

NOTE

REDISCOVERING THE FOUNDATION OF THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT IN *FERGUSON V. CITY OF CHARLESTON**

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I. INTRODUCTION

The Fourth Amendment to the U.S. Constitution mandates that a search or seizure be reasonable and supported by a warrant issued upon a showing of probable cause.¹ There are, however, numerous exceptions to the warrant and probable cause requirement.² One such exception is the special needs doctrine. The Supreme Court has held that a state's "special needs, beyond the normal need for law enforcement," may permit suspension of the warrant and probable cause requirement of the Fourth Amendment.³ Justification for suspension of this traditional requirement derives from the premise that special needs searches are civil or administrative in nature rather than criminal.⁴ In order to qualify for the special needs exception, the state must first identify a vital problem or need that cannot be addressed through the normal warrant and probable cause requirement.⁵ If present, that special need is balanced against the individual privacy interest invaded by the search and the nature of the intrusion.⁶ The Supreme Court's prior special needs case law has focused primarily on these issues—identifying special needs and balancing the respective interests.⁷ As a result,

1. See U.S. CONST. amend. IV. Refer to note 76 *infra* (discussing the varying textual interpretations of the Reasonableness and Warrant Clauses of the Fourth Amendment).

2. See Theodore P. Metzler et al., *Thirtieth Annual Review of Criminal Procedure: Warrantless Searches and Seizures*, 89 GEO. L.J. 1084, 1084 (2001) (listing "investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches," and special needs searches as exceptions to the warrant and probable cause requirement); see also Elise Bjorkan Clare et al., *Twenty-Fifth Annual Review of Criminal Procedure: Warrantless Searches and Seizures*, 84 GEO. L.J. 743, 743 (1996) (same).

3. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment); see also *Chandler v. Miller*, 520 U.S. 305, 313–14, 318 (1997) (reiterating that the special needs of government can justify suspicionless searches not based on warrant or probable cause).

4. See Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 97–98 (1992) ("Since noncriminal penalties are assessed against citizens detected in administrative searches, and since these searches are primarily intended to advance government policy rather than to criminally punish, the Supreme Court has had little difficulty embracing the constitutionality of administrative searches premised on decreasing levels of suspicion.").

5. See Metzler et al., *supra* note 2, at 1156–58 (describing the "heavily fact- and case-specific" mechanism for evaluating the constitutionality of a special needs search).

6. *Id.* at 1156–57 ("Even if a special need is present, however, it must still be balanced against the privacy interest at stake and the character of the intrusion.").

7. Refer to Part III *infra* (reciting the development of the special needs exception

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the Court has largely ignored the original strictures of the special needs doctrine, namely that a special need must be “beyond the normal need for law enforcement” in order to qualify for suspension of the warrant and probable cause requirement.⁸ This gap in special needs case law has led to confusion over judicial use of the doctrine. Specifically, courts and commentators alike have expressed concern over the extent to which law enforcement may participate in a special needs search, and whether the results of these searches may be used to prosecute defendants.⁹

This Note analyzes the Supreme Court’s recent decision in *Ferguson v. City of Charleston*.¹⁰ In *Ferguson*, the Court re-examined the requirement that a special needs search must be “beyond the normal need for law enforcement.”¹¹ Ultimately, the Court reinforced the foundation of the special needs doctrine by determining that the immediate objective of a special needs search cannot be to “generate evidence for law enforcement purposes.”¹² In essence, a special needs search cannot serve as a mere pretext for police activity.¹³

This Note demonstrates that while *Ferguson* does limit the wholesale expansion of the special needs doctrine to the criminal arena, the Court’s decision may not entirely restrict police involvement in a special needs search or prevent criminal prosecution of individuals subjected to such searches. Part II of this Note discusses the facts, procedural history, and the Court’s opinion in *Ferguson*. Part III examines the historical development of the special needs exception leading up to *Ferguson* and evaluates the Court’s decision. Part IV analyzes the impact of *Ferguson* on criminal prosecutions arising from special needs searches and the potential limits on law enforcement involvement. Finally, this Note concludes by recognizing that the Court is unlikely to address the issue of criminal prosecution based on special needs evidence any time in the near future.

in Supreme Court jurisprudence).

8. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment).

9. Refer to Parts III–IV *infra* (chronicling the development of the special needs doctrine and analyzing the role of law enforcement and criminal prosecution in a special needs search).

10. 532 U.S. 67 (2001).

11. *Id.* at 74 n.7, 84.

