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

*Anne Sullivan Kimbel*

## INTRODUCTION

For some Americans, and disproportionately for minorities, poverty is a cold and familiar state.<sup>1</sup> Poor children suffer the financial insecurity, crisis, and constant disruption to family life so understandably consistent in homes where there simply is not enough money to pay the bills. Tragically, poverty often also limits children's ability to grow and learn like more fortunate children.<sup>2</sup> Eventually, and often far too early, children in poverty become aware and resigned to the fact that they are poor, and at risk, and that they are likely to stay that way.<sup>3</sup>

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

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1. MID-ATLANTIC EQUITY CONSORTIUM, U.S. POPULATION STATISTICS DISAGGREGATED BY RACE AND GENDER, U.S. POPULATION BELOW POVERTY LEVEL BY RACE, GENDER, & AGE, at <http://www.maec.org/stats.html> (Mar. 1995) (indicating that 44.3% of black females under the age of 18 and 33.7% of black females of all ages live below the poverty line compared with 12.7% of white females under 18 and 10.7% of white females of all ages, 12.2% of white males under 18 and 8% of white males of all ages, 43.3% of black males under 18 and 27.8% of black males of all ages).

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

3. See MID-ATLANTIC EQUITY CONSORTIUM, *supra* note 1.

4. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., SCHOOLS AND STAFFING SURVEY 1993-94, (1996).

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

The poor occasionally find solace in the use of mood-altering chemicals.<sup>6</sup> Just as the stereotypical businessman “winds down” with a martini or two before dinner, the poor of America sometimes find mental release from their rough days through self-medication.<sup>7</sup> Not infrequently, the poor person’s drug of choice is cocaine,<sup>8</sup> particularly in its concentrated, relatively inexpensive, and readily available form, crack.<sup>9</sup>

Crack is smoked; the inhaled drug is transferred directly from the lungs to the bloodstream.<sup>10</sup> This highly efficient route of administration yields an immediate and intense effect, arguably making crack the most addictive substance in current use.<sup>11</sup> Scientists have researched and described a biological basis for the rapid onset of crack addiction, pinpointing a neurochemical explanation<sup>12</sup> for the nearly unbearable withdrawal syndrome that virtually removes from the addict any choice to refrain from drug use,<sup>13</sup> even in the face of severe negative consequences.

In 1989, the Maternal Child Health Unit of the Medical University of South Carolina (MUSC) noted an increased occurrence of negative

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6. Peggy Riccio, *Research Shows Impact of Poverty on Substance Abuse Among Youth*, NCADI REPORTER (August 1, 1997) (describing an overrepresentation of drug abuse in the poor), at <http://www.health.org/newsroom/rep/30.apx> (last visited November 26, 2004).

7. *Id.* (“Poor people often turn to drugs for relief from anxiety and stress.”).

8. The Nat’l Clearinghouse for Alcohol & Drug Info., *Substances of Abuse – Brief Profiles*, at <http://www.health.org/govpubs/rpo926/> (last visited November 26, 2004) (reporting that cocaine is abused because it induces “carefree feeling, euphoria, relaxation, in control” sensations, but that “high lasts only about 5 to 20 minutes” and “may cause severe ‘mood swings’ and irritability” and describing development of tolerance that causes requirement of increasing doses to achieve desired effect).

9. *See id.*

10. Sharon Begley, *How It All Starts Inside Your Brain*, NEWSWEEK, Feb. 12, 2001, at 40.

11. *Id.*

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

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

health effects on fetuses and newborn babies, which they believed was caused by maternal ingestion of cocaine.<sup>14</sup> MUSC's health care team noted that the patients who were using cocaine during pregnancy were also seeking prenatal care and labor and delivery services.<sup>15</sup> The team did not assume that the women who used drugs while pregnant simply disregarded the effects of drugs on their fetuses. Instead, the team recognized the women's maternal concern and responsibility for their fetuses and provided the women with prenatal care while referring the women for substance abuse treatment<sup>16</sup> through a policy that included the notification of law enforcement when a patient's urine tested positive for cocaine.<sup>17</sup> The policy was described by Solicitor Charles Condon as "amnesty-based [with] basic requirements, number one being drug free, . . . and, number two, if you would go to free drug treatment, not a thing would happen to you."<sup>18</sup>

This Note argues that the MUSC staff recognized the dangerous activity in which their patients were engaged, and that their subsequent intervention on behalf of those patients was justified and necessary to prevent harm.<sup>19</sup> This Note contends, however, that the use of arrest to coerce compliance with treatment served little purpose in meeting either the short term goal of a safe and healthy course of pregnancy<sup>20</sup> or the long term goal of the mother's release from drug dependence.<sup>21</sup> This Note contends that cocaine abuse by pregnant women who wish to carry their fetuses to term merits nonpunitive attention and intervention by medical staff.

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

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

16. *Id.* at 211-12.

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

18. *Id.* at 475.

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

20. For a concise and persuasive prediction of the chilling effect such a policy could have on the degree to which pregnant women seek prenatal care, *see* Brief of Amici Curiae American Civil Liberties Union et al., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936).

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

Through *Ferguson v. City of Charleston*<sup>22</sup> the American medical and legal systems are invited to respond to the effects of poverty and drugs on some of our most vulnerable citizens, pregnant women and their unborn children. The case presents an opportunity to acknowledge the disparity between the life choices available to the poor in America and those available to the middle and upper classes. Indeed, one *Ferguson* amicus brief contended that drug testing threatened the autonomy of pregnant women; it further observed that this policy would disproportionately affect poor and minority women, since they are “more likely to give birth at public institutions and have more contact with state agencies.”<sup>23</sup> Accordingly, to view the case as a question of a woman’s right to privacy versus the state’s right to search is to abandon pregnant drug users as mere props in an exercise of constitutional analysis.

*Ferguson* beckons society to recognize its obligation to create a solution that serves the interests of the individual and society, and that solution should entail neither arrest nor neglect. Instead, *Ferguson* invites society’s exercise of its *parens patriae* power, the “state’s inherent sovereignty to safeguard the community’s welfare.”<sup>24</sup> The *parens patriae* power permits society, through its legislature, to choose to protect the interests of minors and incompetents.<sup>25</sup>

The degree of dependence and loss of competence suffered by the women was manifested in their contradictory behavior: they used cocaine while pregnant despite the desire to safely carry and birth their fetuses.<sup>26</sup> Such contradictory behavior indicates a level of dependence and a lack of control that yields a nearly hopeless prognosis for recovery without intense and sustained intervention.<sup>27</sup> The *parens patriae* power provides an avenue by which specialized treatment could be offered as a viable alternative to either incarceration or abandonment of the women to addiction, all in the name of privacy.

