Watered Down Constitutional Rights: A Hospital's Role in Prosecuting Pregnant Women For Drug Use in Ferguson v. City of Charleston

Petra Sami
WATERED DOWN CONSTITUTIONAL RIGHTS:
A HOSPITAL'S ROLE IN PROSECUTING
PREGNANT WOMEN FOR DRUG USE IN

FERGUSON V. CITY OF CHARLESTON

PETRA SAMI

In the wake of the dramatic rise in the use of illicit drugs in modern society,¹ the resulting "war on drugs,"² and more specifically, the prevalence of drug use among pregnant women³ and the media attention on the rise of crack use and poignant stories of "crack babies,"⁴ states began prosecuting drug-using pregnant

¹ See Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE, Oxford University Press, Inc. (1990) (stating terms "illicit," "illegal," and "unlawful" are basically synonymous, but that "'illicit' carries moral overtones in addition to the basic sense 'not in accordance with or sanctioned by law'"); Mathea Falco, Toward a More Effective Drug Policy, 1994 U. CHI. LEGAL F. 9, 9 (estimating 74 million Americans have used illegal drugs); see also Schedules of Controlled Substances, 21 U.S.C. § 812 (1994) (providing that "illicit drugs" include all statutorily defined controlled substances).

² See Katherine Beckett, Fetal Rights and "Crack Moms": Pregnant Women in the War on Drugs, 22 CONTEMP. DRUG PROBS. 587, 590 (1995) (noting "[t]he recent campaign against pregnant women who use drugs, then, reflects the coincidence of the punitive orientation of the 'war on drugs' and the fetal rights discourse").

³ See Derk B.K. VanRaalte IV, Punitive Policies: Constitutional Hazards of Non-Consensual Testing of Women for Prenatal Drug Use, 5 HEALTH MATRIX 443, 443-44 (1995) (stating that according to 1990 survey of 36 hospitals, 11% of women used illegal drugs during their pregnancies); Report of the American Medical Association Board of Trustees, Legal Interventions During Pregnancy, 264 JAMA 2663, 2666 (Nov. 28, 1990) (estimating that of the 11% of women who use illegal drugs, seventy-five percent have used cocaine); see also Johnson v. State, 602 So. 2d 1288, 1295 (Fla. 1992) (stating 375,000 babies are born each year to women who use illicit drugs).

to small samples, lack of control of conflicting variables, among other factors); Kimani Paul-Emile, *The Charleston Policy: Substance or Abuse?*, 4 MICH. J. RACE & L. 325, 354 (1999) (listing numerous studies and articles concluding early studies were flawed and stating journals refused to publish studies coming to contrary conclusions about cocaine’s effects); Dana Kennedy, *Experts: Children Born Addicted to Crack Rise Above Dire Predictions*, ASSOCIATED PRESS, Dec. 5, 1992, available in 1992 WL 5328389 (discussing programs for crack exposed children that have demonstrated great improvement).

5 See Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393, 394 (1993) (stating that as of 1993, 180 American women have been arrested for offenses relating to drug use during pregnancy); see also Paul-Emile, *supra* note 4, at 326-27 (describing policy in Charleston, South Carolina in which drug using pregnant women were arrested and prosecuted). See generally VanRaalte, *supra* note 3, at 451 (commenting on negative effects of such policies).

6 The Charleston policy was designed in conjunction with the local police department and required release of positive drug test results to authorities. Paul-Emile, *supra* note 4, at 326-27; see also Ferguson v. City of Charleston, 532 U.S. 67, 75-83 (2001) (discussing applicability of fourth amendment to unauthorized drug screenings); Spencer, *supra* note 5, at 407-08 (questioning policy that creates fear in pregnant women and discourages them from seeking medical treatment).

7 See Ferguson, 532 U.S. at 75-83 (discussing state hospital policy in Charleston which required release of positive drug test results to local solicitor and local police department).

8 See Paul-Emile, *supra* note 4, at 327 (discussing Charleston policy giving option of treatment over criminal prosecution once pregnant woman tests positive for cocaine); see also Ferguson, 532 U.S. at 1286 (stating women who failed to comply with the treatment program’s terms or tested positive for cocaine while in the program were arrested); Spencer, *supra* note 5, at 402-03 (discussing the pitfalls of assuring prosecutorial immunity in return for participation in drug treatment program).


10 See Committee on Substance Abuse, *Drug-Exposed Infants*, 86 PEDIATRICS 639, 640 (1990) (describing California District Attorney’s announcement of his intention to prosecute all mothers of newborns with illegal drugs found in their urine); see also Mayes et al., *supra* note 4, at 408; Law & Medicine/Board of Trustees Representative, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2668 (1990) (concluding judicial intervention is rarely appropriate when pregnant woman makes informed refusal of treatment).
tion, early intervention, and effective treatment programs.\textsuperscript{11}

Many argue that problems arise in such prosecutions because they run counter to the legislative intent of these criminal statutes.\textsuperscript{12} Moreover, such prosecutions run contrary to the lenity principle, namely the idea that courts are reluctant to expand the reach of a criminal statute without a clear legislative intent to do so.\textsuperscript{13} In an effort to apply the criminal statutes to prosecute prenatal drug use by pregnant women, trial courts originally engaged in expansive interpretation of these criminal statutes, construing the word “child” in child abuse and neglect statutes to include fetuses.\textsuperscript{14} Such convictions have usually been successfully overturned by state appellate courts\textsuperscript{15} due to the aforementioned

\textsuperscript{11} See Spencer, supra note 5, at 402 (explaining that harmful consequences of punitive sanctions could be avoided if pregnant mothers are given opportunity to participate in prenatal treatment programs and receive assurance of prosecutorial immunity upon the successful completion of such programs). \textit{But see} Michelle D. Mills, Comment, \textit{Fetal Abuse Prosecutions: The Triumph of Reaction Over Reason}, 47 DEPAUL L. REV. 989, 998 (1998) (noting that in spite of these alternatives, no state has implemented treatment schemes that prohibit civil commitment or criminal sanctions all together). \textit{See generally} Heather Flynn Bell, \textit{In Utero Endangerment and Public Heath: Prosecution v. Treatment}, 36 TULSA L.J. 649, 668 (2001) (opining that public health officials should focus on the alternative treatment programs that work and thereby avoid criminal prosecutions).

\textsuperscript{12} See Sheriff, Washoe County, Nev. v. Encoe, 885 P.2d 596, 598 (Nev. 1994) (purporting that to interpret state’s statute to allow for criminal prosecution of mothers who ingest an illegal substance while pregnant was not the legislature’s intent); \textit{see also} Welch, 864 S.W.2d at 282 (citing the opinion of Court of Appeals, which stated “[t]he courts cannot presume a legislative intent to expand the class of persons treatable as victims of criminal activity”); State v. Gethers, 585 So. 2d 1140, 1141-42 (Fla. Ct. App. 1991) (asserting that the amended language of the statute eliminated provisions authorizing the criminal prosecution of mother who gives birth to drug addicted child); Mills, supra note 11, at 994-95 (stating courts who overturned fetal abuse convictions found that legislatures did not intend to protect fetuses under child abuse statutes).

\textsuperscript{13} See People v. Hardy, 469 N.W.2d 50, 52 (Mich. Ct. App. 1990) (stating “It is well settled that penal statutes are strictly construed, absent a legislative statement to the contrary”); \textit{see also} People v. Gilbert, 324 N.W.2d 834, 844 (Mich. 1982) (noting “[a] court should not place a tenuous construction on [a] statute to address a problem to which legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation”); William N. Eskridge, Jr., \textit{Formalism and Statutory Interpretation: Norms, Empiricism, and Canons in Statutory Interpretation}, 666 U. CHI. L. REV. 671, 679 (1999) (explaining that even if the legislative readers do not follow the rule of lenity, the courts can induce this convention by putting the legislature on notice that the rule of lenity will be applied in statutory interpretation).

\textsuperscript{14} \textit{See} Louise Marlene Chan, \textit{S.O.S from the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy}, 21 FORDHAM URB. L.J. 199, 201-202 (1993) (reporting over 160 criminal proceedings through the end of 1992 involving pregnant women consuming drugs); \textit{see also} Mills, supra note 11, at 990-91 (reporting more than 200 women in 30 different jurisdictions since the early 1980’s have been prosecuted for ingesting drugs while pregnant, claiming anywhere from 50 to 180 such criminal prosecutions occurred through the early 1990’s); Lynn Smith, \textit{Punish or Protect?}, L.A. TIMES, Sept. 3, 1996 at E1 (reporting that over 200 women in 30 states have been arrested and charged for ingesting drugs under child carrying fetus).

