DRUG TESTS, ARRESTS & FETUSES: A COMMENT ON THE U.S. SUPREME COURT'S NARROW OPINION IN *FERGUSON v. CITY OF CHARLESTON*

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I. INTRODUCTION

> The arrests resembled the conduct of a state in a totalitarian regime, with police apprehending some patients within days, or even hours, of giving birth, and hauling them to jail in handcuffs and leg shackles. Police attached handcuffs to three-inch wide leather belts that were wrapped around the women's stomachs. Some women were still bleeding from the delivery; when one complained, she was told to sit on a towel at the jail. Another reported that she was grabbed in a chokehold and forcefully escorted into treatment. One woman who was pregnant at the time of her arrest sat in a jail cell waiting to give birth. Another pregnant woman was transported weekly from the jail to the hospital in handcuffs and leg irons for prenatal care; she was still in handcuffs and leg irons when authorities took her to the hospital in labor. She was kept handcuffed to her bed during the entire delivery.[1]

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[1] Christine M. Bulger, *In the Best Interests of the Child? Race and Class Discrimination in Prenatal Drug Use Prosecutions*, 19 B.C. THIRD WORLD L.J. 709, 721 (1999), LEXIS, Nexis Library, Boston College Third World Law Journal (reviewing LYNDA BECK FENWICK, PRIVATE CHOICES, PUBLIC CONSEQUENCES: REPRODUCTIVE TECHNOLOGY AND THE NEW ETHICS OF CONCEPTION, PREGNANCY, AND FAMILY (1998)). *See also* Ferguson v. City of Charleston, S.C., 186 F.3d 469, 485-86 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (Blake, J., dissenting) (describing the *Ferguson* petitioners' individual stories); Bryony J. Gagan, Ferguson v. City of Charleston, S.C.: *"Fetal Abuse," Drug Testing, and the Fourth Amendment*, 53 STAN. L. REV. 491, 491-92 (2000) (discussing petitioner Crystal Ferguson's account of her arrest); Kimono Paul-Emil, *The Charleston Policy: Substance or Abuse?*, 4 MICH. J. RACE & L. 325 (1999) (discussing petitioners' accounts and arguing that by intentionally targeting indigent black women for prosecution, MUSC's policy continued the U.S. "legacy" of the "systematic oppression" of black women, which results in the criminalization of Black Motherhood); John Cloud, *Protecting the Unborn: How Far Can Police Go to Prevent a Mother from Harming Her Fetus? The Supreme Court Will Decide*, TIME, Oct. 9, 2000, at 50, 52 (According to Patricia Williams, one of the other *Ferguson* petitioners, "[a]fter she tested positive for coke on the day she delivered, . . . 'I was in my room screaming with pain, and they walked past like I didn't exist.' Two days later, she was taken to jail, though she spent only a few hours there." Another petitioner was arrested "not long after a hospital staff member noted in a chart that she was passing blood clots and weeping in pain."). For related cases

The events just described did not take place fifty years ago in a communist nation. This egregious account is in fact a description of the drug-testing policy the Medical University of South Carolina (MUSC) instituted at its Medicaid clinic in Charleston, South Carolina in the early nineties.[2] It is also the subject of the U.S. Supreme Court's extremely narrow opinion in *Ferguson v. City of Charleston.*[3]

This case Comment provides a complete and detailed analysis of *Ferguson.* Part I describes the formulation and execution of MUSC's drug-testing policy. Part II reviews the procedural history of *Ferguson,* including its disposition at the district court and appellate levels. Part III explores *Ferguson* at the U.S. Supreme Court level, with reviews of the amicus curiae briefs, oral arguments, and the Supreme Court opinion. Part IV critiques the Supreme Court's opinion. It argues that while the Supreme Court reached the correct decision in *Ferguson,* i.e. that MUSC's drug-testing policy was unconstitutional because it violated the Fourth Amendment's bar against unreasonable searches and seizures, the Supreme Court's "special needs" analysis[4] was vague and incomplete.

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that will not be dealt with in this Comment, see Cloud, *supra,* at 52 (discussing cases like that of Rebecca Corneau, a mother who was sent to a center for pregnant inmates until she gave birth in October 2000 because she refused conventional medical treatment).

2 "There have been similar prosecutions in other states, but they occurred on a case-by-case basis and not through a hospital policy of turning drug tests over to police . . . . Most of those prosecutions were thrown out on grounds that state child-endangerment laws did not apply to fetuses." Laurie Asseo, *Women's Privacy Rights vs. Guarding Fetuses Debated: Testing Pregnant Women for Drugs Argued,* BATON ROUGE ADVOC., Oct. 5, 2000, at 2A, 2000 WL 4502806. *See also* Cloud, *supra* note 1, at 50.

> The prosecutions [of pregnant women] almost never hold up because courts rule that when the relevant laws were passed, they were not intended to apply to fetuses. In 21 of the 22 states where women have challenged fetal-abuse charges, courts have rejected the charges. . . . The most recent decision came last year, when a Wisconsin court dismissed charges of attempted murder against Deborah Zimmerman. She drank heavily during her ninth month of pregnancy, even got drunk, prosecutors allege, on the day she was to deliver her child, who, born sickly, is now apparently healthy.

Id. Cf. Martin Flumenbaum & Brad S. Karp, *"Fetal Rights," Birth Mother Fourth Amendment Rights,* N.Y. L.J., Dec. 27, 2000, at 3 (describing Kia P. v. Long Island College Hospital, 235 F.3d 749 (2d Cir. 2000)).

> [In *Kia*] the United States Court of Appeals for the Second Circuit held that where a private hospital detained a newborn infant for over a week in the good faith belief that the baby had tested positive for drugs, and where that detention was performed solely for medical reasons related to assuring the baby's health, the hospital . . . did [not] violate either the mother's or the infant's due process or Fourth Amendment rights.

Id.

3 532 U.S. 67, 121 S. Ct. 1281 (2001).

4 For a description of the traditional "special needs" analysis, see *infra* notes 214-15 and accompanying text.

Towards this end, Part V.A. argues that when the Court compared *Ferguson* to the other "special needs" cases,[5] it should have recognized that all suspicionless searches where the search was designed to serve "special needs" beyond the normal need for law enforcement, one of the three "types"[6] of "special needs" cases, fit a particular pattern with eight criteria in common. The Court should have then held that MUSC's policy met none of these criteria. Part V.B. argues that after the Court conducted its threshold inquiry into the primary purpose behind MUSC's policy, it should have proceeded with the next step in the traditional "special needs" analysis. It should have weighed the government's interest in protecting the lives and health of fetuses against pregnant women's interests in their privacy and reproductive rights. The Court should have then held that women's rights outweigh the government's interests in cases like *Ferguson.*

Had the Court engaged in the more thorough "special needs" analyses above, the Court would have reached the same result in *Ferguson.* More importantly, however, the Court would have also made it clear (which it currently fails to do) that future state hospital drug-testing policies which are merely revised versions of MUSC's policy will violate *Ferguson* and will therefore be declared unconstitutional. Indeed, under this Comment's analysis, any state hospital drug-testing policy which coerces pregnant women into drug treatment by threatening them with criminal prosecution violates *Ferguson* and is unconstitutional.

Part VI of this Comment explores the future judicial development of some of the related issues raised in *Ferguson.* Part VII concludes this Comment, reiterating that even though the Supreme Court reached the correct holding in *Ferguson,* its opinion was too narrow.

II. BACKGROUND

A. MUSC's Drug Screening Program

MUSC is a state hospital that serves a mostly indigent, minority population.[7] In the fall of 1988, staff members at MUSC became concerned with an alleged increase in the use of cocaine by pa-

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[5] For a definition and description of "special needs" cases, see *infra* notes 207-13 and accompanying text.

[6] For a description of the three "types" of "special needs" cases, see *infra* notes 210-13 and accompanying text.

[7] Bulger, *supra* note 1, at 719. MUSC is the only hospital in South Carolina's Greenville County that serves indigent patients, and its population contains a disparate number of poor black women. *See* Gagan, *supra* note 1, at 499.

tients who received prenatal care at the hospital.[8] Accordingly, in April 1989, MUSC began to order drug screens on the urine samples of maternity patients suspected of cocaine use.[9] At this time, if a patient tested positive for cocaine use, she was referred to the county substance abuse commission for counseling and treatment.[10]

Around August 1989, Nurse Shirley Brown, the case manager for MUSC's obstetrics department, heard a news broadcast reporting that the police in Greenville, South Carolina were arresting pregnant cocaine users based on the theory that these women are guilty of child abuse.[11] Nurse Brown discussed the news broadcast with MUSC's general counsel, Joseph C. Good, Jr., who then contacted Charleston Solicitor Charles Condon.[12] Good offered Con-

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[8] *Ferguson*, 121 S. Ct. at 1284. For other descriptions and critiques of MUSC's drug-testing policy and the *Ferguson* opinions, see Bulger, *supra* note 1, at 719-21; *Civil Rights – Title VI – Fourth Circuit Holds that Articulated Reasons Rebut Challenges Against Discriminatory Practices* – Ferguson v. City of Charleston, S.C., *186 F.3d 469 (4th Cir. 1999)*, 113 HARV. L. REV. 1246, 1246-47 (2000); Jessica M. Dubin, *Constitutional Law: Fourth Circuit Upholds Cocaine Testing of Pregnant Women*, 27 J.L. MED. & ETHICS 279, 279-80 (1999); Richard W. Garnett, *What Are the Limits on Warrantless Drug Testing of Pregnant Women?*, 1 PREVIEW U.S. SUP. CT. CAS. 31 (2000), LEXIS, Nexis Library, Preview of United States Supreme Court Cases; Edward J. Imwinkelried & D.H. Kaye, *DNA Typing: Emerging or Neglected Issues*, 76 WASH. L. REV. 413, 434-36 (2001), LEXIS, Nexis Library, Washington Law Review; Nancy Kubasek & Melissa Hinds, *The Communitarian Case Against Prosecutions for Prenatal Drug Abuse*, 22 WOMEN'S RIGHTS L. REP. 1, 7-10 (2000); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALBANY L. REV. 999, 1024-29 (1999); Major Michael R. Stahlman, *New Developments in Search and Seizure: A Little Bit of Everything*, 2 ARMY LAW. 20, 31-33 (2001); Janet W. Steverson, *Stopping Fetal Abuse with No-Pregnancy and Drug Treatment Probation Conditions*, 34 SANTA CLARA L. REV. 295, 331-34 (1994); Carmen Vaughn, *Circumventing the Fourth Amendment Via the Special Needs Doctrine to Prosecute Pregnant Drug Users:* Ferguson v. City of Charleston, S.C., 51 S.C. L. REV. 671, 672-74 (2000); Charles F. Williams, *Return of the Fourth Amendment*, 8 PREVIEW U.S. SUP. CT. CAS. 442 (2001), LEXIS, Nexis Library, Preview of United States Supreme Court Cases; Heather Flynn Bell, Comment, *In Utero Endangerment and Public Health: Prosecution vs. Treatment*, 36 TULSA L.J. 649, 655-57 (2001); Nicole F. DiMaria, Note, *Fourth Amendment – Search and Seizure – Urinalysis Drug Screenings Performed by State Hospital Without a Warrant Fall Within the "Special Needs" Exception to the Warrant Requirement* – Ferguson v. City of Charleston, *186 F.3d 469 (4th Cir. 1999)*, 11 SETON HALL CONST. L.J. 121 (2000); Jacqueline R. Williams, Note, *A Well Deserved Upper-Cut to Fetal Abuse:* Ferguson v. City of Charleston, 28 S.U. L. REV. 187 (2001), LEXIS, Nexis Library, Southern University Law Review.

