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A DEADLY CURE: THE SUPREME COURT'S DANGEROUS MEDICINE IN FERGUSON V. CITY OF CHARLESTON

GEORGE M. DERY III*

I. Introduction

The United States Supreme Court, in Ferguson v. City of Charleston,1 determined that its "special needs" doctrine could not support drug testing of expectant mothers without their consent2 and that the practice thus violated the Fourth Amendment.3 Such a ruling seems hardly controversial given the unsympathetic treatment shown to the mothers by local law enforcement. One mother who visited the hospital with early contractions wound up jailed during the remainder of her pregnancy, while the police "shackled and handcuffed" another as she delivered her baby.4 No less an authority than the American Medical Association urged that such drug testing, despite its intentions of protecting children, might actually increase, not decrease, "the potential harm to unborn infants."5 Thus, Ferguson, in preventing the drug testing of expectant mothers, not only aimed to protect Fourth Amendment boundaries, but also intended to prevent misguided doctors from worsening their patients' health.

It is therefore ironic that the Ferguson Court, acting as a team of doctors protecting the health of the Fourth Amendment, prescribed a cure that might ultimately kill its patient. The irony is further compounded by the fact that the initial disease afflicting the Fourth Amendment was itself iatrogenic.6 In the mid-

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2. Id. at 84.
3. The Fourth Amendment provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.
6. Webster's Dictionary defines "iatrogenic" as "induced inadvertently by a physician or surgeon or
1980s, the Court determined that it was "impracticable" to measure the reasonableness of certain government conduct, such as the enforcement of school rules by public school teachers, by the Fourth Amendment's traditional warrant and probable-cause protections. For such "exceptional circumstances," where the government's interests went beyond "the normal need for law enforcement," the Court grafted onto the Fourth Amendment a doctrine of its own invention — "special needs." As discussed below, special needs transplanted into Fourth Amendment analysis a judicial balancing of the competing interests of the government and the individual. This, in turn, enabled the Court's subjectivity, over a series of decades, to infect Fourth Amendment fundamentals. Only recently have the Justices become aware of the special needs contagion. The Court's latest efforts in Ferguson, however, instead of cleansing the Constitution of special needs, have only created greater opportunity for the spread of infection.

This Article begins by reviewing the history of the special needs doctrine in Part II. Part III presents Ferguson: its factual background, lower court rulings, and the Supreme Court's own decision. Finally, in light of Ferguson, Part IV discusses the new perils presented by the Court's latest strain of special needs.

II. Historical Background

A. New Jersey v. T.L.O.: The Index Case of the "Special Needs" Infection

The special needs doctrine began as a germ of an idea so insignificant that it initially failed to persuade a majority of the Court. Indeed, Justice Black was the first to mention specifically "special needs" in a concurring opinion in New Jersey v. T.L.O. In T.L.O., a high school teacher caught T.L.O., a fourteen-year-old freshman, and another student violating school rules by smoking in the girl's bathroom. When the teacher reported the students to Assistant Vice Principal Theodore Choplick, T.L.O.'s companion admitted to violating the school rule. In contrast, T.L.O. not only denied that she had been smoking in the lavatory, but "claimed that she did not smoke at all." Mr. Choplick then searched T.L.O.'s purse, finding cigarettes, marijuana, a pipe, and evidence of marijuana dealing. The vice principal turned the evidence over to police, and New Jersey pursued delinquency charges against T.L.O. in court.

8. Id.
9. See Chandler v. Miller, 520 U.S. 305 (1997). In Chandler, the Court determined that drug testing candidates for state office, even under the guise of special needs, was unreasonable under the Fourth Amendment. Id. at 307.
11. Id. at 328.
12. Id.
13. Id.
14. Id.
15. Id. at 328-29.
The war of wills between T.L.O. and her vice principal presented the U.S. Supreme Court with an entirely new battlefield. No longer was the Court judging the typical case of a police officer pursuing a criminal investigation; it now was considering the actions of a school official trying to maintain school discipline in order to foster the proper educational environment. Justice White, writing for the Court, was aware of the important interests implicated on both sides of the case in this unique setting. He declared that a school official's search of a student's person or purse was "undoubtedly a severe violation" of privacy expectations.\(^\text{16}\) The Court further took care to explicitly announce that "there is no reason to conclude that [students] have necessarily waived all rights to privacy" in items they bring to school."\(^\text{17}\) However, the T.L.O. Court was also fully cognizant that the "substantial interest of the teachers and administrators in maintaining discipline in the classroom and on school grounds" required a "certain degree of flexibility in school disciplinary procedures."\(^\text{18}\)

Given the particular concerns presented in the campus setting, Justice White asked, "How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place?"\(^\text{19}\) The answer came from the same place as the problem: the "school setting."\(^\text{20}\) The Court deemed the "warrant requirement" to be "unsuited to the school environment."\(^\text{21}\) Likewise, the "school setting" required "some modification of the level of suspicion," thus diluting probable cause to some lower level of suspicion.\(^\text{22}\) Justice White explained, "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."\(^\text{23}\) Then, in place of Fourth Amendment fundamentals, the Court, when considering the intrusion on a student's privacy, based legality "simply on the reasonableness, under all the circumstances, of the search."\(^\text{24}\) The resulting weighing of facts in T.L.O. found Mr. Choplick's search of the purse to be reasonable.\(^\text{25}\)

It fell to Justice Blackmun to provide the doctrinal label to the Court's balancing of interests. He argued that the Court had omitted a "crucial step" in abandoning probable cause in favor of balancing of interests.\(^\text{26}\) Justice Blackmun wrote, "I

\[\text{16. Id. at 337-38.}\]
\[\text{17. Id. at 339.}\]
\[\text{18. Id. at 339-40.}\]
\[\text{19. Id. at 340.}\]
\[\text{20. Id.}\]
\[\text{21. Id.}\]
\[\text{22. Id. at 340-41.}\]
\[\text{24. Id.}\]
\[\text{25. Id. at 343-47.}\]
\[\text{26. Id. at 351 (Blackmun, J., concurring).}\]
believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with 'a special law enforcement need for greater flexibility.' 27 Special needs was to be truly special; this doctrine created a rarely used balancing test employed in those extreme circumstances not foreseen by the Founders. Justice Blackmun explained, "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." 28 Justice Blackmun identified the special need in T.L.O. as involving education. He noted, education "is perhaps the most important function" of government, and government has a heightened obligation to safeguard students whom it compels to attend school. The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests. 29 

The Court also balanced the interests in the State's favor in Griffin v. Wisconsin, 30 a case involving a much higher level of individual supervision than that occurring in T.L.O. In Griffin, a jury convicted the defendant of "possession of a firearm by a convicted felon" based on evidence uncovered during a search of his home by probation officers. 31 Acting on a tip from a detective on the Beloit Police Department that "there were or might be guns in Griffin's apartment," Michael Lew, a Probation Department supervisor, brought another probation officer and three plainclothes police officers to Griffin's home. 32 When Griffin answered the door, Lew told him who they were and that they were going to search his home. 33 Rather than obtain a search warrant, the officers based their search authority on Wisconsin's probation regulations. 34 Wisconsin law deemed probationers to be "in the legal custody of the State Department of Health and Social Services and render[ed] them 'subject . . . to . . . conditions set by the court and rules and regulations established by the department.' " 35

The Court, in an opinion authored by Justice Scalia, categorized Griffin as a special needs case. Specifically, Justice Scalia noted, "A State's operation of a

27. Id. (quoting Florida v. Royer, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)).
28. Id.
29. Id. at 353 (Blackmun, J., concurring) (citation omitted) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
31. Id. at 871-72.
32. Id. at 871.
33. Id.
34. Id. at 870-71.
35. Id. at 870 (alterations in original) (quoting Wis. Stat. § 973.10(1) (1985-1986)).
probation system, like its operation of a school, . . . likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." This departure was warranted in spite of the fact that "[p]robation, like incarceration, is 'a form of criminal sanction.'" In fact, the Court explicitly placed probation in the larger scheme of law enforcement by characterizing it as "simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service."

However, the Griffin Court did not stop its special needs analysis simply because it characterized probation as part of law enforcement. Instead, it followed a multidimensional approach, considering other purposes served by probation. Probation, the Court noted, provided for "a period of genuine rehabilitation." Indeed, the "more intensive supervision" caused an empirically measured decrease in recidivism. The restrictions of probationary supervision also ensured that the "community is not harmed by the probationer's being at large." All of these aims caused the Court to label "supervision" itself a "special need."

Due to probation's special needs status, the Griffin Court rejected the warrant requirement as interfering "to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires." Further, the delay of "obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct," thus reducing the "deterrent effect" of any searches. Justice Scalia also saw less need for a warrant to protect the probationer than for "the ordinary citizen," for the probation officer had a unique relationship with the probationer. As the Court noted, "Although a probation officer is not an impartial magistrate, neither is he the police officer . . ." Instead, the probation officer was a sort of hybrid, serving more than one master. Justice Scalia described a probation officer as "an employee of the State Department of Health and Social Services who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer (who in the regulations is called a 'client')."

36. Id. at 873-74.
37. Id. at 874 (quoting George G. Killinger et al., Probation and Parole in the Criminal Justice System 14 (1976)).
38. Id.
39. Id. at 875.
40. Id.
41. Id.
42. Id.
43. Id. at 876.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id. (citation omitted). Included in the services a probation officer provides his client is
Probation's supervisory relationship required not only dispensing with the warrant, but also with probable cause. 49 Griffin determined that probable cause "would reduce the deterrent effect of the supervisory arrangement" because an officer would not be able to search his client so long as the "illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion."50 In rejecting probable cause, the Court again concerned itself with the interaction between probation officer and client. It noted, "[W]e deal with a situation in which there is an ongoing supervisory relationship — and one that is not, or at least not entirely, adversarial — between the object of the search and the decisionmaker."51 Finally, in its concluding remarks dispensing with probable cause, the Griffin Court singled out the heightened interests of the government in combating contraband. Here, Justice Scalia offered, "In some cases — especially those involving drugs or illegal weapons — the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society."52

B. The Special Needs Infection Invades the Privacy of the Human Body

The Court's next case employing special needs balancing extended government intrusion from a search of a purse or an apartment to an exploration of fluids from a person's body. In Skinner v. Railway Labor Executives' Ass'n,53 the Federal Railroad Administration (FRA) promulgated regulations regarding the testing of biological samples from railroad operators.54 One regulation, "Subpart C,"55 mandated "blood and urine tests of employees who are involved in certain train accidents."56 The second regulation, "Subpart D,"57 permitted the railroads to "administer breath and urine tests to employees who violate certain safety rules."58 The Railway Labor Executives' Association, and other labor organizations, sued to enjoin the FRA's regulations.59

In its first consideration of the Fourth Amendment implications of toxicological testing, the Court recognized that, "in most criminal cases," it favors "the

49. Id. at 878.
50. Id.
51. Id. at 879.
52. Id.
54. Id. at 606.
56. Skinner, 489 U.S. at 606; see also id. at 609. Examples include accidents resulting in a fatality, the release of hazardous material and accompanying evacuation, and damage to railroad property of $500,00 or more. Id. at 609 (citing 49 C.F.R. § 219.201(a)(1) (1987)).
58. Skinner, 489 U.S. at 606; see also id. at 611.
59. Id. at 612.
procedures described by the Warrant Clause of the Fourth Amendment.\textsuperscript{60} However, Justice Kennedy, authoring the majority opinion, also noted that the Court has made exceptions to the warrant and probable-cause mandates "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"\textsuperscript{61} 

Skinner echoed T.L.O. by announcing that, in such cases, "we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context."\textsuperscript{62}