\textsuperscript{15} \textit{See} Veronique Mistiaen, \textit{Legal Haze: Is Drug Use During Pregnancy Child Abuse?}, CHI. TRIB., Oct. 11, 1992, at 1 (stating that by the late 1980’s, 167 women had been convicted of fetal abuse, 21 of whom appealed and had their convictions successfully overturned); \textit{see also} Reyes v. People, 75 Cal. App. 3d 214, 219-220 (Ct. App. 1977) (describing one of the first cases to successfully overturn
legal concern of contrary legislative intent. In addition, concerns of more attractive, effective and harsher alternatives to prosecution (such as treatment and prevention programs), as well as the concern of possible invalidation of such laws on void-for-vagueness grounds have resulted in reversal of such convictions. In response, courts have begun to rely on a legal fiction, construing the words "delivery" or "distribution," in state statutes criminalizing distribution of a controlled substance to a minor, to include the mother transmitting drugs to her child through the umbilical cord before it is severed, shortly after delivery. Concerns of contrary legislative intent and lack of notice arise from such construction by the courts.

conviction of pregnant heroin user prosecuted for felony child endangerment after trial court concluded that word "child" included fetus. But see Whiner, 492 S.E.2d at 786-78 (1997) (upholding conviction of pregnant mother under child endangerment statute). See Mills, supra note 11, at 1020 (opining that most courts hearing fetal abuse prosecution cases have recognized constitutional problems of notice and vagueness when women are charged under child abuse or drug delivery statutes); see also Welch, 864 S.W.2d at 283 (holding statutory construction of child abuse statute to include injury to fetuses would be impermissibly vague); see, e.g., Reinesbo v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995) (holding that if the court were to interpret the statute as including use of drugs during pregnancy, notions of due process and fundamental fairness would render the statute impermissibly vague); State v. Kruzicki, 541 N.W.2d 482, 488 (Wis. Ct. App. 1995) (describing that courts begin with statutory language itself, and if it is clear, the courts are precluded from using any other extrinsic sources to aid in their interpretation); Encoe, 885 P.2d at 598 (stating this court recognizes that due process prohibits them from interpreting laws in any unforeseeable or unintended manner); Johnson v. State, 602 So. 2d 1288, 1294 (Fla. 1992) (suggesting that interpretation of delivery of controlled substance statute to cover ingestion by pregnant woman would be radical incursion upon existing law); State v. Carter, 602 So. 2d 995 (Fla. Dist. Ct. App. 1992); State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992) (asserting courts, in absence of statutory interpretation precedent, must assign to the terms "delivery" and "distribute" their ordinary meanings); State v. Gray, 584 N.E.2d 710, 712 (Ohio 1992) (finding the word child was not intended to refer to unborn child and that petitioners' prenatal conduct does not constitute felonious child endangering within contemplation of the statute); Gethers, 585 So.2d at 1141; Hardy, 469 N.W.2d at 52 (noting court's primary goal in interpreting statutes is to ascertain and give effect legislature's intent); Reyes, 75 Cal. App. 3d at 218 (asserting that if the statute were interpreted as being applicable to endangering fetus, it would result in absurdity of endangering life of fetus being more punishable than aborting it). See Mills, supra note 11, at 995 (describing this legal fiction and stating that such attempts at prosecution were also unsuccessful, despite avoiding defining fetus as child); see, e.g. Johnson, 602 So. 2d at 1290 (claiming that the lack of legislative intent along with uncertainty of the term "delivery" compels the court to construe the statute in favor of the defendant); Encoe, 885 P.2d at 598 (holding that prosecuting mother for delivery of controlled substance to child in utero is strained and unforeseen application of the child abuse statute); Gray, 584 N.E.2d at 712 (claiming that relationship between using controlled substance when pregnant and the statute was so tenuous that the court could not infer, absent unmistakable legislative intent, that legislature intended it to apply). See Mills, supra note 11, at 995 (asserting that courts have determined prosecutions using drug delivery statutes provide insufficient notice and are contrary to legislative intent); see, e.g. Johnson, 602 So. 2d at 1296 (asserting that if it is legislative intent to make such conduct criminal, they should redraft the bill to clearly address problem of passing illegal substances from mother to child in utero, not just in the birthing process); Hardy, 469 N.W.2d at 55 (opining that it is unreasonable to charge pregnant women with delivery of controlled substances when the ingestion of the drugs occurred when she had no reason to know birth would occur within hours from the time she used).
Such prosecutions arouse concerns not only of contrary legislative intent, but also concerns of infringement on certain constitutionally guaranteed rights, including the right to reproductive privacy, the right to maintain confidentiality of medical records, the right to be free from illegal searches and seizures, the right to be free from cruel and unusual punishment, the right to equal protection of the laws, and the procedural due
process right of notice with regard to the criminality of an act.24 Some of the earlier cases before the courts, however, were
decided on statutory interpretation grounds alone.25 In one recent
case, Ferguson v. City of Charleston,26 the Fourth Circuit upheld
the constitutionality of a typical program involving the prosecu-
tion of pregnant drug users after addressing the constitutional
issues of search and seizure, privacy with respect to disclosure of
medical records, and lack of notice.27 The United States Supreme
Court reversed the Fourth Circuit, holding that "a state hospi-
tal's performance of a diagnostic test to obtain evidence of a pa-
tient's criminal conduct for law enforcement purposes was an un-
reasonable search if the patient has not consented to the
procedure."28 Also, more narrowly, the Court reached that con-
clusion by reasoning that the interest in using the threat of
criminal sanctions to deter pregnant women from using cocaine
could not justify a departure from the general rule that an official
nonconsensual search was unconstitutional if not authorized by a
valid warrant.29

This note will focus on the constitutional issues concerning the
aforementioned methods used to criminally prosecute pregnant
women who use drugs. Part I of this note will discuss the policy

24 See infra Part IV (discussing the lack of procedural due process afforded women held
criminally liable for drug use during pregnancy); see also U.S. CONST. amends. V, XIV (both providing
that "persons shall not be deprived of life, liberty, or property without due process of law").

25 See Mills, supra note 11, at 994 (opining that "broad wording of child abuse...statutes
alarmed courts" and such statutes should not be used to prosecute pregnant women without requisite
legislative intent); see also Sheriff Washoe County Nevada v. Encoe, 885 P.2d 596, 599 (Nev. 1994)
(considering legislature did not intend to criminally prosecute prenatal drug use as state's interest would
be better served by making treatment programs available); Ohio v. Gray, 584 N.E.2d 710, 711 (1992)
(construing statutory language literally to find words "parent" and "child" within their common usage
not to preclude substance abuse occurring before birth); Reyes v. People, 75 Cal. App. 3d 214, passim
(Ct. App. 1977) (determining due to various rational meanings when legislature speaks of "such child"
within statute, term plainly excluded unborn children and therefore petitioner's prenatal conduct did not
constitute felonious child endangering).

26 186 F.3d 469 (4th Cir. 1999), rev'd by Ferguson v. City of Charleston, 532 U.S. 67, 532

27 See infra Part II (discussing Fourth Circuit's analysis on these issues).

28 See Ferguson v. City of Charleston, 532 U.S. at 69. See generally Vernonia Sch. Dist. 47J
v. Acton, 515 U.S. 646, 646 (1995) (using balancing test to determine whether state's interest in pre-
venting drug addiction among students outweighed student athletes' expectation of privacy); National
Treasury Employees v. Von Raab, 489 U.S. 656, 656 (1989) (using balancing test to determine whether
intrusive drug testing of employees required to carry firearms outweighed those employees' privacy
interests).

29 Ferguson, 532 U.S. at 84-85; see also U.S. CONST. amend. IV; Miranda v. Arizona, 384
U.S. 436, 436 (1966) (presuming an effective waiver cannot be achieved by silence; rather, it requires
the accused to refuse constitutional rights after being informed of them).
that was implemented in a Charleston hospital to prosecute pregnant women who tested positive for drug use, the very same policy that was constitutionally challenged in *Ferguson*. Part II will discuss the Fourth Circuit’s analysis of the case’s constitutional claims, which led to an erroneous conclusion that the drug testing in a hospital for use in criminal prosecution in a hospital did not violate the Fourth Amendment. Part III will discuss the Supreme Court’s reversal of the Fourth Circuit, as well as the Court’s constitutional analysis of the case. Part IV will further discuss the constitutional holdings in the case, as well as other constitutional concerns raised by such prosecutions. Moreover, this note will propose that South Carolina adopt other means of addressing the problem of drug use among pregnant women—means that are aimed at prevention rather than punishment—a route that many other states have already begun to explore. This note will also show that such prosecutions only serve to perpetuate an already strong public distrust in law enforcement, as well as increase this sense of mistrust in the doctor-patient relationship, an area in which the patient’s trust is of paramount importance. As a result of such outrageous programs, the prevalence of drug use among pregnant women, arguably, will continue, and not only perpetuate the problem of drug use among pregnant women, but also serve to exacerbate the problem. Mothers will be forced to refrain from seeking medical care for fear of criminal prosecution, leading to a nearly impossible choice between two evils; namely, risking dire consequences to her baby’s health, or terminating her pregnancy, effectively infringing upon her constitutionally protected right to procreation.

**The Charleston Hospital’s Policy**

At the suggestion of a nurse at a local hospital in downtown Charleston, the Medical University of South Carolina (“MUSC”), in conjunction with the Solicitor of the Ninth Judicial Circuit of South Carolina, the City of Charleston, the City of Charleston Police Department (“CCPD”), and various social services agencies, implemented a policy of prosecuting pregnant women who tested positive for cocaine use.\(^{30}\) The policy was implemented in...
the Fall of 1989 after a meeting of the aforementioned parties, during which the Solicitor informed the others that a viable fetus was a "person" under state law, and that as a result, a woman who ingested cocaine at her 24th week of pregnancy could be charged with distribution of a controlled substance to a minor.\footnote{See Ferguson, 186 F.3d at 474; see also Distribution to Persons Under Eighteen, S.C. CODE ANN. § 44-53-440 (Law. Co-op. 1997) (establishing felony to distribute narcotics, LSD, or cocaine, to any person under the age of eighteen, punishable by up to twenty years in prison and up to thirty thousand dollar fine); Arlene Levinson, S.C. Law on Crack Moms May Be Heard in High Court, HERALD (Rock Hill, S.C.), Mar. 15, 1998, at 1A (arguing that South Carolina Attorney General justified the action because fetus's rights stem not from the mother, but from God).}

The actual policy consisted of collecting a urine sample from a pregnant woman who came into the hospital when certain "indicia" of cocaine use were present.\footnote{See Ferguson, 186 F.3d at 474; see also Ferguson, 532 U.S. at 72 (stating there were two protocols in place before the 1990 amendment which provided treatments as alternatives: the first involved women who tested positive for drug use during pregnancy and the second involved those who tested positive shortly after giving birth; former protocol required police notification only if woman missed appointment with substance abuse counselor or tested positive second time and latter protocol required immediate police notification, soon after which patient was arrested); Levinson, supra note 31, at A1 (noting Ms. Whitner was arrested within one day of giving birth); Bob Herbert, In America; Pregnancy and Addiction, N.Y. TIMES, June 11, 1998, at A31 (reporting that 30 women were arrested in shackles, some still bleeding from delivery).} The hospital then tested the sample for cocaine, and any positive result was reported to the Charleston Police Department or a representative of the Solicitor's office, and the woman was subsequently arrested for distributing cocaine to a minor, often shortly after giving birth.\footnote{See Ferguson, 186 F.3d at 474; See generally, Dawn Johnsen, From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster, 138 U. PA. L. REV. 179, 214-15 (1989) (stating that prison is sometimes only available treatment for drug addicts); South Carolina Program for Mothers Takes Creative Approach, ALCOHOLISM & DRUG ABUSE WEEK, Feb. 27, 1993 at 3 (showing the beginnings of community support for female addicts' unique needs).}