[9] *Ferguson*, 121 S. Ct. at 1284.

[10] *Id.*

[11] *Id.* In *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984), the South Carolina Supreme Court held that a viable fetus is a person within the meaning of South Carolina's criminal law. Hence, anyone who delivers cocaine to a minor in South Carolina may be prosecuted under Section 44-53-440, which governs the punishment for the distribution of a controlled substance to a minor (i.e. anyone under the age of eighteen including a fetus). S.C. CODE ANN. § 44-53-440 (Law. Co-op. 2000). Moreover, in *Whitner v. State*, 492 S.E.2d 777, 778-84 (S.C. 1997), *withdrawn & superseded on reh'g by* 492 S.E.2d 777 (1997), *cert. denied*, 523 U.S. 1145 (1998), the South Carolina Supreme Court upheld a woman's conviction for criminal neglect because she ingested cocaine while she was pregnant with a viable fetus. For a further description of *Whitner* and legislative responses to it, see Kubasek & Hinds, *supra* note 8, at 4-8.

[12] *Ferguson*, 121 S. Ct. at 1284.

don MUSC's cooperation in prosecuting mothers whose children tested positive for drugs at birth.[13] Condon accepted the offer, and he organized meetings to discuss a drug-testing policy, decided who would participate, and issued invitations to the meetings.[14] Condon also formed a task force which included the South Carolina Police Department (CCPD), representatives of MUSC, the County Substance Abuse Commission, and the Department of Social Services (DSS).[15] The task force's deliberations led to a twelve-page document entitled "POLICY M-7"—a policy aimed at managing and treating MUSC's pregnant drug users.[16]

According to POLICY M-7, a patient was to be tested for cocaine use through a drug screen when she met one of nine criteria.[17] The policy also provided that a chain of custody was to be followed when obtaining and testing urine.[18] Finally, the policy provided that those who tested positive for cocaine use were to be referred to a substance abuse clinic.[19] In terms of criminal penalties, the policy provided that if a woman tested positive for drugs after giving birth, MUSC personnel had to notify the police immediately, and the police had to promptly arrest the patient.[20] If a woman was suspected of cocaine use during her pregnancy, the police had to be notified after the first positive drug test result, and the patient had to be arrested at that point.[21]

POLICY M-7 was amended six months after it was instituted.[22] Under the new policy, a pregnant patient who tested positive for cocaine use received two options: submit to drug treatment or face arrest.[23] If she chose treatment, MUSC would not forward her pos-

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13 *Id.* Good wrote to Condon: "Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter." *Id.* at 1284 n.3.

14 *Id.* at 1284-85.

15 *Id.* at 1285.

16 *Id.*

17 *Id.* The criteria were as follows: separation of the placenta from the uterine wall; intrauterine fetal death; no prenatal care; late prenatal care (beginning after 24 weeks); incomplete prenatal care (fewer than five visits); preterm labor without an obvious cause; history of drug or alcohol use; unexplained birth defects; and intrauterine growth retardation without an obvious cause. *See* Ferguson v. City of Charleston, S.C., 186 F.3d 469, 473 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001). *See also Ferguson*, 121 S. Ct. at 1285 n.4.

18 *Ferguson*, 121 S. Ct. at 1285.

19 *Id.*

20 *Id.*

21 *Id.* at 1285 n.5.

22 Cynthia Daniels, *Doctors Should Not Police Pregnant Women's Actions*, SAN FRANCISCO CHRON., Nov. 15, 2000, at A23, 2000 WL 6497227.

23 *Id. See also* Ferguson v. City of Charleston, S.C., 186 F.3d 469, 473 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) ("[M]any of the women arrested were never offered this option; others say they rejected it because it required them to leave their other children.").

itive drug test result to the CCPD or to the Solicitor's Office, and she would not be arrested.[24] Instead, she would be shown an educational video regarding the harmful effects of cocaine use during pregnancy.[25] In addition, she would receive two letters.[26] One, from the hospital staff, informed her about MUSC's drug-testing policy and notified her of her first appointment at a substance abuse clinic.[27] The other, from Solicitor Condon, warned:

> If 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.[28]

If a pregnant patient tested positive for cocaine use and refused treatment, if she tested positive more than once, or if she agreed to treatment but then failed to comply with it, MUSC would report her test result to the CCPD, and she would subsequently be arrested.[29] If a pregnant patient tested positive upon giving birth or if her newborn tested positive, she would be subjected to the above penalties, and DSS would be notified; it would then remove the newborn from the mother's custody.[30]

Cocaine-using pregnant patients were criminally charged as follows under the revised policy.[31] If a woman tested positive for cocaine use when she was twenty-seven weeks pregnant or less, she was charged with possession.[32] If she was at least twenty-eight weeks pregnant, she was charged with possession and distribution.[33] If she tested positive upon delivery, she was charged with possession, distribution, and unlawful neglect of a child.[34] In all of

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

25 *Id.*

26 *Id.*

27 *Id.* at 475.

28 *Id.*; Bulger, *supra* note 1, at 709, 720. At some point during this period, Condon produced TV ads proclaiming "[n]ot only will you live with guilt, you could be arrested." *Ferguson*, 186 F.3d at 473. In 1998, Condon "told the *Washington Times* that he would be 'proud' and 'very pleased' to defend his policies, 'even in terms of reversing *Roe v. Wade*.'" Jonathan Ringel, *Drug War Checks into Hospital Bad Medicine?*, LEGAL TIMES, Oct. 9, 2000, at 10, LEXIS, Nexis Library, Legal Times (italics added).

29 *Ferguson*, 186 F.3d at 473.

30 Barry Siegel, *In the Name of the Children: Get Treatment or Go to Jail, One South Carolina Hospital Tells Drug-Abusing Pregnant Women. Now It Faces a Lawsuit and a Civil-Rights Investigation*, L.A. TIMES, at 14, Aug. 7, 1994, 1994 WL 2332673.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

these cases, prosecutors could drop all charges if the patient agreed to treatment.[35]

B. *The Motivations Behind the Policy*

According to MUSC personnel, MUSC instituted its drug-testing program because members of its hospital staff were concerned with the short-term symptoms—symptoms like withdrawal, difficulty eating, and cardiovascular dysfunction—they observed in crack-addicted newborns born at the hospital.[36] Staff members were also allegedly concerned that their cocaine-addicted pregnant patients repeatedly refused drug treatment.[37] Finally, two MUSC officials allegedly feared that MUSC could be held legally responsible for failing to prevent health problems of crack-addicted newborns born at MUSC.[38]

In contrast, according to non-MUSC personnel, MUSC instituted its drug-testing program in response to "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.'"[39] Some have also claimed that Nurse Shirley Brown was the real "impetus" behind MUSC's drug-testing policy.[40]

III. PROCEDURAL HISTORY OF *FERGUSON V. CITY OF CHARLESTON*

A. *Initial Reactions to MUSC's Drug-Testing Policy*

Upon learning of MUSC's drug-testing policy in 1993, abortion-rights advocates filed a lawsuit, arguing that MUSC's drug-testing program was unconstitutional because MUSC conducted its "searches" without warrants and because its pregnant patients did not consent to the "searches."[41] In January 1994, these same advocates filed a complaint with the National Institute for Health, argu-

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35 Ferguson v. City of Charleston, S.C., 186 F.3d 469, 474-75 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001). *See also* Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281, 1285 (2001) (In 1990, this policy was modified at the behest of the Solicitor's Office; under the new policy, a patient who tested positive for drugs during labor could avoid arrest if she consented to treatment.).

36 *Ferguson*, 186 F.3d at 473.

37 *Id.*

38 *Id.*

39 Gagan, *supra* note 1, at 495.

40 *See, e.g.*, *Ferguson*, 186 F.3d at 473; Carrie Wolfe, Ferguson v. City of Charleston, Nw. U. MEDILL SCH. JOURNALISM: ON THE DOCKET 1, 1 (Jan. 5, 2001), *at* http://www.medill.nwu.edu. *Cf.* Bulger, *supra* note 1, at 723-24 (Brown "frequently expressed racial stereotypes about her Black patients to drug counselors and social workers, including her beliefs that most Black women should have their tubes tied and that birth control should be put in the drinking water in Black communities.").

41 Cloud, *supra* note 1, at 52.

ing that MUSC had conducted improper human research.[42] Shortly thereafter, officials at the U.S. Department of Health and Human Services launched a civil rights investigation into MUSC's drug-testing policy because nearly all of the women arrested at MUSC were African-American.[43] As a result of this investigation, the Department of Health and Human Services, Office of Civil Rights, threatened to remove $18 million in federal research funds from MUSC.[44] The federal Office of Protection from Research Risks (OPRR) then conducted its own investigation, and it concluded that MUSC's drug-testing program constituted "human research."[45] Since MUSC performed this "human research" without the requisite approval from the appropriate institutional review board, OPRR sanctioned MUSC and deferred renewal of MUSC's Multiple Project Assurance for a minimum of one year.[46]

Due to the above investigations, MUSC temporarily suspended its drug-testing policy in late 1994.[47] MUSC later amended its policy, reporting positive test results to the Department of Social Services rather than to police.[48] As *Ferguson* was pending before the Supreme Court, MUSC's drug-testing policy was again modified to provide for criminal prosecution only as a "last resort."[49]

B. The District Court Case

In 1996, ten of the women who had been subjected to MUSC's drug-testing policy[50] filed suit in the U.S. District Court for the District of South Carolina against the City of Charleston, certain trustees, representatives, doctors, and nurses at MUSC including Nurse Brown, and law enforcement officials who helped develop and en-

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42 *Id.* MUSC researchers had published a paper discussing the results of MUSC's "secret screens." *Id.*

43 *Id.*

44 Dubin, *supra* note 8, at 281.

45 *Id.*

46 *Id.*

47 Rachel Roth, *Policing Pregnancy (Civil Rights of Pregnant Drug Users)*, NATION, Oct. 16, 2000, at 6, 2000 WL 17719020. *But see* Linda Greenhouse, *Justices Consider Limits of the Legal Response to Risky Behavior by Pregnant Women*, N.Y. TIMES, Oct. 5, 2000, at 26 ("The policy was suspended in 1993 when the lawsuit was filed, and a new state policy instructs hospitals to turn over pregnant women using cocaine to social services rather than the police."); Charles Lane, *Court Hears Drug-Test Arguments*, WASH. POST, Oct. 5, 2000, at A11, 2000 WL 25420421 (arguing that MUSC suspended its policy in 1993).

48 Wolfe, *supra* note 40, at 3.

49 *Id.*

50 Cloud, *supra* note 1, at 52. Nine of these women had been arrested, and two had been sent to prison. *Id.*

force MUSC's policy including the former Ninth Circuit Solicitor Charles Condon.[51]

Petitioners advanced the following arguments in district court. MUSC's drug-testing policy constituted a warrantless search in violation of the Fourth Amendment. MUSC's policy had a racially disparate impact in violation of the regulations implementing Title VI of the Civil Rights Act of 1964.[52] MUSC's disclosure of medical information to law enforcement personnel violated their constitutional right to privacy. And, MUSC personnel committed the state law tort of abuse of process in administering MUSC's policy.[53] Respondents defended, claiming that as a matter of fact petitioners consented to the searches and that as a matter of law the searches were reasonable absent consent because they were justified by non-law enforcement purposes.[54]

The district court granted judgment to the respondents. More specifically, it held that since MUSC is a state hospital, its staff members are government actors.[55] In addition, it held that MUSC's staff conducted drug testing for medical purposes and not to aid police.[56] It also held that there was no improper purpose involved in MUSC's policy of threatening pregnant patients with arrest when they refused drug treatment.[57] The court submitted petitioners' Fourth Amendment claim to the jury, and the jury returned a verdict in favor of the respondents.[58] With respect to their Title VI claim, the court rendered findings of fact based on the evidence presented at trial, and it then ruled in favor of the respondents.[59] In terms of their constitutional right to privacy and abuse of process claims, the court granted judgment as a matter of law to the respondents to the extent that petitioners sought dam-

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51 Ferguson v. City of Charleston, S.C., 186 F.3d 469, 474 n.1 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001).