Accordingly, Justice Kennedy did not hesitate to employ special needs balancing in Skinner. He likened the "[g]overnment's interest in regulating the conduct of railroad employees to ensure safety" to its operation of schools or supervision of probationers.\textsuperscript{63} Railroads thus implicated "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'"\textsuperscript{64} Railway employees engage in "safety sensitive tasks" and, therefore, the legislation in this area was aimed at protecting "'life and property.'"\textsuperscript{65} The FRA's toxicological tests were "not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'"\textsuperscript{66} Thus, the government's interest in protecting the public and the employees themselves from the dangers of combining drugs and trains required "'the exercise of supervision to assure that the restrictions are in fact observed.'"\textsuperscript{67}

Once the Court determined that the need for railway safety transported Skinner's toxicological testing into the special needs realm, the Court then simply balanced the competing interests to assess the practicability of the warrant and probable-cause requirements. In the railroad context, warrants presented several problems.\textsuperscript{68} Because the regular functioning of the human body eliminates "alcohol and other drugs . . . from the bloodstream at a constant rate," the delay involved in procuring a warrant could "result in the destruction of valuable evidence."\textsuperscript{69} Further, the government's reliance on private railroad personnel "to set the testing process in motion" made the warrant mandate all the more unworkable.\textsuperscript{70} Railroad supervisors, like school officials and hospital administrators, are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court's

\textsuperscript{60} Id. at 619.
\textsuperscript{61} Id. (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 620.
\textsuperscript{64} Id. (quoting Griffin, 483 U.S. at 873-74).
\textsuperscript{65} Id. (quoting Baltimore & Ohio R.R. Co. v. ICC, 221 U.S. 612, 619 (1911)).
\textsuperscript{66} Id. at 620-21 (quoting 49 C.F.R. § 219.1(a) (1987)).
\textsuperscript{67} Id. at 621 (quoting Griffin, 483 U.S. at 875).
\textsuperscript{68} Id. at 623.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
Fourth Amendment jurisprudence." Thus, the warrant requirement would hurt more than help in the context of toxicological testing of railway employees. Probable cause fared even worse in Skinner than did the warrant requirement. Warning that "a showing of individualized suspicion is not a constitutional floor," the Court dispensed not only with probable cause, but with any level of suspicion to support toxicological testing. Justice Kennedy declared,

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.

Thus, to satisfy the terms of the Court's balancing test, the majority had to consider Skinner's blood, breath, and urine intrusions to be "minimal." The blood withdrawals satisfied this standard because their intrusion was "not significant, since such 'tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." Further, an employer could further mitigate a blood test's intrusion by ":"[having] blood . . . taken by a physician in a hospital environment according to accepted medical practices." The Skinner Court thus concluded that "'[t]he blood test procedure has become a routine in our everyday life." Justice Kennedy then deemed breath tests "even less intrusive" than blood tests, for among other reasons, breath tests are conducted without piercing the skin.

The urine tests presented the Court with "a more difficult question," for such procedures required employees to "perform an excretory function traditionally shielded by great privacy." Interestingly, the Court found these intrusions to be "minimal," in part, because of the "medical environment" in which the samples were collected. Indeed, Skinner characterized the urine tests as "not unlike similar procedures encountered often in the context of a regular physical examination."
In contrast to the "limited threats" to an employee's "justifiable expectation of privacy," the Skinner majority found the dangers to the government interests from impaired railroaders to be significant.\(^{93}\) Justice Kennedy warned, "Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."\(^{94}\) Thus, government interest in monitoring "railroad employees engaged in safety-sensitive tasks"\(^{95}\) was an established necessity. Finally, because mandating any individualized suspicion in the wake of a train disaster would be "unrealistic, and inimical to the Government's goal of ensuring safety in rail transportation,"\(^{96}\) the "[g]overnment interest in testing without a showing of individualized suspicion" was "compelling."\(^{97}\) Special needs thus enabled the Court, in balancing interests regarding one of the "most private of activities,"\(^{98}\) to discard not only the warrant requirement, but also any protection of an individualized suspicion standard.\(^{99}\)

Justice Kennedy also wrote the majority opinion in National Treasury Employees Union v. Von Raab\(^{100}\) — the Court's next case involving drug testing of biological samples. In Von Raab, a federal employee's union sued the United States Custom Service for performing urinalysis of its employees.\(^{101}\) Specifically, the Customs Commissioner required employees to submit to drug tests as a condition of placement in positions involving drug interdiction, carrying of a firearm, or handling classified material.\(^{102}\)

At the outset in Von Raab, the Court noted that the case involved the "United States Custom Service," which had the "important responsibility" of "interdiction and seizure of contraband, including illegal drugs."\(^{103}\) Von Raab emphasized that "in 1987 alone, Customs agents seized drugs with a retail value of nearly $9 billion."\(^{104}\) The Court then further highlighted the law enforcement role of the Customs Service by offering the following:

> In the routine discharge of their duties, many Customs employees have direct contact with those who traffic in drugs for profit. Drug import operations, often directed by sophisticated criminal syndicates, may be effected by violence or threat. As a necessary response, many Customs operatives carry and use firearms in connection with their official duties."\(^{105}\)

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83. Id. at 628.
84. Id.
85. Id. at 633.
86. Id. at 631.
87. Id. at 628.
88. Id. at 645 (Marshall, J., dissenting).
89. 489 U.S. 656 (1989).
90. Id. at 663.
91. Id. at 660-61.
92. Id. at 659-60.
93. Id. at 660.
94. Id. (citation omitted).
Despite the Customs Service's intensive law enforcement atmosphere, the Von Raab Court still labeled the drug testing of these soldiers in the drug war as one of the "special governmental needs, beyond the normal need for law enforcement." Justice Kennedy concluded, "It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. The purpose of the toxicological tests was not to pursue "criminal prosecution of the employee," but to "deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions." Once in the special needs context, Von Raab reiterated that it had become a "longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." The Von Raab Court, accordingly, dispensed with these Fourth Amendment fundamentals due to the balance of interests in the case. The "veritable national crisis in law enforcement caused by smuggling of illicit narcotics" created a "compelling interest" for the government to monitor its "front-line interdiction personnel."

Against these "valid public interests," the Court weighed "the interference with individual liberty that results from requiring these classes of employees to undergo a urine test." After grudgingly recognizing that a drug screen's invasion of privacy "could be substantial in some circumstances," Justice Kennedy countered that "the 'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." Moreover, the Court considered it "plain" that "certain forms of public employment may diminish privacy expectations," even with respect to searches of the body. Customs employees "who are directly involved in the interdiction of illegal drugs or who are required to carry firearms" are in such a form of public service and, therefore, "have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test." By virtue of their very position, certain Customs employees "reasonably should expect" such intrusions. The balance of interests thus tilted in the government's favor, making Von Raab's toxicological testing reasonable.

95. Id. at 665.
96. Id. at 666.
97. Id.
98. Id. at 665.
99. Id. at 668 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).
100. Id. at 670.
101. Id. at 671.
102. Id. (quoting O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (plurality opinion)).
103. Id.
104. Id. at 672.
105. Id.
106. Id. at 679.
Special needs made its farthest inroads into privacy in the Court's next case, Vernonia School District 47J v. Acton. In Acton, faculty and administrators in a school in the small logging town of Vernonia saw a sharp increase in discipline problems, drug use, and drug-related accidents during the mid-1980s. School officials ultimately by mandating that every student wishing to participate in school athletics must sign waivers authorizing two testing procedures. One procedure required urinalysis of all athletes at the start of each season, without regard to the existence or absence of individualized suspicion of drug use. The next regime subjected students to random drug testing by having 10% of athletes provide a weekly urine sample. For the random testing, a student, under the supervision of an adult monitor of the same sex, would produce a urine sample in an empty locker room. The monitor would station himself about fifteen feet behind each male athlete, while the student produced the sample at a urinal. The monitor ensured the legitimacy of the sample by listening for sounds of urination, checking the sample for temperature, and looking for signs of tampering. The school similarly compelled female athletes to produce samples; however, they were enclosed in bathroom stalls while providing the samples. The school did not prosecute students who tested positive. Instead, any athlete with two positive results could choose between attending an "assistance program" that mandated weekly urinalysis or being suspended from athletics.

The Acton Court, in an opinion written by Justice Scalia, categorized the case as one of "special needs." Interestingly, urinalysis testing triggered special needs balancing at least in part because of the novelty of its intrusion. Justice Scalia declared,

At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

108. Id. at 648.
109. Id. at 650.
110. Id.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
116. The Acton Court noted, "[F]inally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function." Id. at 658.
117. Id. at 651.
118. Id. at 653.
He further explained that compulsory school legislation did not exist until Massachusetts pioneered the movement in 1852.\textsuperscript{120} Moreover, "the drug problem, and the technology of drug testing, are of course even more recent."\textsuperscript{121} Thus, by inventing a new way to intrude upon privacy, such as the urinalysis in\textit{Acton}, the government could avoid the more stringent fundamentals of the Fourth Amendment in favor of special needs balancing.

The balancing involved, however, was not simply balancing the government's interests on the one hand against those of the individual on the other. Instead,\textit{Acton} crafted a complicated multiprong test.\textsuperscript{122} Justice Scalia pigeonholed the competing interests into three factors: 
\begin{itemize}
\item[1.] the decreased expectation of privacy,
\item[2.] the relative unobtrusiveness of the search, and
\item[3.] the severity of the need met by the search.
\end{itemize}

\textit{Acton}'s first factor, "the nature of the privacy interest" of the individual, varied both with the "context" in which it is being asserted, and upon "the individual's legal relationship with the State."\textsuperscript{124} Regarding the relevance of context, Justice Scalia noted that the legitimacy of students' privacy expectations could be eroded by their act of "going out for the team."\textsuperscript{125} School sports were "not for the bashful," as public locker rooms, where students "suit up" and shower, were "not notable for the privacy they afford."\textsuperscript{126} Rather, athletics exposed students to an atmosphere of "communal undress."\textsuperscript{127}

A person's relationship to the government could similarly harm privacy interests. For instance, the State's "supervisory relationship" with the probationer "justifies a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large."\textsuperscript{128} Likewise, the government has exercised a "custodial and tutelary" power over schoolchildren entrusted to its care, which has required school officials to act, "for many purposes," as "in loco parentis."\textsuperscript{129}

Applying\textit{Acton}'s second prong, which focused on the "character of the intrusion that is complained of," the Court conceded that compelled urinalysis intruded upon "an excretory function traditionally shielded by great privacy."\textsuperscript{130} Despite this, Justice Scalia equated the manner of obtaining the sample to a routine visit to the restroom, thus making any traditional privacy shield unnecessary.\textsuperscript{131} The obtrusiveness of the search was also affected by the content of information it

\begin{footnotesize}
\begin{enumerate}
\item[120.] Id. at 652 n.1.
\item[121.] Id.
\item[122.] Id. at 664-65.
\item[123.] Id.
\item[124.] Id. at 654.
\item[125.] Id. at 657.
\item[126.] Id.
\item[127.] Id.
\item[128.] Id. at 654 (alteration in original) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).
\item[129.] Id. at 655.
\item[130.] Id. at 658 (quoting Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 626 (1989)).
\item[131.] Id.
\end{enumerate}
\end{footnotesize}
discovered. Justice Scalia considered it "significant that the tests at issue here look only for drugs." He then contrasted such a minimal invasion to the more severe privacy breach of learning whether a person is pregnant. Finally, Acton considered urinalysis to be "like routine school physicals and vaccinations," rather than like evidentiary searches. Such reasoning led the Court to label the privacy intrusion of Vernonia's compelled urinalysis as "negligible" and "not significant."

Acton then assessed the severity of the need met by the search, breaking this inquiry into a consideration of both the "nature and immediacy" of the relevant governmental concern. Justice Scalia intoned that the importance of the government's concern could "hardly be doubted," for it was nothing less than "[d]elighting drug use by our Nation's schoolchildren." The Court emphasized this point by specifying the health problems caused by drugs, particularly in children. Justice Scalia worried,

School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor."

The Acton Court delved still further into the clinical dangers of drugs, considering such medical particulars as "heart rate increase," "vasoconstriction," and the "inhibition of normal sweating responses."