The policy was amended in 1990 to give women who tested positive the option of entering a drug treatment program, after which positive test results were initially withheld from local law enforcement.\footnote{See Ferguson, 186 F.3d at 474; see also Theodore Slotkin, Letter to the Editor, N.Y. TIMES, June, 16, 1998, at A30 (pointing out the hypocrisy of South Carolina's arrest policy for mothers exposing fetuses to cocaine, while it's major crop, tobacco, is a more severe cause of the enumerated factors).}

Upon rejection of the drug treatment option, arrest inevitably followed.\footnote{See Ferguson, 186 F.3d at 474. See generally, Dawn Johnsen, From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster, 138 U. PA. L. REV. 179, 214-15 (1989) (stating that prison is sometimes only available treatment for drug addicts); South Carolina Program for Mothers Takes Creative Approach, ALCOHOLISM & DRUG ABUSE WEEK, Feb. 27, 1993 at 3 (showing the beginnings of community support for female addicts' unique needs).} Even if the women elected to undergo...
treatment, arrest would ultimately result upon any failure to follow treatment guidelines of a subsequent positive drug test result.  

Patients who entered the hospital were required to sign several forms. The City argued these forms constituted "consent" with respect to the search or the testing of their urine. However, the decision of the Fourth Circuit did not base its decision on whether consent had been obtained. Rather, it reasoned that because the search served a "special need" of the government, neither consent, probable cause, nor a warrant were required to make the search constitutional once the "special needs" balancing test was conducted.

The city claimed that the intent of the policy was to encourage pregnant women who used cocaine to obtain substance abuse counseling, as well as to protect the unborn fetus. However, heart-wrenching and horrendous depictions of such arrests dictate a contrary conclusion. There were episodes in which women, still weak, vomiting, and bleeding heavily after childbirth, were shackled and taken into holding cells for hours on end, separated from their babies and unable to contact family members to care for the newborn. In all, thirty women were arrested, all of

36 See Ferguson, 186 F.3d at 474.
37 See Paul-Emile, supra note 4, at 365 n.178 (arguing tested women did not give their consent, and therefore, search warrant or probable cause were required to make testing lawful); see also Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (holding that even without warrant or probable cause, government may conduct search based on consent, resulting in waiver of Fourth Amendment rights); Gorman v. United States, 380 F.2d 158, 163 (1st Cir. 1967) (stating consent must be "unequivocal, specific and intelligently given, uncontaminated by any duress or coercion").
38 See Ferguson, 186 F.3d at 479 (concluding that balancing of these factors demonstrates that such searches were reasonable and not violative of the Fourth Amendment); see also Chandler v. Miller, 520 U.S. 305, 318-19 (1997) (stating that testing method will not be intrusive if special needs showing has been made); James Drago, Note, One For My Baby, One More for the Road: Legislation and Counseling to Prevent Prenatal Exposure to Alcohol, 7 CARDOZO WOMEN'S L.J. 163, 176 (2001) (stating Ferguson decision held that drug testing of pregnant mother's urine was not unconstitutional because the testing was justified by "special need beyond normal law enforcement goals").
39 See Paul-Emile, supra note 4, at 326 (describing that policy's intent was to help endangered children and deter pregnant women from self-destructive behavior); see also Ferguson, 532 U.S. at 73 (noting policy "made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns"); Bryony J. Gagan, Ferguson v. City of Charleston, South Carolina: "Fetal Abuse", Drug Testing and the Fourth Amendment, 53 STAN. L. REV. 491, 494 (2000) (detailing the prosecutor's argument that testing without warrant, probable cause, or consent was justified by the need to protect the fetus).
40 See Paul-Emile, supra note 4, at 328-329 (depicting more of these arrests); see also Sandi J. Toll, Note, For My Doctor's Eyes Only: Ferguson v. City of Charleston, 33 LOY. U. CHI. L. J. 267, 297 n.231 (2001) (recounting Lori Griffin's experience of being handcuffed and shackled to the bed during examinations while she was still bleeding from childbirth). See generally Ferguson, 532 U.S. at 90 (Kennedy, J., dissenting) (recognizing the use of handcuffs, arrests, prosecutions and police assis-
whom were African American except one woman, who was noted to have a “Negro boyfriend” on her medical records.\textsuperscript{41}

\section*{FOURTH CIRCUIT’S FAULTY ANALYSIS IN FERGUSON V. CITY OF CHARLESTON}

Ten women who were tested under the policy, nine of whom had actually been arrested, brought suit in the District Court in Georgia against the hospital, its medical personnel, the state solicitor, the city and state police. The plaintiffs claimed that the testing of their urine for evidence of cocaine use was a violation of the Fourth Amendment right to be free from unreasonable searches and seizures and a violation of their constitutional right to privacy.\textsuperscript{42}

\section*{The Majority’s Opinion}

The Fourth Amendment of the United States Constitution provides that “people have the right to be free from \textit{unreasonable} searches and seizures” and that warrants are only to be issued upon probable cause.\textsuperscript{43} The Fourth Circuit found that the warrantless testing of urine of pregnant women, when the “indicia”\textsuperscript{44} in designing and implementing the Medical University of South Carolina’s testing and rehabilitation policy; \textit{Leading Case}, 115 HARV. L. REV. 326, 332 n.53 (2001).

\begin{footnotesize}
\begin{enumerate}
\item See Brief for Appellants at 23, \textit{Ferguson v. City of Charleston}, 186 F.3d 469 (4th Cir. 1998) (No. 97-2512); see also Gagan, supra note 39, at 498 (noting that white mother’s chart indicated that she had black boyfriend); \textit{Leading Case}, supra note 40, at 335 n.75 (citing Brief for Petitioner which detailed fact that patient’s boyfriend was black was denoted on patient’s chart).
\item See \textit{Ferguson}, 186 F.3d at 473-74; see also Jennifer Mott Johnson, Note, \textit{Reproductive Ability for Sale, Do I Hear $200 - Private Cash for Contraception Agreements as an Alternative to Maternal Substance Abuse}, 43 ARIZ. L. REV. 205, 216 (explaining claims of the ten female plaintiffs in \textit{Ferguson}); Toll, supra note 40, at 267 (stating that in 1993 ten women challenged Medical University of South Carolina’s MUSC policy of testing suspected drug using expectant mothers’ urine as violating their Fourth Amendment rights).
\item See U.S. CONST. amend. IV (providing “[t]he 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"); see also Mapp v. Ohio, 367 U.S. 643, 655 (1965) (making Fourth Amendment applicable to states by means of Fourteenth Amendment’s due process clause). See generally Douglas K. Yatter, et al., \textit{Twenty-Ninth Annual Review of Criminal Procedure, Warrantless Searches and Seizures}, 88 GEO. L. J. 912 (2000) (providing comprehensive study and analysis Fourth Amendment search and seizure jurisprudence).
\item See \textit{Ferguson}, 186 F.3d at 474 (listing policy’s “indicia” of drug use); see also Johnson, supra note 42, at 216 n.81 (listing the indicia of drug use under the MUSC testing policy); Lina McMeans-Muloway, Notes and Comments, \textit{Should the Drug Testing of Pregnant Women Fall Within the “Special Needs” Exception to the Warrant Requirement? An Examination of Ferguson Et Al. v. City of Charleston, S.C. Et Al.}, 3 J. LEGAL ADVOC. & PRAC. 59, 60 (2001) (noting the indicia of cocaine use that MUSC looked for).
\end{enumerate}
\end{footnotesize}
of possible cocaine use were present, constituted a reasonable "special need" search that did not violate the Fourth Amendment.

In reaching this conclusion, the court referred to the Fourth Amendment requirement that governmental intrusions into privacy by means of searches and seizures be reasonable. Recognizing that neither a warrant nor probable cause is an indispensable element of reasonableness, it concluded that this was a situation in which a Fourth Amendment intrusion served a special governmental need, beyond the normal need for law enforcement. Accordingly, it used the *National Treasury Employees Union v. Von Raab* balancing test of weighing the governmental interest justifying invasion against the degree of the intrusion on the privacy of the individual. The court listed the considerations to be taken into account in this balancing test, as enunciated in *Michigan Dep't of State Police v. Sitz* the governmental interest, the effectiveness of the intrusion (i.e., degree to which intrusion reasonably is thought to advance the governmental interest), and the magnitude of the intrusion upon the individuals affected (from both a subjective and objective stand-

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45 See New Jersey v. T.L.O, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (stating there are limited exceptions to probable cause requirement, in which balancing test of reasonableness consists of weighing government against private interests, but that test should only be applied "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.

46 See Ferguson, 186 F.3d at 479.

47 See id. at 476.

48 Id.

49 Id.

50 489 U.S. 656 (1989). There, the Court upheld Customs Service regulation requiring employees who wanted to transfer or those who wanted a promotion to submit to drug test. Id., at 665-66.

51 See Ferguson, 186 F.3d at 476.

52 See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (invoking reasonableness of automobile sobriety checkpoints, which are seizures, not searches).
The Fourth Circuit saw the governmental interest as reducing the alarmingly high number of pregnancies affected by cocaine use, the associated pregnancy complications, in addition to reducing the resulting financial drain on public resources resulting from caring for such infants. The court identified the effectiveness factor as the degree to which it advanced the public interest, and concluded that the testing of the mother's urine when certain indicia were present was an effective way of identifying the women to be treated, while at the same time saving limited hospital resources. Finally, the court characterized the degree of intrusion on these women as "minimal" in that the collection of urine samples in a hospital setting is common.

