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Pregnant Drug Abusers Are Treated Like Criminals or Not Treated at All: A Third Option Proposed

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NOTES

PREGNANT DRUG ABUSERS ARE TREATED LIKE CRIMINALS OR NOT TREATED AT ALL: A THIRD OPTION PROPOSED

Anne S. Kimbel

INTRODUCTION

For some Americans, and disproportionately for minorities, poverty is a cold and familiar state.[1] From early childhood to perhaps adulthood, the poor know financial insecurity and crisis. They grow up yearning for comfort and security, only to be disappointed. They suffer the constant disruption to family life so understandably consistent in homes where there simply is not enough money to pay the bills.[2] Eventually, and often too early, they become aware that they are poor and at risk and that they are likely to stay that way.[3]

Indeed, many poor children never find their way out of their impoverished world. They often receive substandard education at their local public schools,[4] and the utility of that education is hampered by the stress of adult concerns at a very young age.[5]

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1. U.S. Population Statistics Disaggregated by Race and Gender, U.S. Population Below Poverty Level By Race, Gender, & Age, March 1995, [hereinafter *Poverty Level By Race*] at http://www.maec.org/stats.html (indicating that 44.3% of black females under the age of 18 and 33.7% of black females of all ages live below the poverty line compared with 12.7% of white females under 18 and 10.7% of white females of all ages, 12.2% of white males under 18 and 8% of white males of all ages, 43.3% of black males under 18 and 27.8% of black males of all ages).

2. Deborah L. Cohen, *New Study Links Lower I.Q. at Age 5 to Poverty*, EDUCATION WEEK 12, 29 April 1993 (describing a study in which a strong link was found between persistent childhood poverty and unrealized intellectual potential).

3. See Poverty Level by Race, *supra* note 1.

4. U.S. Department of Education, National Center for Education Statistics, Schools and Staffing Survey (1993-94)[hereinafter "Teacher Questionnaire"], *available at* http://nces.ed.gov/pubs/ce/c0657a01.html :

> Students at public secondary schools with a high poverty level (more than 40 percent of students eligible for free or reduced-price lunch) were less

The poor often find solace in the use of mood-altering chemicals.[6] Just as the stereotypical businessman "winds down" with a martini or two before dinner, the poor of America find mental release from their rough days,[7] and often the poor person's drug of choice is cocaine,[8] particularly in its concentrated and relatively inexpensive form, Crack.[9]

Crack is smoked; the inhaled drug is transferred directly from the lungs to the bloodstream, generating instant effect.[10] This highly efficient route of administration yields an immediate and intense effect, arguably making Crack the most addictive substance in current use.[11] Scientists have researched and described a biological basis for the rapidity of the onset of Crack addiction, pinpointing a neurochemical explanation[12] for the nearly unbearable withdrawal

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likely to be taught any of the core subjects by a teacher who majored in that subject than were students at public secondary schools with a low poverty level (5 percent or less eligible for free or reduced-price lunch). *Id.*

5. *See Cohen, supra* note 2. The author's review of the data yields the conclusion that "there is little doubt that child poverty...is scarring the development of our nation's children." *Id.*

6. The National Clearinghouse for Alcohol and Drug Information, *Research Shows Impact of Poverty on Substance Abuse Among Youth* (August 1, 1997), *available at* http://www.health.org/newsroom/rep/30.html (describing an overrepresentation of drug abuse in the poor).

7. *Id.*(stating "[p]oor people often turn to drugs for relief from anxiety and stress").

8. The National Clearinghouse for Alcohol and Drug Information, *Substances of Abuse – Brief Profiles* [hereinafter "Brief Profiles"], Cocaine *available at* http://www.health.org/govpubs/rpo926 reporting that cocaine is abused because it induces "carefree feeling, euphoria, relaxation, in control" sensations, but that "high lasts only about 5 to 20 minutes" and "may cause severe 'mood swings' and irritability" and describing development of tolerance that causes requirement of increasing doses to achieve desired effect.

9. *See id.*

10. *New Research Reveals How Drugs, Alcohol Affect Parts of Brain*, NEWSWEEK, Feb. 12, 2001 [hereinafter "*Brain Research*"].

11. *Id.*

12. THE COLUMBIA ENCYCLOPEDIA 65 (6th ed., 2000). Cocaine blocks the reabsorption of neurotransmitters (mood creating chemicals) particularly dopamine, in the synaptic cleft. This results in a buildup of chemical that induces very pleasurable sensations. The effect lasts 10 to 30 minutes, and the exhaustion of the neurotransmitter supplies causes subsequent craving. *Id.*

syndrome that virtually removes from the addict the choice to refrain from drug use,[13] even in the face of severe negative consequences.

In 1989, the Maternal Child Health Unit of the Medical University of South Carolina (MUSC) noted an increased occurrence of negative health effects on fetuses and newborn babies which was believed to be caused by maternal ingestion of cocaine.[14] MUSC's health care team noted that the patients who were using cocaine during pregnancy were also seeking prenatal care and labor and delivery services.[15] The team did not assume that the women who used drugs while pregnant simply disregarded the effects of drugs on their fetuses. Instead, the team recognized the women's maternal concern and responsibility for their fetuses and both provided prenatal care and referred these women for substance abuse treatment[16] through a policy that included the notification of law enforcement when a patient's urine tested positive for cocaine.[17] The policy was described by Solicitor Charles Condon as "amnesty-based [with] basic requirements, number one being drug free, ... and, number two, if you would go to free drug treatment, not a thing would happen to you."[18]

This Note argues that the MUSC staff's recognition of the dangerous activity in which their patients were engaged and the subsequent intervention on behalf of those patients was justified and necessary to prevent harm.[19] However, the use of arrest to coerce compliance with treatment served little purpose in meeting either the short term goal of a safe and healthy course of pregnancy[20] or the long term goal of the

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13. *See Brain Research, supra* note 10. The article reports research showing biological basis for addiction, tolerance, withdrawal, and relapse. MRI and PET scans of the brain reveal brain activity during highs and lows, illustrating why withdrawal can be unbearable and demonstrating that changes that addictive drugs cause in the brain that persist long after use ends.

14. Ferguson v. City of Charleston, 186 F.3d 469, 474, 478 (4th Cir. 1999).

15. Ferguson v. City of Charleston, 532 U.S. 67, 211 (2001).

16. *Id.* at 211-12.

17. *Id.* at 474.

18. *Id.* at 475.

19. *See generally* TOM BEAUCHAMP AND JAMES CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS, (Oxford Univ. Press ed., 5th ed. 2001). The authors describe societal obligation to protect persons against some types and levels of harm and suggests a "short step to the conclusion that a positive obligation exists to provide benefits such as health care." *Id.* at 157-58.

20. For a concise and persuasive prediction of the chilling effect such a policy could have on the degree to which pregnant women seek prenatal care, *see* Brief of Amici Curiae American Civil Liberties Union et al., Ferguson v. City of Charleston, 532 U.S. 67 (2001).

mother's release from drug dependence.[21] This Note contends, however, that cocaine abuse by pregnant women who wish to carry their fetuses to term merits attention and intervention by the medical staff.

Ferguson v. City of Charleston[22] presents an opportunity for the American medical and legal systems to tailor a response to the effects of poverty and drugs on some of our most vulnerable citizens, pregnant women and their unborn children. The case presents an opportunity to acknowledge the disparity between the life choices available to the poor in America and those available to the middle and upper class. Indeed, the *Ferguson* amicus brief contended that drug testing threatened the autonomy of pregnant women and observed that this policy would disproportionately affect poor and minority women, since they are "more likely to give birth at public institutions and have more contact with state agencies."[23] To view the case as a question of a woman's right to privacy versus the state's right to search is to abandon pregnant drug users as mere props in an exercise of constitutional analysis.

Ferguson beckons society to recognize its obligation to create a solution that serves the interests of the individual and of society. It also emphasizes that the solution should entail neither arrest nor neglect. The *parens patriae* power, the "state's inherent sovereignty to safeguard the community's welfare,"[24] permits society, through its legislature, to choose to protect the interests of minors and incompetents.[25]

The degree of dependence and loss of competent choice suffered by the women was manifested in their contradictory behavior: they used cocaine while pregnant despite the desire to safely carry and birth their fetuses.[26] Such contradictory behavior indicates a level of dependence and a lack of control that yields a nearly hopeless prognosis for

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21. *Brain Research, supra* note 10. The author describes Crack cocaine as magnifying the addictive qualities of snorted cocaine. Treatment is described as requiring the disruption of an addict's pattern of binges and concerted attention to relapse prevention. The Court also notes that treatment is often complicated by underlying social problems.