The government's interest included not only the health of those students who ingested the drugs, but other children under its care as well. The Court noted that "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." Compounding this concern was "the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." These potential perils, combined

132. Id.
133. Id.
134. Id.
135. Id. at 658 n.2.
136. Id. at 658.
137. Id. at 660.
138. Id.
139. Id. at 661.
140. Id.
141. Id. (quoting Richard A. Hawley, The Bumpy Road to Drug-Free Schools, 72 PHI DELTA KAPPAN 310, 314 (1990)).
142. Id. at 662.
143. Id.
144. Id.
145. Id.
with the immediacy of the government interest in quelling a student "rebellion" fueled by drugs, as well as the efficacy of targeting athletes as the role models of drug use, led the Court to conclude that the balance of interests tilted in the direction of reasonableness.

C. The Court Belatedly Recognized Special Needs' Danger to Fourth Amendment Privacy

Like a physician who suddenly discovers a medical emergency after having negligently watched a patient's vital signs, the Court abruptly changed the course of its special needs precedent in Chandler v. Miller. Unfortunately, as is common in emergencies, the Chandler Court's actions seemed based more on confused panic than on quiet reason. Chandler grew out of a Georgia statute that required candidates for certain state offices, including governor, the attorney general, and judges, to certify that they had taken and passed a drug test. In 1994, Walker L. Chandler, candidate for Lieutenant Governor, along with other Libertarian Party nominees, filed suit in federal court, claiming that Georgia's drug-testing requirement violated the First, Fourth, and Fourteenth Amendments of the United States Constitution.

The mandated testing was, in several ways, less intrusive than that previously upheld in Acton. While the school administration in Acton compelled students to urinate under the watchful eye of a faculty monitor, the candidates in Chandler merely had to present a certificate reporting that they had "submitted to a urinalysis test within 30 days prior to qualifying for nomination or election and the results were negative." Acton's students had no choice about where to perform their urinalysis. In contrast, every candidate in Chandler could choose to provide a specimen at a state-approved laboratory or at the office of a personal physician. In Chandler, if the candidate suffered a positive result at the doctor's office, he could simply prevent disclosure to any state official by not filing the certificate. Acton's urinalysis scheme failed to provide students with any such "opt-out" choice.

The Court in Chandler, in an opinion written by Justice Ginsburg, found that Georgia's urinalysis requirement for candidates violated the Fourth Amendment. Although it refused to expand special needs to include drug testing of political candidates, Chandler still defended the doctrine's legitimacy. Indeed, Justice

146. Id. at 662-63.
147. Id. at 664-65.
149. Id. at 309-10.
150. Id. at 310.
151. Id. at 309.
152. Id. at 310.
153. Chandler v. Miller, 73 F.3d 1543, 1547 (11th Cir. 1996), rev'd, 520 U.S. 305 (1997). Justice Ginsburg noted that the "results of the test are given first to the candidate, who controls further dissemination of the report." Chandler, 520 U.S. at 318.
154. Chandler, 520 U.S. at 308.
Ginsburg raised the balancing approach to the exalted status of a constitutional mandate, intoning, "When such 'special needs' — concerns other than crime detection — are alleged in justification of Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."\(^{155}\)

The *Chandler* Court then reviewed the competing concerns in the special needs precedent. *Skinner* presented significant government interests because railroad employees could "cause great human loss" even before supervisors could detect signs of impairment.\(^{156}\) *Von Raab* concerned the U.S. Customs Office, a government agency with an "almost unique mission" as the "first line of defense" against importing drugs into the country.\(^{157}\) In *Acton*, the government was burdened with "large responsibilities" over the "children entrusted to its care."\(^{158}\)

*Chandler*, in contrast, simply lacked such concerns. An exasperated Justice Ginsburg noted, "Nothing in the record hints that the hazards [the government] broadly describe[s] are real and not simply hypothetical for Georgia's polity."\(^{159}\)

The Court searched in vain for a "demonstrated problem of drug abuse," which, "while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program."\(^{160}\)

Regarding the government's side of the balance, the need was "in short, symbolic, not 'special,' as that term draws meaning from our case law."\(^{161}\)

When *Chandler* considered the candidates' privacy interests, it recalibrated its balancing scales. Traditional special needs reasoning deemed that individuals shrank their reasonable expectation of privacy by participating in settings involving pervasive oversight.\(^{162}\) In *Chandler*, such constant scrutiny actually *increased* privacy expectations from government intrusion. Justice Ginsburg reasoned that because "[c]andidates for public office . . . are subject to relentless scrutiny — by their peers, the public, and the press," any government drug-testing program was unnecessary.\(^{163}\) Finally, *Chandler* criticized Georgia's drug-testing scheme for not *intruding enough*; because the testing date was not secret, the state's legislative scheme enabled drug abusers to cheat the system with temporary abstention.\(^{164}\)

The urinalysis was thus an ineffective, and therefore meaningless, intrusion into individual rights.

The *Chandler* Court, acting as a doctor stunned by the sudden worsening of a patient's condition, applied its special needs remedy in a rough and sloppy manner. To the end, *Chandler* irrationally clung to the belief that the special needs doctrine

\(^{155}\) *Id.* at 314 (emphasis added).

\(^{156}\) *Id.* at 315.

\(^{157}\) *Id.* at 316.

\(^{158}\) *Id.*

\(^{159}\) *Id.* at 319.

\(^{160}\) *Id.* (citation omitted).

\(^{161}\) *Id.* at 322.


\(^{163}\) *Chandler*, 520 U.S. at 321.

\(^{164}\) *Id.* at 319-20.
was good medicine, reiterating that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable.'" The Court therefore simply administered the same treatment in a different, if unpredictable, manner. Such a failure came to foreshadow further blunders in Ferguson.

III. Ferguson v. City of Charleston

A. Factual Background

In 1988, Charleston found itself enmeshed in a struggle to provide healthcare to crack babies and their drug-addicted mothers. Specifically, the staff at the Medical University of South Carolina (MUSC), a public hospital operated in Charleston, "became concerned about an apparent increase in the use of cocaine by patients who were receiving prenatal treatment." Such alarm was part of a larger national picture, in which both the public and the "medical community" worried about an "epidemic" of "crack babies."

Crack use could create a number of "serious consequences for both maternal and infant health." Dangers to mothers included: "risk of premature delivery, premature separation of the placenta (abruptio placentae), spontaneous abortion, and death." Infants who were exposed to cocaine in the womb could suffer increased risk of sudden death syndrome, low birth weight, seizures, strokes, heart attacks, lack of bonding, emotional disorders, behavioral problems, ... learning disabilities ... brain damage, prune belly syndrome, limb reduction defects, kidney damage, and damage to the genitourinary and reproductive systems.

Moreover, even a single dose of crack cocaine could "kill the baby and the mother too." Medical research indicated that the cocaine problem was widespread. One study showed that "each year in South Carolina, alone, approximately 15,000 babies suffered from prenatal exposure to illegal drugs." In 3221 of these cases, cocaine was the mother's drug of choice. Cocaine use during pregnancy had a ripple effect far into the future of both the child and society. Crack babies increased

165. Id. at 323.
167. Id.
168. Id. at 70 n.1.
170. Id.
171. Id.
172. Id.
173. Id. at 5.
174. Id.
the need for neonatal intensive care, social services, foster care, and special education services.¹⁷⁵ These children also suffered "lower levels of achievement of educational and occupational goals, increased family stress, and reduced maternal bonding."¹⁷⁶ Charleston also gathered evidence that, in severe cases, "lifetime economic costs [would be] in excess of $1 million per infant."¹⁷⁷

Charleston responded to these public health dangers by placing MUSC's employees in the awkward position of treating some pregnant women both as patients and as potential targets of criminal prosecution. In April 1989, MUSC began drug screening maternity patients suspected of cocaine use.¹⁷⁸ Due to concerns about "the degree of discretion in allowing individual physicians to order urine drug tests without any parameters," MUSC established "six criteria to control the discretion."¹⁷⁹ The hospital then referred patients who tested positive to the County Substance Abuse Commission "for counseling and treatment."¹⁸⁰ This policy proved ineffective in reducing the incidence of maternity patient cocaine use,¹⁸¹ for virtually none of the patients that MUSC referred to the substance abuse commission followed through with treatment.¹⁸²

The case manager for MUSC's obstetrics department, nurse Shirley Brown, was undaunted by the program's earlier failure.¹⁸³ She had heard on the news that "police in Greenville, South Carolina were arresting pregnant users of cocaine on the theory that such use harmed the fetus and was therefore child abuse."¹⁸⁴

Nurse Brown further learned that, "under state law, prenatal cocaine use constituted child abuse and neglect which the Medical Center was required to report to law enforcement."¹⁸⁵ Nurse Brown discussed her concerns with MUSC's general counsel, Joseph C. Good, Jr., who in turn offered the hospital's help to Charleston Solicitor General Charles Condon in "prosecuting mothers whose children tested positive for drugs at birth."¹⁸⁶ Good's letter spoke explicitly about fighting crime, urging, "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."¹⁸⁷

In response to MUSC's letter, Solicitor Condon formed a task force that included representatives from "MUSC, the police, the County Substance Abuse Commission and the Department of Social Services."¹⁸⁸ The task force's stated objective was

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¹⁷⁵. Id.
¹⁷⁶. Id.
¹⁷⁷. Id.
¹⁷⁹. Respondent's Brief at 5-6.
¹⁸⁰. Ferguson, 532 U.S. at 70.
¹⁸¹. Id.
¹⁸². Respondent's Brief at 6.
¹⁸³. Ferguson, 532 U.S. at 70.
¹⁸⁴. Id.
¹⁸⁵. Respondent's Brief at 6.
¹⁸⁶. Ferguson, 532 U.S. at 70-71.
¹⁸⁷. Id. at 71 n.3.
¹⁸⁸. Id. at 71. The city of Charleston viewed this as a "multidisciplinary task force . . . consisting of representatives from different agencies with varied interests in formulating a solution." See
to "maximize maternal-fetal health and protect children." The task force's deliberations indicated that "this was not supposed to be a punitive policy where we went out and punished people for doing something, even though we knew the activity was illegal. What we were trying to do is give those babies a chance to be born normal." Because the "voluntary referral" program failed, "the substance abuse representative on the task force proposed 'the carrot and stick' method of coercive treatment as a last resort in dealing with the problem." He explained that such leverage was necessary to get the addict's attention, for most are "in such a state of denial that they will not voluntarily seek help."

The result of the task force's deliberations was "Policy M-7" for "Management of Drug Abuse During Pregnancy." Policy M-7 had three steps, only the last of which involved law enforcement. In the first step, the hospital identified pregnant patients who were abusing drugs. The second step included providing patients who tested positive with "educational information and referring [them] to substance abuse counseling." In the third step, the hospital used "the threat of law enforcement intervention" as "leverage" to get the "women into treatment and keep[] them there."

The task force carefully crafted all three steps, however, with the potential of criminal conviction in mind. In its first pages, Policy M-7 instructed hospital staff on how to "identify/assist pregnant patients suspected of drug abuse." These guidelines declared that the hospital should administer a urine drug screen for cocaine to any patient meeting "one or more of nine criteria." Such criteria were

Respondent's Brief at 6. Specifically, the city noted that MUSC's obstetrical and neonatology staff "had a vital interest in maternal and infant health"; the Solicitor's Office and Police had "an interest in protecting the infants and enforcing the laws governing illegal drug use and child abuse and neglect"; the Department of Social Services had an interest in "safeguarding the health and welfare for the infants"; and the County Substance Abuse Commission had an interest in "providing services for treatment of drug abuse." Id. at 7.