This Note first examines the socioeconomic forces that contribute to the incidence of drug use during pregnancy. It next considers the issue of consent, looking at the patient’s consent to the search through urine drug testing as separate from consent regarding the release of medical information to law enforcement. This Note then explores the health care rationale for the course of action taken by MUSC. Finally, it

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22. 532 U.S 67 (2001).

23. See Brief of Amici Curiae American Civil Liberties Union et al., *Ferguson* (No. 99-936).

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

25. See *id.*

26. See Begley, *supra* note 10.

27. *Id.*

proposes that each state invoke its *parens patriae* power to devise a sociomedical policy for effective and constitutional intervention on behalf of the patients.

### I. *FERGUSON V. CITY OF CHARLESTON*

MUSC developed a policy for intervening in women's illicit drug use during pregnancy. First, pregnant cocaine users were identified through urine drug testing<sup>28</sup> of women whose clinical evaluation<sup>29</sup> revealed the presence of particular predetermined indicia of cocaine abuse.<sup>30</sup> The staff then encouraged those women to seek substance abuse treatment.<sup>31</sup> MUSC consulted with governmental entities who exercised authority based on statute<sup>32</sup> and case law<sup>33</sup> to create the

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

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

30. *Ferguson*, 186 F.3d at 474, (describing indicia as:

- (1) separation of the placenta from the uterine wall;
- (2) intrauterine death;
- (3) no prenatal care (fewer than five visits);
- (4) late prenatal care (beginning after twenty-four weeks);
- (5) incomplete prenatal care (fewer than five visits);
- (6) preterm labor without obvious cause;
- (7) a history of cocaine use;
- (8) unexplained birth defects;
- (9) intrauterine growth retardation without an obvious cause).

31. *Ferguson*, 186 F.3d at 473 (describing the policy as "intended to encourage pregnant women whose urine tested positive for cocaine use to obtain substance abuse counseling") and at 475 (referring to J.A. 2739 finding that the "goal [of the policy] was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child").

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

testing policy and to proffer solutions that supported the state's interest in the well being of the fetuses. These parties included the Solicitor of the Ninth Judicial Circuit of South Carolina, the South Carolina Police Department, the City of Charleston and several social services agencies.<sup>34</sup>

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

The women also alleged a violation of the right to privacy and abuse of process. The court found that a privacy right was not violated since the women's medical records were disseminated to a limited number of law enforcement personnel.<sup>38</sup> The court also found that MUSC personnel did not have the requisite improper ulterior purpose necessary to establish abuse of process.<sup>39</sup>

The women further asserted the urine drug testing was a violation of their Fourth Amendment rights because law enforcement was notified of their positive drug test results.<sup>40</sup> Indeed, as a result of the notification, four of the women were arrested; however, none of the women were prosecuted.<sup>41</sup>

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

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

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

36. *Id.* at 469.

37. *Id.* at 481-82.

38. *Id.* at 483.

39. *Id.*

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

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

The district court found the women had consented to the search by consenting to urine testing.<sup>42</sup> The women appealed this judgment, arguing the evidence supporting the jury's consent finding was insufficient.<sup>43</sup>

The Fourth Circuit affirmed the lower court's judgment without reaching the consent issue. The court, instead, reasoned that "the rising use of cocaine by pregnant women among MUSC's patient base and the public health problems associated with maternal cocaine use created a special need beyond normal law enforcement goals."<sup>44</sup> The Special Needs Doctrine is a limited exception to the requirement of probable cause in which reasonableness is evident from "a careful balancing of governmental and private interests."<sup>45</sup>

For cases in which a special need is identified from the facts, the Supreme Court has set out a balancing test weighing governmental interests against individual privacy interests "to assess the practicality of the warrant and probable-cause requirements in the particular context."<sup>46</sup> This balancing test is extremely fact sensitive and is performed by assessing the facts in light of the surrounding circumstances with attention to differences of degree.

To justify waiver of the probable cause/warrant requirement, governmental need must be sufficiently important that the search as it was performed is justified in light of the surrounding circumstances, taking into consideration "other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."<sup>47</sup> Next, the expected effectiveness of the search is scrutinized with focus on "the degree to which [it] advances public interest."<sup>48</sup> Then, the degree of intrusion is measured first objectively, by the duration and intensity of the seizure and investigation<sup>49</sup> and then subjectively, by the amount of fear and surprise experienced by the searched or detained person.<sup>50</sup>

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42. *Ferguson*, 186 F.3d at 476.

43. *Id.*

44. *Id.* at 479.

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

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

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

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

49. *Id.* at 451-52.

50. *Id.* at 452.



The Fourth Circuit applied the special needs balancing test to the urine testing policy at MUSC.<sup>51</sup> First, it found that the policy advanced the public interest.<sup>52</sup> It assisted in providing the women with the safe delivery and birth they sought,<sup>53</sup> and it protected the fetus.<sup>54</sup> Second, it found the policy was an effective and economically efficient way to advance the identified public interest.<sup>55</sup> Third, it found the testing policy to be minimally intrusive.<sup>56</sup> Thus, the Fourth Circuit established that the urine drug screens did not violate the Fourth Amendment as unreasonable searches.<sup>57</sup> The women appealed the affirmance of the judgment against them to the United States Supreme Court.<sup>58</sup>

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51. *Id.* For another illustration of special needs balancing test, see *Skinner*, 489 U.S. at 619.

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

53. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1996) (requiring interest “*important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy”) (emphasis in original).

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

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

56. *Id.* at 479 (finding the context in which the urine sampling occurred minimally intrusive since it was done “in the course of medical treatment to which Appellants had consented . . . [and] [t]he giving of a urine sample is a normal, routine and expected part of a medical examination”). See also *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996) (stating that medical examinations routinely involve the giving of a urine specimen).

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

58. The women enjoyed the support of numerous groups, including the American Civil Liberties Union, NOW Legal Defense and Education Fund, Chicago Abortion Fund, and Americans for Democratic Action, see Brief of Amici Curiae American Civil Liberties Union et al., *Ferguson* (No. 99-936). Cf. George P. Smith, II, *Judicial Decisionmaking in the Age of Biotechnology* 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 93, 94 (1999) (advocating “a full partnership of interest and action should be sought by law, science, ethics, and medicine if progress is to be achieved over the succeeding years” and discussing the disabling effect of the emotionalism that often surrounds important issues).