22. *Ferguson* , 532 U.S. 67..

23. *See Amici brief, supra* note 20.

24. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW 27 (2000).

25. *See id.*

26. *See Brain Research, supra* notes 10.

recovery without intense and sustained intervention.[27] The *parens patriae* power provides an avenue by which specialized treatment could be offered as a viable alternative to either incarceration or abandonment of the women to their addiction in the name of privacy.

This Note first examines the socioeconomic forces that contribute to the incidence of drug use during pregnancy. It next considers the issue of consent, looking at the patient's consent to the search through urine drug testing as separate from consent regarding the release of medical information to law enforcement. This Note then explores the health care rationale for the course of action taken by MUSC. Finally, it proposes that each state invoke its *parens patriae* power to devise a socio-medical policy for effective and constitutional intervention on behalf of the patients.

I. FERGUSON V. CITY OF CHARLESTON

MUSC developed a policy for intervening in women's illicit drug use during pregnancy. First, pregnant cocaine users were identified through urine drug testing[28] of women whose clinical evaluation[29] revealed the presence of particular predetermined indicia of cocaine abuse.[30] The staff then encouraged those women to seek substance

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27. *Id.*

28. Ferguson, 186 F.3d at 474.

29. It is routine nursing care to assess every obstetrical patient for risk factors of which the treatment team must be aware to assist the mother with the safe and healthy pregnancy and delivery. The absence of risk indicators results in the lesser intensity of assessment. The presence of a risk factor(s), however, elicit(s) intensified investigation and assessment to create a complete and accurate clinical picture to allow the treatment team to plan for potentially needed intervention. *See, e.g.,* SAN DIEGO & IMPERIAL COUNTIES REGIONAL PERINATAL SYSTEM, FUNDAMENTALS OF LABOR, DELIVERY & RECOVERY NURSING, Antepartum Care and Assessment 55 (1999).

30. Ferguson, 186 F.3d at 474, (describing indicia as:
(1) separation of the placenta from the uterine wall;
(2) intrauterine death;
(3) no prenatal care (fewer than five visits);
(4) late prenatal care (beginning after 24 weeks)
(5) incomplete prenatal care (fewer than five visits);
(6) preterm labor without obvious cause;
(7) a history of cocaine use;
(8) unexplained birth defects;
(9) intrauterine growth retardation without an obvious cause).

abuse treatment.[31] The testing policy was created in consultation with governmental entities who exercised authority based on statute[32] and case law[33] and proffered solutions that supported the state's interest in the well being of the fetuses. These parties included the Solicitor of the Ninth Judicial Circuit of South Carolina, the South Carolina Police Department, the City of Charleston and several social services agencies.[34]

Ten women, most of whom were black[35] and all of whom had been subjected to the drug testing policy, filed suit in the United States District Court for the District of South Carolina.[36] The women claimed disparate impact in violation of the *Civil Rights Act of 1964*, 42 U.S.C. § 2000d, since the majority of those subjected to the state's action (at the state hospital) were African-American women. The Court of Appeals found that the women had failed to show the existence of an equally effective alternative means of accomplishing policy goals that would impose a less disparate impact on African Americans.[37]

The women also alleged a violation of the right to privacy and abuse of process. The court found that a privacy right was not violated since the women's medical records were disseminated to a limited number of

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31. *Id.* at 473 (describing the policy as "intended to encourage pregnant women whose urine tested positive for cocaine use to obtain substance abuse counseling") and at 475 (referring to J.A. 2739 finding that the "goal [of the policy] was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child").

32. S.C. Code Ann. § 20-7-50 (2000). Unlawful conduct towards child has been interpreted to include abuse and endangerment through the use of crack cocaine during pregnancy. *See* Whitner v. State, 492 S.E.2d 777, 778-84 (S.C. 1997), *cert. denied*, 523 U.S. 1145, 140 L. Ed. 2d 1104, 118 S Ct. 1857 (1998) (upholding a criminal child neglect conviction of a woman who ingested cocaine while pregnant with a viable fetus).

33. *See* State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) (holding that a viable fetus was a person for criminal law purposes under South Carolina law) and *State v. Jenkins*, 294 S.E.2d 44 (S.C. 1982) (interpreting the statute's noninclusion of "knowingly" or similar language regarding intent as demonstrating the legislature's intent that the simple failure to provide care so that the life, health and comfort of a child is endangered or likely to be endangered is a violation of S.C. Code Ann. § 20-7-50).

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

35. *Id.* at 479, n.9 ("[o]f the ten Appellants, eight are African-American, one is of mixed race, and one is Caucasian).

36. *Id.* at 469.

37. *Id.* at 481-82.

law enforcement personnel. The court also found that MUSC personnel did not have the requisite improper ulterior purpose necessary to establish abuse of process.[38]

The women further asserted the urine drug testing was a violation of their Fourth Amendment rights[39] because law enforcement was notified of their positive drug test results. Indeed, as a result of the notification, four of the women were arrested; however, none of the women was prosecuted.[40]

The District Court found the women had consented to the search by consenting to urine testing.[41] The women appealed this judgment, arguing the evidence supporting the jury's consent finding was insufficient.[42]

The Fourth Circuit affirmed the lower court's judgment without reaching the consent issue. The court, instead, reasoned that, "the rising use of cocaine by pregnant women among MUSC's patient base and the public health problems associated with maternal cocaine use created a special need beyond normal law enforcement goals."[43] The special needs doctrine is a limited exception to the requirement of probable cause in which reasonableness is evident from "a careful balancing of governmental and private interests."[44]

For cases in which a special need is identified from the facts, the Supreme Court has set out a balancing test weighing governmental interests against individual privacy interests "to assess the practicality of the warrant and probable-cause requirements in the particular context."[45] This balancing test is extremely fact sensitive and is performed by assessing the facts in light of the surrounding circumstances with attention to differences of degree.

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38. *Id.* at 483.

39. U.S. CONST. amend. IV (addressing citizen's right to be free from unreasonable searches).

40. *Ferguson,* 532 U.S. at 67.

41. *Ferguson*, 186 F.3d 469.

42. *Id.*

43. *Id.* at 479.

44. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *see also* Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 619 (1989) (allowing exceptions to the Fourth Amendment's warrant requirement for searches made "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable").

45. *Ferguson*, 186 F.3d at 477-79 (detailing the three-prong test for Special Need Doctrine applicability).

To justify waiver of the probable cause-warrant requirement, governmental need must be sufficiently important that the search as it was performed is justified in light of the surrounding circumstances, taking into consideration "other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[46] Next, the expected effectiveness of the search is scrutinized with focus on "the degree to which [it] advances public interest."[47] Finally, the degree of intrusion is first measured objectively by the duration and intensity of the seizure and investigation. It is then measured subjectively by the amount of fear and surprise experienced by the searched or detained person.[48]

The Fourth Circuit applied the special needs balancing test[49] to the urine testing policy at MUSC. First, it found that the policy advanced the public interest[50] by assisting in providing the women with the safe delivery and birth they sought[51] as well as protecting the fetus.[52] Second, it held that it was an effective and economically efficient way to advance the identified public interest.[53] Third, it found the testing policy to be minimally intrusive.[54] Thus, the Fourth Circuit established

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46. Chandler v. Miller, 520 U.S. 305, 318 (1997).

47. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990).

48. *Id.* at 452.

49. *Id.* For another illustration of Special Needs balancing test, see Skinner, 489 U.S. at 619.

50. Ferguson, 186 F.3d at 477 (pointing out that the government was not required to have a need that was "compelling in the absolute sense").

51. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1996) (requiring interest "*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." (Emphasis in the original).

52. For further support of the government's interest, see Justice Kennedy's concurrence in *Ferguson*, 532 U.S. at 88-89 (detailing findings of growth and development, psychological and neurological harm to children from exposure to cocaine in utero).