189. Respondent's Brief at 7.
190. Id.
191. Id. at 8.
192. Id.
193. Ferguson, 532 U.S. at 71.
194. Respondent's Brief at 8.
195. Id.
196. Id. at 9.
197. Ferguson, 532 U.S. at 72.
198. Id. at 70-72.
199. Id. at 71.
200. Id. In Ferguson, the Court listed the criteria as:
   1. No prenatal care
   2. Late prenatal care after 24 weeks gestation
   3. Incomplete prenatal care
   4. Abruptio placenta
   5. Intrauterine fetal death
   6. Preterm labor 'of no obvious cause'
   7. IUGR [intrauterine growth retardation] 'of no obvious cause'
   8. Previously known drug or alcohol abuse
hardly unique to drug abuse. Indeed, several patients described problems or even tragedies that might befall any unlucky parent, such as "preterm labor 'of no obvious cause'" or "intrauterine fetal death."201 The hospital, however, treated the urine samples as if they were potential evidence in later criminal proceedings, ensuring that the hospital employees followed a chain of custody for the drug tests.202 Yet, a positive test merely subjected a patient to "education and referral to a substance abuse clinic."203 Only if the patient "failed to follow-up with substance abuse treatment or prenatal visits, or if she tested positive a second time" would the police ultimately arrest her.204

The hospital involved law enforcement according to "two protocols, the first dealing with the identification of drug use during pregnancy and the second with identification of drug use after labor."205 Under the first protocol, if a pregnant patient "tested positive for cocaine a second time or if she missed an appointment with a substance abuse counselor," the hospital notified the police and the patient was arrested.206 Under the second protocol, should a patient test positive after her labor, the hospital immediately notified the police and the patient was arrested.207 In 1990, at the suggestion of the Solicitor General, patients falling within the second protocol could, like those in the first protocol, "avoid arrest by consenting to substance abuse treatment."208

The actual arrests accorded little with the medical needs of the patients. As for the mothers, "[v]arious of them were shackled to their hospital beds, arrested shortly before or immediately after giving birth, often while still dressed in hospital gowns and still suffering pain and bleeding from the childbirth."209

Policy M-7 even described "in detail the precise offenses with which a woman could be charged, depending on the stage of her pregnancy."210 For example,

If the pregnancy was 27 weeks or less, the patient was to be charged with simple possession. If it was 28 weeks or more, she was to be charged with possession and distribution to a person under the age of 18 — in this case, the fetus. If she delivered "while testing positive for

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9. Unexplained congenital anomalies.

1d. at 71 n.4 (alteration in original).

201. Id.

202. Id. at 71-72.

203. Id. at 72.

204. Respondent's Brief at 9.

205. Ferguson, 532 U.S. at 72.

206. Id.

207. Id.

208. Id.


210. Ferguson, 532 U.S. at 72.
illegal drugs," she was also to be charged with unlawful neglect of a child.\textsuperscript{211}

Ten women who were arrested under Policy M-7 filed suit against MUSC, Charleston, and law enforcement officials "who helped develop and enforce the policy."\textsuperscript{212} Among other claims, the ten obstetrics patients urged that MUSC's drug-testing policy violated the Fourth Amendment.\textsuperscript{213}

\textbf{B. Lower Court Rulings}

At trial, the patients who had been arrested under MUSC's drug-testing regime argued that the urine screens were unreasonable searches performed without their consent.\textsuperscript{214} The defendants responded that the searches were consensual and, in any event, were reasonable even absent consent in light of their "special non-law-enforcement purposes."\textsuperscript{215} The trial judge rejected the defense's special needs characterization of the searches, for the searches "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."\textsuperscript{216} The district court did, however, submit the factual issue of consent to the jury, which returned a verdict in favor of the defense.\textsuperscript{217}

The plaintiffs appealed to the Fourth Circuit Court of Appeals, arguing that "the evidence was insufficient to support the jury's consent finding."\textsuperscript{218} The Fourth Circuit, in an opinion authored by Judge Wilkins, found it "unnecessary" to decide the consent issue because the urine tests were reasonable as special needs searches.\textsuperscript{219} Judge Wilkins framed the issue as

[whether a balancing of MUSC's interest in protecting the health of children whose mothers use cocaine during pregnancy, the effectiveness of the policy to identify and treat women who use cocaine during pregnancy, and the degree of intrusion experienced by women whose urine was tested for evidence of cocaine use results in a conclusion that the searches violated the Fourth Amendment.\textsuperscript{220}]

The court of appeals acknowledged the trial court's refusal to find that the searches were reasonable under the special needs doctrine because "law enforcement

\textsuperscript{211} Id. at 72-73.
\textsuperscript{212} Id. at 73.
\textsuperscript{213} Ferguson v. City of Charleston, 186 F.3d 469, 473 (4th Cir. 1999).
\textsuperscript{214} Id. at 476.
\textsuperscript{215} Ferguson, 532 U.S. at 73.
\textsuperscript{216} Id. at 73-74 (alteration in original) (quoting the district court).
\textsuperscript{217} Id. at 74. According to the court's instructions, "in order to find that the plaintiffs had consented to the searches, it was necessary for the jury to find that they had consented to the taking of the samples, to the testing for evidence of cocaine, and to the possible disclosure of the test results to the police." Id. at 74 n.6.
\textsuperscript{218} Id. at 74.
\textsuperscript{219} Ferguson, 186 F.3d at 476.
\textsuperscript{220} Id. at 477.
officers were involved in the formulation of the policy. "221 Yet, Judge Wilkins did not find that law enforcement involvement was fatal to a special needs analysis. 222 In support of this view, the court of appeals relied on Michigan Department of State Police v. Sitz,223 a U.S. Supreme Court case where balancing upheld suspicionless intrusions at sobriety checkpoints by "uniformed police officers."224 Judge Wilkins also noted the dissent's argument that the use of test results to support arrests of patients precluded special needs balancing.225 Here again, the court of appeals found support for its own position in Supreme Court precedent.226 Judge Wilkins relied on Griffin, which found a probation search "justified by the special needs of the Wisconsin probation system even though evidence gathered during the search was employed to support a criminal conviction."227

Thus, believing it would have the Supreme Court's blessing, the court of appeals did not hesitate to weigh the competing interests under the special needs doctrine. In considering the first factor of governmental need, Judge Wilkins noted that Chandler required that the "hazard giving rise to the alleged special need must be a concrete danger, not merely a hypothetical one."228 Charleston easily met this standard, for "medical personnel at MUSC noticed an alarming increase in the number of pregnancies affected by cocaine use," which was "associated with a number of pregnancy complications."229 Maternal cocaine abuse could even have fatal consequences, for "[e]ven a single use of cocaine during pregnancy may result in separation of the placenta from the uterine wall — a condition that may threaten the life of the mother and the fetus — or a stroke in the fetus."230 Further, cocaine use by pregnant mothers also had a substantial cost in public resources, as much as $3 billion annually nationwide.231 Judge Wilkins therefore concluded that "MUSC officials unquestionably possessed a substantial interest in taking steps to reduce cocaine use by pregnant women."232

As to the second factor of effectiveness of the search, the court of appeals understood that it was not to perform some intrusive analysis regarding the best use of public resources; rather, it was merely to assess whether the search "advances the public interest."233 Here, Judge Wilkins determined that there could be "little doubt" that Policy M-7's testing "was an effective way to identify and treat maternal cocaine use while conserving the limited public resources of a public hospital."234

221. Id. at 477 n.7.
222. Id.
224. Ferguson, 186 F.3d at 477 n.7.
225. Id.
226. Id.
227. Id.
228. Id. at 477.
229. Id. at 477-78.
230. Id. at 478.
231. Id.
232. Id.
233. Id. (quoting Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990)).
234. Id.
Indeed, "[such] prenatal testing was the only effective means available to accomplish the primary policy of persuading women to stop using cocaine during their pregnancies" in order to protect their fetuses.235

For the final factor, the degree of intrusion, the court of appeals recognized that, in general, "the privacy interests implicated by the collection and testing of urine are not minimal."236 Skinner, however, had taught that a search's context could diminish a privacy intrusion.237 In Ferguson, the hospital tested patients' urine "in the course of medical treatment" where providing a sample is "normal" and "routine."238 Thus, the intrusion created by urinalysis was "minimal."239 Because the magnitude of the government interest and the effectiveness of its program outweighed this minimal intrusion on patient privacy, the court of appeals found that the drug tests were "reasonable and thus not violative of the Fourth Amendment."240

C. The Court's Opinion

The Supreme Court, in an opinion authored by Justice Stevens, immediately diagnosed Ferguson's problem as one of government intent. Justice Stevens framed the issue as, "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."241 As for the conclusion that the hospital performed the tests without patient permission, the Court made this assumption based on the "posture" of the case. The Ferguson Court reasoned that "[b]ecause the Court of Appeals did not discuss this issue, . . . it [was] more prudent to allow that court to resolve the legal and factual issues in the first instance . . . ."242

The practical effect of Ferguson's deference to the court of appeals' lack of action, however, was to treat consent as unproven, and therefore nonexistent. This was a particularly curious outcome in light of the fact that the trial jury had made a factual ruling on the issue of consent. Indeed, in the trial court, the jury who heard the evidence first hand, and thus was in the best position to assess the facts, found that the patients consented to "the taking of samples, to the testing for evidence of cocaine, and to the possible disclosure of the test results to police."243 Further, the court of appeals neither rejected nor even questioned this jury finding.244 Instead, it simply found the consent issue "unnecessary to address," for

235. Id. (emphasis added).
236. Id. at 479.
238. Ferguson, 186 F.3d at 479.
239. Id.
240. Id.
242. Id. at 77 n.11.
243. Id. at 74 n.6.
244. Ferguson, 186 F.3d at 476.
it decided the case on the separate grounds of special needs. Thus, Justice Stevens refused to recognize consent in this case in deference to a decision never actually made by the court of appeals and in defiance of a finding made by a jury best placed to determine the facts.

Regardless of its shaky foundation, the lack of consent assumption provided the Court's first rationale to label Ferguson as different from other special needs precedent. Justice Stevens intoned,

Because the hospital seeks to justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients, this case differs from the four previous cases [Skinner, Von Raab, Vernonia, and Chandler] in which we have considered whether comparable drug tests "fit within the closely guarded category of constitutionally permissible suspicionless searches."

The Ferguson Court noted that "[i]n the previous four cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties." In contrast, the Court found that each patient in Ferguson had a reasonable expectation of privacy that the hospital would not share the results of her hospital test "with nonmedical personnel without her consent."

Perhaps recognizing the fragility of the "no consent" distinction, Justice Stevens offered a second distinction between Ferguson and prior special needs case law. Here, the Ferguson Court urged that "[t]he critical difference between those four drug-testing cases and this one, however, lies in the nature of the 'special need' asserted as justification for the warrantless searches." The special need justification in each earlier case was "divorced from the State's general interest in law enforcement." In contrast, in Ferguson, "the central and indispensable feature of the [government's] policy ... was the use of law enforcement to coerce the patients into substance abuse treatment."

The resulting discussion of the critical difference became a strained exercise in differentiating between the various kinds of purposes thought relevant by the Court. Justice Stevens noted that "[u]nder our precedents, if there was a proper governmental purpose other than law enforcement, there was a 'special need,' and the Fourth Amendment then required the familiar balancing between that interest and the individual's privacy interest." Only certain purposes, however, were pertinent to the Court's analysis. The city officials contended that their "ultimate purpose —
namely, protecting the health of both mother and child — is a beneficent one."253 The Ferguson Court rejected this "ultimate goal" as an irrelevant purpose, for "law enforcement involvement always serves some broader social purpose or objective."254 Therefore, the "ultimate purpose" formulation could sweep so broadly that it would immunize "virtually any nonconsensual suspicionless purpose."255 Justice Stevens instead ferreted out the government's "direct and primary purpose" or its "immediate objective" as the Court's determinative standard.256 Ferguson assessed the primary purpose, however, in the context of looking at the overall "programmatic purpose."257 In an attempt to explain, Justice Stevens offered this opaque statement, "In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose."258

In applying its new test of government purpose, the Court found Charleston's purposes unavailing. Ferguson concluded that "[w]hile the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal."259 In short, no matter how noble, the ends could not justify the means. Justice Stevens 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."260 Charleston's means, or "primary purpose[,] . . . was to use the threat of arrest and prosecution in order to force women into treatment," thus causing the urinalysis program to fall outside of special needs precedent.261 Ferguson, hoping to reign in its special needs treatment, therefore added an entirely new element to the Court's balance: the divination of officialdom's primary purpose.