On the constitutional privacy claim, the Fourth Circuit also concluded that any privacy interest the appellants possessed was outweighed by a compelling governmental interest, particularly in light of the nonpublic nature of the disclosure. In reaching this conclusion, the court noted that a generalized right to privacy does not exist. Moreover, the court noted that even if such a right to privacy in nondisclosure of medical records did exist, the governmental interest in disclosing them outweighed any

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53 See Ferguson, 186 F.3d at 476.
54 See id. at 477-78.
55 See id. at 478 (explaining that testing of mother's urine enabled identification of women to be treated while conserving limited medical resources); see also Major Michael R. Stahlman, New Developments in Search and Seizure: A Little Bit of Everything, 2001 ARMY LAW. 20, 33 (2001) (stating purpose for collecting mother's urine was for treatment); Johnson, supra note 42, at 216 n.88 (2001) (noting testing of mother's urine pushes women into treatment).
56 See Ferguson, 186 F.3d at 479 (stating collection of mother's urine during hospital visit is minimally intrusive); see also Theodore P. Metzler et al., Comment, Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: I. Investigation and Police Practices: Warrantless Searches and Seizures, 89 GEO. L.J. 1084, 1156-57 n.349 (arguing collection of urine specimen during medical visit is "minimally intrusive"); Yatter, supra note 43, at 983-84 n.352 (explaining "special needs" testing of pregnancy cocaine users in medical exam setting is "minimally intrusive").
57 See Ferguson, 186 F.3d at 482 (noting test results were only disclosed to limited number of law enforcement, and were not disclosed to MUSC, Solicitor's Office, or public); see also Catherine Louise Glenn, Note, Protecting Health Information Privacy: The Case for Self-Regulation of Electronically Held Medical Records, 53 VAND. L. REV. 1605, 1620 (2000) (commenting appellant's privacy interest in non-disclosure of their medical records is outweighed by governmental interest); cf. Jacqueline R. Williams, Note, A Well Deserved Upper-Cut to Fetal Abuse: Ferguson v. City of Charleston, 26 S.U. L. REV. 187, 192 (2001) (stating privacy interest of mother's is outweighed by governmental interest).
58 See Ferguson, 186 F.3d at 482 (citing Condon v. Reno, 155 F.3d 453 (4th Cir.1998) (discussing that Supreme Court has only recognized privacy interest in certain areas, such as "matters of reproduction, contraception, abortion, and marriage"); see also Glenn, supra note 57, at 1610 n.36 (explaining there is no generalized Constitutional right to privacy); Williams, supra note 57, at 190 (stating there is no generalized right to privacy in Constitution).
PROSECUTING PREGNANT WOMEN FOR DRUG USE

such interest. 59

Judge Blake's Partial Dissent

District Judge Blake, at the trial level, submitted a dissenting opinion in which he criticized the majority's holding that there was no Fourth Amendment infringement. 60 He reached his conclusion on the Fourth Amendment claim based on his conclusion that the record reflected that the hospital policy was not implemented for the purpose of protecting the health of fetuses carried by drug using mothers, as the City of Charleston claimed, but rather for the purpose of prosecuting these women. 61 Judge Blake pointed to evidence that law enforcement officials were involved in the implementation of the program from the very beginning. Specifically, he referred to a letter from MUSC General Counsel to the Charleston solicitor illustrating this point. 62 He also noted the operational guidelines issued by the Captain of Charleston Police which referred to a positive test result as "probable cause"

59 See Ferguson, 186 F.3d at 482-83 (citing Whalen v. Roe, 429 U.S. 589 (1977) (recognizing that although Whalen involved disclosure of medical records, the United States Supreme Court has never recognized such a constitutionally guaranteed right)); see also Glenn, supra note 57, at 1620 (explaining that even if appellants had constitutional interest in privacy of their medical records, it is outweighed by governmental interest). Compare Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133, 1137 (3d Cir. 1995) (recognizing that individuals have that type of constitutional privacy right) with Jarvis v. Wellman, 52 F.3d 125, 126 (6th Cir. 1995) (holding no such right exists).

60 See Ferguson, 186 F.3d at 484 (Blake, J., dissenting); 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, 141 (2000) (explaining dissenting Judge Blake would have reversed based on Fourth Amendment claim); Toll, supra note 40, at 301-02 (noting Judge Blake's disagreement with majority based on Fourth Amendment).

61 See Ferguson, 186 F.3d at 484 (Blake, J., dissenting) (arguing Fourth Amendment claim implements policy to prosecute mothers rather than to help fetus); see also McMeans-Muloway, supra note 44, at 65 (noting Judge Blake's contention that MUSC's policy had prosecutorial purpose); Toll, supra note 40, at 301-02 (stating Judge Blake viewed the program as prosecutorial from inception).

62 The letter stated:

I read with great interest in Saturday's newspaper accounts of our good friend the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs... Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter.

Ferguson, 186 F.3d at 484 (Blake, J., dissenting); see also Toll, supra note 40, at 302 n.267 (explaining Judge Blake relied on said letter and voted to reverse district court based on prosecutorial nature of program); Carmen Vaughn, Note, Circumventing the Fourth Amendment via the Special Needs Doctrine to Prosecute Pregnant Drug Users: Ferguson v. City of Charleston, 51 S.C. L. REV. 671, 681 n.98 (2000) (noting Judge Blake relied upon said letter to show the prosecutorial nature of program).
for arrest of the mother. The guidelines provided that women up to 27 weeks pregnant were to be charged with possession of a controlled substance (a much lesser crime), whereas women at 28 weeks or more were to be charged with both possession and distribution of a controlled substance.

Furthermore, he distinguished *Sitz*, upon which the majority relied in applying the "special needs" balancing test, in that it involved individuals who had consented to drug testing, or involved drug testing not conducted for the purpose of criminal prosecution. Moreover, he distinguished those cases involving a special needs exception as only relevant to the initial seizure, which turned out to be minimally intrusive in those cases. He characterized any search of the person, conducted for the purpose of criminal prosecution, as still requiring either probable cause or consent.

In this case, however, the patients' consent was not obtained, nor was the testing based on probable cause. Subjective criteria, the alleged "indicia of cocaine use" were used, resulting in a great deal of discretion in selection of who was to be tested. There was a greatly disproportionate treatment of drug-using pregnant women based on their race, as evidenced by the fact that African Americans were treated to an arrest, while Caucasians were afforded drug treatment in all but one situation.

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63 See *Ferguson*, 186 F.3d at 484 (Blake, J., dissenting) (noting Judge Blake's use of operational guidelines as "probable cause" to arrest mother).
66 See *Ferguson*, 186 F.3d at 484 (Blake, J., dissenting).
68 See *Ferguson*, 186 F.3d at 487 (Blake, J., dissenting).
69 See Paul-Emile, supra note 4, at 360-61 (noting this wide degree of discretion); see also *Ferguson*, 186 F.3d at 474 (outlining indicia of cocaine use).
70 See *Ferguson*, 186 F.3d at 485-86 (Blake, J., dissenting) (telling story of each arrested woman, nine out of ten of whom were African American); cf. Paul-Emile, supra note 4, at 328 n10 (citing that 29 of the 30 women were African American).
The plaintiffs in the case appealed to the Supreme Court of the United States on the ground that the warrant and probable cause requirements with respect to searches and seizures, mandated by the Fourth Amendment, were not met. Moreover, the plaintiffs contend that the Fourth Circuit incorrectly used the "special needs" balancing test. That test, they asserted, has never been used with respect to a search serving the "normal needs of law enforcement," obtained without the individual's consent, as was the case here. The City responded with two defenses. First, that the searches were constitutional because, as a matter of fact, the women had consented to the searches. Alternatively, the City argued that the searches were reasonable in that they were justified by "special non-law enforcement purposes."

The Court first noted that it was not deciding the issue of the sufficiency of evidence with respect to whether or not consent had been obtained from the patients subjected to the drug testing, but that instead it was assuming, for purposes of the decision, that "the searches were conducted without the informed consent of the patients." Recognizing that the hospital was a state hospital, and therefore its employees were government actors subject to compliance with the Fourth Amendment, the Court concluded that the urine toxicology tests conducted by the hospital were "indisputably" searches within the meaning of the Fourth

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71 See Brief for Petitioner at 19-20, Ferguson v. City of Charleston, 532 U.S. 67 (2001); see also Ferguson, 532 U.S. at 73-75 (summarizing petitioner's claims); Ferguson, 186 F.3d at 475-76 (summarizing appellant's position).
72 See Ferguson, 532 U.S. at 73-74 (stating that District Court rejected second defense because searches in question "were not done by the medical university for independent purposes. Instead, the police came in and there was an agreement reached that the positive screens would be shared with the police").
73 See Ferguson, 532 U.S. at 74-75 (abstracting the factual finding).
74 See Ferguson, 532 U.S. at 74-75; see also New Jersey v. T.L.O., 469 U.S. 325, 335-37 (1985) ("But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'—that is, 'upon the activities of sovereign authority'").
Amendment.\textsuperscript{75} Citing the "special needs" line of cases in which the drug-testing was held not to infringe upon the Fourth Amendment,\textsuperscript{76} the Court concluded that this case was not analogous with those cases in that they dealt with an asserted "special need" that "was divorced from the State's general interest in law enforcement."\textsuperscript{77} Moreover, the Court also distinguished the Charleston hospital's policy's "central and indispensable feature. . ." of "the use of law enforcement to coerce . . . patients into substance abuse treatment"\textsuperscript{78} from those situations in which health care providers may be obligated by law or ethics to report information obtained through ordinary treatment.\textsuperscript{79}

Next, it was noted that even though the city argued that the "beneficent" primary purpose behind the policy was protecting the health of both mother and child,\textsuperscript{80} the Court disagreed and concluded that 'the purpose actually served by the MUSC searches "is ultimately indistinguishable from the general interest in crime control,"'\textsuperscript{81} In reaching that conclusion, the Court pointed

\textsuperscript{75} See Ferguson, 532 U.S. at 74-75 (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989); see also Laura Martin, Recent Developments: Select Recent Court Decisions, 27 Am. J.L. & Med. 345, 346 (2001) (noting that Supreme Court has treated urine screens taken by state agents as searches within meaning of Fourth Amendment); Toll, supra note 40, at 304 (stating that Court reiterated that urine tests constituted searches under Fourth Amendment).