53. *Ferguson*, 186 F.3d at 478 (describing "little doubt" that the policy implemented by MUSC "was an effective way to identify and treat "maternal cocaine use while conserving the limited resources of a public hospital"). *See also id.* at 481 (finding proposed alternative practices would be prohibitively expensive).

54. *Id.* at 479 (finding the context in which the urine sampling occurred minimally intrusive since it was done "in the course of medical treatment to which Appellants had consented...[and] [t]he giving of a urine sample is a normal, routine and expected part of a medical examination"). *See also* Yin v. California, 95 F.3d

that the urine drug screens did not violate the Fourth Amendment as unreasonable searches.[55] The women appealed this affirmance of the judgment against them to the United States Supreme Court.[56]

In *Ferguson v. City of Charleston*,[57] the Supreme Court considered the case, presuming that the MUSC's policy impinged upon the women's autonomy in that the urine testing was performed without the women's consent.[58] The Court also presumed that the primary purpose of the testing was to provide the results to law enforcement,[59] which then used that information as evidence.[60] The women were susceptible to the threat of arrest and prosecution,[61] and the offense with which each woman would be charged depended upon the stage of her pregnancy.[62]

864, 870 (9th Cir. 1996) (stating that medical examinations routinely involve the giving of a urine specimen).

55. *See Sitz*, 496 U.S. at 452. *See also Skinner* 489 U.S. at 619 (describing as matter of degree of intrusion as material in determining reasonableness).

56. The women enjoyed the support of numerous groups, including the American Civil Liberties Union, NOW Legal Defense and Education Fund, Chicago Abortion Fund, and Americans for Democratic Action, *see* Brief of Amici Curiae American Civil Liberties Union, et al., Ferguson v. City of Charleston, 532 U.S. 67. *Cf.* GEORGE P. SMITH, II, *Judicial Decisionmaking in the Age of Biotechnology* 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93,94 (1999) (advocating "a full partnership of interest and action should be sought by law, science, ethics, and medicine if progress is to be achieved over the succeeding years" and discussing the disabling effect of the emotionalism that often surrounds important issues).

57. 532 U.S. 67.

58. *Ferguson*, 532 U.S. at 76.

59. *Id.* at 69.

60. *Id.* at 85-86.

61. *Id.* at 82-84 (describing the possibility that the threat of law enforcement may have been intended as the means to a desired end of getting the women in question into substance abuse treatment but describing the threat of law enforcement means as the direct and primary purpose of MUSC's policy, i.e., contending that MUSC's primary purpose was not to help the women take treatment).

62. *Id.* at 72-73 (detailing precise offenses with which a woman would be charged: (1) 27 weeks or less gestation: simple possession; (2) 28 weeks or more: possession and distribution to a person under the age of 18 (the fetus); (3)At delivery: possession, distribution to a person under the age of 18, and unlawful neglect of a child).

Accordingly, the Supreme Court reversed the Court of Appeals and remanded the case for a determination on consent.[63] Regarding reversal of the lower court's exclusion of the case from the warrant requirement, the Court reasoned that the urine drug testing performed by the hospital did not meet the standard for the special needs doctrine. The majority found that, because the applicable government interest was the use of criminal sanctions as deterrence, MUSC's "benign motives" were relegated to the significance of only a secondary goal and that weighted the balancing test toward the protection of autonomy.[64]

As to the issue of consent, the majority of the Court maintained that, because the Court of Appeals had not discussed the issue, the more prudent course for the Supreme Court was to express no view, thus allowing the Court of Appeals to examine and resolve it.[65]

Justice Kennedy reviewed the Court's abdication on the consent issue in his concurrence, acknowledging that the Court had "erected a strange world for deciding the case"[66] by finding it "necessary to take the unreal step of assuming there was no voluntary consent."[67] He stated plainly that, had consent rather than nonconsent been assumed for purposes of analysis, "the case might have been quite a different one."[68]

Justice Scalia took a strong stance in his dissent.[69] He stated clearly that his assessment of the facts revealed no unconsented search.[70] He reasoned that the women provided the urine samples and gave express, written consent to the testing. He further asserted that Fourth Amendment jurisprudence does not require that the consensually

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63. *Id.* at 86.

64. *Id.* at 85 (holding that MUSC's 'benign motive' "cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement with the development and application of the MUSC policy").

65. *Id.* at 77,(citing Glover v. United States 531 U.S. 198 (2001) and National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 470 (1999)).

66. *Id.* at 91.

67. *Id.*

68. *Id.*

69. Scalia's willingness to take a strong stance merits consideration. *See* PHILIP K. HOWARD, THE LOST ART OF DRAWING THE LINE 35-40 (2001) (citing 'The Abdication of Legal Authority' for commentary on how striving for neutrality can cause the inadvertent removal of a critical element of justice; quoting Oxford philosopher P.S. Atiyah, " Legal principle [has been] rejected as a form of authoritarianism").

70. *Ferguson*, 532 U.S. at 96.

searched party be informed of potential law enforcement involvement.[71] Scalia contended that, even if the search had been unconsented, under the circumstances the search would have been valid under the special needs doctrine. Applying the special needs balancing test Scalia characterized the government's intervention as beneficent and necessary. He described the goal of the drug testing policy as being intended to facilitate treatment and protect the mother and the unborn child.[72] On the other hand, he valued the impingement on the women's Fourth Amendment rights as a less weighty concern, and indeed found those rights undisturbed.[73]

Scalia's determination was sensible, considering the illegality of the drug use and its ultimately negative impact on all of society.[74] Action meant to curb the use of illegal substances, particularly by pregnant citizens, can be anticipated to improve the health status of both the mother and fetus which confers a benefit not only on them, but also on the citizens whose taxes would be spent to correct drug-induced problems.

Scalia identified the goal of the drug-testing program as the creation of an incentive for the addicted women to take treatment for their addiction. He described law enforcement as joined with the hospital staff "in that benign purpose,"[75] and punctuated his opinion with a sardonic final statement: "It would not be unreasonable to conclude that today's judgment, authorizing the assessment of damages against the county solicitor and individual doctors and nurses who participated

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71. *Id.* (*citing* Respondents Brief, Part II):

Petitioners...freely and voluntarily...provided the urine samples....[E]ach of the Petitioners signed a consent to treatment form which authorized the MUSC medical staff to conduct all necessary tests of those urine samples – including drug tests....[T]here is no precedent in this Court's Fourth amendment search and seizure jurisprudence which imposes any...requirement that the searching agency inform the consenting party that the results of the search will be turned over to law enforcement.

72. *Id.* at 99 (citing the District Court's finding of fact and observing that this finding is binding on the Court unless clearly erroneous, Fed. Rule Civ. Proc. 52(a)).

73. *Id.* at 92.

74. Shelley L. Beckmann, Ph.D., Address at the 123rd Annual Meeting of the American Public Health Association (1992) (describing the influence of drug abuse on crime and citing a 1992 report by the United States Department of Justice that showed more than half of arrestees who were tested for drugs were shown to have used drugs recently and that cocaine was the most prevalent drug found).

75. *Ferguson*, 121 S.Ct. at 1302.

in the program, proves once again that no good deed goes unpunished."[76]

Scalia's willing recognition of the compelling nature of the women's need for care spotlights the real issue in the case, the need for protective action on behalf of a uniquely vulnerable group of citizens. But Scalia wrote in dissent, and the majority leaves the real problem untouched. A stringent but non-punitive policy is required to intervene in the addictive process in order to protect the patients and their fetuses from the health risks created by drug use during pregnancy.

Analogous situations have been presented in recent history and specialized policies have been adopted to benefit both the individuals and society at large. For example, in 1986, the Department of Defense tested all service members for HIV and questioned those who tested positive about the manner in which they had contracted the virus.[77] In order to protect those who reported homosexual activity or needle-sharing from adverse personnel action,[78] a law was passed which specifically restricts the Department of Defense's use of such information.[79] Similar legislative action can be tailored to allow rigorous but nonpunitive intervention on behalf of other special categories of patients such as those in the instant case.

II. THE PATIENTS

Often, America's poor find the use of illicit drugs to be a reliable, affordable, albeit brief,[80] release from the troubles and worries which

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76. *Id.*

77. Interview with John V. Sullivan, Dep. Parliamentarian, Office of Parliamentarian, United States House of Representatives, former Counsel to the House Armed Services Committee, in Washington, D.C. (Mar. 4, 2002).