IV. Potential Dangers of Ferguson's Proposed Remedy

A. The Ferguson Court Failed to Heed Its Own Special Needs Precedent, Creating Further Confusion Regarding How to Balance the Competing Interests

In holding that Ferguson did not involve special needs, the Court distinguished the drug testing of expectant mothers from that of railroad workers, Customs Service employees, and students. Finding that MUSC's drug testing violated the Fourth Amendment provided the Court no other option, for the weight of the prior special needs cases actually supported toxicological testing of expectant mothers. In short, the Ferguson Court simply did not balance the interests as it had in the earlier special needs cases. Such unacknowledged abandonment of the earlier

253. Id. at 81.
254. Id. at 82, 84.
255. Id. at 84.
256. Id. at 83-84.
257. Id. at 81.
258. Id.
259. Id. at 82-83 (footnote omitted).
260. Id. at 83-84.
261. Id. at 84.
balancing approach created an unexplained inconsistency that will bewilder future government actors.

In *Skinner*, the railroad employee case, the Court minimized the individual intrusion occasioned by toxicological testing. When considering blood tests, Justice Kennedy deemed the resulting invasion as "not significant, since such tests are a commonplace in these days of periodic physical examinations." The blood test, being "safe, painless, and commonplace," had become "routine in our everyday life." While *Skinner* recognized that urine tests presented a "more difficult question" because they required the performance of "an excretory function traditionally shielded by great privacy," Justice Kennedy again found solace in the fact that the samples were akin to "a regular physical examination." *Skinner* also found the fact that the urinalysis was performed in a "medical environment" to be a mitigating factor. Finally, railroaders' expectations of privacy were diminished by the context in which they worked. As employees in "an industry that is regulated pervasively to ensure safety," railroad personnel had diminished privacy expectations.

*Ferguson*’s drug testing of expectant mothers might be seen quite differently when viewed through *Skinner*’s lens. A urinalysis test, when considered in the larger context of an obstetric exam or labor itself, hardly seems to be the largest of intrusions on the patient's privacy. When juxtaposed to the contractions of labor, known to cause sometimes life-threatening complications and generally recognized to cause severe pain, a urinalysis test certainly seems "safe" and "painless." Additionally, even though urination is traditionally shielded in privacy, in the context of a hospital, where patients suffer the indignities of pelvic exams, bedpans, and hospital gowns that open in the back, the privacy intrusion of a urinalysis test seems small indeed. If the *Skinner* Court was assured that its similarity to a physical examination and its occurrence in a "medical environment" lessened urinalysis’ intrusion, MUSC’s urine tests, which were actual physical exams and occurred in hospitals, should place the Court at even greater ease. *Skinner* considered toxicological testing, such as a blood test, to be "routine in our everyday life." If this was true for a railroad employee working on tracks, it should be even truer for a pregnant patient receiving care at a hospital.

On the other side of the scale, *Skinner* seemed quite solicitous to the government’s concerns. A railroad employee's duties were so "fraught with such risks of injury to others" that the Court worried "even a momentary lapse of

263. *Id.* (quoting South Dakota v. Neville, 459 U.S. 553, 563 (1983); *Briehaupt v. Abram*, 352 U.S. 432, 436 (1957)).
264. *Id.* at 626.
265. *Id.*
266. *Id.* at 627.
267. *Id.* at 626.
268. *Id.* at 627.
269. *Id.* at 625.
attention can have disastrous consequences." Justice Kennedy further warned, "Much like persons who have routine access to dangerous nuclear power facilities, employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others." In fact, an impaired employee would "seldom display any outward signs detectable by . . . even the physician." Applying this analysis to drug-addicted mothers, it could be argued that doctors might miss the risks of harm to children growing in the womb just as they missed risks of injury to others caused by impaired railroaders. Indeed, while mothers may manifest no outward symptoms of impairment, each contraction of her heart could be sending drugs through the placenta to her baby.

Ferguson's weighing of interests also ran counter to the balancing applied in Von Raab. When assessing Von Raab's individual privacy interests, Justice Kennedy minimized the government's intrusion by considering the urinalysis in the greater context of diminished privacy expectations. Although urinalysis could cause "substantial" privacy interference in "some circumstances," Von Raab viewed the intrusion in light of the "operational realities of the workplace" of the Customs Service. Working as an officer with Customs was hardly the typical job; employees with the Service could expect routinely to come into contact with "sophisticated criminal syndicates," resulting in exposure to drugs and violence. Thus, by joining this form of "public employment," such personnel should expect "intrusive inquiries into their physical fitness for those special positions." These Customs officers, therefore, had a "diminished expectation of privacy in respect to the intrusions occasioned by a urine test." Again, what was true for Customs employees should be more so for maternity patients. For maternity patients, going to the hospital is an exercise in reconciling oneself to being continually poked and prodded. Most expectant mothers would probably gladly trade the intrusions occasioning amniocentesis or a cesarean section for that of a urine test. Indeed, maternity patients undergo the most extreme of privacy intrusions. For instance, the goal of some prenatal testing is to divine a person's own genetic information to determine if the parent is a carrier of certain conditions. If certain

270. Id. at 628.
271. Id.
272. Id.
274. Id.
275. Id. at 660.
276. Id. at 671.
277. Id. at 672.
278. Amniocentesis is "[t]he most commonly performed technique for prenatal diagnosis." MERCK MANUAL OF DIAGNOSIS AND THERAPY 1845 (Robert Berkow et al. eds., 16th ed. 1992) [hereinafter MERCK MANUAL]. This procedure involves the insertion of "a 20- or 22-gauge spinal needle" that is "passed transabdominally into the amniotic fluid," causing the collection of "20 to 30 ml of fluid" from the mother. Id.
279. Cesarean section is "surgical delivery by incision in the body of the uterus." Id.
280. Genetic screening includes tests for carriers of Sickle Cell Anemia and Tay-Sachs disease. Id.
Customs officers "reasonably can expect effective inquiry into their fitness and probity,"281 expectant mothers reasonably can expect a multitude of extreme and uncomfortable privacy intrusions. In the context of an expecting mother, the intrusion of one drug test might seem relatively minor indeed.

In weighing the government's interests, the Court in *Von Raab* was as deferential to the needs of the State as it was in *Skinner*. With no reference to empirical studies, *Von Raab* simply accepted the existence of a "veritable national crisis in law enforcement caused by smuggling of illicit narcotics."282 Furthermore, the Customs Service, being "our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population,"283 was exposed to the violence and temptations growing out of this drug war.284 It was thus "readily apparent" to the Court that the government had a "compelling interest" in the urinalysis program.285 Turning to *Ferguson*, it could be argued that the only national crisis more pressing than the smuggling of illegal drugs into our nation would be the crisis caused by the entry of drugs into our citizens. In *Ferguson*, the national crisis was even more dire because not only were mothers ingesting drugs, but fetuses, a group of drug users who never even consented to receive drugs, were ingesting them as well. If drugs meant for use by adults threatened the nation's "health and welfare," then such drugs posed an even more fundamental and longer-term threat when directed toward a future generation.

Perhaps the most awkward case for the *Ferguson* Court was *Acton*. In this case, Justice Scalia crafted a densely packed balancing test to assess the competing interests in a special needs case.286 Instead of simply balancing the interests of both sides, *Acton* created three factors: 
1. the decreased expectation of privacy,
2. the relative unobtrusiveness of the search, and
3. the severity of the need met by the search.287 *Acton* refined this complicated balancing test still further. The Court divided the first factor of privacy expectation into an inquiry of: (a) "context" in which the individual asserted the privacy interest; and (b) the "individual's legal relationship with the State."288 *Acton* broke the second factor, assessing the intrusion occasioned by the search, likewise into two parts: (a) the "manner" of the search; and (b) the "content of information" revealed by the search.289 The Court also divided the third prong of *Acton*'s test. "the severity of the need met by the search," into three queries: (a) the "nature . . . of the governmental concern;" (b) the "immediacy of the governmental concern;" and (c) the "efficacy of this means for

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281. *Von Raab*, 489 U.S. at 672.
282. *id.* at 668 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).
283. *id.*
284. *id.* at 669.
287. *id.*
288. *id.* at 654.
289. *id.* at 658.
meeting" the governmental concern.\textsuperscript{290} Thus, the Acton Court expanded its test beyond the interests of government versus the individual, into a three-factor test, which further included seven subparts.

A review of Acton's actual application of its complex test to its facts causes the case to become even more relevant to Ferguson. Justice Scalia, weighing the Acton test's first factor, considered the expectation of privacy asserted by the individual, here student athletes.\textsuperscript{291} Because this factor's first consideration was the "context" in which the individual asserted the right, Acton reviewed the world of the student playing on a school sports team.\textsuperscript{292} Justice Scalia determined that school football players had little legitimate privacy expectations, for "[s]chool sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford."\textsuperscript{293}

Likewise, delivery of a child is hardly for the bashful. It requires patients to be in varying states of undress and to allow parts of their body, which are typically shielded by great privacy,\textsuperscript{294} to be open to view often to a variety of doctors, nurses, and other hospital personnel. Expectant mothers often are called upon to expose private facts that are not just skin deep; a common test is the ultrasound, which enables medical staff to look inside the patient at the fetus in her womb.\textsuperscript{295} Further, patients expose not only their persons, but their pain and vulnerability as they experience, often for several hours, one of life's most challenging events. The delivery rooms of hospitals, often shared by more than one patient and protected by a thin screen pulled around the bed, can make locker rooms, where people expose only their skin for a matter of a few minutes, seem secure and private.

Acton also considered how the person's relationship with the State affected privacy expectations. Here, Justice Scalia stretched the school's duty to properly supervise students to cover his conclusion that "school authorities," for many purposes, "act[t] in loco parentis."\textsuperscript{296} Acton included in the school's "custodial and tutelary responsibility for children," which authorities exercised "[f]or [the students'] own good and that of their classmates," physical examinations and vaccinations.\textsuperscript{297} Such medical practices included checks of hearing, vision, and skin.\textsuperscript{298} Thus, Acton found medical invasions on student privacy to be not only reasonable, but to justify the further intrusion of urinalysis. The Court reached this conclusion even though such medical procedures arguably were not part of the core role of school as institutions of learning.

\textsuperscript{290} Id. at 660.  
\textsuperscript{291} Id. at 655, 657.  
\textsuperscript{292} Id. at 657.  
\textsuperscript{293} Id.  
\textsuperscript{295} MERCK MANUAL, supra note 278, at 1854-55.  
\textsuperscript{296} Acton, 515 U.S. at 655 (alteration in original) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986)).  
\textsuperscript{297} Id. at 656.  
\textsuperscript{298} Id.
Acton's "relationship with the State" rationale would seem all the stronger when applied to a setting where the connection between individual and government is truly a medical one. When maternity patients came to MUSC's obstetrics ward, they rightly expected the county doctors to take all reasonable efforts within their means to deliver a healthy baby from a healthy mother. Indeed, any shirking of this duty could be grounds for malpractice. Because evidence at the time of MUSC's program indicated that illegal drugs could harm fetal and maternal health, as well as complicate delivery, doctors would be duty-bound to determine the presence of such toxins. Hence, a urinalysis screen for drugs would fit squarely among the actions taken in this particular relationship with the State.