\textsuperscript{76} See Ferguson, 532 U.S. at 75-77 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995); Von Raab, 489 U.S. at 711; Skinner, 489 U.S. at 634); see also Stahlman, supra note 55, at 32 (explaining that Justice Stevens distinguished Ferguson from previous "special needs" line of cases involving urinalysis testing).

\textsuperscript{77} See Ferguson, 532 U.S. at 78-79; see also Wayne R. LaFave, The Fourth Amendment as a "Big Time" TV Fad, 53 Hastings L.J. 265, 281 (2001) (stating majority of Supreme Court correctly concluded that Ferguson was distinguishable from previous cases in which Court considered whether similar drug tests were constitutionally permitted suspicionless searches); Leading Case, supra note 40, at 329 (stating that Justice Stevens emphasized that difference between instant case and other cases in which Court upheld similar drug tests was that hospital's drug testing policy had central law enforcement purpose).

\textsuperscript{78} See Ferguson, 532 U.S. at 80-82; see also Leading Case, supra note 40, at 329 (explaining that Court noted close involvement of Charleston police and prosecutors in design and administration of hospital's search policy); Toll, supra note 40, at 304 (noting crucial component of MUSC's drug testing policy was threat of arrest and prosecution if patient failed to comply with drug treatment obligations).

\textsuperscript{79} See Ferguson, 121 S. Ct at 1290 (stating use of law enforcement to coerce patients into drug abuse treatment distinguished case from situations in which doctors discover information about patients in ordinary course of treatment, latter of which must be reported under rules of law or ethics); see also Ark. Code Ann. § 12-12-602 (Michie 1999) (requiring health care professionals and facilities to report all cases of intentionally inflicted knife or gunshot wounds); Ariz. Rev. Stat. Ann. § 13-3620 (Supp. 2000) (requiring "any . . . person having responsibility for the care or treatment of children" to report suspected abuse or neglect to peace officer or child protective services).

\textsuperscript{80} See Ferguson, 532 U.S. at 80-82 (stating essence of respondents' argument is that protection of health of both mother and child is beneficent goal).

\textsuperscript{81} See Ferguson, 532 U.S. at 80-82; see also Stahlman, supra note 55, at 32 (stating that majority rejected respondents' argument that search policy's ultimate goal was to protect health of mothers
to the actual document codifying the hospital's policy, which contained the police's operational guidelines, but did not include a discussion of different courses of medical treatment for mother or infant, except for treatment of the mother's drug addiction.82

Furthermore, they noted that "[t]he threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of MUSC's policy was to ensure the use of those means. . . . Because law enforcement involvement always serves some broader social purpose or objectives, under [the city]'s view, virtually all nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose." 83 Based on the foregoing reasoning, the Court concluded that "[g]iven the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every state of the policy this case simply does not fit within the closely guarded category of 'special needs.'"84

Moreover, the Court noted that certain seizure cases, such as Michigan Dep't of State Police v. Sitz,85 which used a balancing test in determining Fourth Amendment reasonableness and upon which the Fourth Circuit relied, were not applicable in this case for two reasons.86 First, those cases involved roadblock seizures, and their children); Toll, supra note 40, at 306 (noting that Court did not accept respondents' claim that desire to protect unborn children justified drug testing as special need).

82 See Ferguson, 121 S. Ct at 1290-91 (noting that document codifying search policy incorporated police operational procedures including chain of custody, and police notification and arrest but did discuss alternative courses of medical treatment for mother or infant); see also LaFave, supra note 77, at 281 (stating that law enforcement purpose of search policy and extensive police involvement in policy led Court to conclude that case did not fit within "special needs" category); Toll, supra note 40, at 304 (stating majority identified four instances in which law enforcement goals took precedence over hospital's asserted purpose of protecting health of mothers and their children).

83 See Ferguson, 532 U.S. at 82-85; see also LaFave, supra note 77, at 281 (arguing majority's conclusion was essential to avoid circumvention of Fourth Amendment warrant and probable cause protections through use of "special needs" doctrine); Toll, supra note 40, at 306 (stating majority determined immediate purpose of hospital's search policy was to promote law enforcement goals).

84 Ferguson, 532 U.S. at 84-85; see also Leading Case, supra note 40, at 329 (stating Court concluded such searches were unconstitutional as they did not fall within special needs exception to Fourth Amendment); Journal's Editorial Staff, Developments and Trends in the Law: Synopsis of State Case and Statutory Law, 1 Yale J. Health Pol'y L. & Ethics 237, 283 (2001) (stating the Court ruled special needs exception to Fourth Amendment safeguards does not apply to hospital drug testing procedure enacted for law enforcement purposes and not medical purposes).


86 See Ferguson, 532 U.S. at 75-81 (distinguishing this case from cases applying balance of interests test); see also Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding
"rather than 'the intrusive search of the body or the home.'"

Searches, especially those involving the sanctity of one's own person (as in the case of searching one's bodily fluids), are to be "afforded the most stringent Fourth Amendment protection." Second, the Court has explicitly distinguished those cases dealing with roadblock checkpoints from those dealing with 'special needs.'

Finally, the Court realizes that in certain situations, state hospital employees may have the duty to reveal evidence of criminal conduct they inadvertently acquire, a duty which all citizens have. Here, however, because employees here "undertook to obtain such evidence from their patients for the specific purpose of incriminating those patients, they had a special obligation to make sure that the patients were fully informed about their constitutional rights, as standards of knowing waiver require."

FOURTH AMENDMENT IMPLICATIONS OF THESE PROSECUTIONS

The Fourth Circuit, holding that the collection and testing of these women's urine constituted a 'special needs' search and therefore justified after weighing all of the relevant factors, was

constitutionality of sobriety checkpoints where government interest outweighed privacy intrusion); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) (weighing public interest against individual's Fourth Amendment rights).

See Ferguson, 532 U.S. at 84 (quoting Indianapolis v. Edmond, 531 U.S. 32 (2000) (Rehnquist, C.J., dissenting)); see also Martinez-Fuerte, 428 U.S. at 559 (differentiating between checkpoint stops and other Fourth Amendment intrusions); United States v. Ortiz, 422 U.S. 891, 897 (1975) (noting difference between automobile searches and searches of homes or offices).

Martinez-Fuerte, 428 U.S. at 561 (noting one's expectation of privacy in an automobile is different from traditional expectation of privacy one would expect in one's home); see also McDonald v. United States, 335 U.S. 451, 453 (1948) ( remarking that Fourth Amendment protection marks the right of privacy as one of unique values of our civilization); Weeks v. United States, 232 U.S. 383, 391-92 (1914) ( remarking that effect of Fourth Amendment is to put limitations on power of government).

See Ferguson, 532 U.S. at 84 (citing Sitz, 496 U.S. at 450) (addressing issue of "special needs" in context of sobriety checkpoints); see also Illinois v. MacArthur, 531 U.S. 326, 330 (2001) (noting special needs of law enforcement as exception to warrant requirement).

See Ferguson, 532 U.S. at 90 (noting existence of situations where hospital employees have duty to report evidence of criminal conduct); see, e.g., S.C. CODE ANN. § 20-7-510 (Law Co-op 2000) (requiring physicians and nurses to report information that child has been abused or neglected to child welfare agency or law enforcement officials received "when [learned] in the person's professional capacity.