52 Petitioners based this argument in part on the fact that forty-one of the forty-two women prosecuted under MUSC's drug-testing policy were black; the only white woman prosecuted had a black boyfriend. Bulger, *supra* note 1, at 718-19. *See* also Daniels, *supra* note 22, at A23 (noting that the only white woman arrested gave birth to a biracial child). *Cf.* Gagan, *supra* note 1, at 499 (noting recent study that shows that black and white women use drugs at a similar rate, but black women are statistically more likely to be reported to government authorities for drug use; arguing that black women are more likely to be reported because they are more likely to be poor and are thus subject to government supervision through interaction with public hospitals, welfare case workers, and probation workers).

53 *Ferguson*, 186 F.3d at 475-77.

54 Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281, 1286 (2001).

55 *Ferguson*, 186 F.3d at 475-77.

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

ages.[60] Finally, at a post-trial hearing, the court denied petitioners injunctive relief for their denial of the constitutional right to privacy claim.[61]

C. The Court of Appeals Case

After their disappointing loss in district court, petitioners appealed to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the district court's holding.[62]

The petitioners challenged the following in their appeal to the Fourth Circuit: (1) the district court's submission of their Fourth Amendment claim to the jury; (2) the sufficiency of the evidence supporting the verdict; (3) the district court's decision to grant respondents judgment on the Title VI claim; and (4) the district court's order granting respondents judgment as a matter of law on their violation of the constitutional right to privacy claim and their commission of the tort of abuse of process claim.[63]

In terms of petitioners' arguments (1) and (2), the court held that MUSC's policy fell within the "special needs" exception to the warrant and probable cause requirements of the Fourth Amendment.[64] The court then proceeded with a traditional "special needs" analysis to determine the constitutionality of MUSC's policy. First, it balanced "the individual's privacy expectations against the Government's interests to determine whether it [was] impractical to require a warrant or some level of individualized suspicion in the particular context."[65] It then held that MUSC officials "unquestionably possessed a substantial interest in taking steps to reduce cocaine by pregnant women" and that MUSC's policy was effective.[66] According to the court:

> [T]here can be little doubt that testing the urine of maternity patients when certain indices 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. Indeed, prenatal testing was the only effective means available to accomplish the primary goal of persuading women to stop using cocaine during their pregnancies in order to reduce health ef-

60 *Id.*
61 *Id.*
62 *Id.* at 476.
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.* at 478.

> fects on children exposed to cocaine in utero. . . . [T]he method chosen by MUSC officials was an effective one.[67]

Next, the court considered whether MUSC's urine tests were subjectively and objectively intrusive.[68] It held that MUSC's tests were only "minimally" intrusive because petitioners consented to the urine tests, because the urine tests occurred during routine medical exams, and because MUSC's medical examiners had no discretion in the matter.[69] It then held that in light of the rise in cocaine use by MUSC's pregnant patients and in light of the public health problems associated with maternal cocaine use, MUSC's searches were reasonable; and, they did not violate the Fourth Amendment.[70]

In terms of petitioners' argument (3), the Fourth Circuit affirmed the district court's judgment in favor of the respondents.[71] According to the court, the petitioners failed to establish a prima facie case of discrimination with respect to any of the challenged practices.[72] In addition, it held that even if MUSC's policy was discriminatory, since MUSC offered a legitimate justification for the policy, petitioners were required but failed to establish the existence of an equally effective practice that would have had a less disparate impact.[73] According to the court, the alternative practices the petitioners offered to combat the drug problem at MUSC would have been "prohibitively expensive."[74]

The court of appeals next rejected petitioners' argument that disclosing their blood test results to the Solicitor's Office and to the CCPD violated their constitutional right to privacy.[75] According to the court, "any privacy interest Petitioners possessed in their medical records was outweighed by a compelling governmental interest, particularly in light of the nonpublic nature of the disclosure."[76]

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67 *Id.*

68 *Id.* at 479.

69 *Id.*

70 *Id. See also* Dubin, *supra* note 8, at 279-80.

71 *Ferguson*, 186 F.3d at 482.

72 *Id.* at 480.

73 *Id.* at 482. However, according to one source: "By failing to require that a defendant's reasons be substantially compelling in nature, the court misapplied the controlling legal principles that distinguish disparate impact cases from cases in which a defendant harbors discriminatory animus. In so doing, the court inappropriately weakened statutory protections for victims of racial injustice." *Civil Rights, supra* note 8, at 1246.

74 *Ferguson*, 186 F.3d at 480.

75 *Id.* at 482.

76 *Id.*

Finally, the court rejected petitioners' argument that MUSC personnel committed the state law tort of abuse of process by threatening pregnant patients with arrest to coerce them into obtaining drug treatment.[77] The court held that MUSC personnel did not perform any act not authorized by the process, hence there was no need to decide whether the respondents had an improper purpose.[78] The court further held that the fact that petitioners could avoid criminal prosecution by obtaining treatment did not render MUSC's process abusive.[79]

Judge Blake dissented in this two-to-one opinion. He held that the "'special needs' exception [did] not apply" in this case.[80] In reaching this holding, he noted that it was "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 to the children presumably affected by the cocaine use."[81] He also noted that the "prosecutorial purpose of the policy and the substantial involvement of law enforcement officials [was evident] from the very beginning of its implementation."[82] Finally, he noted that though some of the petitioners signed consent forms, these forms did not indicate that positive drug test results would be turned over to the police.[83] Moreover, Justice Blake held that MUSC's drug-testing policy was not effective because seven of the petitioners were arrested after they gave birth.[84] Hence, "any adverse effect of maternal cocaine use on the developing fetus had already occurred, and the arrest could only have had a punitive rather than preventative purpose."[85]

After losing at the appellate level, petitioners petitioned for a rehearing en banc; the Fourth Circuit denied their petition.[86] Petitioners subsequently appealed to the Supreme Court, and the Supreme Court granted certiori on February 28, 2000.[87]

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77 *Id.* at 483.

78 *Id.*

79 *Id.*

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

81 *Id.* at 484.

82 *Id.*

83 *Id.* at 486. *See also* Siegel, *supra* note 30, at 14 ("Once at the hospital, [the petitioners] had to sign a general consent for medical treatment that – without explicitly saying so – allowed, among other things, a drug screen.").

84 *Ferguson*, 186 F.3d at 488 (Blake, J., dissenting).

85 *Id.*

86 Wolfe, *supra* note 40, at 2.

87 *Id.*

IV. *FERGUSON* AT THE SUPREME COURT LEVEL

A. Petitioners' Brief

In their Supreme Court brief, the petitioners argued that MUSC's drug tests were aimed at gathering evidence of criminal activity and that, as a result, MUSC's tests violated the Fourth Amendment's bar against unreasonable searches and seizures.[88] Next, petitioners argued that MUSC's drug tests did not fall within the "special needs" exception to the warrant requirement because the searches violated the following four "special needs" identified by Justice Blackmun.[89] The law enforcement purpose behind MUSC's drug-testing policy was "integral" to its searches.[90] Law enforcement played an "integral role" in MUSC's searches, and the purpose of the policy was to search for evidence of a crime.[91] The policy was incapable of protecting the health of fetuses or pregnant patients. And, obtaining warrants and/or probable cause were really not "impracticable."[92] Petitioners then argued that pregnant patients have "heightened expectation[s] of privacy with respect to their medical care and records."[93] Finally, petitioners argued that the court of appeals erred in the following ways when it conducted its "special needs" analysis. It misapplied *Michigan Dep't of State Police v. Sitz*[94] and the "checkpoint seizure cases" to *Ferguson*.[95] It wrongfully held that MUSC's policy was effective.[96] And, it incorrectly held that the policy was only minimally intrusive.[97] As a result, the court "put[ ] at risk the privacy of every pregnant woman in South Carolina."[98]

B. Respondents' Brief

Respondents, the City of Charleston, et al., advanced three main arguments in their Supreme Court brief.[99] First, they argued that MUSC's policy involved "special needs" beyond the normal

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88 Brief for Petitioners at 22, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 76, 121 S. Ct. 1281 (2001) (No. 99-936).

89 *Id.* at 24-25, 25 n.18.

90 *Id.* at 25-29.

91 *Id.* at 30-32.

92 *Id.* at 32-33.

93 *Id.* at 35.

94 496 U.S. 444 (1990).

95 Brief for Petitioners at 36-40, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 76, 121 S. Ct. 1281 (2001) (No. 99-936).

96 *Id.* at 41.

97 *Id.* at 42.

98 *Id.*

99 Brief for Respondents at 2-3, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936).

need for law enforcement.[100] According to respondents, MUSC's policy was motivated by a clinical need for urine tests, i.e. the need to know whether pregnant patients were using cocaine so that hospital personnel could safely manage their pregnancies and provide treatment, and a medical and social need to "stem the tide of an epidemic of maternal drug use with potentially devastating medical consequences and staggering social costs."[101] Second, respondents argued that MUSC had the following compelling justifications for its drug-testing policy.[102] Pregnant cocaine-users cause severe health consequences to themselves and their fetuses.[103] MUSC observed evidence of a cocaine use "epidemic" prior to the implementation of its drug-testing policy.[104] "One study indicated that each year in South Carolina, alone, approximately 15,000 babies suffered from prenatal exposure to illegal drugs. Of those, as many as 3,221 pregnant women, were using cocaine."[105] This increase in cocaine use by MUSC's pregnant patients was expected to lead to staggering medical costs at MUSC.[106] Third, respondents argued that MUSC's drug-testing policy was effective.[107] According to respondents:

> The medical staff experienced a decline in the number of positive drug screens and fewer medical complications previously attributed to cocaine abuse. The substance abuse counselors reported that many of the patients referred by MUSC benefited from and successfully completed the treatment. Even many of the Petitioners themselves admitted that the Policy helped them successfully complete treatment and fight their addictions. Of the 253 patients who tested positive during the relevant time period, only thirty failed to complete treatment or tested positive a second time and consequently, were arrested. . . . [There is] no evidence that the Policy discouraged women from seeking treatment at the Medical Center.[108]

C. Petitioners' Reply Brief

Petitioners replied to the respondents' brief with three principal arguments. First, they disagreed with respondents regarding

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100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 10.
108 *Id.* (citations omitted).

the purpose of MUSC's drug-testing policy.[109] According to petitioners, the primary purpose of MUSC's policy was law enforcement, a purpose that removed MUSC's policy from the "special needs" exception to the warrant requirement.[110] Petitioners pointed to the following in support of this argument: respondents' own admissions regarding the essential role law enforcement played in the formulation and execution of MUSC's policy; respondents' mischaracterization of the evidence; the evidence negating respondents' insistence that the searches were consensual;[111] the fact that "[l]aw enforcement helped create [MUSC's] [p]olicy, drafted the central documents regarding how it would operate, and coordinated regularly with the hospital in order to arrest the Petitioners";[112] the fact that MUSC documents instructed hospital personnel to maintain a "chain of custody" in obtaining blood samples;[113] and the fact that four of the petitioners were arrested but never offered treatment after they tested positive for cocaine.[114]

Second, petitioners distinguished *Ferguson* from *New Jersey v. T.L.O.*,[115] one of the cases the respondents relied on to justify the constitutionality of MUSC's policy. According to the petitioners, in *T.L.O.*, the law enforcement purposes of the drug tests at issue were "incidental" to the search; here, on the other hand, the policy was formulated and implemented in conjunction with law enforcement.[116] Further, in *T.L.O.*, school authorities "acting alone and in their own authority" carried out the drug-testing policy; here again, on the other hand, hospital officials acted "in conjunction with or at the behest of law enforcement agencies."[117]

Lastly, petitioners argued that the record contradicted respondents' claims of efficiency[118] and that respondents failed to establish petitioners' consent to the searches at issue.[119]

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109 Reply Brief for Petitioners at 1-2, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936).