12. *Id.* at 82–84 (acknowledging that while the ultimate goal of a special needs search will always serve some “broader social purpose or objective,” the immediate objective of the searches in question was law enforcement).

13. *See id.* at 81 (describing the purpose actually served by the searches as “ultimately indistinguishable from the general interest in crime control” (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000))).

II. CASE RECITATION

A. *Facts and Procedural History*

Responding to an apparent increase in drug use by pregnant mothers receiving prenatal care at a Charleston public hospital operated by the Medical University of South Carolina (MUSC), staff members at MUSC ordered drug screens on urine samples taken from maternity patients suspected of cocaine use.¹⁴ Beginning in April 1989, patients testing positive for cocaine use were referred to the county substance abuse commission for counseling and treatment.¹⁵ These referrals proved ineffective at stemming the tide of drug use.¹⁶ Four months later, MUSC's general counsel, Joseph C. Good Jr., contacted Charleston Solicitor Charles Condon and offered to cooperate with the state in "prosecuting mothers whose children tested positive for drugs at birth."¹⁷ Solicitor Condon began developing a policy to prosecute women who tested positive for cocaine use during their pregnancy.¹⁸ Condon organized meetings and formed a task force comprised of MUSC representatives, the police, the County Substance Abuse Commission, and the Department of Social Services.¹⁹ MUSC adopted the recommendations of the task force, designated "Policy M-7," which set forth the procedure to identify and assist pregnant patients suspected of drug use.²⁰

Policy M-7 established a chain of custody to preserve evidence obtained through urine drug screens, while also providing educational services and referrals to a substance abuse

14. *Id.* at 70.

15. *Id.*

16. *Id.* (noting that "despite the referrals, the incidence of cocaine use among the patients at MUSC did not appear to change").

17. *Id.* at 70–71. The decision to contact Solicitor Condon was sparked by a news broadcast reporting that police in Greenville, South Carolina, had arrested pregnant cocaine users on a theory that drug use during pregnancy "harmed the fetus and was therefore child abuse." *Id.* While several states previously had attempted to charge pregnant drug users with distribution to a minor, criminal child abuse, or even homicide, most courts rejected these approaches. See Ellen Marrus, *Crack Babies and the Constitution: Ruminations About Addicted Pregnant Women After Ferguson v. City of Charleston*, 47 VILL. L. REV. 299, 301 (2002) (noting that this rejection is based "mainly on statutory grounds, reasoning that the word 'child' or 'minor' means one that is born"). However, the South Carolina Supreme Court held that "a viable fetus is a child within the meaning of the child abuse and endangerment law." *Id.* at 302 (citing *Whitner v. State*, 492 S.E.2d 777, 785 (S.C. 1997)).

18. *Ferguson*, 532 U.S. at 71.

19. *Id.*

20. *Id.* at 71–72.

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clinic for patients who tested positive.²¹ Policy M-7 also established a list of criteria to determine whether a patient should be tested for cocaine use.²² If the patient met any one of nine identified criteria, she would be tested for cocaine through a urine drug screen.²³ Differing criminal sanctions were implemented depending upon which stage of pregnancy the mother was in when she was found to be using cocaine.²⁴ First, if drug use was identified after labor had begun, the police were immediately notified and the patient was arrested.²⁵ However, if drug use was identified *during* pregnancy, the patient was arrested only after a second positive test or if she failed to meet with a substance abuse counselor.²⁶

Petitioners in *Ferguson* included ten pregnant women who received obstetrical care at MUSC and were arrested after urine drug screens revealed cocaine use.²⁷ The mothers filed suit against MUSC, the city of Charleston, state police, and various MUSC medical personnel.²⁸ The suit claimed that Policy M-7 provided for “warrantless and nonconsensual drug tests” resulting in unconstitutional searches.²⁹ The respondents argued that the pregnant mothers had in fact consented to the tests and that, even absent consent, the searches were justified by the special needs of the government.³⁰ The district court rejected the special needs defense on the basis that the searches were performed in conjunction with the police.³¹ However, the district

21. *Id.* at 72.

22. *Id.* at 71–72. These criteria included:

1. No prenatal care
2. Late prenatal care after 24 weeks gestation
3. Incomplete prenatal care
4. Abruptio placentae
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
9. Unexplained congenital anomalies.

Id. at 71 n.4.

23. *Id.* at 71.

24. *Id.* at 72.