78. *Id.* Adverse personnel actions included, among other things, court martial, punishment, involuntary separation, demotion, denial of promotion and an unfavorable entry in a personnel record.

79. Restriction on Use of Information Obtained During Certain Epidemiologic-Assessment Interviews, Pub. L. No. 99-661, §705(c) division A, 100 Stat. 3904 (1986).

80. *See* Brief Profiles, *supra* note 8 Cocaine (explaining that cocaine is abused because it induces "carefree feeling, euphoria, relaxation, in control" sensations, but that "high lasts only about 5 to 20 minutes" and "may cause severe 'mood swings' and irritability" and describing development of tolerance that causes requirement of increasing doses to achieve desired effect). *See also* Substances of Abuse – Brief Profiles, Crack (explaining that crack is abused because it induces

are their constant companions.[81] Also, in the United States, African-American women are more likely to be poor than are white women or males of either race.[82] The high probability of lifelong poverty that many young, black women face and the despair that such odds engender are augmented by the higher likelihood that the African-American female will end her education without completing high school.[83] Even if she does finish high school, her college prospects will be often be hampered by SAT scores that are lower than those of most white women or black or white males.[84]

Examining these statistics, one can imagine how women for whom these statistics are predictors might see any attempt at escape as futile and adopt the use of harmful drugs as a viable coping mechanism. Indeed, Dr. Rand Conger, the Director of the Center for Family Research in Rural Mental Health at Iowa State University of Science and Technology, addressed the National Institute on Drug Abuse's Prevention Research Working Group on the subject of drug use as escapism. The National Clearinghouse for Alcohol and Drug Information Reporter describes Conger with asserting that, for the poor, "[u]sing drugs provides a means to escape; dealing can be an alternative source of income. Often people suffering from economic hardship feel that they have little to lose if the get involved in drugs."[85] Once involved, however, they often develop dependencies and

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"quick high, power, euphoria" sensations but that Crack is almost instantly addictive, the desirable effects last only a few minutes, and there are more hospitalizations per year resulting from crack and cocaine than any other illicit substance).

81. *Poverty Level By Race, supra* note 1.

82. *Id.* Not only are black females statistically more likely to live in poverty, but the proportion of black females—nearly half of those under 18 and more than one third of all—who *will* live in poverty is staggering. *Id.*

83. *Id.* at Educational Attainment of Persons 25 to 34 Years of Age, By Race & Gender, 1995 (indicating high school graduation or more education was obtained by 84.7% of black females, compared with 93.1% of white females, 91.7% of white males, and 86.1% of black males).

84. *Id.* at SAT Scores By Race & Gender, 1996 (indicating Verbal/Math SAT scores for black females 437/416; compare with 524/507 for white females; 528/542 for white males; 431/431 for black males).

85. The National Clearinghouse for Alcohol and Drug Information, *supra* note 6.

addictions that preclude the capacity to choose whether or not to continue to use drugs.[86]

With an informed view of the socioeconomic influences of substance abuse, one can recognize that the inequitable fate of poor women produces the disparity between the rates of cocaine use during pregnancy by African-American (4.5%) white (0.4%) and Hispanic women (0.7%).[87] To abandon those women and their fetuses to poverty and addiction in the name of protecting the right to be left alone would be a disastrous distortion of the values that generated the Fourth Amendment to our Constitution.

III. WHAT IS CONSENT?

A. Consent to Urine Drug Testing Makes a Search Per Se Reasonable

Patients in American health care settings routinely provide urine specimens to health care professionals for analysis,[88] and on occasion those samples are used as legal evidence.[89] Nearly always and necessarily, the samples are provided with the patient's unequivocal and documented consent.[90] When the government obtains information

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86. THE COLUMBIA ENCYCLOPEDIA, *supra* note 12, describing the addictive nature of cocaine.

87. Robert Mathias, *NIDA Survey Provides First National Data on Drug Use During Pregnancy,* NIDA Notes Women and Drug Abuse. Vol. 10, Number 1 (January/February 1995), *available at* http://www.nida.nih.gov/NIDA_Notes/NNvol10N1/NIDASurvey.html (also showing that, "overall, 11.3% of African-American women, 4.4% of white women, and 4.5% of Hispanic women used illicit drugs while pregnant. While African Americans had higher rates of drug use, in terms of actual numbers of users, most women who took drugs while they were pregnant were white").

88. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY [hereinafter *MERCK MANUAL*] (Robert Berkow, M.D. et al. eds., 16th ed. 1992) (recommending laboratory testing of various body fluids for diagnostic purposes); Yin v. California, 95 F.3d 864, 870 (9th Cir. 1996) (observing that "in today's world, a medical examination that does not include either a blood test or urinalysis would be unusual").

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

90. *See, e.g.,* United States v. Glover, 104 F.3d 1570, 1584 (10th Cir. 1997) (holding that evidence obtained by a consent-based search is admissible only if the government (1) produces clear and positive testimony that the consent was unequivocal, specific, and freely given, and (2) proves that the consent was given without duress or coercion, express or implied.)

from a citizen through a consented search,[91] the government must be able to prove that the consent was genuine.[92] Furthermore, the quality of that consent will merit scrutiny if the Constitutional rights of the individual consenting could be affected.[93]

The author of this Note contends that the women consented to urine drug testing. Even if consent cannot be proven, however, a compelling argument can be made that the testing was reasonable to protect the public interests in the health of the mother and fetus. However, the consent to testing given by the women was applicable only within the confidential health care setting. The consent to urine drug testing did not extend to the dissemination of the results of the urine test to law enforcement.

B. Nonconsensual Testing

1. When Is a Urine Drug Screen a Search?

There are some occasions when a urine specimen may lawfully and permissibly be extracted from a patient without his or her consent.[94] Such an event constitutes a search when it is executed by a state actor[95]

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91. United States v. Nicholson, 983 F.2d 983, 988 (holding as in *Glover* that for consent-based search, "the government must show that there was no duress or coercion, express or implied, that the consent was unequivocal and specific, and that it was freely and intelligently given.").

92. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 89 (Date?). 1 John Wesley Hall, Jr. Search and Seizure, § 8:1 at 382 (2d ed. 1991) (The ultimate question in any consent search is whether the consent was voluntary). *See also id.* at §§ 8:12 – 8:30.

93. Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973) (asserting that virtually without exception, "the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.").

94. *See MERCK MANUAL, supra* note 88. The manual recommends that physicians order certain laboratory testing in emergent situations, regardless of consciousness of patient.

95. *United States v. Attson*, 900 F.2d 1427, 1432 (9th Cir. 1990) (analyzing the expansion of Fourth Amendment beyond its usual application to conduct of law enforcement and describing the assessment of Fourth Amendment implications of the actions of non law enforcement. "To determine applicability of Fourth Amendment, court must: (1) gauge whether the acting party intended to assist the government in search or seizure activities which implicates the Fourth

or his agent[96] with the intention that the patient will be subjected to subsequent law enforcement investigation.[97]

In the instant case, a distinction can be drawn between the compulsory removal of body fluids for testing purposes, and the voluntary provision of a body fluid specimen that requires no physical penetration or contact.[98] The compulsory removal of fluids is a search subject to the Fourth Amendment, but voluntary provision is not similarly protected. The women provided the urine with the expectation that the specimen would be tested and the results would be used to foster the health of themselves and their fetuses.[99]

2. Reasonable Suspicion Doctrine

Any governmental search must be reasonable to be constitutional[100] and government is normally prevented by this reasonableness constraint from conducting searches in the absence of individualized suspicion.[101] The United States Supreme Court has held that a court must balance the "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"[102] in order to determine the reasonableness of a search.

In the instant case, MUSC, as a government agent, conducted the urine drug testing out of concern for the well being of both mother and

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Amendment, or (2) whether that party possessed a motive independent of government's objectives"). *Id.*

96. *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981)(holding that act of airline employee with sole purpose to support Drug Enforcement agent is government act).

97. *Attson*, 900 F.2d at 1430-31 (describing that, "under proper factual circumstances" government activity that furthers investigatory or administrative purposes falls within the scope of the Fourth Amendment). *Cf.* Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991) (indicating that reduced privacy concerns accompany a urine drug test that is conducted in the course of a medical examination).