In *Ferguson v. City of Charleston*,<sup>59</sup> the Supreme Court considered the case, presuming that MUSC's policy impinged upon the women's autonomy in that the urine testing was performed without the women's consent.<sup>60</sup> The Court also presumed that the primary purpose of the testing was to provide the results to law enforcement,<sup>61</sup> which then used that information as evidence.<sup>62</sup> The women were susceptible to the threat of arrest and prosecution,<sup>63</sup> and the offense with which each woman would be charged depended upon the stage of her pregnancy.<sup>64</sup>

Accordingly, the Supreme Court reversed the court of appeals and remanded the case for a determination on consent.<sup>65</sup> Regarding reversal of the lower court's exclusion of the case from the warrant requirement, the Court reasoned that the urine drug testing performed by the hospital did not meet the standard for the Special Needs Doctrine. The majority found that, because the applicable government interest was the use of criminal sanctions as deterrence, MUSC's motives were only a secondary goal and that weighted the balancing test in favor of the protection of autonomy.<sup>66</sup>

As to the issue of consent, the majority of the Court maintained that because the court of appeals had not discussed the issue, the more

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59. 532 U.S. 67.

60. *Id.* at 76.

61. *Id.* at 69.

62. *Id.* at 85-86.

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

64. *Ferguson*, 532 U.S. at 72-73 (detailing precise offenses with which a woman would be charged:

(1) 27 weeks or less gestation: simple possession;

(2) 28 weeks or more: possession and distribution to a person under the age of 18 (the fetus);

(3) At delivery: possession, distribution to a person under the age of 18, and unlawful neglect of a child).

65. *Id.* at 86.

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

prudent course for the Supreme Court was to express no view, thus allowing the court of appeals to examine and resolve it.<sup>67</sup>

Justice Kennedy reviewed the Court's abdication on the consent issue in his concurrence, acknowledging that the Court had "erected a strange world for deciding the case"<sup>68</sup> by finding it "necessary to take the unreal step of assuming there was no voluntary consent."<sup>69</sup> He stated plainly that had consent rather than nonconsent been assumed for purposes of analysis, "the case might have been quite a different one."<sup>70</sup>

Justice Scalia took a strong stance in his dissent.<sup>71</sup> He stated clearly that his assessment of the facts revealed no unconsented search.<sup>72</sup> He reasoned that the women voluntarily provided the urine samples, thereby obviating the consent requirement.<sup>73</sup> He further asserted that Fourth Amendment jurisprudence does not require that the consensually searched party be informed of potential law enforcement involvement.<sup>74</sup> Scalia contended that, even if the search had been unconsented, under the circumstances it would have been valid under the Special Needs Doctrine.<sup>75</sup> Applying the special needs balancing test, Scalia characterized the government's intervention as beneficent

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

68. *Id.* at 91.

69. *Ferguson*, 532 U.S. at 91.

70. *Id.*

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

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

73. *Id.* at 95 ("Until today, we have *never* held—or even suggested—that material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain.").

74. *Id.* at 96 (citing Respondents Brief, Part II:

Petitioners . . . freely and voluntarily . . . provided the urine samples . . . each of the Petitioners signed a consent to treatment form which authorized the MUSC medical staff to conduct all necessary tests of those urine samples – including drug tests...there is no precedent in this Court's Fourth amendment search and seizure jurisprudence which imposes any . . . requirement that the searching agency inform the consenting party that the results of the search will be turned over to law enforcement).

75. *Id.* at 102-03.

and necessary.<sup>76</sup> He described the goal of the drug testing policy as being intended to facilitate treatment and protect the mother and the unborn child.<sup>77</sup> On the other hand, he valued the impingement on the women's Fourth Amendment rights as a less weighty concern, and indeed found those rights undisturbed.<sup>78</sup>

Scalia considered the illegality of the drug use and its ultimately negative impact on all of society.<sup>79</sup> Action meant to curb the use of illegal substances, particularly by pregnant citizens, can improve the health status of both the mother and fetus which confers a benefit not only on them, but also on the citizens whose taxes would be spent to correct drug-induced problems.

Scalia identified the drug testing program's goal as the creation of an incentive for the addicted women to take treatment for their addiction. He described law enforcement as joined with the hospital staff "in that benign purpose,"<sup>80</sup> and punctuated his opinion with a sardonic final statement: "It would not be unreasonable to conclude that today's judgment, authorizing the assessment of damages against the county solicitor and individual doctors and nurses who participated in the program, proves once again that no good deed goes unpunished."<sup>81</sup>

Scalia's recognition of the compelling nature of the women's need for care only spotlights the real issue in the case; it does nothing to meet the need for protective action illustrated by this uniquely vulnerable group of citizens, poor pregnant women. The outcome of *Ferguson* leaves the real problem untouched. A rigorously responsive but patently nonpunitive policy is required to intervene in the addictive process to protect the patients and their fetuses from the health risks created by drug use during pregnancy.

Analogous public health situations have presented in the past, and specialized policies have been adopted to benefit both the individuals and society at large. For example, in 1986 the Department of Defense tested all service members for HIV and questioned those who tested

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76. *Id.* at 100-103.

77. *Id.* at 99 (citing the district court's finding of fact and observing that this finding is binding on the Court unless clearly erroneous, FED. R. CIV. P. 52(a)).

78. *Id.* at 92.

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

80. *Ferguson*, 532 U.S. at 103.

81. *Id.*

positive about the manner in which they had contracted the virus.<sup>82</sup> To protect those who reported homosexual activity or needle sharing from adverse personnel action,<sup>83</sup> a law was passed which specifically restricts the Department of Defense's use of such information.<sup>84</sup>

Similar legislative action can and has been tailored to allow rigorous but nonpunitive intervention on behalf of other special categories of patients such as those in the instant case. Most recently, judicial and governmental action has altered the manner in which other chemically dependent patients are treated and is discussed later in this Note.

## II. THE PATIENTS

Often, America's poor find the use of illicit drugs to be a reliable and affordable, albeit brief,<sup>85</sup> release from the troubles and worries that are their constant companions.<sup>86</sup> Notably, African American women are more likely to be poor than are white American women, or males of either race.<sup>87</sup> The high probability of lifelong poverty that many young, black women face understandably can engender hopelessness. That hopelessness is augmented by the higher likelihood that the African American female will end her education without completing

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82. Interview with John V. Sullivan, Dep. Parliamentarian, Office of Parliamentarian, United States House of Representatives, in Washington, D.C. (Mar. 4, 2002).

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

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

85. See Nat'l Clearinghouse for Alcohol & Drug Info., *supra* note 8 (explaining that cocaine is abused because it induces "carefree feeling, euphoria, relaxation, in control" sensations, but that "high lasts only about 5 to 20 minutes" and "may cause severe 'mood swings' and irritability" and describing development of tolerance that causes requirement of increasing doses to achieve desired effect). See also *id.* (explaining that crack is abused because it induces "quick high, power, euphoria" sensations but that crack is almost instantly addictive, the desirable effects last only a few minutes, and there are more hospitalizations per year resulting from crack and cocaine than any other illicit substance).