110 *Id.* at 2-6.

111 *Id.*

112 *Id.* at 2.

113 *Id.* at 3

114 *Id.*

115 469 U.S. 325 (1985).

116 Reply Brief for Petitioners at 7, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936).

117 *Id.* at 8.

118 *Id.* at 13.

119 *Id.*

D. Amicus Curiae Briefs

On June 29, 2000, the Supreme Court permitted the following organizations to file amicus curiae briefs: the American Civil Liberties Union, et al. (ACLU), the National Coalition for Child Protection Reform, et al., the NARAL Foundation Inc. (NARAL), the American Public Health Association, et al., and the American Medical Association (AMA).[120] The Court permitted the Rutherford Institute to file an amicus brief on August 28, 2000.[121] These organizations advanced some of the following arguments in their respective briefs, as they all ultimately concluded that MUSC's drug-testing policy was unconstitutional.

The ACLU[122] argued that: (1) pregnant women do not have diminished expectations of privacy, hence they may not be subjected to warrantless, suspicionless, nonconsensual searches under the "special needs" doctrine;[123] (2) since pregnant women, unlike prisoners, parolees, and public school students, do not have decreased expectations of privacy, MUSC's urine testing policy constituted a severe intrusion into their personal privacy;[124] and (3) if the Supreme Court sanctioned such a policy, it would "open the door" to other extensive restrictions on individual autonomy and the privacy rights of pregnant women.[125]

According to NARAL:[126] (1) MUSC conducted its drug-testing policy to incriminate its drug-using pregnant patients;[127] (2) MUSC's policy was ineffective;[128] (3) MUSC's policy failed to improve its pregnant patients and their fetuses' health;[129] (4) drug searches alone do not stop drug use;[130] (5) Charleston originally had no treatment facilities geared toward treating indigent, drug-addicted pregnant women, and the available treatment was inade-

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120 Wolfe, *supra* note 40, at 2-3.

121 *Id.* at 3. A total of seventy-five organizations including those listed above filed amicus briefs on behalf of the petitioners. Greenhouse, *supra* note 47, at 26.

122 The ACLU is a nation-wide, non-profit organization. Brief of Amici Curiae American Civil Liberties Union et al. at 2, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936), 2000 WL 1506983.

123 *Id.* at 6-7, 11.

124 *Id.*

125 *Id.* at 13-17.

126 NARAL and those that filed the brief in conjunction with it are organizations "committed to promoting women's reproductive health and freedom, ensuring that women are not punished based on their reproductive capacities, and helping decision-makers understand the impact of policies and laws on women's health and lives." Brief of Amici Curiae NARAL Foundation et al. at 6, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936).

127 *Id.* at 5-6.

128 *Id.* at 19.

129 *Id.*

130 *Id.*

quate;[131] (6) involuntary searches actually deter pregnant women from obtaining treatment;[132] and (7) the intrusions here were neither objectively nor subjectively minimal, regardless of whether the drug tests were conducted during medical examinations.[133]

The American Public Health Association, et al.[134] argued that: (1) the prosecutors' "purported" health motivations in this case did not excuse the fact that MUSC conducted searches without warrants and without probable cause;[135] (2) MUSC personnel were not functioning as medical professionals but as law enforcement agents;[136] (3) the benefits of MUSC's drug-testing policy did not justify its substantial burdens on petitioners' privacy rights;[137] (4) the policy was ineffective;[138] (5) the policy harmed the relationship between treatment providers and patients, thereby undermining the process of healing women and children;[139] and (6) cocaine use by pregnant women does not present a special need for forced, nonconsensual drug tests.[140]

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131 *Id. See also* Ringel, *Drug War, supra* note 28, at 10.

> [A]t the time the policy took effect, there was not a single residential drug-abuse-treatment program for women in the entire state. MUSC itself would not admit pregnant women to its treatment center. And no outpatient program in Charleston provided childcare so that pregnant women with young children could keep their counseling appointments.

Id. See also Gagan, *supra* note 1, at 498 ("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."); Siegel, *supra* note 30, at 14 ("Until the recent opening of the Sojourner Center for Women, which serves only one ZIP code in the city, there was no outpatient program in Charleston that offered day-care or direct door-to-door transportation." According to Siegel, there is still no residential drug program in South Carolina that specifically caters to women with children.).

132 Brief of Amici Curiae NARAL Foundation et al. at 6, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936).

133 *Id.* at 21-25.

134 The American Public Health Association is an organization which consists of physicians, nurses, public health officers, substance abuse treatment professionals, medical researchers, and state, local, and national medical and professional associations. Brief of Amici Curiae American Public Health Association et al. at 1, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936).

135 *Id.* at 10.

136 *Id.*

137 *Id.* at 16-17.

138 *Id.* at 16-19.

139 *Id.*

140 *Id.* at 26-30.

According to the AMA:[141] (1) criminal sanctions fail to halt drug abuse by pregnant women[142] and (2) sanctions like MUSC's policy discourage patients from obtaining prenatal and postnatal care, undermine the physician-patient relationship, inhibit patients' voluntary disclosure of their drug use, and ultimately result in inadequate postnatal infant health and development.[143]

Finally, the Rutherford Institute[144] argued that: (1) MUSC's drug-testing policy was not "justified at its inception" because it lacked objective testing criteria;[145] (2) the policy had an overtly criminal context that required but did not contain some form of individualized suspicion;[146] (3) the policy infringed upon physician-client confidentiality standards;[147] (4) there is no legitimate governmental interest in unauthorized drug testing because forced drug treatment is not a recommended therapy in the health care profession;[148] (5) absent probable cause or individualized suspicion that a pregnant patient engaged in cocaine use, there was no independent interest in drug testing petitioners;[149] and (6) mothers have a fundamental right to raise their children, a right that cannot be denied without due process.[150]

"Strikingly, no organization – conservative or liberal, pro-life or pro-choice – submitted an amicus (friend-of-the-court) brief in support of the policy."[151] Even the Rutherford Institute, a "conservative" group opposed to abortion, was opposed to MUSC's policy.[152]

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141 The AMA is an Illinois non-profit corporation representing 300,000 physicians who practice throughout the U.S. including in South Carolina. Brief of Amici Curiae American Medical Association at 1, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936). The AMA did not file its brief on behalf of either the petitioners or the respondents; it filed its brief only to point out that MUSC's policy placed physicians in an adversarial position and discouraged pregnant women from seeking medical care. *Id.* at 1-2.

142 *Id.* at 6-10.

143 *Id.* at 10-22.

144 The Rutherford Institute is an international, non-profit, civil liberties organization. Brief of Amici Curiae Rutherford Institute at 2, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936).

145 *Id.* at 2.

146 *Id.*

147 *Id.* at 8-18.

148 *Id.* at 18-21.

149 *Id.* at 21-23.

150 *Id.* at 22.

151 Sherry Colb, *Drug-Testing Pregnant Women Is Both Counterproductive and Unconstitutional*, FINDLAW'S LEGAL COMMENTARY, *at* http://writ.news.findlaw.com/colb/20001025.html (Oct. 25, 2000).

152 *Id.*

E. Oral Arguments

The Supreme Court held oral arguments on October 4, 2000. This section highlights some of the remarks the petitioners, the respondents, and the Supreme Court Justices made at this proceeding.

Priscilla J. Smith, Esq. represented the petitioners at oral arguments. She made one of her most poignant remarks in her rebuttal argument. Smith stated:

> What happened here is that doctors used the promise of confidentiality in the private doctor-patient relationship to obtain information from their patients in order to turn it over to the police. That's all they did, and when they did that, when they took on the mantle of the police, they had to obtain a warrant based on probable cause, and they had to do that for all the reasons this Court enunciated in the special needs doctrine . . . .[153]

Robert J. Hood, Esq., attorney for the respondents, "adamantly rejected the notion that the police were partners with the doctors, noting that the police did not determine which mothers took the tests, who saw the test results, or which mother received counseling."[154] He also argued that since pregnant women are regularly subjected to urine tests, MUSC's tests were only a minor intrusion.[155] Finally, Hood argued that doctors who reported urine test results to the police were already required to do so pursuant to South Carolina's mandatory child abuse reporting laws.[156]

In terms of the Justices, "Smith appeared to get sympathy from the liberal and moderate wing of the Court - Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer."[157] More specifically, Justice John Paul Stevens repeatedly noted that MUSC's policy was only carried out at MUSC and not at

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153 *But cf.* Transcript of Oral Argument, Ferguson v. Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2001), 2000 WL 1513143, *56 (Oct. 4, 2000). *See also* Jonathan Ringel, *The Supreme Court Takes up Two Challenges to the War on Drugs, First in a Debate on how Cops Can Go in Stopping Cars on the Street and then in a Case that Tests the Legality of a State Hospital Program; Supreme Court Roundup Questioning Tactics in War on Drugs; Justices Raise Eyebrows at Drug-Sniffing Dogs at Roadblocks and Hospital Testing of Pregnant Women for Cocaine Use*, N.J. L.J., Oct. 9, 2000, at 3 ("Smith acknowledges that if a doctor, through routine examination of a pregnant patient, suspected she was using cocaine, the doctor could test for the drug and report the results to the police.").

154 David C. Slade, *Crack-Baby Prevention*, WORLD & I, March 1, 2001, at 48, 2001 WL 12759975.

155 Joan Biskupic, *Justices Debate Prenatal Drug-Test Case*, USA TODAY, October 5, 2000, at 3A, LEXIS, Nexis Library, USA Today.

156 Slade, *supra* note 154, at 48.

157 Ringel, *Drug War*, *supra* note 28, at 10. *See also* Biskupic, *supra* note 155, at 3A (noting Justice Souter seemed "sympathetic to the women's case").

other Charleston hospitals.[158] He asked Hood: "Was there ever any effort to extend the policy to other hospitals?"[159] Hood answered no, and he stated that doctors at and managers of MUSC did not plan to revive the former drug-testing policy.[160] Justice David Souter suggested to Smith that doctors might have "a special need to know" whether their patients are using drugs.[161] But, he also commented that it appeared that MUSC's doctors, who reported positive test results to the police, had become "agents of the police."[162] Justice Ruth Bader Ginsburg "challenged the idea that drug testing helped protect fetuses."[163] "[N]oting that many of the women were arrested after delivery, she said, 'You can't prevent anything when the child is born.'"[164] She also told Hood, "I don't see a protective purpose. . . . Whatever was done was done. I don't understand the argument at all."[165] She then added, "I looked at the (hospital) consent form; it doesn't say anything about police."[166] Justice Stephen Breyer focused on whether MUSC's program was effective, and he wondered whether the policy "hurt[ ] more than [it] help[ed]."[167]

In contrast, Justices Antonin Scalia and Anthony Kennedy appeared less sympathetic to the petitioners' arguments.[168] According to Justice Scalia: "This [was] being done for medical purposes . . . . The police didn't just show up at the hospital and say, 'We'd like to find a way to bust your patients.'"[169] Likewise, Justice Kennedy compared MUSC's policy to state mandates which require doctors to report gunshot wounds or signs of child abuse—mandates that have been declared constitutional.[170]

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158 Lane, *supra* note 47, at A11. Condon and David Schwacke, Condon's successor as Solicitor, testified that their attempts to persuade other South Carolina hospitals to adopt similar drug-testing policies were unsuccessful. Ferguson v. City of Charleston, S.C., 186 F.3d 469, 480 (1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001). In addition, note that MUSC's public Medicaid clinic adopted a drug-testing policy, but its private obstetric clinic did not. Gagan, *supra* note 1, at 499-500. Finally, note that "no other city ever adopted Charleston's approach and no other city and has come forward to defend it." Greenhouse, *supra* note 47, at 26.