98. Michael T. Flannery & Raymond C. O'Brien, *Mandatory HIV Testing of Professional Boxers: An Unconstitutional Effort to Regulate A Sport that Needs to Be Regulated,* 31 U.C. DAVIS L. REV. 409, 459 (1998) (discussing personal liberty and the Fourth Amendment in blood testing for HIV).

99. *Ferguson*, 186 F.3d at 486 (describing how women signed consent forms for urine testing).

100. *Acton*, 515 U.S. at 652 (reasoning that reasonableness is the "ultimate measure of the constitutionality of a governmental search").

101. *Chandler*, 520 U.S. 305.

102. Delaware v. Prouse, 440 U.S. 648, 654 (1979).

fetus.[103] Ideally, the reasonableness of a search is assured by the judicial warrant issued upon probable cause.[104] However, recognized exceptions do exist. Under the Special Needs Doctrine, compelling governmental needs allow a search conducted in the absence of suspicion or probable cause.[105]

3. Special Needs Doctrine Exception to Warrant Requirement

Between 1989 and 1997, the United States Supreme Court considered a series of cases, all of which challenged the constitutionality of the acquisition and testing of non-consensually obtained urine specimens.[106] In the aggregate, these cases created the Special Needs Doctrine,[107] which defines a narrow exception to the Fourth Amendment warrant requirement for cases in which a special governmental need for intrusion outweighs the individual's privacy expectations.[108] It is generally well accepted that when a sample or specimen is extracted from a patient without consent, the scope of the search of that patient is extended beyond the acquisition of the sample to the subsequent testing of the sample obtained.[109] Therefore, in *Ferguson*, both the specimen and its subsequent testing were a part of

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103. For a discussion of the best interests of children when parental care is in question, *see* Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209 (1994).

104. *Skinner*, 489 U.S. at 619.

105. *Von Raab*, 489 U.S. at 665.

106. *See Chandler*, 520 U.S. 305; *Acton*, 515 U.S. 646; *Skinner*, 489 U.S. at 617; and *Von Raab*, 489 U.S. 656.

107. *Ferguson*, 186 F.3d at 477-79 (describing three-prong test for Special Need Doctrine applicability: (1) Governmental need "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." (*See Chandler*, 520 U.S. at 318). (2) Effectiveness of the search, with focus on "the degree to which [it] advances the public interest." (*See Sitz*, 496 U.S. at 453). (3) Degree of intrusion, measured objectively by the duration and intensity of the seizure and investigation, and measured subjectively by the amount of fear and surprise experienced by the searched or detained person. (*See Sitz* at 452).

108. *Id.* (identifying the Special Needs Doctrine and showing that, under that doctrine, the screening of urine obtained by state agents from an involuntary subject is routinely treated as a search within the meaning of the Fourth Amendment).

109. *Ferguson*, 532 U.S. at 93 fn1 (dissenting with outcome of case, but agreeing that, when the provision of the urine specimen is involuntary, the subsequent testing of the urine can be considered to have been infected by the search that yielded the specimen).

the search for Fourth Amendment purposes. The documented results of the test were then made a part of each patient's record.

In the instant case, the motive of the MUSC staff in testing the women's urine was the legitimate concern for the safe pregnancy and delivery of the mother and fetus. Viewed from the medical, rather than the law enforcement vantage point, the urine drug testing qualifies for exception under the special needs doctrine.[110] Indeed, one of the *Ferguson* appellants has died since the case was filed,[111] illustrating the seriousness of the health concerns the staff of MUSC sought to address.

The dissemination of the positive findings to law enforcement, however, was a separate act, the legitimacy of which turns on whether law enforcement used the information to punish or protect and assist the patients.[112] It is arguable that law enforcement used the information to motivate or coerce the women to take treatment for addiction, but the punitive character of arrest for failure to comply is indisputable.

C. Analysis of Consent

1. The Presumptions

In *Ferguson v. City of Charleston*,[113] the stance from which the Supreme Court considered the facts was critical to the outcome of the case. The Court presumed first that the women had not consented to urine drug testing,[114] and second that the primary purpose of the urine testing was to obtain evidence for law enforcement.[115] The facts of the case, however, challenge the validity of these presumptions.

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110. *Ferguson*, 186 F.3d at 477-79.

111. *Ferguson*, 186 F.3d. at 485.

112. *Ferguson*, 532 U.S. at 69 (identifying the issue of consent as material to the reasonableness of a search that yields evidence of criminal conduct because of the threat of law enforcement action).

113. *Ferguson*, 532 U.S. 67.

114. *Id.* at 1288 (reasoning that, "given the posture in which the case comes to us, we must assume for purposes of our decision that the tests were performed without the informed consent of the patients...").

115. *Id.* at 1284 (stating that the case required the determination of whether "a state hospital's 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").

Regarding the first presumption of non-consent, the women manifested their consent when they signed the authorization for urine drug testing.[116] These women further manifested their consent through their conduct when they provided the MUSC staff with the physical specimen required for the test.[117] They did not, however, give consent to the disclosure of their medical records to law enforcement.

Regarding the second presumption that the testing was performed to obtain evidence for law enforcement, a distinction must be noted. The MUSC staff engaged law enforcement's coercive power, but it did so to control the women's access to drugs, and not to facilitate prosecution for prosecution's sake.[118]

2. The Wrong Done

Although the women consented to urine testing, they did so without knowledge of the potential dissemination of the test results to law enforcement.[119] Courts have found the dissemination of the results of a consensual search to law enforcement to be in keeping with Fourth Amendment jurisprudence, even when government extracts the consent without identifying itself.[120] It logically follows that any attack

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116. *Ferguson*, 186 F.3d at 486 (describing how, although the women signed consent forms for urine testing, they were not advised that the results would be disclosed to law enforcement).

117. *Id.*

118. *Id.* at 474 (stating that "the impetus behind the policy came from Nurse Shirley Brown, a case manager in the obstetrics department at MUSC;" and was motivated by a perceived rise in cocaine use by maternity patients and by the wish to prevent the negative health consequences of that use in the babies born to those patients).

119. *Ferguson*, 532 U.S. at 77 (describing the hospital's contention that the presence of indicia of drug abuse justified turning over test results to law enforcement without the knowledge or consent of the patients). *See* Griffin v. Wisconsin, 483 U.S. 868, 870, 875-877 (1987) (determining that a warrantless search based on reasonable grounds is justified by the state's special needs even if evidence gained is used to support a criminal conviction); and *Sitz* 496 U.S. at 455 (reasoning that arrest for driving under the influence can result from suspicionless stop at a sobriety checkpoint).

120. *Cf. Chandler*, 520 U.S. 305; *Acton,* 515 U.S. 646; *Skinner*, 489 U.S. 602; and *Von Raab*, 489 U.S. 656 (creating the Special Needs Doctrine and treating drug testing of urine that was obtained without consent as a search) *with* Hoffa v. United States, 385 U.S. 293 (1966) (holding that a consent allowing access to evidence is not vitiated by the failure on the part of a government agent to disclose his role as informant). *See also* United States v. Calandra, 414 U.S. 338, 354 (1974)

on the dissemination of the results of the urine testing to law enforcement must be severed from the search.

Indeed, the women themselves separated the search from the dissemination and challenged the disclosure of information contained in their medical records as discriminatory and a violation of their right to privacy.[121] The women confronted the policy as disproportionately affecting African Americans because it tested only for cocaine, only at MUSC, and only in certain departments of MUSC.[122]

The appellate court found that MUSC had answered these assertions with a legitimate explanation: MUSC wished to intervene upon an increase in cocaine use in pregnant women, and the cost of alternative practices suggested to lessen the discriminatory impact of the policy would have been "prohibitively expensive."[123] The appellate court also noted that there existed "no evidence in the record to support a conclusion that MUSC could have forced other hospitals to adopt the policy."[124]

In assessing the violation of the women's right privacy, the appellate court took into account the private nature of the disclosure and found that the government's interest outweighed the women's privacy interests.[125] The court reasoned that, although there is no "general constitutional right to privacy,"[126] there is a recognized constitutional "interest in avoiding disclosure of personal matters"[127] when such disclosures involve rights that "are fundamental or implicit in the concept of ordered liberty."[128] The appellate court decided, however, that the interest of the government outweighed the women's interest in nondisclosure of their medical records.[129] In other words, the

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(reasoning that the Fourth Amendment exclusionary rule was judicially fashioned to deter unlawful police conduct and the derivative use of the results of a search raises a question not of rights, but of remedies).