86. MID-ATLANTIC EQUITY CONSORTIUM, *supra* note 1.

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

high school,<sup>88</sup> and even if she does finish high school, her college prospects will often be hampered by SAT scores that are lower than those of most white women or black or white males.<sup>89</sup>

Examining these statistics, one can imagine how women for whom these statistics are predictors might see any attempt at escape as futile, and may adopt the use of harmful drugs as a viable coping mechanism. Indeed, Dr. Rand Conger, the Director of the Center for Family Research in Rural Mental Health at Iowa State University of Science and Technology, addressed the National Institute on Drug Abuse's Prevention Research Working Group on the subject of drug use as escapism. The National Clearinghouse for Alcohol and Drug Information Reporter describes Conger asserting that, for the poor, "[u]sing drugs provides a means to escape; dealing can be an alternative source of income. Often people suffering from economic hardship feel that they have little to lose if they get involved in drugs."<sup>90</sup> Once involved, however, they often develop dependencies and addictions that preclude the capacity to choose whether or not to continue to use drugs.<sup>91</sup>

With an informed view of the socioeconomic influences of substance abuse, one can recognize the inequitable fate of poor women that produces the disparity between the rates of cocaine use during pregnancy by African American (4.5%), white (0.4%), and Hispanic women (0.7%).<sup>92</sup> To abandon those women and their fetuses to poverty and addiction in the name of protecting the right to be left alone would be a disastrous distortion of the values that generated the Fourth Amendment to our Constitution.

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88. *Id.* (indicating high school graduation or more education was obtained by 84.7% of black females, compared with 93.1% of white females, 91.7% of white males, and 86.1% of black males).

89. *Id.* (indicating average Verbal/Math SAT scores for black females 437/416; compare with 524/507 for white females; 528/542 for white males; 431/431 for black males).

90. Riccio, *supra* note 6.

91. THE COLUMBIA ENCYCLOPEDIA, *supra* note 12 (describing the addictive nature of cocaine).

92. Robert Mathias, *NIDA Survey Provides First National Data on Drug Use During Pregnancy*, 10 NIDA NOTES WOMEN AND DRUG ABUSE (Jan./Feb. 1995), at [http://www.nida.nih.gov/NIDA\\_Notes/NNvol10N1/NIDASurvey.html](http://www.nida.nih.gov/NIDA_Notes/NNvol10N1/NIDASurvey.html) (last visited November 26, 2004) (“[O]verall, 11.3% of African-American women, 4.4% of white women, and 4.5% of Hispanic women used illicit drugs while pregnant. While African Americans had higher rates of drug use, in terms of actual numbers of users, most women who took drugs while they were pregnant were white.”).

### III. WHAT IS CONSENT?

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

Patients in American health care settings routinely provide urine specimens to health care professionals for analysis.<sup>93</sup> On occasion, those samples are used as legal evidence.<sup>94</sup> Nearly always and necessarily the samples are provided with the patient's unequivocal and documented consent.<sup>95</sup> When the government obtains information from a citizen through a consented search,<sup>96</sup> the government must be able to prove that the consent was genuine.<sup>97</sup> Furthermore, the quality of that consent will merit scrutiny if the Constitutional rights of the individual consenting could be affected.<sup>98</sup>

This Note contends that the women consented to urine drug testing. Even if consent cannot be proven, however, an argument can be made that the testing was reasonable to protect the public interests in the health of the mother and fetus. However, the consent to testing given by the women was applicable only within the confidential health care setting. It is critical to note that the consent to urine drug testing did

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

94. See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

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

96. *United States v. Nicholson*, 983 F.2d 983, 988 (1993) (holding, as in *Glover*, that for consent-based search "the government must show that there was no duress or coercion, express or implied, that the consent was unequivocal and specific, and that it was freely and intelligently given").

97. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 89 (1997). 1 JOHN WESLEY HALL, JR. SEARCH AND SEIZURE, § 8:1 at 382 (2d ed. 1991) The ultimate question in any consent search is whether the consent was voluntary. See also *id.* §§ 8:12 – 8:30.

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

not extend to the dissemination of the results of the urine test to law enforcement.

## B. Nonconsensual Testing

### 1. When Is a Urine Drug Screen a Search?

There are some occasions when a urine specimen may lawfully and permissibly be extracted from a patient without his or her consent.<sup>99</sup> Such an event constitutes a search when it is executed by a state actor<sup>100</sup> or his agent<sup>101</sup> with the intention that the patient will be subjected to subsequent law enforcement investigation.<sup>102</sup>

In the instant case, a distinction can be drawn between a medical staff's compulsory removal of body fluids for testing purposes, and the staff's acceptance of a voluntarily provided body fluid specimen for which no physical penetration or contact was required.<sup>103</sup> The compulsory removal of fluids is a search subject to the Fourth Amendment, but voluntary provision is not similarly protected. In *Ferguson*, the women provided the urine with the expectation that the

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99. See MERCK MANUAL, *supra* note 93. The manual recommends that physicians order certain laboratory testing in emergent situations, regardless of consciousness of patient.

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

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

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

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



specimen would be tested and the results would be used to foster the health of themselves and their fetuses.<sup>104</sup>

## 2. *Reasonable Suspicion Doctrine*

Any governmental search must be reasonable to be constitutional.<sup>105</sup> This reasonableness constraint normally prevents the government from conducting searches in the absence of individualized suspicion.<sup>106</sup> The United States Supreme Court has held that a court must balance the “intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests”<sup>107</sup> in order to determine the reasonableness of a search.

In the instant case, MUSC, as a government agent, conducted the urine drug testing out of concern for the well being of both mother and fetus.<sup>108</sup> While the reasonableness of a search ideally is assured by a judicial warrant issued upon probable cause,<sup>109</sup> recognized exceptions do exist that could apply here. Indeed, under the Special Needs Doctrine, compelling governmental needs allow a search conducted in the absence of suspicion or probable cause.<sup>110</sup>

## 3. *Special Needs Doctrine Exception to Warrant Requirement*

Between 1989 and 1997, the United States Supreme Court considered a series of cases, all of which challenged the constitutionality of the acquisition and testing of nonconsensually obtained urine specimens.<sup>111</sup> In the aggregate, these cases created the Special Needs Doctrine<sup>112</sup> which defines a narrow exception to the

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

105. *Acton*, 515 U.S. at 652 (stating that reasonableness is the “ultimate measure of the constitutionality of a governmental search”).