Further, once the hospital detected drugs, one would not expect doctors to sit on their hands. Alerted to the existence of the dangerous substances, doctors would alter treatment of baby and mother accordingly. It could reasonably be foreseen that such medical procedures, from the test to the resulting reactions in treatment, would not be free of charge. Thus, the hospital would route the resulting documentation to an insurer or to the relevant government officials. According to the Court itself, voluntarily turning over such information to third parties diminishes the reasonable expectation of privacy.299

Charleston's hospital officials would also do well under Acton's second factor, the unobtrusiveness of the search. Acton found that the school's urinalysis program barely registered on its first measure of obtrusiveness, the manner of intrusion.300 Equating faculty monitoring of urine samples to students' typical experience every time they used the restroom, Justice Scalia found any privacy interests implicated to be "negligible."301 The same could be said of a patient providing a urine sample in a hospital. A maternity patient, with bigger things on her mind, might consider one biological sample to be no different from the myriad of other tests.

Regarding obtrusiveness, Acton continued, "The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested."302 Here, ironically, Justice Scalia contrasted the school's screens, which looked "only for drugs," with more intrusive tests, such as those that determined if a person was pregnant.303 With the importance the Court has placed on context, a straightforward look at urinalysis of maternity patients, where the bigger secret of pregnancy is already out of the bag, would deem such invasions, in the unique circumstances of a hospital, as similarly negligible.

Finally, in applying its third factor of severity of government need, Acton first weighed the nature of this concern.304 Labeling it as "[d]eterring drug use by our Nation's schoolchildren," Justice Scalia urged that this interest was "important,

300. Acton, 515 U.S. at 658.
301. Id.
302. Id.
303. Id.
304. Id. at 660.
Indeed — compelling.\textsuperscript{305} When turning to the nature of the government's need in \textit{Ferguson}, the Court could adopt Justice Scalia's phrasing with little editing. The government could claim essentially the same interest as that in \textit{Acton}, save the fact that the children are not of school age but are fetuses, and thus any harm from drugs would start much earlier. Further, on top of the danger to children, \textit{Ferguson} possessed yet another concern — the impact of drug use on the health of the mother.

However, even more important to \textit{Ferguson} regarding \textit{Acton}'s nature-of-governmental-concern analysis would be its reliance on medical evidence to support the urine testing of children. In \textit{Acton}, Justice Scalia took on the jargon of doctors, speaking of "peripheral vasoconstriction," "masking of the normal fatigue response," and "myocardial infarction."\textsuperscript{306} Perhaps in an effort to add the weight of medical judgment to its conclusions, \textit{Acton} also cited medical journals for support, such as \textit{Clinical Pediatrics and Archives of General Psychiatry}.\textsuperscript{307} As a result, Justice Scalia's analysis turned downright clinical:

School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor."\textsuperscript{308}

In its \textit{Ferguson} briefs, the government urged that maternal drug abuse could similarly have long-lasting effects on mothers, including "[in]creased risk of premature delivery, premature separation of the placenta (abruptio placentae), spontaneous abortion, and death."\textsuperscript{309} Medical consequences for the infant were just as dire, including "increased risk of sudden death syndrome, low birth weight, seizures, strokes, heart attacks . . . brain damage, prune belly syndrome, limb reduction defects [and] kidney damage."\textsuperscript{310} \textit{Ferguson}'s outcomes were thus at least as "profound" as those facing the children in \textit{Acton}. Indeed, \textit{Ferguson}'s fetuses were even more vulnerable than \textit{Acton}'s athletes, for the children born at MUSC had just been delivered from the womb of a drug-addicted mother, and therefore had no escape from an environment literally filled with drugs. In contrast, the students in \textit{Acton} were exposed to counterbalancing positive influences of teachers and family. Further, Justice Scalia's worry of "lifelong" impact would be even stronger in \textit{Ferguson}, where the infants are just starting their lives, and so the time of "lifelong" is truly of greater duration. Finally, fetuses are not nearly as developed as schoolchildren, and therefore Justice Scalia's concern that "maturing nervous

\textsuperscript{305} Id. at 661.
\textsuperscript{306} Id. at 662.
\textsuperscript{307} Id. at 661-62.
\textsuperscript{308} Id. at 661 (quoting Hawley, \textit{supra} note 141, at 314).
\textsuperscript{309} Respondent's Brief at 4.
\textsuperscript{310} Id.
systems are more critically impaired by intoxicants than mature ones has even more weight in Ferguson than it did in Acton.

Acton had further intoned that weighing the severity of government need also necessitated a review of the immediacy of the government interest. In Acton, Justice Scalia deemed the immediacy element satisfied by the trial court's finding that Vernonia was besieged by a "state of rebellion" where "disciplinary actions had reached epidemic proportions." When this analysis is moved from Acton to Ferguson, the "epidemic" moves from metaphor to reality. Ferguson involved an epidemic in the literal sense, for one study calculated that "each year in South Carolina, alone, approximately 15,000 babies suffered from prenatal exposure to illegal drugs." The Supreme Court itself has long identified drug addiction as a medical problem, explicitly declaring that "narcotic addiction is an illness" and that addicts "are diseased and proper subjects of [medical] treatment."

Thus, who would be better placed to determine the immediacy of the medical dangers posed by drugs than physicians themselves? Ferguson itself conceded that MUSC, in implementing the urinalysis program, had the "beneficent" purpose of "protecting the health of mother and child" and that the staff's "motive was benign rather than punitive." Despite this, Justice Stevens gave the medical experts no heed. This is curious, in light of the fact that the Ferguson Court had elsewhere deferred the resolution of factual issues to those closer to the particular circumstances of the case than itself.

Ferguson's refusal to consider the findings of those on the front line of the drug war becomes ever more mysterious when it is contrasted with the Court's treatment of "immediacy" findings in prior cases. In Skinner, the Court upheld drug testing "based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test." In Von Raab, the Court was even more generous to the government, allowing urinalysis despite the fact that "there was no documented history of drug use by any customs officials." Yet in Ferguson, where the danger of drug abuse moved far beyond the hypothetical to target actual individual patients, the Court no longer supported testing.

311. Acton, 551 U.S. at 661.
312. Id. at 660.
314. Respondent's Brief at 5.
317. Id. at 85.
318. Id. at 77 n.11.
320. Id. (citing Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 673 (1989); id. at 683 (Scalia, J., dissenting)).
The final piece of the Acton balancing test concerned the efficacy of the government program. Here, Justice Scalia was satisfied to simply surmise that testing would solve the school's drug problem by ensuring that the athletes, who had a "role model" effect on the rest of the student body, "do not use drugs."\(^{321}\) In contrast, the MUSC staff in Ferguson moved beyond speculation of effectiveness to deliver hard numbers. The city of Charleston noted,

Of the 253 patients who tested positive during the relevant time period, only thirty failed to complete treatment or tested positive a second time and consequently, were arrested. Of those thirty, most were processed through pretrial intervention upon voluntary completion of substance abuse treatment. Only two — neither of whom is a Petitioner — failed to complete treatment and were prosecuted, but even they were ordered to complete treatment as a condition of probation rather than sentenced to an active jail term.\(^{322}\)

Charleston reinforced these numbers with individual testimonials:

After implementation of the Policy, the medical staff experienced a decline in the number of positive drugs screens and fewer medical complications previously attributed to cocaine abuse. The substance abuse counselors reported that many of the patients referred by MUSC benefitted from and successfully completed the treatment. Even many of the Petitioners themselves admitted that the Policy helped them successfully complete treatment and fight their addictions.\(^{323}\)

Even Chandler, a case rejecting special needs drug testing, offers Ferguson little support for its own refusal to extend special needs to expectant mothers in light of the specific reasons the Chandler Court advanced to distinguish Georgia's urinalysis program from the other special needs precedent. Chandler offered essentially three reasons why drug urinalysis of candidates fell outside of special needs balancing. None of Chandler's three arguments, however, remove Ferguson from special needs' reach.

Indeed, Chandler's three arguments actually militate in favor of categorizing Ferguson as a special needs case. The Court's first concern in Chandler was Georgia's failure to identify any "fear or suspicion of drug use by state officials."\(^{324}\) Justice Ginsburg declared, "Notably lacking in respondents' presentation

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321. Id.
322. Respondent's Brief at 10.
323. Id. at 9-10. The city also aimed to ally fears that the program would discourage mothers from coming to the hospital for treatment. It noted,
   Contrary to the Petitioners' supposition, there was no evidence that the Policy discouraged pregnant women from seeking treatment at the Medical Center. The MUSC data did not demonstrate any change in the utilization patterns of their prenatal clinics nor did they identify any increase in unbooked deliveries at other regional hospitals.
is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule. Nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity.\textsuperscript{325} In acknowledging \textit{Von Raab}'s lack of evidence directly demonstrating agent drug abuse, however, \textit{Chandler} did hedge that a "demonstrated problem of drug abuse" was "not in all cases necessary to the validity of a testing regime."\textsuperscript{326} Still, the Court disparaged any attempt to justify special needs based solely on the need to "set a good example."\textsuperscript{327} Justice Ginsburg thus concluded that Georgia's need was "symbolic, not 'special,' as that term draws meaning from our case law."\textsuperscript{328}

\textit{Ferguson}, in contrast, hardly faced an empty threat of maternal drug use. It was uncontested that MUSC routinely treated mothers who were addicted to drugs.\textsuperscript{329} Moreover, it would seem that the \textit{Ferguson} Court itself would hesitate to characterize Charleston's program as merely symbolic. Instead, Justice Stevens criticized \textit{Ferguson}'s drug program for its very real impact, where Charleston employed law enforcement as leverage to "coerce patients into substance abuse treatment."\textsuperscript{330}

\textit{Chandler}'s second argument distinguishing Georgia's drug urinalysis from previous schemes concerned the efficacy of the State's testing regime.\textsuperscript{331} Justice Ginsburg worried that the test date was "no secret," enabling candidates to "abstain for a pretest period sufficient to avoid detection."\textsuperscript{332} The \textit{Chandler} Court therefore reasoned that "Georgia's certification requirement is not well designed to identify candidates who violate antidrug laws. Nor is the scheme a credible means to deter illicit drug users from seeking election to state office."\textsuperscript{333} Such worries could hardly apply to \textit{Ferguson}. For hard evidence of actual identification of drug abusers, one need look no further than the court of appeal's opinion. In \textit{Ferguson v. City of Charleston}, Circuit Judge Wilkins dutifully listed the plaintiffs' test results,\textsuperscript{334} and the listed mothers either tested positive for cocaine or gave birth to babies who did.\textsuperscript{335} Further, the testing resulted in "a decline in the number of positive drug screens and fewer medical complications previously attributed to cocaine abuse."\textsuperscript{336} Thus, unlike Georgia's officials, those in Charleston could argue

325. \textit{Id.} at 318-19.
326. \textit{Id.} at 319. Later in its opinion, the \textit{Chandler} Court explicitly accepted that, in \textit{Von Raab}, there was an "absence of any documented drug use problem among Service employees." \textit{Id.} at 320.
327. \textit{Id.} at 322.
328. \textit{Id.}
332. \textit{Id.} at 319-20.
333. \textit{Id.} at 319.
334. \textit{Ferguson}, 186 F.3d at 485-86.
335. Those specifically listed as testing positive were Sandra Powell, Lori Griffin, Lavene Singleton, Paula Hale, Pamela Pear, Theresa Joseph, Crystal Ferguson, Patricia Williams, and Darlene Nicholson. \textit{Id.} Although Ellen Knight tested negative, her child tested positive. \textit{Id.} at 485.
that Ferguson’s Policy M-7 demonstrated its effectiveness not only in identifying drug users, but in deterring use by future patients.

Chandler’s third feature distinguishing its urinalysis scheme from those in earlier special needs cases focused on the "scrutiny" placed on individuals. Justice Ginsburg pointed to a "telling difference between Von Raab and Georgia’s candidate drug-testing program."337 Von Raab’s Service employees created an invisible danger because their "work product" was not subjected to "day-to-day scrutiny."338 In contrast, Chandler’s candidates for public office were subjected to "relentless scrutiny — by their peers, the public, and the press," and so urinalysis was simply not needed.339

On this issue of oversight, Ferguson’s doctors are much closer to sharing the disadvantage suffered by employers in Von Raab than the easy access enjoyed by Chandler’s peers, press, and public. MUSC’s physicians could not be at their patient’s bedside at all times. These mothers were adults, free to pursue any activity they chose once outside the hospital. The doctors could only prescribe medication and offer guidance during the long, nine-month gestation period. They necessarily relied on their patients’ own sense of responsibility to follow medical advice during the time between visits. Further, the dangers caused by maternal drug use were even less visible than the outward acts committed by Customs agents. The damage being caused in Ferguson was hidden inside the human body, carried out with each beat of the heart carrying drugs to the fetus. Chandler’s "relentless scrutiny" protection was just not available in Ferguson.