159 Lane, *supra* note 47, at A11.

160 *Id.*

161 Asseo, *supra* note 2, at 2A.

162 *Id.*

163 *Id.*

164 *Id.* (Ginsburg further stated that she did not see how arresting women after they give birth will protect fetuses.). *See also* Ringel, *Drug War*, *supra* note 28, at 10 ("Ginsburg harshly questioned the benefits of the program, pointing several times to women who were arrested only after giving birth.").

165 Asseo, *supra* note 2, at 2A.

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 Biskupic, *supra* note 155, at 3A.

Justice Sandra Day O'Connor, who often provides the swing vote, appeared unconvinced by the respondents' arguments.[171] She told Hood that the program appeared too "tangled up with law enforcement" to fall within the Court's "special needs" exception to the warrant requirement.[172] However, she also inquired whether drug tests are routinely performed on pregnant women.[173] Smith responded, "[a]bsolutely not, your honor."[174]

Justice Clarence Thomas asked no questions and made no remarks.[175] And, according to one reporter, comments by Chief Justice William Rehnquist were hard to read.[176]

F. The Opinion

The Supreme Court sought to and did in fact resolve the following issues in *Ferguson v. City of Charleston*:[177]

> [W]hether a state's hospital performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. More narrowly, the question is whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.[178]

The Court ultimately answered the first issue in the affirmative and the second issue in the negative, in an opinion delivered by Justice Stevens and joined by Justices O'Connor, Souter, Ginsburg, and Breyer.[179]

The Court began its opinion by noting that MUSC is a state hospital and that the members of its staff are therefore government actors subject to the requirements of the Fourth Amendment.[180]

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171 Greenhouse, *supra* note 47, at 26.
172 *Id.* *See also* Biskupic, *supra* note 155, at 3A.
173 Asseo, *supra* note 2, at 2A.
174 *Id.*
175 *Id.*
176 *Id.*
177 532 U.S. 67, 121 S. Ct. 1281 (2001).
178 *Id.* at 1284.
179 *Id.*
180 *Id.* at 1287. The Fourth Amendment to the U.S. Constitution (which is applicable to the states via the Fourteenth Amendment, *see* Mapp v. Ohio, 367 U.S. 643, 654-55 (1961)) provides:

> 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.

The Court next confirmed that MUSC's mandatory drug tests were "searches" under the Fourth Amendment.[181] It then assumed for purposes of the opinion that the searches were conducted without consent,[182] and it held that the searches were conducted without warrants, probable cause, or reasonable suspicion.[183]

Next, the Court considered whether MUSC's drug-testing policy was a constitutional "special needs" search. First, it distinguished *Ferguson* from the other "special needs" cases as follows. In the other cases, patients' drug test results were not turned over to law enforcement agents without the patients' knowledge or consent; here, they were.[184] In the other cases, there were no misunderstandings about the purposes of the drug tests or about the potential uses of the drug test results; here, there were.[185] In the other cases, there were protections against the dissemination of test results to third parties; here, there were none.[186] Finally, in the other cases, the special need advanced for the absence of warrants or individualized suspicion was not the State's general interest in law enforcement; here, the interest in law enforcement was in fact the "central and indispensable feature of [the] policy from its inception."[187]

The Court then rejected the respondents' argument that the ultimate purpose of MUSC's policy was the protection of mother and child.[188] According to the Court, the ultimate purpose of the policy was to coerce patients into substance abuse treatment by threatening them with criminal prosecution,[189] and its immediate goal was to gather evidence for law enforcement purposes.[190] In support of this argument, the Court pointed out the following facts about MUSC's policy. MUSC's policy incorporated the police's op-

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U.S. CONST. amend. IV. Pursuant to this amendment, a search or seizure conducted by the federal government without either a warrant or probable cause is per se unreasonable. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). However, in some contexts individualized suspicion of wrongdoing is instead required. *See* Chandler v. Miller, 520 U.S. 305, 308 (1997).

181 *Ferguson*, 121 S. Ct. at 1287. It is well settled that urine tests are "searches and seizures" under the Fourth Amendment. *See Chandler*, 520 U.S. at 313; Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617 (1989). Hence, absent consent, government actors like MUSC must have probable cause, warrants, and/or individualized suspicion to compel their pregnant patients to submit to urine tests. *See Schneckloth*, 412 U.S. at 219.

182 *Ferguson*, 121 S. Ct. at 1292 n.24. The Court deferred to the Fourth Circuit regarding the issue of consent. *Id.*

183 *Id.* at 1287-88.

184 *Id.* at 1288.

185 *Id.*

186 *Id.*

187 *Id.* at 1289-90.

188 *Id.* at 1290.

189 *Id.*

190 *Id.* at 1291.

erational guidelines including its chain of custody rules.[191] The police and prosecutors were involved extensively in the day-to-day administration of the policy. The police had access to medical files on female patients who tested positive for drugs. The police attended substance abuse team meetings and received copies of documents regarding female patients' progress. Lastly, the police coordinated arrests with MUSC personnel including Nurse Brown.[192] After noting the above, the Court ceased its "special needs" analysis, and it held that MUSC's policy "simply [did] not fit within the closely guarded category of 'special needs' [cases]."[193]

Justice Kennedy filed a concurring opinion, in which he agreed with the majority that MUSC's policy could not be sustained under the Fourth Amendment.[194] However, he held that the majority mistakenly distinguished the ultimate goal of MUSC's policy (i.e. to protect the life of mother and fetus) from its immediate purpose (i.e. the collection of evidence of drug use).[195] According to Justice Kennedy, the Court never distinguishes between these purposes in "special needs" cases because the immediate goal of drug-testing is always the collection of evidence.[196] Justice Kennedy also placed limitations on the majority's holding.[197] He held that there is in fact a legitimate state interest in fetal life and that cocaine use by pregnant women does pose a grave risk to the life and health of fetuses.[198] He then held:

> There should be no doubt that South Carolina *can* impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing him or her lifelong damage and suffering. The State, by taking special measures to give rehabilitation and training to expectant mothers with this tragic addiction or weakness, acts well within its powers and its civic obligations. The holding of this Court, furthermore; does not call into question the validity of mandatory reporting laws such as child abuse laws which require teachers to report evidence of child abuse to the proper authorities, even if arrest and prosecution is the likely result. . . . [W]e must accept the premise that the medical profession can adopt acceptable criteria for testing expectant mothers for cocaine use in order to provide prompt and effective counseling to the mother and to take proper medi-

191 *Id.* at 1290.
192 *Id.* at 1290-91.
193 *Id.*
194 *Id.* at 1293 (Kennedy, J., concurring).
195 *Id.*
196 *Id.* at 1294.
197 *Id.*
198 *Id.* at 1295.

> cal steps to protect the child. If prosecuting authorities then adopt legitimate procedures to discover this information and prosecution follows, that ought not to invalidate the testing.[199]

Justice Scalia dissented, joined in part by Chief Justice Rehnquist and Justice Thomas. According to Justice Scalia, the petitioners consented to MUSC's drug tests, the tests were not "searches" under the Fourth Amendment, and MUSC's policy therefore did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.[200] Alternatively, Justice Scalia held that even if MUSC's drug tests fell within the ambit of the Fourth Amendment, the tests satisfied the traditional "special needs" analysis.[201] Unlike the majority, Justice Scalia held that the purpose of MUSC's policy was not to incriminate patients, noting that the drug tests were initially implemented without police suggestion or involvement.[202] He also likened MUSC's drug tests to mandatory reporting laws[203] and to the search at issue in *Griffin v. Wisconsin*,[204] where a parolee's home was subject to a warrantless search by a probation officer.[205] According to Justice Scalia, he doubts:

> whether Griffin's reasonable expectation of privacy in his home was any less than petitioners' reasonable expectation of privacy in their urine taken, or in the urine tests performed, in a hospital — especially in a State such as South Carolina, which recognizes no physician-patient testimonial privilege and requires the physician's duty of confidentiality to yield to public policy, . . . and which requires medical conditions that indicate a violation of the law to be reported to authorities.[206]

V. CRITIQUE

A. *MUSC's Policy Failed to Meet the Eight Type I Criteria*

The Supreme Court has recognized only a limited number of "special needs" cases[207]— cases in which neither a warrant, probable cause, nor individualized suspicion are required[208] because the "Fourth Amendment intrusion" serves special governmental needs

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199 *Id.* (emphasis added).
200 *Id.* at 1296-99 (Scalia, J., dissenting).
201 *Id.* at 1299.
202 *Id.* at 1300.
203 *Id.*
204 483 U.S. 868 (1987).
205 *Ferguson*, 121 S. Ct. at 1300 (Scalia, J., dissenting).
206 *Id.* at 1301.
207 City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).
208 New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

beyond the normal need for law enforcement.[209] In addition, the Court has organized (at least implicitly) the "special needs" cases into three "types":[210] (1) suspicionless searches where the program was designed to serve "special needs, beyond the normal need for law enforcement" (hereinafter Type I);[211] (2) limited searches for certain administrative purposes without particularized suspicion of misconduct;[212] and (3) brief, suspicionless seizures of motorists at fixed border patrol checkpoints designed to intercept illegal aliens, at sobriety checkpoints aimed at removing drunk drivers from the road, and at roadblocks to verify driver's licenses and vehicle registrations.[213]

In *Ferguson*, the Supreme Court correctly commenced its "special needs" analysis by characterizing MUSC's drug-testing policy as a Type I "special needs" case.[214] It then rightly compared MUSC's drug-testing policy to the drug-testing policies at issue in the other Type I cases.[215] However, the Court erred by engaging in only a limited "special needs" analysis at this point.

Granted, the Supreme Court is not permitted to issue advisory opinions,[216] and it is required to draw its opinions narrowly.[217] Nevertheless, the Court has found it constitutionally necessary on several occasions to draw its opinions more broadly.[218] Due to the widespread interest in prosecuting pregnant drug users[219] and the very real possibility that other state hospitals will attempt to implement revised versions of MUSC's drug-testing policy, *Ferguson*

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

210 *See Edmond*, 531 U.S. at 37-38.

211 *Id.* at 37. The Type I cases include *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989); and *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989). *See id.*

212 *Id.*

213 *Id.* at 37-38.

214 *See* Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281, 1288 (2001).

215 *See supra* notes 184-87 and accompanying text.

216 Alabama State Fed'n of Labor, Local Union No. 103, United Bhd. of Carpenters and Joiners of Am. v. McAdory, 325 U.S. 450, 461-62 (1945).

> Th[e] [Supreme] Court is without power to give advisory opinions. It has long been its considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied.

Id. (citations omitted).

217 *See id. See also* Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs, 113 U.S. 33, 39 (1885) (The Court is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.").

218 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

219 *See supra* notes 2, 11, 158.

presented yet another instance where a much more thorough analysis and therefore a slightly more broad opinion were in order.