106. *Chandler v. United States*, 520 U.S. 305, 305 (1997).

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

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

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

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

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

112. *Ferguson*, 186 F.3d at 477-79 (describing three-prong test for Special Need Doctrine applicability: (1) Governmental need “important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.” (2) Effectiveness of the search, with focus on “the degree to which [it] advances the public interest.”

Fourth Amendment warrant requirement for cases in which a special governmental need for intrusion outweighs the individual's privacy expectations.<sup>113</sup> It is generally well accepted that when a sample or specimen is extracted from a patient without consent, the scope of the search of that patient is extended beyond the acquisition of the sample to the subsequent testing of the sample obtained.<sup>114</sup> Therefore, in *Ferguson*, both the specimen and its subsequent testing were a part of the search for Fourth Amendment purposes. The documented results of the test were then made a part of each patient's record.

In the instant case, the MUSC staff was motivated to test the women's urine by a legitimate concern for the safe pregnancy and delivery of the mother and fetus. Viewed from the medical rather than the law enforcement vantage point, the urine drug testing qualifies for exception under the Special Needs Doctrine.<sup>115</sup> Indeed, one of the *Ferguson* appellants has died since the case was filed,<sup>116</sup> illustrating the seriousness of the health concerns the staff of MUSC sought to address.

The dissemination of the positive findings to law enforcement, however, was a separate act, the legitimacy of which turns on whether law enforcement used the information to punish, or to protect and assist, the patients.<sup>117</sup> It is arguable that law enforcement used the information to motivate or coerce the women to take treatment for addiction, but the punitive character of the threat of arrest for failure to comply is indisputable.

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(3) Degree of intrusion, measured objectively by the duration and intensity of the seizure and investigation, and measured subjectively by the amount of fear and surprise experienced by the searched or detained person)(footnotes omitted).

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

114. *Ferguson*, 532 U.S. at 93 n.1 (dissenting with outcome of case, but agreeing that, when the provision of the urine specimen is involuntary, the subsequent testing of the urine can be considered to have been infected by the search that yielded the specimen).

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

116. *Id.* at 485.

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

### C. *Analysis of Consent*

#### 1. *The Presumptions*

In *Ferguson v. City of Charleston*<sup>118</sup> the stance from which the Supreme Court considered the facts was critical to the outcome of the case. The Court presumed first that the women had not consented to urine drug testing,<sup>119</sup> and second that the primary purpose of the urine testing was to obtain evidence for law enforcement.<sup>120</sup> The facts of the case, however, challenge the validity of these presumptions.

Regarding the first presumption of nonconsent, the women manifested their consent when they signed the authorization for urine drug testing.<sup>121</sup> They further manifested their consent through conduct by providing the MUSC staff with the physical specimen required for the test.<sup>122</sup> The women did not, however, consent to the disclosure of their medical records to law enforcement.

Regarding the second presumption that the testing was performed to obtain evidence for law enforcement, a distinction must be noted. The MUSC staff performed the tests to verify drug use and to engage law enforcement's coercive power, but it did so to control the women's use of drugs, not simply to facilitate prosecution for prosecution's sake.<sup>123</sup>

#### 2. *The Wrong Done*

The women consented to urine testing without knowledge of the potential dissemination of the results to law enforcement.<sup>124</sup> Courts

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118. 532 U.S. 67.

119. *Id.* at 77 (reasoning that, "given the posture in which the case comes to us, we must assume for purposes of our decision that the tests were performed without the informed consent of the patients . . .").

120. *Id.* at 69-70 (stating that the case required the determination of whether "a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure").

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

122. *Id.*

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

124. *Ferguson*, 532 U.S. at 77 (describing the hospital's contention that the presence of indicia of drug abuse justified turning over test results to law

have found the dissemination of the results of a consensual search to law enforcement does not offend Fourth Amendment jurisprudence, even when government extracts the consent without identifying itself.<sup>125</sup> Therefore, to attack the dissemination of the results of the urine testing to law enforcement, analysis of the dissemination of the results must be severed from the analysis of the validity of the search.

Indeed, the women themselves separated the search from the dissemination and challenged the disclosure of information contained in their medical records as discriminatory and a violation of their right to privacy.<sup>126</sup> The women confronted the policy as disproportionately affecting African Americans because it tested only for cocaine, only at MUSC, and only in certain departments of MUSC.<sup>127</sup>

The appellate court found that MUSC had answered the assertions of discriminatory policy with a legitimate explanation: MUSC wished to intervene upon an increase in cocaine use in pregnant women, and the cost of alternative practices suggested to lessen the discriminatory impact of the policy would have been “prohibitively expensive.”<sup>128</sup> The appellate court also noted that there existed “no evidence in the record to support a conclusion that MUSC could have forced other hospitals to adopt the policy.”<sup>129</sup>

In assessing the violation of the women’s right to privacy, the appellate court took into account the private nature of the disclosure and found that the government’s interest outweighed the women’s

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enforcement without the knowledge or consent of the patients). See *Griffin v. Wisconsin*, 483 U.S. 868, 870, 875-877 (1987) (determining that a warrantless search based on reasonable grounds is justified by the state’s special needs even if evidence gained is used to support a criminal conviction); *Sitz*, 496 U.S. at 455 (reasoning that arrest for driving under the influence can result from suspicionless stop at a sobriety checkpoint).

125. Cf. *Chandler*, 520 U.S. at 305; *Acton*, 515 U.S. at 646; *Skinner*, 489 U.S. at 602; *Von Raab*, 489 U.S. at 656 (creating the Special Needs Doctrine and treating drug testing of urine that was obtained without consent as a search) *with* *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that a consent allowing access to evidence is not vitiated by the failure on the part of a government agent to disclose his role as informant). See also *United States v. Calandra*, 414 U.S. 338, 354 (1974) (reasoning that the Fourth Amendment exclusionary rule was judicially fashioned to deter unlawful police conduct and the derivative use of the results of a search raises a question not of rights, but of remedies).

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

127. *Id.* at 480-81.

128. *Id.* at 480.

129. *Id.* at 477-79.

privacy interests.<sup>130</sup> The court reasoned that, although there is no “general constitutional right to privacy,”<sup>131</sup> there is a recognized constitutional “interest in avoiding disclosure of personal matters”<sup>132</sup> when such disclosures involve rights that “are fundamental or implicit in the concept of ordered liberty.”<sup>133</sup> The appellate court decided, however, that the interest of the government outweighed the women’s interest in nondisclosure of their medical records.<sup>134</sup> In other words, the disclosure of the women’s urine drug test results passed the test for constitutionality<sup>135</sup> as long as the governmental interest was compelling and appropriate.