See Ferguson, 532 U.S. at 85; see also National Treasury Employees v. Von Raab, 489 U.S. 656, 666 (1989) (requiring employee consent for use of drug test results in criminal prosecution); cf. Miranda v. Arizona, 384 U.S. 436, 467-468 (1966) (holding a confession is voluntary only if defendant has been informed of his constitutional rights).
not justified according to the factual record.\footnote{See Ferguson, 186 F.3d at 484 (Blake, J., dissenting) (disagreeing with holding that search was reasonable under "special needs exception to warrant requirement); see also Chandler v. Miller, 520 U.S. 305, 314 (1997) (noting that when "special needs" are alleged as justification for Fourth Amendment intrusion courts should undertake a context-specific inquiry); Von Raab, 489 U.S. at 665-666 (stressing importance of balancing individual's privacy interests against government's interests).} In general, the Supreme Court has interpreted the Fourth Amendment requirement that any search or seizure be "reasonable" to mean that either probable cause or a warrant are required in any search or arrest by a government agent.\footnote{See Yatter, supra note 43, at 912 (noting Supreme Court's interpretation of Fourth Amendment reasonableness requirement calls for arrests to be based on probable cause and executed pursuant to warrant); see also Katz v. United States, 389 U.S. 347, 357 (1967) (holding Fourth Amendment makes presumptive warrant requirement for searches and seizures); Johnson v. United States, 333 U.S. 10, 14-15 (1948) (stating Fourth Amendment imposes warrant requirement for search and seizure unless pre-existing exception exists).} There are several exceptions to these warrant and probable cause requirements,\footnote{See Yatter, supra note 43, at 912, 982-988 (listing exceptions to probable cause and warrant requirements: investigatory detentions, warrantless arrests, searches incident to valid arrest, seizure of items in plain view, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and searches in which special needs of law enforcement make requirements impracticable); see also Craig M. Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468, 1473-74 (1985) (providing extensive list of exceptions to warrant and probable cause requirements); Cathryn Jo Rosen & John S. Goldkamp, The Constitutionality of Drug Testing at the Bail Stage, 80 J. Crim. L. & Criminology 114, 133 (1989) (offering three broad categories of exceptions that justify warrantless urinalysis performed without probable cause: searches permitted by virtue of subject's arrest, non-criminal administrative searches, and consent searches). See generally Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (asserting that "special needs" making warrant and probable cause requirement impractical exist in public school setting); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627-631 (1989) (holding drug testing requirement justified by public safety interest).} including instances in which the "special needs" of law enforcement make those requirements impracticable,\footnote{See Griffin v. Wisconsin, 483 U.S. 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring)) (stating searches unsupported by probable cause can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable."); cf. Vernonia Sch. Dist. 47J, 515 U.S. at 661 (holding drug testing of student athletes in public schools was justified by school's interest in deterring drug use and maintaining discipline); Von Raab, 489 U.S. at 670-72 (holding drug testing of Customs Service officials seeking transfer or promotion to certain positions was justified by public safety interest in keeping front-line [drug] interdiction personnel and customs officials who must carry firearms drug-free); Skinner, 489 U.S. at 620 (requiring blood and urine testing of employees involved in major train accidents). But see Chandler, 520 U.S. at 318-19 (refusing to find special need in Georgia statute requiring drug testing of candidates for public office as prerequisite for eligibility in running).} upon which the majority of the Fourth Circuit relied in reaching its holding.\footnote{See Ferguson, 186 F.3d at 479.} Even if such a special needs search is found, it must be weighed against the individual's privacy interest and the effectiveness of the intrusion.\footnote{See Vernonia Sch. Dist. 47J, 515 U.S. at 652-53, 658 (recognizing special needs search analysis requires balancing intrusion on individual's Fourth Amendment interests against promotion of}
In light of this backdrop, as the Supreme Court held, Charleston's alleged interest in protecting the health of unborn fetuses from drug exposure from drug-using mothers was in fact a legitimate special need interest justifying the drug testing of these mothers. However, any use of the fruits of the search and seizure, in criminally prosecuting those who are subjected to the search or seizure was beyond the scope of what the Supreme Court intended to include in justifying a search or seizure on a special needs basis. None of the Supreme Court cases justifying drug testing without probable cause or a warrant involved using any positive drug test result in a criminal prosecution. In addition, even though the Supreme Court has never explicitly recognized an exception to special needs searches when such seizures result in criminal prosecution, those cases in which such a search was upheld did not involve criminal prosecution. Moreover, those cases involved drug testing programs in which the consent of those individuals who tested positive was required before any criminal prosecutors were contacted.

Even if the Supreme Court had applied the Sitz balancing test, as the Fourth Circuit had done, the drug testing program would not have satisfied the effectiveness prong of a special needs analysis. More effective means of handling the concerns of heightened drug use among pregnant women and fetal health legitimate governmental interests); see also Willis v. Anderson Community Sch. Corp., 158 F.3d 415, 421 (7th Cir. 1998) (finding special needs search analysis requires balancing special need against privacy interest at stake and intrusiveness of search); McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 546-47 (1st Cir. 1996) (explaining special needs search analysis requires balancing special need against “nature and quality of the intrusion” of privacy interest).

98 See Ferguson, 532 U.S. at 78 n.12 (holding special needs exception to Fourth Amendment does not apply to policies that are linked to law enforcement goals); see also Book, supra note 45, at 652 (2000) (discussing group suspicion searches which are limited to non-criminal searches); Toll, supra note 40, at 312-13 (citing previous special needs cases that employed protections against releasing information to third parties).

99 See Von Raab, 489 U.S. at 666 (concerning drug screening program that required employee’s written consent before positive test results could be turned over to any other agency, “including criminal prosecutors”); see also Chandler, 520 U.S. at 318 (explaining that drug testing guidelines require that test results be given first to the candidate “who further controls dissemination of the report”); Vernonia Sch. Dist. 47J, 515 U.S. at 650 (requiring both students and their parents to sign form consenting to drug testing for athletic participation).

100 See Ferguson, 186 F.3d at 478 (concluding “prenatal testing was the only effective means available to accomplish the primary policy goal of persuading women to stop using cocaine during their pregnancies in order to reduce health effects on children exposed to cocaine in utero”); see also Drago, supra note 38, at 181-82 (explaining that harsh criminal sanctions are not effective means for protecting fetuses from alcohol abuse); McMeans-Muloway, supra note 44, at 63 (discussing Fourth Circuit holding in Ferguson).
were available. The arrest of many of these mothers at a late stage in pregnancy or after delivery after the negative impact of the drugs on the fetus had already occurred, leads to the conclusion that the effectiveness of such programs is questionable, notwithstanding the otherwise alleged legitimate purposes.

OTHER CONSTITUTIONAL IMPLICATIONS OF SUSPICIONSLESS DRUG TESTING FOR PURPOSES OF CRIMINAL PROSECUTION NOT RAISED IN FERGUSON

Reproductive Privacy

The constitutional right to reproductive privacy has been firmly established in American jurisprudence, beginning with Skinner v. Oklahoma and Griswold v. Connecticut, and culminating in Roe v. Wade and the subsequent line of abortion cases. It has been established that the Constitution not only protects women from being forced to terminate wanted pregnancies but also prevents penalizing them for carrying their preg-

101 See discussion infra Part IV.
102 See Ferguson, 186 F.3d at 488 (Blake, J., dissenting) (making observation that seven arrests were made after women had given birth, and that three of them were actually tested during or after delivery); see also McMeans-Muloway, supra note 44, at 66 (discussing policy utilized in Ferguson as facially discriminatory); Vaughn, supra note 62, at 865 (reaching same conclusion).
103 316 U.S. 535, 541 (1942) (invalidating, on equal protection grounds, statute mandating sterilization for those convicted of three "moral turpitude" felonies, stating "[m]arriage and procreation are fundamental to the very existence and survival of the race").
104 381 U.S. 479, 483-86 (1965) (recognizing that "penumbra" of rights emanating from Constitution, including rights to marry and procreate, lead to implied right of privacy in reproductive decisions in marriage); see, e.g., Cary v. Population Servs. Int'l, 431 U.S. 678, 684-88 (1977) (stating access to contraceptives can not be denied without a compelling state interest); Paul, 424 U.S. at 713 (reserving due process right of privacy challenges to area of marriage, procreation, contraception, family relationships, and child rearing and education); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending right of privacy in reproductive decisions to unmarried couples).
105 410 U.S. 113, 153 (1972) (holding reproductive privacy right was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); see also Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (citing Roe v. Wade as standing for constitutional right of women to choose option of abortion); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992) (stating Roe v. Wade stands for liberty of woman to terminate her pregnancy in its early stages).
106 See, e.g. Stenberg, 530 U.S. at 930 (striking down state partial birth abortion statute in that it contained no provision for exceptions in medical emergencies and when the mother's life is at stake, and placed "undue burdens" on woman by discouraging doctors from performing technique due to overbroad language in statute); Casey, 505 U.S. at 874 (reaffirming woman's abortion right and disallowing any restrictions which are "undue burdens" on this right); Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (limiting due process rights to those involving reproduction and not to homosexual intercourse).
nancies to term. In light of this firmly established constitutional right of procreation, and the Supreme Court's position of favoring the health of the mother over that of the fetus, the Charleston hospital's policy should be seen as a constitutional violation in that it severely pressured drug-using women into involuntarily terminating their pregnancies in an attempt to avoid criminal charges, and furthermore, punished women for carrying their babies to term. Despite society's views, many of these women are not immoral for having chosen to continue taking drugs over protecting the health of the fetus inside of them. Moreover, the scarcity of drug rehabilitation programs in poorer urban areas such as Charleston mandate the view that these women should not be denied their right to procreate.

See Casey, 505 U.S. at 859 (noting that Roe v. Wade has been "sensibly relied upon" to counter attempts to interfere with woman's decision to become pregnant or to carry to term); see also Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974) (striking down school system policy requiring maternity leave without pay at fifth month of pregnancy, characterizing the policy as "acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms [of personal choice in matters of marriage and family life]"); Arnold v. Bd. of Educ. of Escambia County, 880 F.2d 305, 311 (11th Cir. 1989) (stating "[t]here can be no question that the individual must be free to decide to carry a child to term"). But see Whitner v. State, 492 S.E.2d 777, 785 (S.C. 1997) (refusing, in fetal prosecution case, to recognize woman's argument that imprisonment is much greater burden on exercise of her freedom to carry fetus to term than unpaid maternity leave recognized in LaFleur, and instead, Court characterized the privacy as one of using crack cocaine, which was not a fundamental privacy right.)

See Paul-Emile, supra note 4, at 381 ("The United States Supreme Court has consistently rejected claims that fetal rights should trump maternal rights . . . ."); see also Casey, 505 U.S. at 912-14 (Stevens, J., dissenting) (agreeing with Court's reaffirmation that health of pregnant women take precedence over health of their fetus); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 779 n.8 (1986) (Stevens, J., concurring) (noting fetuses have never been considered persons); Colautti v. Franklin, 439 U.S. 379, 400-01 (1979) (invalidating statute that didn't guarantee mother's health always prevailed over life and health of fetus).

See Paul-Emile, supra note 4, at 384 ("The women prosecuted under the Policy would not have been prosecuted or even charged with a crime had they terminated their pregnancies. Hence, they were prosecuted for exercising their constitutional right to procreate."). See generally Dorian L. Eden, Note, Is It Constitutional and Will it be Effective? An Analysis of Mandatory HIV Testing of Pregnant Woman, 11 HEALTH MATRIX 659, 662-64 (2001) (discussing maternal-fetal conflict in setting of mandatory HIV testing).

See Katherine Irwin, Ideology, Pregnancy and Drugs: Differences Between Crack-Cocaine, Heroin and Metamphetamine Users, 22 CONTEMP. DRUG PROB. 613, 614 (1995) (portraying society's view of pregnant addicts as "individuals who willingly put themselves and their unborn babies into psychopharmacological prisons where their actions, feelings and experiences are determined by the damaging effects of the drugs they take"); Stacey L. Best, Comment, Fetal Equality?: The Equality State's Response to the Challenge of Prosecuting Unborn Children, 32 LAND & WATER L. REV 193, 197 (1997) (describing pregnant addicts as being "viewed as lacking some intrinsic moral compass"); Sheryl McCarthy, These Defective Moms Need Treatment, Not Prison, NEWSDAY (New York), May 21, 2001, at A24 (describing plight of one addicted woman who was sentenced for murder of her stillborn baby).