Accordingly, the Court should have recognized in *Ferguson* that the Type I cases share eight characteristics in common. These include the following: (1) law enforcement personnel played no role in the formulation of the drug-testing policy at issue;[220] (2) law enforcement played no role in the execution of the drug-testing policy at issue;[221] (3) those subjected to drug tests were notified of the tests in advance, and they consented to being tested;[222] (4) all of the members of a particular class were subjected to drug tests;[223] (5) those subjected to drug tests were tested and ultimately disciplined for any type of drug use;[224] (6) a second test was generally administered to confirm a positive test result;[225] (7) law enforce-

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220 In *Vernonia*, the drug-testing policy at issue was formulated by the Vernonia School District. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 649 (1995). In addition, district officials only began to consider a drug-testing program when "the administration was at its wits end . . . [a]nd disciplinary actions had reached 'endemic proportions.'" *Id.* In *Skinner*, the FRA first "solicited comments from interested parties on various regulatory approaches to the problems of alcohol and drug abuse throughout the Nation's railroad system." Skinner v. Railway Labor Executives Assn., 489 U.S. 602, 607 (1989). The FRA then reviewed the comments it received, and it later promulgated the regulations ordering the drug-testing policy. *Id.* at 608. In *Von Raab*, the Commission of Customs first established a Drug Screening Task Force (DSTF) to explore implementing a drug-testing policy in the U.S. Customs Service. National Treasury Employees v. Von Raab, 489 U.S. 656, 660 (1989). The DSTF concluded, after extensive research and consultation with experts in the field, that urine tests would be "technologically reliable, valid and accurate." *Id.*

221 *Vernonia*, 515 U.S. at 646; *Skinner*, 489 U.S. at 602; *Von Raab*, 489 U.S. at 660.

222 In *Vernonia*, prior to implementing the drug-testing policy, the district held a "parent 'input night' to discuss the proposed Student Athlete Drug Policy (Policy), and the parents in attendance gave their unanimous approval." *Vernonia*, 515 U.S. at 649-50. In addition, students who wished to play sports in the district were asked to sign consent forms and to obtain written consent from their parents. *Id.* at 650. In *Skinner*, employees could refuse to provide blood and urine samples; however, in some instances the railroad employer could presume an impairment from such a refusal. *See Skinner*, 489 U.S. at 611-12. However, the railroad was required to provide detailed notice of this presumption to its employees and to advise them of their right to provide a contemporaneous blood sample. *Id.* at 612. In *Von Raab*, the Commissioner announced publicly the future implementation of a drug-testing program. *Von Raab*, 489 U.S. at 660. The U.S. Customs Service also sent letters to potential employees whose positions would be subject to the drug-testing program; these letters indicated that final selection was contingent upon the successful completion of the program. *Id.* at 661. In addition, employees subject to drug testing were required to sign chain of custody forms. *Id.*

223 In *Vernonia*, the policy applied to all students who participated in the district's interscholastic athletics. *Vernonia*, 515 U.S. at 650. In *Skinner*, any railroad employee involved in certain types of accidents was subject to blood and alcohol testing by the FRA, though urine testing was permissible in several other instances. *Skinner*, 489 U.S. at 609, 611. In *Von Raab*, any employee who wished to apply for certain positions was subject to drug tests. *Von Raab*, 489 U.S. at 660-61. Note, however, that the Supreme Court only upheld the drug testing of employees who were directly involved in drug interdiction and/or required to carry firearms; it remanded for further proceedings the testing of other applicants. *Id.* at 664-65.

224 *Vernonia*, 515 U.S. at 651; *Skinner*, 489 U.S. at 611; *Von Raab*, 489 U.S. at 663.

225 *Vernonia*, 515 U.S. at 651; *Skinner*, 489 U.S. at 610 n.2; *Von Raab*, 489 U.S. at 662.

ment did not receive positive test results;[226] and (8) none of those who tested positive for drugs were subjected to criminal penalties.[227]

Next, the Court should have held that MUSC's policy met none of these criteria. First, law enforcement personnel including the Solicitor's Office and the CCPD formulated MUSC's policy.[228] Second, law enforcement personnel played a great role in the execution of MUSC's drug-testing policy.[229] MUSC's drug testing was performed at the request of the Solicitor's Office,[230] and the Solicitor secured patients' signatures on the treatment contracts patients signed to avoid criminal prosecution.[231] In addition, though "testing under [MUSC's policy was] conducted by health care profes-

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226 In *Vernonia*, "[o]nly the superintendent, principals, vice-principals, and athletic directors [had] access to test results, and the results [were] not kept for more than one year." *Vernonia*, 515 U.S. at 651. In *Skinner*:

> The regulations provide that "[e]ach sample provided . . . is retained for not less than six months following the date of the accident or incident and may be made available to . . . a party in litigation upon service of appropriate compulsory process on the custodian . . . ." The FRA explained, when it promulgated this provision, that it intends to retain such samples primarily "for its own purposes (*e.g.* to permit reanalysis of a sample if another laboratory reported detection of a substance not tested for in the original procedure)." While this provision might be read broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or actually has been, so used.

Skinner, 489 U.S. at 621 n.5 (citations omitted). *But see id.* at 651 (Marshall, J., dissenting) (arguing that the majority ducked this issue in *Skinner* by proceeding on the assumption that positive drug test results would not be turned over to law enforcement officials). In *Von Raab*, confirmed positive test results were reported to a medical review officer and to a licensed physician. *Von Raab*, 489 U.S. at 662. "After verifying the positive test result, the Medical Review Officer transmits it to the agency. . . . Test results may not, however, be turned over to any other agency, including criminal prosecutors, without the employee's written consent." *Id.*

227 In *Vernonia*, if a student athlete tested positive for drugs a second time, his parents were notified, and the school principal held a meeting with the student and his parents. *Vernonia*, 515 U.S. at 651. At this meeting:

> [T]he student [was] given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student [was] then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.

Id. In *Skinner*, "Employees who refuse to provide required blood or urine samples may not perform covered service for nine months, but they are entitled to a hearing concerning their refusal to take the test." *Skinner*, 489 U.S. at 610-11. In *Von Raab*, when an employee's positive test result was verified and when he could offer no satisfactory explanation for the result, he was only subject to dismissal from the Service. *Von Raab*, 489 U.S. at 662.

228 *See supra* notes 12-16 and accompanying text.

229 *See supra* notes 23-35 and accompanying text.

230 Derk B.K. VanRaalte IV, Note, *Punitive Policies: Constitutional Hazards of Non-Consensual Testing of Women for Prenatal Drug Use*, 5 HEALTH MATRIX: J.L. & MED. 443, 472-73 (1995), LEXIS, Nexis Library, Health Matrix.

231 *Id.*

sionals rather than by the police[,]" MUSC's "clinicians effectively assume[d] the role of deputized police informers."[232] Third, MUSC did not personally warn its patients of the drug-testing policy,[233] and MUSC did not obtain its patients' consent.[234] Fourth, MUSC only drug tested pregnant patients at its Medicaid clinic.[235] Additionally, MUSC only drug tested pregnant patients who met certain ambiguous, subjective, and prejudicial criteria.[236] Fifth, MUSC only prosecuted patients who tested positive for cocaine use even though "urine drug screens conducted by MUSC indicated the past use of any drug, not just cocaine."[237] Sixth, only one urine test was administered.[238] Seventh, MUSC reported drug test results to law enforcement.[239] Eighth, those who tested positive for cocaine use were arrested and charged with various offenses.[240]

Had the Court engaged in the above analysis, it would have reached the same result in *Ferguson.* More importantly, however, it would have also banned, at least implicitly, future, merely revised versions of MUSC's drug-testing policy. (The Court appears to have sought to, and if it did not, it should have sought to ban future drug-testing policies like MUSC's in *Ferguson.*[241]) Consider the following hypothetical. Suppose after *Ferguson,* a state hospital seeks to implement a drug-testing policy which submits pregnant patients to drug tests and reports their positive drug test results to local authorities. But, assume that unlike MUSC, this hospital formulates and executes its policy without the assistance of law en-

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232 *Id.*

233 Ferguson v. City of Charleston, S.C., 186 F.3d 469, 488 (4th Cir. 1999), *rev'd,* 532 U.S. 67, 121 S. Ct. 1281 (2001) (Blake, J., dissenting) (noting that city prosecutor did produce TV ad regarding MUSC's policy; however, only two petitioners saw it).

234 *See id.* at 489.

235 *See* Gagan, *supra* note 1, at 499.

236 *See Ferguson,* 186 F.3d at 473; Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281, 1285 n.4 (2001); Brief of Amici Curiae Rutherford Institute at 2, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd,* 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936).

237 *Ferguson,* 186 F.3d at 474, 482. MUSC did so even though a 1991 South Carolina study indicated that only 0.79% of women who gave birth in the state tested positive for cocaine, while 2.5% tested positive for marijuana, and 1.9% tested positive for alcohol. Paul-Emile, *supra* note 1, at 353.

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

239 *See supra* notes 24, 29 and accompanying text.

240 In *Ferguson,* pregnant patients who refused drug treatment were arrested and charged (depending on their stage of pregnancy) with a variety of crimes including distribution of cocaine to a minor. *Ferguson,* 186 F.3d at 474. *See also* Bulger, *supra* note 1, at 721; VanRaalte, *supra* note 230, at 453.

241 Note that this Comment is not arguing that state hospitals should refrain from persuading cocaine-addicted pregnant women to obtain drug treatment. This Comment is only arguing that state hospitals should not subject pregnant women to mandatory, unconsented drug tests and should not threaten pregnant women with criminal prosecution when they fail to submit to drug treatment.

forcement personnel. Under the Court's limited analysis in *Ferguson*, this hypothetical policy may be constitutional because of law enforcement's limited role in the formulation and execution of the policy, even though the hospital threatens its pregnant patients with criminal prosecution which was deemed unconstitutional in *Ferguson*.[242] Now, consider the same hypothetical policy under this Comment's analysis. Since the hospital reports drug test results to law enforcement and since it criminally prosecutes pregnant patients who test positive for drug use, it violates criteria (7) and (8) above. As a result, the hospital's drug-testing policy is automatically unconstitutional.

B. The Privacy and Reproductive Rights of Women Outweigh the Government's Interest in Protecting the Lives and the Health of Fetuses

In addition to this Comment's analysis above, the Supreme Court should also have engaged in the following more thorough "special needs" analysis in *Ferguson*. First, the Court should *not* have ceased its "special needs" analysis after it conducted a threshold inquiry into the primary purposes of MUSC's drug-testing policy[243] and found improper purposes (i.e. to use law enforcement to coerce patients into substance abuse treatment and to detect evidence of criminal wrongdoing).[244] Rather, it should have assumed that the purposes behind MUSC's policy *were* constitutional, and it should have proceeded with the next step in the traditional "special needs" analysis. The Court should have balanced the following three factors: (1) the State's interest in prompting the search and seizure; (2) the effectiveness of the intrusion (i.e. the degree to which the intrusion is reasonably thought to advance the governmental interest); and (3) the magnitude of the intrusion upon the

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242 *Cf.* Stahlman, *supra* note 8, at 32.

> *Ferguson* establishes that drug treatment programs may not have overriding law enforcement purposes or involvement. This does not mean that medical personnel are prohibited from involving police when evidence of a crime is found during medical treatment. Actually, the opposite has been and continues to be the law. Medical personnel are required to notify police under certain circumstances as recognized by the Court. The clear message from the Court is that police participation in programs at medical treatment facilities involving drug abuse testing should not be so pervasive that the ultimate purpose of the program becomes law enforcement instead of rehabilitation.

Id.

243 *But cf.* City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000).