121. *Ferguson*, 186 F.3d at 481-82.

122. *Id.* at 480-81.

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

124. *Id.* at 477-79.

125. *Id.*

126. See Condon v. Reno, 155 F.3d 453, 464 (4th Cir. 1998).

127. Whalen v. Roe, 429 U.S. 589, 599 (1977).

128. Paul v. Davis, 424 U.S. 693, 713 (1976) (internal quotation marks omitted).

129. *See* Bloch v. Ribar, 156 F.3d 673, 684 (6th Cir. 1998) (holding that when a constitutional right of privacy attaches to personal information, disclosure does not violate the Constitution when "the government's interest in disseminating the

disclosure of the women's urine drug test results passed the test for constitutionality[130] as long as the governmental interest was compelling and appropriate.

3. The Supreme Court's Analysis

The Supreme Court's analysis of the case may be viewed as a confounding permutation of Fourth Amendment jurisprudence. The Court's decision could carve out an area of nonconsent that turns not on whether the individual consented to the search, but rather revolves around whether that individual anticipated the full consequences of the evidence that consent would reveal.[131] In other words, the Supreme Court's analysis may clarify the scope of consent when evidence can be extracted from the by-product of a search.

Although case law supports the transfer of the product of a search to law enforcement,[132] it does not so clearly support the transfer of the results of that product's evaluation and interpretation. As a matter of fact, in many jurisdictions, an argument could be made that, by providing law enforcement with the test results from the patient's medical record, the physician-patient privilege is violated.[133] South Carolina has chosen not to protect the physician-patient relationship in this way,[134] but has enacted a law making a woman who ingests cocaine after the twenty-fourth week of pregnancy guilty of distribution of a

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information" outweighs "the individual's interest in keeping the information private").

130. A circuit split exists on the issue of whether medical records can be protected by the individual's right to privacy. *Cf. Doe v. Southeastern Pa. Transp. Auth.*, 72 F.3d 1133, 1137 (3d Cir. 1995) (stating the individual has a constitutional right to privacy of medical records) *with Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (holding that there exists no constitutionally protected right to privacy in medical records).

131. *Ferguson*, 532 U.S. at 93 (dissenting, Scalia states "[u]ntil today, we have never held – or even suggested – that material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain").

132. *Ferguson*, 532 U.S. at 1284.

133. Thomas R. Malia, *Validity, Construction, and Application of Statute Limiting Physician-Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect*, 44 A.L.R. 4th 649 (1986). The physician-patient privilege is intended to inspire confidence in the patient and encourage him to make a full disclosure to the physician.

134. *See, e.g.*, Peagler v. Atlantic Coast R.R. Co., 101 S.E.2d 821 (1958).

controlled substance to a minor,[135] so no such argument could be made in *Ferguson.*

The Supreme Court's *Ferguson* decision can be viewed as not only remanding the issue of consent but also the issue of drug abuse and its effect on society to the "laboratory of the states."[136] Clearly, South Carolina has a mandate to resolve this issue in this particular case, and it follows that the state's policy must adhere to the findings on remand. The social and health problems identified in *Ferguson* are not unique to South Carolina. The problem of drug abuse, particularly during pregnancy, deserves attention and redress throughout the United States.

Fortunately, members of the United States House of Representatives are currently attempting to safeguard the health of mothers and babies. Consequently, the states are being afforded an opportunity for synergistic effort with the federal government.

On July 24, 2001, Rep. Lowey introduced the Mothers and Newborns Health Insurance Act of 2001 which would to expand the availability of coverage of pregnancy-related assistance for targeted low-income women.[137] The proposed Act is now with the House Committee on Energy and Commerce. The bill not only proposes optional coverage for uninsured pregnant women under a state child health plan,[138] but also would provide automatic assistance to a child born of that pregnancy for at least the first year of his or her life.[139] With concerted legislative and administrative effort, a mechanism could be tailored to afford women treatment during pregnancy for drug addiction.

IV. THE HEALTH CARE RATIONALE FOR THE URINE DRUG TESTING POLICY

135. S.C. Code Ann. § 44-53-440 (2002).

136. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (describing the States' right to experiment in social and economic government, and cautioning that the Court's "[d]enial of the right...may be fraught with serious consequences to the Nation").

137. H.R. 2610, 107th Cong (2001).

138. *Id.* at §2.

139. *Id.* at §3(f).

A. Erroneous Presumptions

In assessing the health care needs of the patients, MUSC's staff did not assume that the women involved proactively chose to expose their fetuses to harmful substances in utero. Rather, they surmised that the women's use of harmful drugs during pregnancy was not an exercise of autonomy, but instead a manifestation of the women's inability to refrain from ongoing drug use due to the effects of the drugs themselves. Accordingly, the primary purpose of the testing was not that which was presumed by the Supreme Court but rather was a special need to care for the drug addicted mothers and their fetuses.[140]

This case, therefore, qualified for application of the Special Needs Doctrine.[141] The need to assist and protect both mother and fetus was compelling, especially after considering the negative physical and neurological effects of maternal cocaine use on developing fetuses.[142] The drug testing and substance abuse treatment could reasonably be expected to be effective,[143] and testing the urine, which would have otherwise have been discarded, was minimally intrusive.[144]

The ultimate wrong suffered by the women suffered was not the violation of their Fourth Amendment rights — those rights were

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140. *See Ferguson*, 186 F.3d at 477-78 (describing policy development caused by "alarming increase" in cocaine-affected pregnancies complications at MUSC and concluding that "MUSC officials unquestionably possessed a substantial interest in taking steps to reduce cocaine use by pregnant women."). *Cf.* Acton, 515 U.S. at 661-662 (concluding that the interest in preventing and deterring drug use by schoolchildren was important in view of the drug use's negative effects).

141. *See , supra* note . *????*

142. *Ferguson*, 532 US at 89-90, *citing* CHIRIBOGA, ET AL. DOSE RESPONSE EFFECT COCAINE EXPOSURE ON NEWBORN NEUROLOGIC FUNCTION, 103 Pediatrics 79 (1999) (detailing "higher rates of intrauterine growth retardation, smaller head circumference, global hypertonia, coarse tremor, and extensor leg posture"), *also citing* ARENDT, ET AL., MOTOR DEVELOPMENT OF COCAINE-EXPOSED CHILDREN AT AGE TWO YEARS 103 Pediatrics 86 (1999) (noting that exposure to cocaine antenatally "can also result in developmental problems which persist long after birth).

143. *Ferguson*, 186 F.3d at 478 (describing "little doubt" that the policy implemented by MUSC "was an effective way to identify and treat maternal cocaine use while conserving the limited resources of a public hospital").

144. *Id.* at 479 (finding the context in which the urine sampling occurred "minimally intrusive" since it was done "in the course of medical treatment to which Appellants had consented...[and] [t]he giving of a urine sample is a normal, routine and expected part of a medical examination").

vindicated by the Supreme Court. Rather, the women were wronged through the cursory application of the Fourth Amendment as a means of dismissing their need from the consciousness of society.

Although the women walked freely out of the hospital, they walked straight back into poverty and drug dependence to assume their hopeless positions in society. Their unhappy situation was now compounded by the profound responsibility of a newborn who may have had neurological side effects from in utero drug exposure.[145] Such side effects commonly cause the baby to be irritable, tense and fussy which in turn predetermines a difficult, demanding, and unrewarding neonatal period that significantly interferes with maternal child bonding.[146] The care of neurologically-affected newborns can be extremely difficult and exhausting. Many state social services agencies recognize this fact and provide respite care to allow the parents of such children some time to recharge[147] even when those parents have supportive and available family members. The women in *Ferguson* could access such services only if their infants were identified as requiring special care through identification and diagnosis of the abnormality in the infants' neurological development.[148]

B. Standard Maternal Child Health Care

The staff at MUSC knew that the women were risking their pregnancies by abusing cocaine. They also had first hand knowledge of the impact of that abuse on the fetuses the women were carrying. Contrary to the contention of the majority of the court in *Ferguson*, the absence of documented change in the women's prenatal or newborn care plans[149] does not equate to a primary focus on law enforcement. Routine maternal and child health nursing care has long included an assessment of the medication (legal and illegal) consumed

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145. *See* CHIRABOGA *supra* note 142.