See, Paul-Emile, supra note 4, at 344-49. Paul-Emile noted that African American mothers, post-slavery, have been faced with society's view that they are "unfit mothers," as liabilities and
Confidentiality of Medical Records

In reaching its conclusion that an individual does not possess a constitutionally guaranteed right to privacy through the nondisclosure of medical records, the Fourth Circuit relied on Whalen v. Roe, in which the Supreme Court failed to recognize such a right. Also, the issue involved disclosure to a limited number of people rather than the general public. What the Fourth Circuit failed to note, however, was that disclosure of the test results would result in criminal conviction, in other words, a permanent stamp of public disapproval, which should be regarded as an intrusion on privacy. Furthermore, the disclosure that a woman is pregnant further implicates an invasion of privacy, especially if a woman has reasons to keep such information secret.

In the context of the fiduciary relationship between a doctor drains upon the economy. Early family planning initiatives in the 1930's and '40's were aimed at African American women in efforts to reduce their birth rate. During the 1970's, African American women were threatened with removal from welfare upon refusal to agree to sterilization. Even in the 1990's, the contraceptive Norplant was aimed at controlling African American fertility.

112 See Ferguson v. City of Charleston, 186 F.3d 469, 482 (4th Cir. 1999) (noting circuit split on this issue and describing Whalen); see also Cutshall v. Sundquist, 193 F.3d 466, 480 (6th Cir. 1999) ("[T]he Whalen Court concluded that the law at issue, which compiled data on patient prescriptions, did not implicate the alleged privacy interest in avoiding the disclosure of private matters"); Barry v. City of New York, 712 F.2d 1554, 1559 (2nd Cir. 1983) ("The nature and extent of the [privacy] interest recognized in Whalen and Nixon, and the appropriate standard of review for alleged infringements of that interest, are unclear").

113 See Ferguson, 186 F.3d at 482 (noting results were only disclosed to certain law enforcement officials, not to general public); see also Williams, supra note 57, at 192 (discussing Court's reasoning that governmental interest outweighed the privacy interest of the patients in their medical records based on the nonpublic nature of the disclosure). See generally Vaughn, supra note 62, at 695-696 (arguing Whalen allowed for the possibility of future court finding privacy right in highly sensitive medical records, such as the records at issue in Ferguson).

114 See Ferguson, 121 S.Ct. 1281, 1288 (2001) (noting use of positive drug test results to disqualify one from eligibility for particular benefit, as was the case in Skinner, Von Raab, Vernonia), is much less intrusive on privacy than "unauthorized dissemination of such results to third parties"); see also Vaughn, supra note 62, at 689 (opining hospital patients suffered increased intrusion on privacy when law enforcement officers were notified of positive drug test results by physicians). See generally Margo L. Ely, Waging War Against Drugs — and Expectant Mothers, CHI. DAILY BULLETIN, Oct. 9, 2000, at 5 (noting Court concluded disclosure was limited, therefore no privacy violation occurred).

115 See Mills, supra note 11, at 1027 (explaining women may want to keep pregnancy secret for fear of domestic violence resulting from increased financial strain and feelings of not wanting a child); Shari Roan, A Dirty Secret: Society Would Like to Think That All Expectant Moms are Cherished, But Pregnancy May Start—or Increase—Domestic Violence, L.A. TIMES, Dec. 5, 1995, at E1 (citing survey finding 6% of women who had recently given birth reported being beaten during pregnancy); see also Casey v. Planned Parenthood of Pennsylvania, 505 U.S. 833, 887-899 (1992) (striking down state statute's spousal notification requirement as requisite to abortion, reasoning that risk of increased domestic violence may result).
and patient, a relationship in which trust and confidence is of paramount importance, patients have a reasonable expectation that their test results will not be shared with non-medical personnel without their consent. In fact, not only did the hospital violate its own policy of maintaining confidentiality of patient medical records, it also violated a federal statute prohibiting disclosure of drug test results to substantiate or initiate criminal prosecution. All of this leads to the conclusion that the hospital should not have been allowed to disclose the drug test results to law enforcement officials without the patient’s informed consent.

Right to Refuse Medical Treatment

The right to refuse medical treatment has been firmly established in American law through the Common Law Doctrine of Informed Consent, as well as in constitutional precedent. In

117 See Ferguson, 121 S.Ct. at 1289, n.14 (citing Whalen v. Roe, 429 U.S. 589, 599-600) (stating "we have previously recognized that an intrusion on that expectation may have adverse consequences because it my deter patients from receiving needed medical care"); see also Paul-Emile, supra note 4, at 363 (commenting health care providers and patients share fiduciary relationship that places upon providers affirmative duty of confidentiality). See generally Eden, supra note 109, at 682 (arguing a doctor-patient relationship lacking in trust will result in many women not seeking prenatal counseling).

118 See Paul-Emile, supra note 4, at 363-64 (arguing hospital’s consent forms, which allowed attending physician to “reveal information to appropriate agencies and individuals,” would not give patient reason to believe that law enforcement were included); see also Andrew S. Krulwich & Bruce L. McDonald, Evolving Constitutional Privacy Doctrines Affecting Healthcare Enterprises, 55 FOOD DRUG L.J. 491, 505 (2000) (stating plaintiff’s argument that hospital gave no indication that its confidentiality policy did not apply to these women); Vaughn, supra note 62, at 687 (noting consent forms did not disclose to patients that results would be disclosed to the police).

119 See 42 U.S.C. §290dd-2(c) (1999) (stating “Except as authorized by a court order granted under subsection (b)(2)(C), no record referred to in subsection (a) may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient”); see also Michael Bagge, Survey: Health Law, 49 SYRACUSE L. REV. 547, 553 (1999) (commenting 42 U.S.C. §290dd-2 maintains the confidentiality of admission records to chemical dependency treatment centers); Vaughn, supra note 62, at 366 n. 198 (noting §290dd-2 prohibits the disclosure of patients’ records by drug programs for use in criminal charges).


121 See Cruzan, 497 U.S. at 278-79 (noting “the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions” and explaining liberty interest in refusing treatment is to be balanced against the relevant state interest); see also In re Quinlan, 355 A.2d 647, 664 (N.J. 1976) cert. denied sub nom. Garger v. N.J., 429 U.S. 922 (1976) (holding person in vegetative state had right to terminate treatment privacy grounded in Constitutional right to privacy); see, e.g., Wash. v. Harper, 494 U.S. 210, 229 (1990) (holding “forcible injection of medication into a non-consenting [prisoner]’s body represents a substantial
light of this established right and the view that drug addiction is a disease,122 these women should not have been forced to undergo drug treatment as their only alternative to being criminally prosecuted, nor should they have been involuntarily tested for a urine toxicology screen (which does constitute treatment).123 What is more shocking is the fact that many women were informed only after they had been screened.124 Furthermore, requiring these women to undergo such forced treatment undermines the fiduciary relationship between patient and health care provider, one that is necessary for successful therapy.125


123 See Paul-Emile, supra note 4, at 363 (stating Charleston’s policy violated right to refuse medical treatment); see also James A. Filkins, M.D., Ph.D., A Pregnant Mother’s Right To Refuse Treatment Beneficial To Her Fetus: Refusing Blood Transfusions, 2 DePaul J. Health Care L. 361, 363 (1998) (stating some courts have held the State’s interest in the well-being of patient’s child outweighs the right of the patient to refuse medical treatment, if the children would be deprived of parent by the patient’s refusal of treatment). But see People v. Brown, 689 N.E.2d 397 (Ill. 1997) (stating the State’s interest in the preservation of life, the prevention of suicide, protection of third parties, and the ethical integrity of the medical profession does not override patient’s decision to refuse medical treatment). See generally John P. Elwood, What Were They Thinking: The Supreme Court in Revue, October Term 2000, 4 The Green Bag 365, 372-373 (commenting Ferguson is interesting because of Justice Steven’s suggestion that before waiving Fourth Amendment rights, one must be informed of the rights he or she is waiving); Paul-Emile, supra note 4, at 363 (stating Charleston’s policy violated right to refuse medical treatment); VanRaalte, supra note 3, at 468 (arguing Cruzan Court acknowledged the right to refuse treatment is the logical consequence of informed consent).

124 See Paul-Emile, supra note 4, at 364-65 (the letter stated in part that “[i]f however, we continue to detect evidence of drug abuse or a failure to follow recommended treatment, we will take action to protect your unborn child. . . There was no indication that the urine test was conducted for law enforcement purposes, or that such confidential medical information was to be revealed to the local police department”); see also Anable v. Ford, 663 F. Supp. 149, 152 (W.D. Ark. 1985) (holding student’s consent as insufficient because the student was not fully informed and was misled as to what they were giving consent to); Chandler, 520 U.S. at 313 (stating Georgia’s drug testing requirement “effects a search within the meaning of the Fourth and Fourteenth Amendments”).

125 See Paul-Emile, supra note 4, at 363 (noting that consulting health care provider is not the same as granting them general consent to investigate other medical conditions of the patient); see also supra Part III-A-3 (discussing confidentiality). See generally Poland et al., Punishing Pregnant Drug Users: Enhancing the Flight from Care, 31 Drug and Alcohol Dependence 199-203 (1993).
The Eighth Amendment & Cruel and Unusual Punishment

The Supreme Court's holding in *Robinson v. California*,\(^{126}\) that addiction cannot be the basis for criminal prosecution, pursuant to the Eighth Amendment's prohibition against cruel and unusual punishment,\(^{127}\) coupled with the modern view of drug use as a disease\(^{128}\) further point to the need to eradicate any and all policies resulting in criminal prosecutions of pregnant drug addicts.