244 *See supra* notes 188-92 and accompanying text.

individuals affected from both a subjective and an objective viewpoint.[245]

The first factor in the "special needs" analysis is, as noted above, the governmental interest involved in the search. This interest need not be compelling.[246] Rather, 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."[247]

States do in fact have a compelling governmental interest in deterring drug use by pregnant women and in treating pregnant drug users and their fetuses.[248] Drug use by pregnant women is a nationwide problem. In 1991, the National Institute on Drug Abuse estimated that 500,000 to 700,000 fetuses are exposed annually to illicit drugs in utero, and 14-18% of all newborns will have some exposure to drugs by the time they are born.[249] Likewise, a 1989 study by the New York City Health Department estimated that there had been a 3,000% increase in births by pregnant drug users from 1979 to 1989.[250] At MUSC, "[o]f the first four [pregnant women tested for cocaine], three tested positive. Within one year, they had 119 positives, all but 15 of them women who'd first visited the hospital at the time of the delivery."[251] Additionally, MUSC, like other hospitals, had difficulty in urging its pregnant drug users to obtain drug treatment. In fact, "not a single woman kept her appointment for drug treatment [at the Charleston County Substance Abuse Commission]," and "[o]f the 15 who came in for delivery, only one even came back for additional prenatal care."[252]

Cocaine use by pregnant women is also expensive. In fact:

> The average initial hospital visit for a cocaine-exposed baby costs $24,000 at MUSC, compared to $500 for a normal delivery. One drug-exposed baby stayed a year, costing $731,000; then his mother delivered another drug-addicted infant who stayed four months and cost $167,132. What with developmental follow-up,

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245 This balancing test was set forth in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

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

247 *Id.*

248 *Cf.* Vaughn, *supra* note 8, at 677, 697 (arguing that MUSC had an important governmental interest in conducting urine drug tests but that MUSC had no authority to turn positive test results over to law enforcement officials).

249 Steverson, *supra* note 8, at 312-13.

250 *Id.*

251 Siegel, *supra* note 30, at 14.

252 *Id.*

> special education, and foster care, one federal report calculates the total cost of each drug-exposed baby at $1 million.[253]

In addition, the nation spends approximately $3.3 billion per year in caring for "cocaine babies."[254]

Moreover, cocaine use by pregnant women has been blamed for a number of pregnancy complications including low birth weight, premature labor, birth defects, and neurobehavioral problems.[255] According to one source, "almost no cocaine-exposed baby fully escapes its damaging effects."[256] In fact, just a single use of cocaine can result in the separation of the placenta from the uterine wall, a condition that can threaten the life of a mother and can cause a stroke in the fetus.[257] Hence, "[f]or obstetricians to protect both mother and fetus, knowing whether drugs are involved, especially cocaine, is critical."[258]

The second factor in the "special needs" analysis is, as noted above, the effectiveness of the "search" at issue. Though the State has compelling governmental interests in deterring and treating drug use by pregnant women, drug testing these women and compelling them to obtain drug treatment by threatening them with criminal prosecution are ineffective means towards the State's ends. First, drug addiction is a legitimate disease recognized by both health professionals and courts.[259] As several of the amici curiae in *Ferguson* argued, drug addiction cannot be cured by forced

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253 *Id.*

254 Slade, *supra* note 154, at 48. *See also* Ferguson v. City of Charleston, S.C., 186 F.3d 469, 478 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001).

255 *Ferguson*, 186 F.3d at 478. *See also* Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 661 (1995) ("Maturing nervous systems are more critically impaired by intoxicants than mature ones are."); Steverson, *supra* note 8, at 300 (arguing that cocaine use by pregnant women may result in one or more of the following: improper organ development, respiratory distress, pulmonary hypertension, abnormal and rapidly changing heartbeats, cerebral infractions, malformed kidneys and genitals, a lack of two middle fingers, neutral tube defects, skull defects, a lack of small intestines, fetal fatalities, fetal intolerance to labor, low birth weight, below average length, below average head circumference, premature birth, stillbirths, respiratory diseases, delayed development, and/or sudden infant death syndrome (SIDS)). *But see* Bulger, *supra* note 1, at 724 (arguing that recent medical studies indicate that the harmful effects of prenatal crack exposure may only be temporary, that the effects are treatable, and that the effects can be minimized by ensuring proper health care and nutrition for drug-dependent mothers); VanRaalte, *supra* note 230, at 454 (arguing that according to one study, there is no conclusive evidence that cocaine withdrawal syndrome is even present in newborns exposed to cocaine in utero; "[d]ue to the paucity of statistical data, little concrete evidence exists to show that intrauterine cocaine exposure equals 'harm' to the fetus").

256 Steverson, *supra* note 8, at 300.

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

258 Slade, *supra* note 154, at 48.

259 *See, e.g.*, Paul-Emile, *supra* note 1, at 373; VanRaalte, *supra* note 230, at 449; Vaughn, *supra* note 8, at 373.

drug treatment and criminal prosecution.[260] Pregnant drug users must instead be educated, and they must be offered voluntary, accessible drug treatment that includes child care and free transportation.[261] Second, there is no indication that drug tests, including those that lead to arrest, motivate pregnant women to refrain from using drugs and to complete drug treatment.[262] In fact, in *Ferguson*, four of the petitioners continued to test positive for cocaine and/or failed to obtain drug treatment despite being subjected to MUSC's drug-testing policy.[263] Third, arresting and incarcerating pregnant drug users actually harms these women and their fetuses.[264] Due to overcrowding in prisons, these women are forced to sleep on mats on the floor, are often provided with further access to drugs, and receive inadequate prenatal care, general medical care, nutrition, and exercise.[265] Prisons also rarely provide effective drug detoxification; and, when pregnant women quit using drugs "cold turkey," they often suffer miscarriages and damage to their fetuses.[266] Fourth, prosecuting pregnant drug users actually deters them from obtaining prenatal care[267] because of their fear of being reported to government authorities.[268] Fifth, prosecuting pregnant drug users places health care providers in a conflicting position.[269] Health care providers must choose between their legal duty to report their patients' drug use and their ethical

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260 *See, e.g.*, Paul-Emile, *supra* note 1, at 326, 373; VanRaalte, *supra* note 230, at 449; Vaughn, *supra* note 8, at 373.

261 VanRaalte, *supra* note 230, at 449, 479-82.

262 *Id.* at 488 n.4.

263 Paula Hale tested positive for cocaine in December 1990; she was arrested in March 1991 for failing to complete the drug program. Pamela Pear tested positive for cocaine in July 1990, was referred to substance abuse counseling, and then tested positive for cocaine again in August 1990 when she was admitted to the hospital for pre-term labor. Crystal Ferguson tested positive for cocaine in June 1991, agreed to attend substance abuse counseling, and then tested positive again in August 1990 when she delivered her child; she was later arrested for failing to comply with the drug treatment program. Patricia Williams was referred to substance abuse counseling in January 1992, failed to attend the counseling, and subsequently tested positive for cocaine four times including when she gave birth. *Id.* at 485. *See also* Ferguson v. City of Charleston, S.C., 186 F.3d 469, 485-86 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (Blake, J., dissenting). Moreover, seven of the ten petitioners were arrested for positive drug test results after they gave birth. Hence, by the time they were arrested, any damage to these women's fetuses was already done. *Id.*

264 *See, e.g.*, Bulger, *supra* note 1, at 713; Steverson, *supra* note 8, at 327-28.

265 Bulger, *supra* note 1, at 713.

266 Steverson, *supra* note 8, at 327-28. To deal with this problem, Steverson proposes legislation that would make it a crime for women to abuse alcohol, illicit substances, or licit substances while pregnant. *Id.* at 332-72. For a more detailed description of the proposed legislation, see *id.*

267 Dubin, *supra* note 8, at 281. The AMA, the American Academy of Pediatrics, the American Public Health Association, and the American Nurses Association object to drug testing on this ground. *Id.*

268 Bulger, *supra* note 1, at 725.

269 VanRaalte, *supra* note 230, at 455-56.

duty to maintain physician-patient confidentiality.[270] According to one source, this tension "create[s] a climate that is professionally 'intolerable.'"[271]

The third "special needs" factor measures the magnitude of the search and seizure upon the individuals affected from both an objective and a subjective viewpoint. The objective intrusion suffered by an individual is "measured by the duration of the seizure and the intensity of the investigation."[272] The subjective level of the intrusion is measured by the extent to which the method chosen minimizes or enhances fear on the part of those searched or detained.[273]

Mandatory state hospital drug tests are severe intrusions from both an objective and a subjective viewpoint. Granted, drug tests like MUSC's are "quick" intrusions in that the drug screens are conducted on urine samples. Nevertheless, these tests are objectively intrusive because pregnant women differ from those subjected to drug tests in the other Type I "special needs" cases. First, the State has no supervisory role over pregnant women.[274] As Richard W. Garnett notes: "[T]he era is past in which pregnant women were regarded as peculiarly subject to the authority of the state because of their status as child-bearers."[275] Unlike parolees,[276] public

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270 *Id.*

271 *Id.*

272 Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 452 (1990).

273 *Id.*

274 The Supreme Court has held that the State has "supervisory or custodial authority" over the following classes of people: pretrial detainees, those on probation, and public school students. *See* Brief of Amici Curiae American Civil Liberties Union et al. at 7, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936), 2000 WL 1506983. According to the Court, these individuals have diminished expectations of privacy because of the State's ongoing supervisory role over them and because of the State's interest in adequately supervising them. *See* Douglas K. Yatter et al., *Warrantless Searches and Seizures*, 88 GEO. L.J. 912, 987 (2000). *See also* Brief of Amici Curiae American Civil Liberties Union et al. at 9-10, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936), 2000 WL 1506983 ("Any purported justification for excepting women from the Fourth Amendment's general protection against unreasonable searches must ultimately rest on an outmoded view of women as mere incubators of the fetus and mothers to their children, subjecting women, on that basis to otherwise unconstitutional intrusions into their privacy.").

275 Garnett, *supra* note 8, at 31. In fact, in *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992), the Court recognized that "[t]he Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family." Hence, the mother of a healthy half-brother of a boy with leukemia cannot be forced to consent to having the two boys tested for compatibility for a bone marrow donation. Alicia Ouellette, *New Medical Technology: A Change to Reexamine Court-Ordered Medical Procedures During Pregnancy*, 57 ALB. L. REV. 927, 949 (1994). Similarly, "[a] man who was identified . . . as the father of a man with leukemia could not be compelled to undergo a simple blood test sought by the sick man for the purpose of compiling the information necessary for his treatment." *Id.*

school athletes,[277] and certain government employees,[278] pregnant women are not in the temporary custody of the State. Second, pregnant women do not have diminished expectations of privacy.[279] Like men, women have a constitutional right to make the decisions that affect their bodies. They do not forfeit these rights when they become pregnant or when they engage in drug use. As Justice Marshall once proclaimed, "[t]here is no drug exception to the Constitution."[280] Third, poor pregnant drug users, unlike those subjected to drug tests in the other Type I cases, cannot escape mandatory drug-testing policies. For instance, if an employee in a highly regulated industry or a student athlete at a public school does not wish to be drug tested, he may simply change his job or play on a different team. In contrast, since there are few Medicaid clinics in many areas,[281] poor pregnant drug-users have no choice but to submit to drug-testing at their local state hospitals. Otherwise, they must completely forego obtaining prenatal care and giving birth in a hospital. Fourth, permitting state hospitals like MUSC to drug test and prosecute pregnant drug users will arguably result in a slippery slope.[282] If state hospitals are permitted to drug test and prosecute pregnant drug users today, they may seek in the future to prosecute pregnant women who smoke, drink alcohol, fail to maintain proper nutrition, and/or work excessive hours.[283] They may also seek to prosecute fathers who endanger

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276 *See* Griffin v. Wisconsin, 483 U.S. 868 (1987).