Had the Ferguson Court followed the balancing analysis that it repeatedly applied in its own special needs precedent, it would have reached a holding 180 degrees opposite of its actual conclusion. The Court’s failure to adhere to its own balancing rules, without a candid admission of its change in course, will ultimately create confusion as to when and how courts should apply special needs. Ferguson attempted to cover this gap in its analysis with a new fig leaf it labeled "law enforcement purpose." As will be seen, this exercise in sophistry caused its own troubles.

B. In Avoiding Special Needs Precedent, Ferguson Distinguished Earlier Special Needs Cases Based on the Nonexistent Difference of "Law Enforcement Purpose"

The Justices in Ferguson, like doctors confronted with the latest victim of a spreading epidemic, were alarmed by the degree of contagion spread in the name of special needs. Justice Stevens acknowledged the severity of the most recent illness, noting that "the invasion of privacy in this case is far more substantial" than in prior special needs cases.340 Perhaps coming to grips, on some level, with the notion that the danger currently facing the Fourth Amendment was doctor-induced, the Court backed-off from prescribing the usual dose of special needs.

337. Chandler, 520 U.S. at 321.
338. Id. (quoting Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989)).
339. Id.
In doing so, however, the Court still lacked the nerve to reject outright its previous course of special needs treatment. Instead of admitting the failure of the special needs doctrine, Ferguson hoped to avoid its effects by distinguishing the current case from earlier precedent. Because the four special needs cases involving urinalysis were directly relevant to MUSC's testing of expectant mothers, the Court's need to detect differences turned Justice Stevens into an intellectual contortionist.

Justice Stevens gamely embarked on the dubious exercise of distinguishing Ferguson from its predecessors by contending that the earlier cases had a "critical difference" from Ferguson in that those cases possessed a special need "divorced from the State's general interest in law enforcement."344 However, T.L.O., the first case to explicitly use the "special needs" rubric upon which all four later cases rely, failed to make Ferguson's stark demarcation. The law-enforcement-versus-other-government-needs distinction would have been lost on Mr. Theodore Choplick in T.L.O., for he felt no compunction in immediately involving police upon discovery of his student's marijuana.345 Other officials in T.L.O. also misunderstood the purpose of the school's search, for the fruits of Mr. Choplick's intrusion triggered delinquency charges against T.L.O.346 Even Justice White, who crafted the opinion in T.L.O., demonstrated a failure to separate law enforcement cases from other government activity.347 In supporting its abandonment of the probable cause requirement, the T.L.O. Court relied on "a number of cases" in which "the legality of searches and seizures [were] based on suspicions that, although 'reasonable,' [did] not rise to the level of probable cause."348 One of these cases was Terry v. Ohio, the seminal case allowing officers to pat-down persons reasonably suspected of criminal activity.349

Skinner, the first of the four cases from which the Court aimed to distance Ferguson, did not speak of a need to eliminate any and all connection to law enforcement. Rather, it saw operating railroads as involving an additional need "beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."341 Thus, Justice Kennedy likened Skinner not only to the government's "operation of a school, or prison," but also to "its supervision of probationers."342 The Skinner Court's reference to probationers, and its consequent citation to Griffin, was quite revealing, for Griffin was openly and directly connected with law enforcement. In Griffin, both probation and police officers directly searched the probationer.343 Of particular interest, in light of the Court's later conclusions in Ferguson, the officers in Griffin operated without any pretense of consent, showing up to the door of the probationer's apartment and

341. Id. at 79.
343. Id. at 328-29.
344. Id. at 341-42.
345. Id. at 341.
348. Id.
informing him that they "were going to search his home."350 The apparent purpose of the search in Griffin was at least in part connected to law enforcement, for the probationer was "charged with possession of a firearm by a convicted felon, which is itself a felony."351 Indeed, the prosecutor in Griffin used the evidence found by the officers' search during the probationer's trial.352

In Griffin, probation's direct connection with law enforcement did not faze Justice Scalia. He declared openly that "[p]robation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after a verdict, finding, or plea of guilty,'" and he characterized probation as "one of a set of points . . . on a continuum of possible punishments."353 The existence of law enforcement, however, was not fatal to the special needs aspect of the government program. Instead of acting as a poison pill, law enforcement involvement became part of a larger, more sophisticated analysis of multiple variables. Probation might have been punishment meted out by officers charged with "protecting the public interest,"354 but it also served "a period of genuine rehabilitation" for the probationer.355 Thus, the probation officer "is also supposed to have in mind the welfare of the probationer" known as his "client."356 Indeed, Griffin did not banish the probation officer from special needs simply because of the law enforcement aspect of the job. Instead, the Court was able to recognize, within the dual nature of the probation officer's role, a special needs aspect, allowing for a loosening of Fourth Amendment standards.

A closer look at other cases Ferguson hoped to label as "divorced" from "law enforcement" also tends to undermine the Court's all-or-nothing approach. A comparison of Von Raab and Chandler creates particular difficulty for Ferguson. In Von Raab, the Customs officers subject to drug tests were so enmeshed in fighting crime that they were "targets of bribery by drug smugglers on numerous occasions, and several [had] been removed from the Service for accepting bribes and for other integrity violations."357 Despite Von Raab's purpose of fighting drug crimes, Justice Kennedy still found a special need to justify urinalysis.358

In Chandler, however, where officials were not "front-line" crime fighters, and therefore further removed from law enforcement involvement than Von Raab's Customs agents, the Court found no special needs.359 Justice Ginsburg noted an interesting difference between the government officials in Von Raab and Chandler. She noted that in Von Raab, "'[d]rug interdiction ha[d] become the agency's primary

350. Id.
351. Id. at 872.
352. Id. at 871-72.
353. Id. at 874 (quoting KILLINGER, supra note 37, at 14).
354. Id. at 876.
355. Id. at 875.
356. Id. at 876.
358. Id. at 679.
enforcement mission."\textsuperscript{360} Further, Customs officers, "more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use."\textsuperscript{361} The candidates for public office in Chandler, in contrast, had no such direct involvement with crime fighting.\textsuperscript{362} Thus, any need to test candidates was "in short . . . symbolic, not 'special.'"\textsuperscript{363} The mere purpose to "set a good example" was insufficient to create a special need.\textsuperscript{364} Instead of supporting Ferguson's current view of special needs, the Court's earlier comparison of Von Raab and Chandler tends to undermine it. Thus, upon close inspection, Ferguson's sharp division between law enforcement and other government needs is quite blurred.

C. Ferguson's Novel "Purpose" Standard Poses New Dangers to Fourth Amendment Freedoms

The Ferguson Court's injection of a "purpose" standard hopelessly confuses a balancing test already suffering from uncertainty and malleability. Ferguson managed to do what no previous Court could — cause the earlier special needs test to appear straightforward by contrast. The Court's addition of a "purpose" element to special needs resulted in two "cures" that will worsen the disease. First, the consideration of purpose runs directly counter to the Court's earlier edict prohibiting assessment of subjective motivation. Second, the purpose inquiry took a test that the Court designed to be applied by laypersons outside of law enforcement, and made it even more complicated by adding an entirely extra level of complexity.

1. Ferguson's "Purpose" Element Dredged Up the Previously Forbidden Consideration of Subjective Motivation

When Justice Stevens placed Charleston's officials on the couch, he performed a meticulous analysis, honing in on their "primary purpose" in drug testing patients.\textsuperscript{365} Earlier, the Court had flatly rejected such an inquiry, while perhaps diligent and well meaning, as not only outside the proper realm of Fourth Amendment doctrine, but as essentially futile. Further, this explicit denunciation of the relevance of subjective motivation to Fourth Amendment analysis occurred only five years prior to Ferguson, in Whren v. United States.\textsuperscript{366}

In Whren, plainclothes vice-squad officers, having probable cause to believe that a motorist had violated three different traffic codes, seized the motorist's truck at a red light.\textsuperscript{367} As a result of the traffic stop, police "immediately observed," and therefore recovered, crack cocaine from Whren's hands.\textsuperscript{368} Whren acknowledged

\textsuperscript{360} Id. at 321 (alterations in original) (quoting Von Raab, 489 U.S. at 660).
\textsuperscript{361} Id. (quoting Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170, 173 (5th Cir. 1987)).
\textsuperscript{362} Id. at 321-22.
\textsuperscript{363} Id. at 322.
\textsuperscript{364} Id.
\textsuperscript{367} Id. at 808-09.
\textsuperscript{368} Id. at 809.
that the police did indeed have probable cause to believe that he had violated traffic laws.\textsuperscript{369} He argued, however, that the officers had still violated the Fourth Amendment in his case because the officers had based their decision to perform the traffic stop on "impermissible factors."\textsuperscript{370}

Justice Scalia, in delivering the opinion of the Court, did not mince words in rejecting the defendant's pretext argument. He declared, "Not only have we never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary."\textsuperscript{371} This announcement, however absolute, was not enough for Justice Scalia, who continued to flog the horse by reiterating that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."\textsuperscript{372} Moreover, of particular interest to \textit{Ferguson}, the \textit{Whren} Court singled out the determination of group intent for special derision. Justice Scalia surmised, "It seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement . . . ."\textsuperscript{373} Additionally, focus on a particular department's practices would cause inconsistent application of Fourth Amendment rights.\textsuperscript{374} \textit{Whren} noted that "police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable, and can be made to turn upon such trivialities."\textsuperscript{375}

None of these concerns, however, prevented the \textit{Ferguson} Court from feeling the bumps on the hospital staffers' heads.\textsuperscript{376} Justice Stevens openly discussed the contents of officials' minds, speculating that "the 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."\textsuperscript{377} This kind of divination of intent, whether of "ultimate," "primary," or "direct" intent, was exactly the practice that \textit{Whren} forbade in mandating that courts focus only on objective behavior when assessing Fourth Amendment reasonableness.

\textit{Ferguson}'s detour into subjective motivation caused the Court to wander into discussions that it seemed to itself deem irrelevant. Justice Stevens rejected the MUSC administrators' interpretation of their own thoughts by characterizing them as merely the parroting of an empty platitude.\textsuperscript{378} He noted that Charleston officials contended "in essence that their ultimate purpose — namely, protecting the health

\textsuperscript{369} Id. at 810.
\textsuperscript{370} Id.
\textsuperscript{371} Id. at 812.
\textsuperscript{372} Id. at 813 (alterations in original) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).
\textsuperscript{373} Id. at 815.
\textsuperscript{374} Id.
\textsuperscript{375} Id. (citations omitted).
\textsuperscript{376} The feeling of "bumps" on "heads" is a reference to the "pseudo-science of phrenology" popular in the 1800s. Phrenologists believed they could find evidence of a person's "brain functions" by observing his "cranial features." Pierre Schlag, \textit{Commentary: Law and Phrenology}, 110 \textit{HARV. L. REV.} 877, 878 (1997).
\textsuperscript{378} Id. at 80-82.
of both mother and child — is a beneficent one." 379 Justice Stevens, however, cautioned that, in the past, the Court "did not simply accept the State's invocation of a 'special need,'" instead it carried out a "'close review' of the scheme at issue." 380 Later, Ferguson even more plainly equated motivation with irrelevancy. The Court recognized that "respondents have repeatedly insisted [that] their motive was benign rather than punitive. Such a motive, however, cannot justify a departure from Fourth Amendment protections . . . ." 381 Thus, the new signal from the Court seems to be that subjective motivation is relevant — unless the Court says that it is not.