### 3. *The Supreme Court’s Analysis*

The Supreme Court’s analysis of the case may be viewed as a confounding permutation of Fourth Amendment jurisprudence. The Court’s decision could carve out an area of nonconsent that turns not on whether the individual consented to the search, but rather on whether that individual anticipated the full consequences of the evidence that consent would reveal.<sup>136</sup> In other words, the Court’s analysis may clarify the scope of consent when evidence can be extracted from the by-product of a search.

Although case law supports the transfer of the product of a search to law enforcement,<sup>137</sup> it does not clearly support the transfer of the results of that product’s evaluation and interpretation. As a matter of

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130. *Id.*

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

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

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

134. *See Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998) (holding that when a constitutional right of privacy attaches to personal information, disclosure does not violate the Constitution when “the government’s interest in disseminating the information” outweighs “the individual’s interest in keeping the information private”).

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

136. *Ferguson*, 532 U.S. at 93 (Scalia, J., dissenting). (“Until today, we have never held – or even suggested – that material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain.”).

137. *Ferguson*, 532 U.S. at 84.

fact, in many jurisdictions, an argument could be made that by providing law enforcement with the test results from the patient's medical record, the physician-patient privilege is violated.<sup>138</sup> South Carolina has chosen not to protect the physician-patient relationship in this way.<sup>139</sup> On the contrary, South Carolina has enacted a law making a woman who ingests cocaine after the twenty-fourth week of pregnancy guilty of distribution of a controlled substance to a minor,<sup>140</sup> so no violation of physician-patient privilege could be argued in *Ferguson*.

The Supreme Court's *Ferguson* decision can be viewed as not only remanding the issue of consent, but also the issue of drug abuse and its effect on society to the "laboratory of the states."<sup>141</sup> Clearly, South Carolina has a mandate to resolve this issue in this particular case, and it follows that the state's policy must adhere to the findings on remand. However, the social and health problems identified in *Ferguson* are not unique to South Carolina.

The problem of drug abuse, particularly during pregnancy, deserves attention and redress throughout the United States. Fortunately, members of the United States House of Representatives are working to safeguard the health of mothers and babies, and encouraging the states to work synergistically with the federal government. For example, in July 2001, the Mothers and Newborns Health Insurance Act of 2001 was introduced in Congress, which would expand the availability of coverage of pregnancy-related assistance for targeted low-income women.<sup>142</sup> The bill not only proposed optional coverage for uninsured pregnant women under a state child health plan,<sup>143</sup> but also would provide automatic assistance to a child born of that pregnancy for at least the first year of life.<sup>144</sup> With concerted legislative

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

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

140. S.C. CODE ANN. § 44-53-440 (2002).

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

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

143. *Id.* § 2.

144. *Id.* § 3(f).

and administrative effort, a mechanism could be tailored to afford women treatment during pregnancy for drug addiction.

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

##### A. *Erroneous Presumptions*

In assessing the health care needs of the patients, MUSC's staff did not assume that the women involved proactively chose to expose their fetuses to harmful substances in utero. Rather, they viewed the women's use of harmful drugs during pregnancy not as an exercise of autonomy but instead as a manifestation of the women's inability to refrain from ongoing drug use, due to the effects of the drugs themselves. Accordingly, MUSC's staff's primary purpose for the testing was not that which was presumed by the Supreme Court; it was to care for the special needs of drug addicted mothers and their fetuses.<sup>145</sup>

This case, therefore, qualified for narrow application of the Special Needs Doctrine. The need to assist and protect both mother and fetus was compelling, especially considering the negative physical and neurological effects of maternal cocaine use on developing fetuses.<sup>146</sup> Drug testing and substance abuse treatment could reasonably be expected to be effective,<sup>147</sup> and testing the urine which would have otherwise have been discarded was minimally intrusive.<sup>148</sup>

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

146. *Ferguson*, 532 US at 89-90, citing C. A. Chiriboga et al. *Dose Response Effect Cocaine Exposure on Newborn Neurologic Function*, 103 PEDIATRICS 79 (1999) (detailing "higher rates of intrauterine growth retardation, smaller head circumference, global hypertonia, coarse tremor, and extensor leg posture"), also citing Robert Arendt et al., *Motor Development of Cocaine-exposed Children at Age Two Years*, 103 PEDIATRICS 86 (1999) (noting that exposure to cocaine antenatally "can also result in developmental problems which persist long after birth").

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

148. *Id.* at 479 (finding the context in which the urine sampling occurred "minimally intrusive" since it was done "in the course of medical treatment to

The ultimate wrong suffered by the women was not the violation of their Fourth Amendment rights, which were vindicated by the Supreme Court. Rather, the women were wronged by the dismissal of their need from the consciousness of society through the opportunistic application of the Fourth Amendment.

Although the women walked freely out of the hospital, they walked straight back into poverty and the drug dependence that caused them to harm their wanted fetuses, and resumed their hopeless positions in society. However unhappy the situation to which each woman returned was now compounded by the profound responsibility of a newborn who may have had neurological side effects from in utero drug exposure.<sup>149</sup>

Such side effects commonly cause the affected baby to be irritable, tense, and fussy, which in turn predetermines a difficult, demanding and unrewarding neonatal period that significantly interferes with maternal child bonding.<sup>150</sup> The care of neurologically-affected newborns can be extremely difficult and exhausting. In fact, many state social services agencies recognize this fact and provide respite care to allow the parents of such children some time to recharge,<sup>151</sup> even when those parents have supportive and available family members and do not suffer from active drug addiction. Ironically, the women in *Ferguson* could access such services only if their infants were intervened upon and identified as requiring special care through diagnosis of an abnormality in the infants' neurological development.<sup>152</sup>

### B. Standard Maternal Child Health Care

The staff at MUSC knew that the women were risking their pregnancies by abusing cocaine. They also had firsthand knowledge of the impact of that abuse on the fetuses the women were carrying. Contrary to the contention of the majority of the court in *Ferguson*, the absence of documented change in the women's prenatal or newborn care plans<sup>153</sup> does not equate to a primary focus on law

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which Appellants had consented . . . [and] [t]he giving of a urine sample is a normal, routine and expected part of a medical examination").

149. See Chiriboga et al., *supra* note 146.

150. Scott J. Turner, *Maternal Exposure to Crack Cocaine Produces Stressed Newborns*, at [http://www.brown.edu/Administration/George\\_Street\\_Journal/newborns.html](http://www.brown.edu/Administration/George_Street_Journal/newborns.html) (last visited November 26, 2004).

151. S.C. CODE ANN. § 44-21-60 (2000).

152. *Id.* § 44-22-10(9).