146. Scott J. Turner, *Maternal Exposure to Crack Cocaine Produces Stressed Newborns available at* http://www.brown.edu/Adminstration/George_Street_Journal/newborns.html

147. S.C. Code Ann. § 44-21-60 (2000).

148. S.C. Code Ann. § 44-22-10(9) (2000).

149. *Ferguson*, 532 U.S. 73 (describing MUSC's intervention plan for women whose urine drug test is positive as consisting only to substance abuse treatment and making no mention of any change in the prenatal care or special care for the women's newborns).

by the pregnant woman.[150] Indeed, substance abuse is considered a medical problem that creates risk in any pregnancy.[151]

In a clinical, organizational sense, documentation of patients' treatment plans do not belong in MUSC's urine drug testing policy and exclusion of those plans from that document does not equate to the absence of any such plan, as the Court suggests.[152] On the contrary, maternal child health units routinely include specific risk assessment tools in every patient's individual chart. Furthermore, those tools characteristically include substance use or abuse as a major factor for high risk prenatal or labor and delivery care.[153] The primacy of MUSC's concern for the health of their female patients was demonstrated by MUSC's adherence to medical standards for documentation rather than those for law enforcement.

Further supporting the inference that MUSC's policy documentation was adequate if not excellent is MUSC's 1997 receipt of Accreditation with Commendation from the Joint Commission on Accreditation of Healthcare Organizations.[154] Accreditation with Commendation is an honorable recognition that is assigned only to facilities with exemplary clinical organization, including assessment and treatment planning that is integrated into its labor and delivery unit's daily operation.

Accepting, for the sake of argument, that the primary purpose of MUSC's drug testing policy was to assist law enforcement, the assertion of a Fourth Amendment violation suggests that the women exercised free and healthy choice to expose the fetuses they intended

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150. SALLY B. OLDS ET AL., OBSTETRIC NURSING 288, 374-377 (1980).

151. SAN DIEGO & IMPERIAL COUNTIES REGIONAL PERINATAL SYSTEM, FUNDAMENTALS OF LABOR, DELIVERY & RECOVERY NURSING, Antepartum Care and Assessment 55 (1999).

152. *See Ferguson*, 532 U.S. 82 (describing MUSC's policy as making no mention, other than offering substance abuse treatment to the women).

153. SAN DIEGO & IMPERIAL COUNTIES REGIONAL PERINATAL SYSTEM, FUNDAMENTALS OF LABOR, DELIVERY & RECOVERY NURSING, Preterm Labor 10, and 23 4 (1999) (describing a history of smoking or illicit drug use as predisposing factors for puerperal infection).

154. Joint Commission on Accreditation of Healthcare Organizations, *Summary of Accreditation Information, Medical University of South Carolina Medical Center, Accreditation date August, 1997, available at* http://www.Jcprdwl.jcaho.org/qualitycheck/pds/pds_org.asp.

to carry to term and deliver[155] to harmful substances. On the contrary, the women's use of harmful drugs during pregnancy was not an exercise of autonomy,[156] but rather was a manifestation of their inability[157] to refrain from ongoing drug use[158] due to a dependency on the drugs themselves.[159] The women were thus entitled to the health care and treatment that is provided to those who are incompetent to protect or care for themselves.[160] In other words, the women were in dire need of societal concern[161] and should not have been abandoned to their addictions in the name of protecting the right to be left alone.

V. SOCIO-MEDICALLY RESPONSIVE AND CONSTITUTIONALLY RESPONSIBLE POLICY

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155. *Ferguson*, 532 U.S. at 1284. The court describes maternity patients who were subjected to MUSC's drug testing policy were receiving prenatal treatment, which implies the goal of fruition and delivery. *Id.*

156. BARRY R. FURROW ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 4 (3d ed. 1997) (defining autonomy as the principle that "independent actions and choices of the individual should not be constrained by others"). (emphasis added).

157. *Brain Research, supra* note 10. The director of the National Institute on Drug Abuse says drugs reset "the brain's pleasure circuits...you can't just tell an addict, 'Stop,' anymore than you can tell a smoker 'Don't have emphysema.' Starting may be volitional. Stopping isn't.")

158. *Ferguson*, 186 F.3d at 485 (listing three women, one of whom is now deceased, whose positive urine drug tests resulted in referral to substance abuse counseling and subsequent return for maternity treatment with repeat positive drug tests in all three).

159. *Brief Profiles, Crack, supra* note 8 (explaining that crack is abused because it induces the sensations of a "quick high, power, euphoria." However, Crack is almost instantly addictive, the desirable effects last only a few minutes, and there are more hospitalizations per year resulting from crack and cocaine than any other elicit substance).

160. FURROW, *supra* note 156, at 209 (delineating the principle of beneficence, which declares that what is best for a person should be accomplished through both non-malfeasance and recognition of the positive obligation to do that which is good).

161. *Id.* at 209 (discussing ethical intrusion into the decisions of others and recognizing that an individual may not want that which others have determined in his interest and, in such a case, a conflict between autonomy and beneficence results; also giving an example of "if we treat the continued life of a healthy person to be in that person's interest, the values of autonomy and beneficence become inconsistent when a healthy competent adult decides to take his own life").

Although the Supreme Court viewed the goal of the urine testing policy as primarily punitive, the ultimate goal of any new policy must be the treatment of mother and fetus.[162] Modification of the MUSC policy and development of any other policy directed at pregnant drug abusers requires consideration of both the constitutionality of the policy and the degree to which a need for societal intervention existed in those to whom the policy was applied.

A. Constitutionality

In creating protection from intrusive government searches, the Framers were motivated by a strong desire to safeguard liberty from the unreasonable acts of law enforcement.[163] The Fourth Amendment was intended to act as a mechanism for curbing law enforcement's exercise of discretionary authority by making reasonable suspicion a prerequisite to warrant issuance.[164] More specifically, the idea that animated the Framers was the "right to be secure," not the right to evade police.[165]

In the case of the pregnant drug abuser, law enforcement's suspicion was raised by the hospital staff's expression of concern, which was itself supported by the divulgence of laboratory evidence. Such reasonable suspicion resulting from the derivative use of the results of a consented search is not the sort of intrusion the Fourth Amendment was intended to prevent. The hospital's release of the women's medical information, however, is not permissible under the Fourth Amendment, and South Carolina can be expected to statutorily recognize a physician-patient privilege should such a breach of patient confidentiality result in criminal charges.[166]

B. Societal Need

The women used drugs, risking complications and injury to themselves and their fetuses, despite the desire to give safe and healthy

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162. *Ferguson*, 532 U.S. at 72 (describing threat of law enforcement as "leverage" necessary for the success of the policy in getting women into treatment and keeping them in treatment).

163. Carol S. Steicker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 837 (1994).

164. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552-557 (1999).

165. *Id.* at 750.

166. *See supra* note 127.

birth. They were in need of intervention into their harmful, illegal activity. The misplaced invocation of Fourth Amendment jurisprudence works to advance the protection of hospital patients from law enforcement involvement generally, but simultaneously prohibits societal intervention on behalf of these socio-economically disadvantaged women whose maladaptive behaviors were fostered by society's earlier failure to respond to their known risk for drug dependence.

The application of the Fourth Amendment in this case must be scrutinized within the context of American society. The use of drugs during pregnancy affects not only the user and her fetus,[167] but also those citizens whose taxes fund the provision of medical, vocational and educational services to those who require them.[168] To champion the right to be free absolutely from governmental intervention is to champion rights without corresponding responsibility. It is disingenuous to claim any such right and simultaneously ignore the attendant obligation to comply with the tenets of the society that identified and protects these rights.[169] The women sought health care funded through their state and provided through the state's agents, the MUSC staff. Those agents identified and attempted to correct the women's illegal activities that undermined or negated the care the women themselves requested.

