself to aid another.¹⁹⁶ Because a fetus does not receive the same legal recognition as a child, the mother's responsibility to the fetus should not exceed her responsibility to a living child—she should not be forced to undergo invasive procedures for the benefit of an unborn child.¹⁹⁷

Although there was no actual physically invasive medical treatment in *Ferguson*, the treatments are comparable. The mothers were forced, for the benefit of their unborn children, to either attend inpatient substance abuse treatment, a potentially emotionally invasive treatment, or face arrest and jail time, a significant restriction on their liberty interests. This policy of protecting one's unborn fetus to

decision may be harmful to her fetus); *In re Baby Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994) (holding that a woman's competent choice to refuse invasive medical treatment must be honored even when the decision may be harmful to her fetus). *But see* *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981) (holding that an expectant mother whose fetus is viable lacks the right of other persons to refuse medical treatment if the life of her fetus is at stake).

¹⁹³ AMA Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2664 (1990).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See* *McFall v. Shimp*, 10 Pa. D. & C. 3d. (1978) (court held that a person could not be compelled to donate bone marrow to his cousin, even if it was the cousin's only chance for survival).

¹⁹⁷ AMA Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2664 (1990).

the detriment of the mother's rights is very dangerous. MUSC would argue that clearly it is acceptable to enforce such drastic measures when the mother is endangering her fetus with illegal drug use. But where does this justification end? Will mothers also be civilly or criminally liable if they participate in legal behaviors that might harm the fetus, such as alcohol or tobacco use? Will the law stretch so far as to hold pregnant women accountable for missing prenatal appointments or not taking prenatal vitamins? If other courts follow the *Ferguson* decision, there will be a movement to do away with a pregnant woman's right to privacy all together.

Both the Supreme Court and the Fourth Circuit in *Ferguson* failed to uphold the patients' privacy interest in personal decision making. The Court ignored the fact that the patients did not give voluntary informed consent to the searches and were often subjected to unfairly deceptive tactics by hospital personnel to obtain consent. In addition, the MUSC policy violated the patients' right to refuse medical treatment by forcing them to attend inpatient substance abuse treatment or face immediate arrest. The women were involuntarily committed without meeting the requisite dangerousness requirement.¹⁹⁸ Both the Supreme Court and the Fourth Circuit also failed to address the violation of the patients' privacy interest in making personal behavior decisions without the interference of government. This has the potential to undermine a pregnant woman's right to privacy altogether.

CONCLUSION

The MUSC policy violated the Fourth Amendment because it provided for warrantless searches of non-consenting patients. Although the Supreme Court came to this conclusion, it ignored the issue of consent, effectively leaving it possible for Policy M-7 to be upheld on remand. Moreover, the Court complicated the established special needs analysis by adding an unnecessary step. The intense focus on law enforcement

¹⁹⁸ See *supra* notes 10-11 and accompanying text.

indicates that the search should not have been deemed a special needs search, and the analysis should have ended there.

In addition, both the Supreme Court and the Fourth Circuit were wrong to avoid the significant issue of a privacy interest in one's medical records. The patients' interests in avoiding disclosure of personal matters was clearly violated when the hospital turned over their entire medical records to law enforcement without patient consent. The patients' privacy interests in the content of those records outweighed the government interest in full disclosure.

Moreover, the Court was wrong to ignore the important issue of decision-making privacy. Mandating substance abuse treatment without satisfying the required criteria for civil commitment violated the patients' right to refuse medical treatment. Forcing a woman to be liable for her personal decisions according to how they might affect her unborn fetus is an excessive intrusion on her personal privacy. In addition, the Court set an unfortunate precedent in allowing a hospital to use deceptive and covert tactics to obtain one's consent to gather evidence against him or her.

The Supreme Court in *Ferguson* failed to fully address all three facets of the right to privacy: (1) the right of the individual to be free in his private affairs from government surveillance and intrusion; (2) the individual interest in avoiding disclosures of personal matters; and (3) the interest in independence in making certain kinds of decisions.¹⁹⁹ Although the Court appears to protect privacy under the Fourth Amendment, at closer review, the Court merely complicates the well-established special needs analysis, while leaving the search and seizure issue open by ignoring the question of consent. For all these reasons, the Court failed to address the fact that the MUSC policy violated one's right to privacy in one's own medical records and violated one's right to make independent decisions regarding one's medical treatment. In doing so, the Court undermined the established privacy doctrine and set a dangerous precedent for the future of a

¹⁹⁹ *Whalen*, 429 U.S. at 600 n.24 (citations omitted).

pregnant woman's right to privacy. Moreover, the Court violated the basic tenet of life in the United States today, "the right to be let alone."²⁰⁰

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²⁰⁰ *Olmstead*, 277 U.S. at 478 (Brandeis, J. dissenting).

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