153. *Ferguson*, 532 U.S. at 73 (describing MUSC's intervention plan for women whose urine drug test is positive as consisting only to substance abuse treatment



enforcement. Routine maternal and child health nursing care has long included an assessment of the medication (legal and illegal) consumed by the pregnant woman.<sup>154</sup> Indeed, substance abuse is considered a medical problem that creates risk in any pregnancy.<sup>155</sup>

In a clinical organizational sense, documentation of patients' treatment plans do not belong in MUSC's urine drug testing policy. In fact, exclusion of those plans from that document does not equate to the absence of any such plan as the Court suggests.<sup>156</sup> On the contrary, maternal child health units routinely include specific risk assessment tools in every patient's individual chart. Furthermore, those tools characteristically include substance use or abuse as a major factor for high risk prenatal or labor and delivery care.<sup>157</sup>

The primacy of MUSC's concern for the health of their female patients was demonstrated by their adherence to medical standards for documentation rather than those for law enforcement. Further supporting the inference that MUSC's policy documentation was adequate, if not excellent is MUSC's 1997 receipt of Accreditation with Commendation from the Joint Commission on Accreditation of Healthcare Organizations.<sup>158</sup> Accreditation with Commendation is an honorable recognition that is assigned only to facilities with exemplary clinical organization, including assessment and treatment planning that is integrated into its labor and delivery unit's daily operation.

Accepting, for the sake of argument, that the primary purpose of MUSC's drug testing policy was to assist law enforcement, the assertion of a Fourth Amendment violation suggests that the women

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and making no mention of any change in the prenatal care or special care for the women's newborns).

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

155. SAN DIEGO & IMPERIAL COUNTIES REGIONAL PERINATAL SYSTEM, *FUNDAMENTALS OF LABOR, DELIVERY & RECOVERY NURSING, ANTEPARTUM CARE AND ASSESSMENT* 55 (1999).

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

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

158. Joint Comm. on Accreditation of Healthcare Orgs., *Summary of Quality Information, Medical University of South Carolina Medical Center* (Nov. 22, 2003), at <http://www.jcaho.org/qualitycheck/directry/QualityReport.aspx?hcoid=6584> (last visited Nov. 26, 2004).

exercised a free and healthy choice to expose to harmful substances the fetuses they intended to carry to term and deliver.<sup>159</sup>

On the contrary, the women's use of harmful drugs during pregnancy was not an exercise of autonomy<sup>160</sup> but rather a manifestation of their inability,<sup>161</sup> despite their demonstrated desire to care well for their fetuses, to refrain from ongoing drug use<sup>162</sup> due to a dependency on the drugs themselves.<sup>163</sup> These women were in desperate need of, and entitled to, the health care and treatment that society provides to its members who are incompetent or unable to protect or care for themselves.<sup>164</sup> In other words, the women were in dire need of societal concern<sup>165</sup> and should not have been abandoned to their addictions in the name of protecting the right of others to be left alone.

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

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

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

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

163. Nat'l Clearinghouse for Alcohol & Drug Info., *supra* note 8 (explaining that crack is abused because it induces the sensations of a "quick high, power, euphoria") However, crack is almost instantly addictive, the desirable effects last only a few minutes, and there are more hospitalizations per year resulting from crack and cocaine than any other elicit substance. *Id.*

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

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

## V. SOCIOMEDICALLY RESPONSIVE AND CONSTITUTIONALLY RESPONSIBLE POLICY

The Supreme Court viewed the goal of the urine testing policy as primarily punitive; the goal of any new policy must be the treatment of mother and fetus.<sup>166</sup> Modification of the MUSC policy, and development of any other policy directed at pregnant drug abusers, requires consideration of both the constitutionality of the policy and the degree to which a need for societal intervention exists in those to whom the policy applies.

### A. *Constitutionality*

In creating protection from intrusive government searches, the Framers were motivated by a strong desire to safeguard liberty from the unreasonable acts of law enforcement.<sup>167</sup> The Fourth Amendment was intended to curb law enforcement's exercise of discretionary authority by making reasonable suspicion a prerequisite to warrant issuance.<sup>168</sup> More specifically, the idea that animated the Framers was the "right to be secure," not the right to evade police.<sup>169</sup>

In the case of the pregnant drug abuser, law enforcement's suspicion was raised by the hospital staff's expression of concern which was supported by laboratory evidence. Such reasonable suspicion resulting from derivative use of the results of a consented search is not necessarily protected by the Fourth Amendment. Clearly, however, the hospital's release of the women's medical information to law enforcement is not made permissible by Fourth Amendment jurisprudence, and South Carolina could be expected to statutorily recognize a physician-patient privilege should case law legitimize such a breach of patient confidentiality that could result in criminal charges.<sup>170</sup>

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

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

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

169. *Id.* at 750.

170. See Malia, *supra* note 138.

### B. *Societal Need*

The women used drugs, risking complications and injury to themselves and their fetuses, despite the desire to have a safe and healthy birth. They were in need of intervention into their harmful, illegal activity. The manner in which Fourth Amendment jurisprudence was invoked in *Ferguson* works generally to protect hospital patients from law enforcement involvement. But a dire unintended consequence of this extension of Fourth Amendment analysis may be that it inhibits societal intervention on behalf of the socio-economically disadvantaged women whose maladaptive behaviors society itself fostered-by failing to address their known risk for drug dependence.

Tragically, *Ferguson* may have reduced society's options to imposing criminal sanctions on these women and so on their children, or affording the women and children no attention at all.

Furthermore, application of the Fourth Amendment in this case must be scrutinized within the context of American society. The use of drugs during pregnancy affects not only the user and her fetus<sup>171</sup> but also those citizens whose taxes fund the provision of medical, vocational and educational services to those who require them.<sup>172</sup> To champion the right to be absolutely free from governmental intervention is to champion rights without corresponding responsibility. It is disingenuous to claim any such right and simultaneously ignore the attendant obligation to comply with the tenets of the society that identified and protects these rights.<sup>173</sup> The women sought health care funded through their state and provided through the state's agents, the MUSC staff. Those agents identified and attempted to intervene upon the women's illegal activities, activities that undermined or negated the care which the women themselves requested.

### C. *Judicial and Societal Solutions*

The prognosis for recovery from cocaine dependence without diligent treatment is grim, with half of all addicted patients relapsing

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

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

173. *Id.* at 40-45.

into drug use within a year of detoxification.<sup>174</sup> Although specialized twelve-step cocaine and narcotic programs have been born of the remarkably successful Alcoholics Anonymous program, it is generally recognized by members of those groups that initial stabilization and detoxification from cocaine, and especially crack, requires intervention that the twelve step programs are not designed to provide.<sup>175</sup> Success has been noted, however, in patients who have received rigorous and structured treatment.