25. *Id.* The policy was modified in 1990 to allow patients testing positive after labor the chance to avoid arrest by consenting to a substance abuse program. *Id.*

26. *Id.*

27. *Id.* at 73. Four of the mothers were arrested during the implementation of the original policy and did not receive the opportunity to participate in a drug treatment program as an alternative to arrest. *Id.* The other mothers were arrested after the policy was modified and had either failed to comply with a treatment program or tested positive a second time. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* Refer to Part I *supra* (noting that the special needs exception allows for warrantless, reasonable searches that are not tied to the normal needs of law enforcement).

31. *Ferguson*, 532 U.S. at 73–74 (noting that the searches “were not done by the

court did submit the issue of consent to the jury, along with an instruction requiring a verdict for the mothers if the jury found that the mothers did not consent.³² The jury found that there was consent, and the mothers appealed to the Fourth Circuit Court of Appeals.³³

The Fourth Circuit affirmed without reaching the question of consent, holding instead that the searches were justified by the special needs exception.³⁴ The dissenting judge argued that the special needs doctrine was not applicable and that “the evidence of consent was insufficient to sustain the jury’s verdict.”³⁵ The U.S. Supreme Court granted certiorari to review the Fourth Circuit’s holding on the issue of special needs and, without deciding the issue, assumed that the searches were conducted without consent.³⁶

B. *Opinion of the Court*

1. *Majority Opinion.* In a six-to-three decision, the Supreme Court reversed the Fourth Circuit and remanded the case for a determination on the issue of consent.³⁷ Justice Stevens wrote for the majority and was joined by Justices O’Connor, Souter, Ginsburg, and Breyer.³⁸ The majority made initial findings that MUSC’s status as a state hospital subjects it to the strictures of the Fourth Amendment, and that prior case law identifies urine testing as a search within the ambit of the Fourth Amendment.³⁹ The majority also noted that neither lower court had concluded that any of the nine criteria used to identify

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” (alteration in original) (quotation marks omitted)).

32. *Id.* at 74.

33. *Id.*

34. *Id.* at 74–75. The Fourth Circuit recited Supreme Court precedent holding that special needs may justify a search policy that is designed to serve non-law enforcement ends. *Id.* The circuit court found that the drug screens were conducted “for medical purposes wholly independent of an intent to aid law enforcement efforts” and applied the balancing test used in previous special needs decisions. *Id.* at 75 (quoting *Ferguson v. City of Charleston*, 186 F.3d 469, 477 (4th Cir. 1999)). The Fourth Circuit weighed the government’s “interest in curtailing the pregnancy complications and medical costs associated with maternal cocaine use” against a “minimal intrusion on the privacy of the patients.” *Id.*

35. *Id.* at 75–76.

36. *Id.* at 76. This is an important point. The Court does not consider the issue of consent, but instead examines the special needs justification on its own. *See id.*

37. *Id.* at 69, 76.

38. *Id.* at 69. Justice Kennedy filed an opinion concurring in the judgment. *Id.*

39. *See id.* at 76 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 335–37 (1985), and *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 617 (1989)).

pregnant women for urine screening provided probable cause or a reasonable suspicion for the searches.⁴⁰ Therefore, the only way the screening policy could be upheld as a reasonable search was for the government to fit the policy within the special needs exception of the Fourth Amendment.⁴¹

The majority distinguished the facts of *Ferguson* from four integral special needs decisions.⁴² Three of these decisions sustained drug tests for employees and high school athletes as valid special needs searches, while the fourth decision struck down drug testing of political candidates.⁴³ The Court reasoned that the invasion of privacy was much more substantial in *Ferguson* than in any of the four identified cases.⁴⁴ First, in the prior decisions, there was no confusion over the purpose of the drug testing and “there were protections against the dissemination of the results to third parties.”⁴⁵ Furthermore, the testing of employees and athletes was performed in order to disqualify participants from a benefit.⁴⁶ This type of testing involved a significantly less serious invasion of privacy than testing with the intent of turning the results over to the police, which was the goal in *Ferguson*.⁴⁷

The Court’s decision implied that a balancing of the privacy interests of the mothers against the special interests of the State might very well tip in the direction of the mothers.⁴⁸ However, the majority determined that it was not necessary to proceed to the

40. *Id.*

41. *See id.* at 76–77.

42. *Id.* at 77.