Pondering the inner thoughts of officials poses dangers to the Fourth Amendment, for it distances the Court from the concrete protections afforded in objective reality. Indeed, picking and choosing some subjective motivations over others removes any certainty from special needs. Ferguson thus makes a malleable test all the more vulnerable to manipulation by future courts.

2. Ferguson Has Further Complicated and Confused an Already Unwieldy Special Needs Rule

In distinguishing special needs precedent, Ferguson designated government "purpose" as the determinative question regarding Fourth Amendment reasonableness. However, as noted above, the Court did not deem every thought in a government official's head worthy of scrutiny. Instead, the Court found only the "primary purpose" to be of constitutional relevance. In fact, Ferguson's "purpose" inquiry required such precision that no earlier Court seemed to get it right. Von Raab apparently stumbled when it spoke of a "public interest" that demanded "effective measures to bar drug users from positions directly involving the interdiction of illegal drugs," 382 and when it recognized the Custom Service's goal in defending against "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." 383 Such language certainly smacks of ultimate purposes. The Court in Acton was an even worse offender. In Acton, Justice Scalia committed the ultimate faux pas in Ferguson's eyes by deeming the government's concern as "[d]eterring drug use by our Nation's schoolchildren." 384 The Ferguson Court must have viewed Justice Scalia as a bull in a china shop when he characterized Von Raab's "governmental concern" as "enhancing efficient enforcement of the Nation's laws against the importation of drugs," and must have further shuddered when he declared Skinner's government interest as "deterring drug use by engineers and trainmen." 385

Despite such prior lapses, the Ferguson Court now plunged into "purpose" as its only hope to distinguish MUSC's testing from its special needs precedent. As a

379. Id. at 81.
380. Id. (quoting Chandler v. Miller, 520 U.S. 305, 322 (1997)).
381. Id. at 85.
383. Id. at 668 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).
385. Id.
result, the Court's latest refinement of special needs balancing created an intricate and subtle test applicable by only the most seasoned Fourth Amendment scholars. The current balancing test's complexity stems from the Court's apparent fear to accept that elements of its special needs rule could be flawed. Thus, the Court attempted to fix a bad rule by attaching even more elements to it, instead of reexamining the propriety of the original special needs doctrine. The result of the Court's ad hoc construction is a curious amalgam of tests essentially knitted together from its three latest cases. The Court has thus burdened special needs with a rule built of parts within parts and terms understood only by nuanced definitions.

Ironically, special needs was born in part due to the Court's hope of simplifying the lives of officials called upon to employ it. In T.L.O., the Court respected that a school's capacity to maintain "security and order" required "a certain degree of flexibility in school disciplinary procedures" and the ability to preserve "the informality of the student-teacher relationship." Consequently, the Court aimed to craft a simple "reasonableness" balancing test, which would "neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren." The goal was to offer faculty, who were laypersons in the law, a simpler alternative to the complicated rules that guided police. Justice White believed that "[b]y focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."

Instead of relieving officials of the niceties of probable cause, the Court merely replaced these niceties with a different set for special needs. Consider how special needs evolved by the time of Acton into a three-factor test, complete with subparts under each element. In Acton, Justice Scalia moved beyond a simple balance of government versus individual interests to the following multipronged test:

(1) Decreased expectation of privacy:
   (a) the context in which privacy expectations are asserted; and
   (b) the individual's relationship with the State.

(2) The relative unobtrusiveness of the search:
   (a) the manner of the search; and
   (b) the content of information revealed by the search.

(3) The severity of the need met by the search:
   (a) the nature of the governmental concern; and
   (b) the immediacy of the governmental concern; and

387. Id. at 342-43.
388. Id. at 343.
389. Id.
(c) the efficacy of the means for meeting the governmental concern. 390

Chandler, however, refined this balancing test still further by setting up a triggering mechanism that a party must satisfy before he can employ the balancing test in the drug-testing context. 391 Chandler identified the triggering factor as the following: "[T]he proffered special need for drug testing must be substantial — important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." 392 Thus, the special need was special not because it was different in kind (as a need outside of law enforcement), but because it was special in degree (as being "important"). 393 Further, this special need could be "shore[d] up" by a "demonstrated problem of drug abuse." 394

In Chandler, Justice Ginsburg also tweaked some of Acton's elements. Specifically, she altered Acton's prong (1)(a), which considered the context in which an individual asserted his privacy expectations. 395 Typically, reduced privacy expectations likewise reduced an individual's interests in special needs balancing. 396 However, Chandler noted that a reduced expectation of privacy in the context of public office could create the exact opposite effect, actually increasing the individual's rights under special needs. 397

Justice Ginsburg also fine-tuned Acton's prong (2)(a), which, in weighing the unobtrusiveness of the search, considered the manner in which the search occurred. 398 Under Acton, the only concern expressed was that the search not be unduly intrusive. 399 Indeed, the Acton Court was put at ease by finding that school officials did not directly observe the children while they provided a urine sample. 400 Chandler then created a limitation on the other end of the spectrum, nullifying testing schemes that were not intrusive enough. 401 Thus, Justice Ginsburg faulted Georgia's testing for failing to deter drug users by enabling them to temporarily abstain before known testing dates. 402

Ferguson adds still more complexity to special needs' Byzantine rules. Justice Stevens 'purpose' element apparently fits into Acton's prong (3)(a), the nature of the governmental concern. Here, the government actor pursuing a particular special

390. See Acton, 515 U.S. at 654-64.
392. Id. at 318.
393. Id. at 318-19.
394. Id. at 319.
395. Id. at 321.
398. Id. at 319-20.
399. Acton, 515 U.S. at 658.
400. Id. In this respect, the Court was careful to note that boys remained fully clothed and were observed only from behind, while girls produced samples while sitting inside stalls. Id.
402. Id.
needs program would have to stop for some self-assessment, inquiring, "What is our purpose in performing this search?" Of course, this oversimplifies the analysis, for the official would have to identify the government's "programmatic purpose."\textsuperscript{403} Moreover, not just any programmatic purpose will do; the government employee must locate the "primary" purpose and distinguish it from any "ultimate" purpose.\textsuperscript{404} Only with this primary, programmatic purpose in mind will the State be able to properly assess one of three subparts to a three-element balancing test. While wading through this mess, at least officialdom can find solace in the fact that \textit{T.L.O.} relieved it of the burden of considering the "common-sense"\textsuperscript{405} standard of probable cause.\textsuperscript{406}

The tortured special needs test that the Court created in \textit{Acton, Chandler}, and \textit{Ferguson} is the very kind of rule that the Court once openly criticized. In \textit{New York v. Belton},\textsuperscript{407} where the Court crafted an easily applied bright-line test for searches incident to arrest for automobiles, Justice Stewart spoke of the importance of simplicity. Although the Court meant for the rule advanced in \textit{Belton} to guide police officers in the field, the case's call for clarity resonates all the more for rules designed for lay persons. Justice Stewart admonished,

Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."\textsuperscript{408}

Special needs, thanks to \textit{Ferguson}, is now encumbered with such sophistication, nuance, and hairline distinctions. This complexity is all the more alarming when one recalls that special needs began as a vehicle to free teachers, lay persons at the law, from the complicated "niceties" of probable cause.\textsuperscript{409} Ironically, in contrast to special needs, the Court currently sees probable cause as nothing more than a


\textsuperscript{404} Id. at 82-84.

\textsuperscript{405} The Court had previously simplified probable cause into a "common-sense" standard that officials could easily apply in the haste of criminal investigations. Illinois \textit{v. Gates}, 462 U.S. 213, 235-36 (1983).


\textsuperscript{407} 453 U.S. 454 (1980).

\textsuperscript{408} Id. at 458 (quoting Wayne R. LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures"; \textit{The Robinson Dilemma}, 1974 \textit{SUP. CT. REV.} 127, 141).

\textsuperscript{409} The \textit{T.L.O.} Court reasoned, "By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of common sense." \textit{T.L.O.}, 469 U.S. at 343.
"practical, nontechnical conception."140 Probable cause merely involves "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."141 The Court, in treating cases with the special needs remedy of its own creation, has strayed ever farther from a Constitutional fundamental that required officials to answer, at most, a "commonsense, practical question."142

Ferguson's intricate special needs analysis is reminiscent of the nineteenth century discipline of phrenology, which "was devoted to the identification of basic brain functions and their manifestations in cranial features."143 Dr. Franz Joseph Gall, the founder of phrenology, "wished to transform the study of brain functions, then called psychology, into a science. Above all, Gall believed that he had to rescue this nascent field from the conjectures and constructions of metaphysicians and speculative philosophers."144 Gall therefore constructed a discipline that "developed into an intricate multi-layered field," which struggled to identify and classify such subtle concepts as "fundamental faculties."145 Phrenology blossomed into a highly regarded science, complete with scholarly journals and crowded lectures.146 Only one problem existed for phrenology: it lacked any basis in fact.147 Phrenology might have been very beneficial to its adherents; the patients of those practitioners might not have been so lucky.

In the doctrine of special needs, the Court may have found its own legal version of phrenology. Created by the highest court in the nation and repeatedly expanded in a series of opinions, special needs is offered by those with prestige and power. However, it too has a fundamental flaw: it lacks any basis in the text of the Fourth Amendment. While the Court comforts itself with intricate formulas and added elements, Fourth Amendment privacy, the patient in need of care, wastes away.

V. Conclusion

In 1971, Dr. Arthur DeVoe, "an eye surgeon and chairman of the department of ophthalmology at the College of Physicians and Surgeons of Columbia University," diagnosed a fifty-five-year-old female patient as having a disease requiring a corneal transplant.148 As a cure, Dr. DeVoe transplanted a cornea from a donor whose later autopsy "showed the characteristic damage of Creutzfeldt-Jakob disease," a human brain disease analogous to bovine spongiform encephalopathy ("mad cow" disease).149 As a result of the operation, the patient's eye healed, and she could see

411. Id.
412. Id. at 230.
413. Schlag, supra note 376, at 878.
414. Id. at 878-79.
415. Id. at 882.
416. Id. at 877.
417. Id. at 886-87.
419. Id. at 132-33.
clearly through the donor's cornea. However, one-and-a-half years later, the patient "began feeling nauseated, had difficulty swallowing," and ultimately degenerated into a vegetative state, ending in death. An autopsy revealed damage to her brain similar to that of the cornea donor. Here, the doctor's treatment was successful in that it met its objective to correct his patient's vision. Yet, in righting one wrong, the surgeon inadvertently created a much worse problem.

In cases such as T.L.O. and Skinner, the Court invented special needs to remedy the conflicts between individual privacy and valid public concerns. Although its new therapy lacked any explicit basis in the Fourth Amendment's text, the Court felt special needs was merited in light of new situations occurring that were beyond the Framers' imaginations. In their attempt to refine the Framers' original prescription, the Justices injected more than just special needs into the Fourth Amendment. The Court inadvertently infected the patient with a test so malleable that Justices could use the same fact, such as exposure to public scrutiny, to both bolster and attack a government program. Further, the new treatment spawned a reasonableness balancing that became so complicated that it itself defied reason.

To its credit, the Ferguson Court recognized that it had lost control over its special needs cure. Yet, rather than candidly reassess the efficacy of its treatment, the Court simply tried to cover up its adverse side effects by applying the Band-Aid of further refinements. Ferguson thus increased the virulence of special needs. Now, the infecting agent, armed with the new element of "purpose," is so subjective that it ultimately embraces as an element what the Court had previously criticized as a dangerous and futile inquiry: the subjective intent of government. Moreover, the purpose analysis, in adding a new analytical layer, guarantees new complexity, and thus confusion, in special needs.

Baron Gottfried Wilhelm von Leibnitz once quipped, "I often say a great doctor kills more people than a great general." Perhaps this is something the Court should ponder before it next operates on the Fourth Amendment with its "special needs" scalpel.

420. Id. at 132.
421. Id. at 133.
422. Id.