Narconon, a substance abuse treatment that utilizes a “purification program” developed by L. Ron Hubbard,<sup>176</sup> boasts a seventy-six percent success rate in treating addiction and describes this as the “highest in the nation.”<sup>177</sup> There are, however, barriers to the use of such a program. Most obviously, the \$21,000 treatment cost excludes most Americans, including the women with whom *Ferguson* was concerned.<sup>178</sup> Additionally, the Narconon program involves mandatory participation in program activities designed to instruct and adjust patients in new methods of communication, ethics, and integrity.<sup>179</sup>

Remarkably, treatment is available to patients whose criminal drug use has been intervened upon by law enforcement. For example, the Department of Justice utilizes special drug courts.<sup>180</sup> Approximately 140,000 drug dependent offenders have been enrolled in such programs since 1989 and seventy percent of them are either still enrolled or have graduated from the program successfully.<sup>181</sup>

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174. Begley, *supra* note 10.

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

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

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

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

179. *Id.*

180. DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, DRUG COURTS PROGRAM OFFICE, OFFICE OF JUSTICE PROGRAMS, UNITED STATES DEPARTMENT OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS, at <http://www.american.edu/academic.depts/spa/justice/publications/decade1.htm> (last visited May 10, 2003).

181. *Id.*

The benefits of The Department of Justice drug court program extend beyond addiction treatment: the program requires that participants obtain a GED, obtain and maintain employment and remain current on all financial obligations. Moreover, participants are subject to and comply with random urine drug screens. The program's success is reflected in the births of over 750 drug-free babies to drug court participants. The program also touts the successful reunification of hundreds of families and the realization of education and vocational training goals for most of its participants.<sup>182</sup>

Similarly, the City of San Diego holds monthly "homeless court" in a shelter for defendants, many of whom are Vietnam Veterans that have outstanding warrants for various, sometimes alcohol-related, infractions of the law.<sup>183</sup> San Diego's public defenders negotiate in advance of the court session with the city prosecutor and defendants typically are receiving counseling or drug treatment before they appear in the special court.

Such courts are springing up in the United States to "combine social work with law by practicing therapeutic jurisprudence . . . some individuals, such as drug addicts and the mentally ill, need treatment more than jail time."<sup>184</sup> Specialization is not new to American courts—bankruptcy, immigration and military courts are well accepted. In time, sociolegal specialty courts could become a uniquely viable mechanism for dealing with sociolegal problems.

## CONCLUSION

Justification for intervening upon drug abusers does not necessarily require a punitive result or judgment against these claimants. The negative impact visited upon society from illegal drugs is sufficient to endorse the use of "force in defense against another party who is a threat, even though he is innocent and deserves no retribution."<sup>185</sup> Indeed, such activity is the function of public health entities, as Lawrence O. Gostin states in *Public Health Law*:

Public health law is the study of the legal powers and duties of the state to assure the conditions for people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to

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182. *Id.*

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

184. *Id.* at 34.

185. ROBERT NOZICK, ANARCHY, STATE, UTOPIA 34 (1974).

constrain the autonomy, privacy, liberty, propriety, or other legally protected interests of individuals for the protection or promotion of community health.<sup>186</sup>

Thus, it is the province of public health entities to act within the confines delineated by the members of the public to whom they answer. In so doing, public health entities must choose productive and beneficent responses, as in the case of the individual drug user's abuse of autonomy. Notably, such intervention by public health agency officials is made all the more legitimate when their instruction is codified by a democratic process.

The *Ferguson* Court attempted to derive a template from Fourth Amendment jurisprudence that would allow them to decide the case in a manner that was consistent with previous case law. Perhaps most significantly, Justice Scalia pointed out that the case required a social judgment, and that the Constitution is not the appropriate tool for the settling of difficult societal questions. Rather, Scalia would have the Court leave the "vast majority of [such questions] to resolution by debate and the democratic process — which would produce a decision by the citizens of Charleston, through their elected representatives, to forbid or permit the police action at issue here."<sup>187</sup> Considered pragmatically, the ultimate goal of healthy mothers and babies will be realized only if women remain willing to seek the care they need. A sound, rigorous, but nonpunitive policy is therefore required.

The groundwork for such a policy has been laid. The State of South Carolina has manifested its values through legislation requiring various professionals to report medical conditions indicating a violation of the law to authorities,<sup>188</sup> as well as through other statutory and judge-made law.<sup>189</sup> The pregnant women in *Ferguson* manifested their desire to foster the health of their fetuses by seeking prenatal care. Accordingly, it is in the best interests of the patients and the common citizen that the state's and its citizens' values be honored as long as it is done in a manner that respects each citizen's individual rights and forwards the ultimate goal of the policy. Such a goal will best be realized through nonpunitive, therapeutic legal intervention.

There is room to speculate that such a change in health care intervention may be welcomed by the women involved. For example,

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186. GOSTIN, *supra* note 24, at 4.

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

188. S.C. CODE ANN. § 20-7-510 (2000).

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

critics of state delivery of health care contend that the emphasis on each state's autonomy in health service plans results in inadequate care for ethnic Americans.<sup>190</sup> The United States' health care system might benefit from studying the social service programs that intervene upon particular health problems that have been implemented in Europe and successfully protect the health and welfare of its citizens.<sup>191</sup>

A balance must be struck, however, between beneficent oversight and the respect for patient autonomy. The late Justice William J. Brennan once wrote,

In *The Republic* and in *The Laws*, Plato offered a vision of a unified society, where the needs of children are met not by parents but by the government, and where no intermediate forms of association stand between the individual and the State. This vision is a brilliant one, but it is not our own.<sup>192</sup>

Indeed, each state within the United States, with its rich mix of social, political, religious, and ethnic groups, must strive to discover and apply necessary basic ethical principles in their investigation and thoughtful consideration of the benefits and risks of potential course of action.<sup>193</sup> In so doing, each state is challenged to persist in the effort to achieve an ultimate and real goal: to support women specifically in their pursuit of safe and healthy pregnancy by providing every woman all necessary health care, regardless of her socioeconomic status.

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190. See Vernellia R. Randall, *Symposium: Does Clinton's Health Care Reform Proposal Ensure Equality of Health Care for Ethnic Americans and the Poor?*, 60 BROOK. L. REV. 167, 180-182 (1994) (criticizing the emphasis on state's autonomy in health service plans and describing the resulting inadequacy of care provided to ethnic Americans).

191. GLENDON, *supra* note 172, at 99 (citing Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 SUP. CT. REV. 311, 328 and David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986)).

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

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