43. *Id.* The Court had sustained the use of drug tests for high school students participating in interscholastic sports, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), U.S. Customs Service employees seeking promotion to sensitive positions, *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and railway employees involved in train accidents, *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989). *See Ferguson*, 532 U.S. at 77–78 (comparing this case law with the present facts). The Court had struck down the drug testing of political candidates running for state office as unreasonable in *Chandler v. Miller*, 520 U.S. 305 (1997). *See Ferguson*, 532 U.S. at 77 (comparing *Chandler* with the present facts). These four cases represent the core interpretation of the special needs exception prior to *Ferguson*. Refer to Part III *infra* (providing a detailed discussion of these cases).

44. *Ferguson*, 532 U.S. at 78.

45. *Id.*

46. *Id.*

47. *Id.* (“The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties.”).

48. *Id.* (“The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent. In none of our prior cases was there any intrusion upon that kind of expectation.” (citations omitted)).

balancing stage of the special needs analysis because the policy in question did not meet a critical requirement—the special need must be “divorced from the State’s general interest in law enforcement.”⁴⁹ The Court found that “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.”⁵⁰ This distinction is the heart of the majority’s analysis and establishes a test to evaluate future searches on the basis of objective or primary purpose.⁵¹

The Court reasoned that the ultimate purpose of any drug testing program, regardless of law enforcement involvement, would always be a beneficent one—a societal objective separated from the means by which it is carried out.⁵² Therefore, in order to evaluate whether a special need was truly separate from the State’s general interest in law enforcement, the majority examined the immediate, as opposed to the ultimate, objective of the program.⁵³ The Court stated 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 . . . was to generate evidence *for law enforcement purposes* in order to reach that goal.”⁵⁴

The majority noted several factors that played a role in this determination, including the fact that the policy included police operational guidelines, chain of custody instructions, and guidelines detailing the logistics of police notification and arrests.⁵⁵ Furthermore, police and prosecutors were actively involved in the day-to-day administration of the policy, deciding who would get testing reports, what was to be included in those reports, and what procedures were to be followed.⁵⁶ Based on an accumulation of all these factors, the majority determined that the MUSC policy had an *immediate* goal of arrest and prosecution, not the beneficent aim of treatment.⁵⁷

49. *Id.* at 79.

50. *Id.* at 80.

51. *Id.* at 82–84 (“Given the primary purpose of the Charleston program, . . . this case simply does not fit within the closely guarded category of ‘special needs.’”).

52. *Id.* at 84. For example, the ultimate societal goal of any drug testing regime—even one conducted by police—is to prevent drug abuse, not to arrest drug abusers.

53. *Id.* at 82–84.

54. *Id.* at 82–83 (footnotes omitted).

55. *Id.* at 82.

56. *Id.*

57. *Id.* at 82–84 (“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.”).

The majority stated that the government's legal reasoning would allow "virtually any nonconsensual suspicionless search"—even a criminal search—to be "immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose."⁵⁸ The majority sought to limit just such an application of the special needs doctrine by demarcating a line between drug testing without police involvement and testing that is significantly intertwined with law enforcement.⁵⁹ The majority explained that "[w]hile state hospital employees . . . may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*," medical personnel have the obligation to fully inform patients of their constitutional rights.⁶⁰ Ultimately, the majority struck down the testing policy because it had the specific purpose of incriminating the pregnant mothers and the immediate goal of obtaining evidence for arrest and prosecution.⁶¹

2. *Concurring Opinion.* Justice Kennedy concurred in the judgment of the Court but disagreed with the majority's "ultimate" versus "immediate" goal test.⁶² By comparing the ultimate and immediate goals in prior special needs cases, Justice Kennedy illustrated that the immediate objective of any drug or urine test is to procure evidence of drug or alcohol abuse; previous decisions focused only on the ultimate objective rather than on the immediate one.⁶³ Nevertheless, Justice Kennedy acknowledged: "None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests."⁶⁴ Justice Kennedy reiterated that the warrant and probable cause requirement is waived for special needs searches based on the assumption that

58. *Id.* at 84.

59. *Id.* at 82–85.

60. *Id.* at 84–85. Refer to Part IV *infra* (discussing the applicability of mandatory reporting statutes).

61. *Ferguson*, 532 U.S. at 84–86.

62. *Id.* at 86–87 (Kennedy, J., concurring in the judgment) ("The majority views its distinction between the ultimate goal and immediate purpose of the policy as critical The distinction the Court makes, however, lacks foundation in our special needs cases." (citation omitted)).

63. *Id.* at 87 (Kennedy, J., concurring in the judgment) ("It is unsurprising that in our prior cases we have concentrated on what the majority terms a policy's ultimate goal, rather than its proximate purpose. By very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence.").