C. Societal Solution

The prognosis for recovery from cocaine dependence without diligent treatment is grim, with half of all addiction patients relapsing into drug use within a year of detoxification.[170] Although specialized twelve-step cocaine and narcotic programs have been born of the remarkably successful Alcoholics Anonymous program, it is generally recognized by members of those groups that initial stabilization and detoxification from cocaine, and especially crack, requires intervention

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167. *See Ferguson*, 532 U.S. at 89 (detailing, in Justice Kennedy's concurrence, findings of growth and development, psychological and neurological harm to children from exposure to cocaine in utero).

168. MARY ANN GLENDON, RIGHTS TALK 46 (1991) (stating, "the independent individualist, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward").

169. *Id.* at 40-45.

170. *Brain Research*, *supra* note 10.

that the twelve step programs are not designed to provide.[171] Success has been noted, however, in patients who have received rigorous and structured treatment.

Narconon, a substance abuse treatment that utilizes a "Purification Program" developed by L. Ron Hubbard,[172] boasts a seventy-six percent success rate in treating addiction and describes this as the "highest in the nation."[173] There are, however, barriers to the use of such a program. Most obviously, the $21,000 treatment cost[174] excludes most Americans, including the women with whom *Ferguson* was concerned. Additionally, the Narconon program involves mandatory participation in program activities designed to instruct and adjust patients in new methods of communication, ethics and integrity.[175]

Treatment is available to patients whose criminal drug use has been intervened upon by law enforcement. For example, the Department of Justice utilizes special Drug Courts.[176] Approximately 140,000 drug dependent offenders have been enrolled in such programs since 1989 and seventy percent of them are either still enrolled or have graduated from the program successfully.[177]

The Department of Justice Drug Court program requires that participants obtain a GED, obtain and maintain employment and remain current on all financial obligations. Moreover, participants are subject to and comply with random urine drug screens. The program's success is reflected in the births of over 750 drug free babies to drug court participants. The program also touts the successful reunification

171. Telephone Interview with Scott S., 14 year Cocaine Anonymous member (February, 2002).

172. L. Ron Hubbard, *A Review of Scientific Literature Supporting the Detoxification Method ("Purification Program")*, Compiled by the Foundation for Advancements in Science and Education (August, 1991).

173. Letter from Dena Boman, Intake Counselor, Narconon Arrowhead, to Anne Kimbel, staff member, Journal of Contemporary Health Law and Policy (on file with the Journal of Contemporary Health Law and Policy).

174. NARCONON OF OKLAHOMA, INC. PROGRAM DESCRIPTION, DRUG AND ALCOHOL REHABILITATION (2001).

175. *Id.*

176. *Looking at a Decade of Drug Courts*, Drug Court Clearinghouse and Technical Assistance Project, Drug Courts Program Office, Office of Justice Programs, U.S. Department of Justice *at* http://www.american.edu/academic.depts/spa/justice/publications/decade1.htm.

177. *Id.*

of hundreds of families and the realization of education and vocational training goals for most of its participants.[178]

Similarly, the city of San Diego holds monthly "Homeless court" in a shelter for defendants, many of whom are Viet Nam Veterans, have outstanding warrants for various, sometimes alcohol related, infractions of the law.[179] San Diego's public defenders negotiate in advance of the court session with the city prosecutor and the defendants are typically receiving counseling or drug treatment before they appear in the special court.

Such courts are springing up in the United States to "combine social work with law by practicing therapeutic jurisprudence....some individuals, such as drug addicts and the mentally ill, need treatment more than jail time."[180] Specialization is not new to American courts; bankruptcy, immigration and military courts are well accepted. In time, socio-legal specialty courts could become a uniquely viable mechanism for dealing with socio-legal problems.

V. CONCLUSION

Justification for intervening upon drug abusers does not necessarily require a negative result or judgment of these claimants. The negative impact visited upon society from illegal drugs is sufficient to endorse the use of "force in defense against another party who is a threat, even though he is innocent and deserves no retribution."[181] Indeed, such activity is the function of public health entities, as Lawrence O. Gostin states in *Public Health Law*:

Public health law is the study of the legal powers and duties of the state to assure the conditions for people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to constrain the autonomy, privacy, liberty, propriety, or other legally protected interests of individuals for the protection or promotion of community health.[182]

Thus, it is the province of public health entities to act within the confines delineated by the members of the public to whom they answer and, by so doing, choose the beneficent response to the individual drug

178. *Id.*

179. Wendy N. Davis, *Special Problems for Specialty Courts*, 89 A.B.A. J. 32 (Feb. 2003).

180. *Id.* at 34.

181. ROBERT NOZICK, ANARCHY, STATE, UTOPIA 34 (1974). (PLEASE REVIEW)

182. *GOSTIN*, supra note 21, at 4.

users abuse of autonomy. Such intervention by public health agency officials is all the more legitimate since their instruction is codified by a democratic process.

In *Ferguson*, Justice Scalia attempted to derive a template from Fourth Amendment jurisprudence that would allow the Court to decide the case in a manner that was consistent with previous case law. Perhaps more significantly, however, Scalia pointed out that the case required a social judgment, and that the Constitution is not the appropriate tool for the settling of difficult societal questions. Rather, Scalia would have the Court leave the "vast majority of [such questions] to resolution by debate and the democratic process — which would produce a decision by the citizens of Charleston, through their elected representatives, to forbid or permit the police action at issue here."[183] Considered pragmatically, the ultimate goal of healthy mothers and babies will be realized only if women remain willing to seek the care they need. A sound, rigorous, but nonpunitive policy is therefore required.

The groundwork for such a policy has been laid. The State of South Carolina has manifested its values through legislation requiring various professionals to report medical conditions indicating a violation of the law to authorities,[184] as well as through other statutory and judge made law.[185] It is in the best interests of the patients and the common citizen that the state's values be honored, so long as it is done in a manner that respects each citizens individual rights and forwards the ultimate goal of the policy.

There is room to speculate that health care intervention may be welcomed by the women involved. Critics of state delivery of health care contend that the emphasis on each state's autonomy in health service plans results in inadequate care provided to ethnic Americans.[186] Social service programs that intervene upon particular

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183. *Ferguson*, 532 U.S. at 92.

184. S.C. Code § 20-7-510 (2000); Persons Required or Permitted to Report; Method; Confidentiality.

185. *See* Whitner v. State, 492 S.E.2d 777, 778 (1997) (upholding a criminal child neglect conviction of a woman who ingested cocaine while pregnant with a viable fetus). *See also* State v. Horne, 319 S.E.2d 703, 704 (1984) (holding that a viable fetus was a person for criminal law purposes).

186. *See* Vernellia R. Randall, *Symposium: Does Clinton's Health Care Reform Proposal Ensure Equality of Health Care for Ethnic Americans and the Poor?*, 60 BROOK. L. REV. 167, 180-182 (1994) (criticizing the emphasis on state's

health problems have been implemented in Europe to successfully protect the health and welfare of its citizens.[187]

A balance must be struck, however, between beneficent oversight and the respect for patient autonomy. The late Justice William J. Brennan once wrote, "In *The Republic and in The Laws*, Plato offered a vision of a unified society, where the needs of children are met not by parents but by the government, and where no intermediate forms of association stand between the individual and the State. This vision is a brilliant one, but it is not our own."[188]

Indeed, each state within the United States, with its rich mix of social, political, religious, and ethnic groups, must strive to discover and apply necessary basic principles.[189] This can only take place through investigation and thoughtful consideration of the benefits and risks of potential courses of action. Each state is also challenged to persist in the effort to achieve the ultimate and real goal of supporting women specifically in their pursuit of safe and healthy pregnancy by providing every woman all necessary health care, regardless of her socioeconomic status.

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autonomy in health service plans and describing the resulting inadequacy of care provided to ethnic Americans).

187. *GLENDON, supra* note 162 (citing Casper, "Changing Concepts" and David P. Currie, "Positive and Negative Constitutional Rights," 53 U. CHI. L. REV. 864 (1986).

188. Bowen v. Gilliard, 483 U.S. 587, 632 (1987) (Brennan, J., dissenting).

189. *See* K. Danner Clouser, Bioethics, *in* CONTEMPORARY ISSUES IN BIOETHICS 54 (Tom L. Beauchamp & Leroy Walters eds., 3d ed. 1989).