277 *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) .

278 *See* Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989).

279 Ringel, *Drug War*, *supra* note 28, at 10. *See also* Gagan, *supra* note 1, at 515. "[P]regnant women . . . enjoy[ ] 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. . . . More importantly, under *Griswold v. Connecticut* and *Roe v. Wade*, these women also enjoy the right to reproductive autonomy." *Id.* (italics added).

280 *Skinner*, 489 U.S. at 641 (Marshall, J., dissenting).

281 In *Ferguson*, there was no other Medicaid clinic within a fifty mile radius. Gagan, *supra* note 1, at 499. *See also* VanRaalte, *supra* note 230, at 466 n.127.

282 *But see* Jennifer Braceras, *Defining the Rights of Unborn Children*, BOSTON GLOBE, Sept. 28, 2000, at A17, LEXIS, Nexis Library, The Boston Globe.

> It seems that to radical feminists any attempt to protect the unborn places us on a slippery slope toward total prohibition of abortion; any acknowledgment that a fetus is a life worth protecting represents a threat to "a woman's right to choose." Of course, proponents of this view fail to recognize that *Ferguson*, like the Connecticut baby AIDS case and the Corneau case, is not about choice. Indeed, in all three of these cases, the women have already made their choices – they have chosen to carry their babies to term. . . . It's time for the pro-abortion lobby to recognize that when mothers deliver healthy babies, everybody wins.

Id. (italics added).

283 Bulger, *supra* note 1, at 726. *See also* Bell, *supra* note 8, at 671-72 ("If we begin interpreting statutes regarding child endangerment to include all viable fetuses, as was the case in *Whitner v. State*, it could lead to prosecution of parents for acts that are legal but might endanger the child's well-being, including smoking or the consumption of alcohol. . . .

the lives and health of their fetuses, i.e. fathers who engage in drug use when their fetuses are conceived[284] or fathers who mentally, physically, and/or emotionally abuse their pregnant mates.[285]

State hospital drug-testing policies like MUSC's are also severely intrusive from a subjective standpoint. The privacy interests implicated by the collection and testing of urine are not minimal.[286] According to the American Civil Liberties Union, "[S]uch urine testing is a severe intrusion on personal privacy. Indeed, at least four Justices of this Court have recognized that state-compelled, state-monitored collection and testing of urine . . . is . . . particularly destructive of privacy and offensive to personal dignity."[287]

MUSC's urine tests were particularly intrusive. MUSC forced its pregnant patients to take drug tests, but it did not warn them that they would be criminally prosecuted for positive drug test results. MUSC personnel also reported patients' test results not only to the CCPD but also to the Solicitor's Office. Such drug testing, though done in the context of routine medical exams, cannot be considered "normal, routine, and expected."[288] "Imagine how reluctant you would be to go back to your doctor or to share sensitive medical information with any health-care provider after being threatened with such an arrest."[289]

'[N]o woman can provide the perfect womb, [and] prosecution for prenatal drug use could possibly open the door for any variety of activities during their pregnancy.'") (italics added); Daniels, *supra* note 22, at A23 ("Many substances can harm fetal health, with alcohol and cigarettes in the lead. Both do more damage in this country than all illicit drugs combined. Why not arrest pregnant women who abuse alcohol and nicotine?").

284 Paltrow, *supra* note 8, at 1030-55. *See also* Kubasek & Hinds, *supra* note 8, at 10.

> Men, however, are not prosecuted for their actions that threaten the health of a viable fetus. A man may harm a fetus by beating a pregnant woman, smoking in her presence, or even by transmitting "toxic substances . . . through the placental barrier during intercourse." None of these activities have been prosecuted as "fetal abuse," yet enormous energies are directed toward prosecuting pregnant women.

Id.

285 *Id.*

286 *See* Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 626 (1989). *See also* Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 671-72 (1995) (O'Connor, J., dissenting) ("[S]tate-compelled, state-monitored collection and testing of urine, while perhaps not the most intrusive of searches, is still 'particularly destructive of privacy and offensive to personal dignity.'") (citations omitted).

287 Brief of Amici Curiae American Civil Liberties Union et al. at 6, Ferguson v. City of Charleston, S.C., 186 F.3d 469 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001) (No. 99-936), 2000 WL 1506983 (quoting *Vernonia*, 515 U.S. at 672) (internal quotation marks omitted).

288 Ferguson v. City of Charleston, S.C., 186 F.3d 469, 479 (4th Cir. 1999), *rev'd*, 532 U.S. 67, 121 S. Ct. 1281 (2001).

289 Daniels, *supra* note 22, at A23.

In sum, though states have a substantial governmental interest in deterring and treating drug use by pregnant women, mandatory drug-testing policies which threaten criminal prosecution cannot effectively meet this interest. In addition, such policies are severely intrusive from both an objective and a subjective viewpoint. Hence, pregnant women's privacy and reproductive rights outweigh the government's interest in protecting the lives and health of fetuses.

VI. Possible Future Judicial Development

In addition to engaging in this Comment's analyses, the Supreme Court could also have resolved some of the following related issues in *Ferguson.* First, under South Carolina law, a viable fetus is a person.[290] Hence, if a pregnant woman engages in drug use in South Carolina, she can be prosecuted for delivering drugs to a minor.[291] In light of the Court's holding in *Roe v. Wade,*[292] i.e. that a fetus is not a person deserving full constitutional protection,[293] is South Carolina's characterization of the viable fetus constitutional?

Likewise, pursuant to South Carolina statutory[294] and case

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290 *See supra* note 10.

291 Dubin, *supra* note 8, at 280-81. In fact, "South Carolina has been a leader in the movement, building ever since *Roe v. Wade* legalized abortion, to establish rights for fetuses. No state has ever done more to target pregnant women who use drugs." Roth, *supra* note 47, at 6 (italics added).

292 Roe v. Wade, 410 U.S. 113 (1973).

293 *Roe,* 410 U.S. at 158. *See also* Kubasek & Hinds, *supra* note 8, at 11 ("The Supreme Court in *Roe v. Wade* clearly stated that '"person" as used in the Fourteenth Amendment does not include the unborn.' . . . The court did find a state interest in protecting the health of the woman and the potential life, both of which increased as the term progressed.") (italics added); Ouellette, *supra* note 275, at 945 (construing *Roe:* "any rights a fetus may have are simply not compelling enough to override the pregnant women's clear and uncontested constitutional rights in making decisions about her pregnant body").

294 Section 20-7-510(A) of the South Carolina code states:

> A physician, nurse, dentist, optometrist, medical examiner or coroner or an employee of a county medical examiner's or coroner's office or any other medical, emergency medical services, mental health, or allied health professional or Christian science practitioner, religious healer, school teacher, counselor, principal, assistant principal, social or public assistance worker, substance abuse treatment staff, or childcare worker in any daycare center or foster care facility, police or law enforcement officer, undertaker, funeral home director or employee of a funeral home, persons responsible for processing of films, computer technician, or any judge shall report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect.

S.C. Code Ann. § 20-7-510(A) (Law. Co-op. 2000), 2000 S.C. H.B. 3891 (Law. Co-op. 2001). *But cf.* Transcript of Oral Argument, Ferguson v. Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2001), 2000 WL 1513143, *38 (Oct. 4, 2000) ("QUESTION: But does the child abuse

law,[295] a woman who engages in cocaine use in South Carolina when she is at least twenty-three weeks pregnant[296] may be reported to the South Carolina Department of Social Services because she is "adversely affect[ing]" her "child."[297] Two other issues therefore remain after *Ferguson*: (1) may a viable fetus be treated as a "child" for purposes of mandatory child abuse reporting laws and (2) are such laws constitutional.[298] Justices Kennedy and Scalia

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statute impose a protocol of medical testing on doctors who treat pregnant women? MR. HOOD: No, it does not.").

295 *See supra* note 11.

296 A fetus is generally considered viable after twenty-three and one-half to twenty-four weeks. *See* Webster v. Reproductive Health Services, 492 U.S. 490, 493 (1989).

297 *Cf.* Paltrow, *supra* note 8, at 1043. Such a policy would probably still turn pregnant women away from health care and social services systems, thereby endangering the health of mothers and fetuses. *See id.*

298 This issue was raised at oral arguments in *Ferguson*.

> QUESTION: They had turned this information over to the Social Services Department . . . to the people who act as counselors to women who are receiving public assistance. Would that have involved any Fourth Amendment violation in your view?
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> MS. SMITH: I don't believe it would have been a violation, Your Honor, if they were testing for medical purposes and discovered evidence of drug use during pregnancy. At that point they have some level of individualized suspicion and reporting to DSS, as they did, for every other substance, for heroin, for methamphetamines—they didn't report any of those to the police. Reporting those to DSS may meet some kind of reasonable ground standard.
>
> . . . .
>
> QUESTION: . . . If you didn't have the police driving it, it would be okay for medical purposes and for social welfare purposes. Now, is that your position?
>
> MS. SMITH: That it is my position, Your Honor, and I didn't mean to change from that. All I meant to do was clarify why I thought it was okay, and not a Fourth Amendment violation, to then turn it over once you have some evidence and you can meet the standards of the Fourth Amendment.

Transcript of Oral Argument, Ferguson v. Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2001), 2000 WL 1513143, *6, *25 (Oct. 4, 2000). *See also* David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence, and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L.J. 243, 254 (2001), LEXIS, Nexis Library, Hastings Women's Law Journal. According to Brody and McMillin:

> While the South Carolina policy clearly involved law enforcement, state policies that require disclosure to social welfare agencies are very common and are enforced. These reports then lead to civil neglect and abuse actions that may result in the civil commitment of the mother or removal of the children from the mother's home. As with many other state policies aimed at protecting an unborn child, the mandatory reporting requirements tend to have acutely negative consequences to both the mother and the fetus. If a pregnant drug-dependent woman is afraid that her doctor will learn about her drug usage and report it, chances are good that she will simply avoid seeking the prenatal care that is vital to her giving birth to a healthy baby. Additionally, even if she does seek medical care, she is not likely to inform her doctor of her drug use for fear of punishment or the removal of her children stemming from state-mandated reporting.

Id. *See also* Siegel, *supra* note 30, at 14 ("Few South Carolina judges were buying the attempt to treat fetuses as children; in 1992, a state appellate court had tossed out the child-neglect conviction of a pregnant substance abuser, basically ruling it a nonexistent charge.").

seemed to hold in *Ferguson* that such mandatory child abuse reporting laws are constitutional,[299] but the majority ducked the issue.

VII. CONCLUSION

The Supreme Court reached the correct holding in *Ferguson v. City of Charleston*, i.e. that MUSC's drug-testing policy was unconstitutional because it violated the Fourth Amendment's bar against unreasonable searches and seizures. Nevertheless, the Court's opinion was extremely narrow, and its "special needs" analysis was vague and incomplete. The Court failed to recognize that the Type I cases fit a particular pattern with eight criteria in common, and it failed to hold that MUSC's policy met none of these criteria. Additionally, the Court failed to weigh the government's interest in protecting the lives and health of fetuses against pregnant women's interests in their privacy and reproductive rights. Finally, it failed to hold that women's rights outweigh the government's interests in cases like *Ferguson*.

Had the Court engaged in these analyses and reached these holdings, it would have made it clear that future state hospital drug-testing policies, which like MUSC's coerce pregnant women into drug treatment by threatening them with criminal prosecution, will be declared unconstitutional. Perhaps, the Court would have also discouraged state hospitals and other institutions from attempting to implement policies like MUSC's which trample upon the rights of women.

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299 *See supra* notes 199, 203, 206 and accompanying text.