The Fourteenth Amendment & Equal Protection

The Equal Protection clause provides that "[n]o state shall... deny to any person within its jurisdiction the equal protection of the laws."\(^{129}\) Charleston's policy may be seen as an infringement on equal protection, both on the basis of gender and race.\(^{130}\) Traditionally, the Supreme Court has recognized that any such classification may be a violation of the constitutional guarantee of equal protection, and that the clause guarantees that those similarly situated are to be treated similarly, and logically, that those who are not similarly situated need not be treated similarly.\(^{131}\)


\(^{127}\) *See id.*, at 666-67 (describing drug addiction as disease similar to any other illness); *see also* U.S. CONST. amend. VIII (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"). *See generally* Robinson, 370 U.S. at 667 (citing *Linder*, and holding that drug addiction is not a crime but an illness).

\(^{128}\) *See Paul-Emile*, *supra* note 4, at 235 (stating Charleston's Policy only punished women for their addiction, rather than addressing health problems associated with it, and that addiction is viewed as disease); *see also* United States v. Southern Management Corp., 955 F.3d 914, 921 (4th Cir. 1992) (recognizing that World Health Organization and American Psychiatric Association classify substance addiction as disease).

\(^{129}\) U.S. CONST. amend. XIV, § 1. The aforementioned language refers to the Equal Protection clause. The remainder of § 1 of the amendment include the privileges and immunities and due process clauses, providing that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the united States; nor shall any State deprive any person of life, liberty, or property, without due process of law".

\(^{130}\) *See Paul-Emile*, *supra* note 4, at (arguing Charleston's Policy was discriminatory towards Black Women); Mills, *supra* note 11, at 1028 (arguing Charleston's Policy violates equal protection on race and gender basis). *See generally* Craig v. Boren, 429 U.S. 190, 197 (1976) (imposing intermediate standard of review on gender classifications).

\(^{131}\) *See U.S. CONST. amend. XIV, § 1; Laurence H. Tribe, American Constitutional Law*, § 16-1, at 1438 (2d ed. 1988) (discussing how any violation has the potential of arising equal protection claim if there be any form of classification or separation).
Gender Classification

Classification on the basis of gender has been recognized as a possible infringement upon equal protection. Such classification has been subject to an intermediate scrutiny standard of review: in other words, if the gender classification is closely related to an important governmental interest, then the classification is not a violation of equal protection, and therefore, is constitutionally permissible. In classifications based on biological factors, such as pregnancy, the Court has held that such classifications do not discriminate on the basis of sex, and that therefore only a rational basis standard of review is applied. As long as the classification is rationally related to a legitimate governmental interest, it is constitutionally permissible. Cases in which rational basis review was used in pregnancy classifications involving insurance coverage do not nearly implicate privacy considerations involved in fetal prosecution programs. As a result, a higher standard of review may be justified in determining the constitutionality of these fetal prosecution programs.

Race Discrimination

The leading case for equal protection challenges on the basis of

132 See Craig, 429 U.S. at 197 (imposing intermediate standard of review on gender classifications); Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding gender-based classifications to remedy disadvantageous conditions suffered by women in both economic and military life); Reed v. Reed, 404 U.S. 71, 75-76 (1971) (stating such review is "subject to scrutiny under the Equal Protection Clause" and must serve important governmental objective);

133 See General Electric Co. v. Gilbert, 429 U.S. 125, 136 (1976) (adopting conclusion in Geduldig v. Aiello, 417 U.S. 484 (1974) that excluding pregnancy from insurance coverage is not gender-based discrimination); see also Geduldig, 417 U.S. 496 n. 20 (noting "while it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification"); Frontiero v. Richardson, 411 U.S. 677, 691-92 (1973) (Powell, J., concurring) (cautioning Court against adopting view that all sex-based classifications are inherently suspect).


135 See Mills, supra note 11, at 1029 (arguing that the possibility of incarceration in fetal prosecution programs raises the stakes because of limitations such treatment places on personal liberty); see also UAW v. Johnson Controls, Inc., 499 U.S. 187, 199-200 (1991) (applying intermediate scrutiny in striking down workplace policy prohibiting women of childbearing age from work which could have exposed them to substances potentially harmful to reproductive health); Craig, 429 U.S. at 197 (describing permissible gender classifications under intermediate scrutiny as those which "serve important government objectives and...are substantially related to achievement of those
race for facially neutral statutes is Washington v. Davis, which requires a showing of discriminatory intent on the part of the government entity or state actor. Once a discriminatory intent is shown, the statute is subject to strict scrutiny. If the classification is narrowly tailored to meet a compelling governmental interest, it does not violate equal protection and is thus constitutionally permissible. The use of statistics has been important in evaluation of whether there was a discriminatory intent involved in a policy or statute.

The discriminatory intent involved in the Charleston hospital’s policy can be demonstrated in several specific areas: the policy was only implemented at one public hospital in the Charleston area that served a predominantly black and economically disadvantaged part of Charleston, and the policy only applied to mothers who used cocaine, a drug whose cheapest form, crack, tends to be concentrated in urban black communities.

137 See Washington v. Davis, 426 U.S. 229, 239 (1976) (noting Court will look to law’s purpose in evaluating its constitutionality); see also Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 994 (1988) (noting plaintiff needs to show more than mere statistical disparities to establish prima facie case when challenging racially discriminatory employment practices); Eric K. Yamanoto et al., Dismantling Civil Rights: Multiracial Resistance and Reconstruction, 31 CUMB. L. REV. 523, 546 (2000) (citing Davis and agreeing that challenges to facially neutral statutes require showing of discriminatory intent).
138 See McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (stating that racial classifications are examined with strict scrutiny); see also Bass v. Bd. of County Commissioners, 256 F.3d 1095, 1116 (11th Cir. 2001) (noting racial classifications require strict scrutiny analysis); Albright v. New Orleans, 2001 U.S. Dist. LEXIS 9159, at 14 (E.D. La. 2001) (stating “[a]ll racial classifications imposed by a governmental actor must be analyzed under the ‘strict scrutiny’ test”).
140 See Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (finding discriminatory intent in city safety ordinance requiring masonry buildings for laundries when enforced against Chinese owners while non-Chinese owners were not subjected to similar requirements). But see United States v. Edelin, 134 F. Supp. 2d 59, 85-87 (D.C. Cir. 2001) (expressing concern over the use of statistical data in claim of racial discrimination regarding federal capital charges); McCleskey v. Kemp, 481 U.S. 279, 287-91 (1987) (refusing to find discriminatory intent in statistical data showing black defendants in Georgia courts were more likely to receive death sentence for killing whites than other defendants).
141 See Paul-Emile, supra note 4, at 350 (emphasizing that the policy was applied to hospital that served area of Charleston with a 70% Black population, compared to Charleston’s 30% Black population); see also Nancy Kubasek & Melissa Hinds, The Communitarian Case Against Prosecutions for Prenatal Drug Abuse, 22 WOMEN’S RTS. L. REP. 1, 10 (2000) (noting most prosecutions for prenatal drug use are brought against minority women).
142 See Paul-Emile, supra note 4, at 353-54 (noting that only cocaine use was targeted and led to arrest and possible incarceration, despite study showing that only 0.79% of infants were exposed to cocaine, versus 2.5% for marijuana and 1.9% for alcohol, both of which substances may also cause
Furthermore, discriminatory intent can be demonstrated by the fact that the hospital employees, some of whom openly held racist views, had substantial discretion in determining who was tested and who was reported. Moreover, only African American women were reported to the authorities. Consequently, the policy appears to have a racial discriminatory intent on the basis of its unequal treatment in administration and effects.

The next step in equal protection analysis involves the weighing of discriminatory intent against the asserted state interest. Here, Charleston asserted the interests in protecting fetal health and reducing maternal drug use, as well as reducing the resulting social costs. While these may be compelling interests, the means chosen to implement the policy do not appear to be narrowly tailored to meet these otherwise noble ends. The clearly discriminatory behavior on the part of the City of Charleston was not justified by the asserted goals of the Policy. There exist less extreme, more effective measures for reducing drug use and protecting an unborn fetus from being born with a drug addiction, which reinforce the conclusion that the means were not narrowly tailored to accomplish the compelling state interest. Thus, the Policy appears to have violated the Equal Protection Clause.

CONCLUSION

Because the Charleston Policy of fetal prosecution and other jurisdictions' similar policies violate many firmly established constitutionally guaranteed rights and constitutional principles, they should be banned forever. The existence and availability of more effective and constitutionally permissible means of achieving the asserted compelling governmental interests in protecting fetal health, reducing drug use in pregnant women and reducing the resulting social and financial costs further justifies banning such policies. Moreover, the judiciary’s ludicrous interpretation of child abuse, child neglect, and distribution of controlled substance statutes to apply to the fetuses of drug-using mothers not.

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142 See Paul-Emile, supra note 4, at 360-61 (describing hospital staff’s “unfettered discretion” in running the program, including filing complaints and coordinating the mother’s arrest).
only serves to undermine constitutionally mandated separation of powers by giving legislative powers to the courts, but violates the firmly established principle that any ambiguity in criminal statutes are to be construed in the narrowest manner possible.

Any belief that such policies will serve to deter drug use in mothers and effectively protect fetuses is an erroneous conclusion. It may be more likely that that mothers, in fear of being criminally prosecuted, will actually refrain from seeking prenatal care, leading to one of two detrimental results: either the increased probability of birth defects or health risks for the child, or the mother aborting her child. Both of these results, of course, clearly run counter to the asserted governmental interest in protecting the health of fetuses.

Such policies exacerbate the problem by deterring women from seeking vital pre-natal care. Rather, the policies criminally punish women for a legally and medically recognized condition, and deprive them of certain fundamental constitutionally cherished rights. In evaluating such policies, courts should heed the timeless words of Justice Brandeis:

[I]t is immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.144

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144 Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting); see also Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting). Justice Scalia commented:

Those who lose because of the lack of understanding that begot the present exercise in symbolism are . . . all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.