64. *Id.* at 88 (Kennedy, J., concurring in the judgment).

evidence obtained in such a search is not intended to be used for law enforcement purposes.⁶⁵

However, Justice Kennedy also emphasized the limited nature of the Court's opinion. He explained that the majority's opinion should not be read to interfere with South Carolina's right to "impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing him or her lifelong damage and suffering."⁶⁶

3. *Dissenting Opinion.* Justices Scalia and Thomas, along with Chief Justice Rehnquist, dissented from the majority, arguing that the drug testing of urine screens conducted by MUSC was a consensual search.⁶⁷ The dissent also argued that the Court would never need to consider the special needs exception because Supreme Court precedent has held that material voluntarily entrusted to another can be given to the police and used as evidence.⁶⁸

Furthermore, the dissent maintained that the special needs exception does in fact validate the search policy at issue.⁶⁹ Justice Scalia noted that before law enforcement was involved in the administration of the policy, MUSC tested patients for drug use and referred them to rehabilitation clinics without the threat of criminal prosecution.⁷⁰ Justice Scalia argued that the immediate purpose of these tests was not related to law enforcement, and thus, the *addition* of law enforcement cannot negate the immediate objective of health and rehabilitation.⁷¹

Finally, the dissent noted that the Court's previous special needs decision in *Griffin v. Wisconsin*⁷² authorized probation officers to search probationers' homes in tandem with police to procure evidence for future prosecution.⁷³ The dissent questioned how the majority could reconcile the facts of *Ferguson* with the facts of *Griffin* insofar as *Griffin* seems to

65. *Id.* (Kennedy, J., concurring in the judgment).

66. *Id.* at 89–90 (Kennedy, J., concurring in the judgment).

67. *Id.* at 92–93 (Scalia, J., dissenting) ("It is rudimentary Fourth Amendment law that a search which has been consented to is not unreasonable.").

68. *Id.* at 95, 98 (Scalia, J., dissenting).

69. *Id.* at 98 (Scalia, J., dissenting) (noting that the Court was bound by the district court's finding that the goal of the testing policy was to facilitate treatment for the protection of both mother and child and not to arrest patients).

70. *Id.* at 98–99 (Scalia, J., dissenting).

71. *Id.* at 99–100 (Scalia, J., dissenting).

72. 483 U.S. 868 (1987).

73. *Ferguson*, 532 U.S. at 100–01 (Scalia, J., dissenting) (citing *Griffin*, 483 U.S. at 870–72, 876–77).

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allow for a special needs search closely associated with the needs of law enforcement.⁷⁴

III. HISTORICAL DEVELOPMENT OF THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT

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.⁷⁵

The positioning of the two clauses—the “Reasonableness Clause” and the “Warrant Clause”—has been the subject of intense scholarly debate, resulting in differing interpretations that alter the Fourth Amendment’s judicial meaning.⁷⁶ The U.S. Supreme Court has generally applied the requirements of the Warrant Clause when determining the propriety of a search and seizure, allowing law enforcement to conduct reasonable searches only after obtaining a warrant supported by probable cause.⁷⁷

A. *Creation of the Administrative Inspection Exception*

Initially, the provisions of the Fourth Amendment were applied only to criminal evidentiary searches.⁷⁸ It was not until

74. *Id.* at 101 (Scalia, J., dissenting) (noting that in *Griffin*, “even more than [in *Ferguson*], police were involved in the search from the very beginning”). Refer to text accompanying notes 100–05 *infra* (discussing the impact of *Griffin* on Fourth Amendment jurisprudence).

75. U.S. CONST. amend. IV.

76. The debate centers around whether the Warrant Clause modifies the Reasonableness Clause, thereby defining what is a reasonable search—only those searches supported by warrant and probable cause. If the two clauses are read separately, the definition of reasonableness might not depend on the issuance of a warrant supported by probable cause. Compare Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801 (1994) (arguing that the “core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness”), with Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 20–21 (1994) (maintaining that “the Warrant Clause defines and interprets the Reasonableness Clause”). See generally Jennifer Y. Buffalo, Note, “*Special Needs*” and the Fourth Amendment: *An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529 (1997) (summarizing the two countervailing Fourth Amendment interpretive positions).

77. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring) (describing as “axiomatic” the principle that the warrant and probable cause requirement of the Fourth Amendment must be read in conjunction with the requirement of reasonableness).

78. See *Frank v. Maryland*, 359 U.S. 360, 365 (1959) (explaining that “evidence of

the Court's 1967 decision in *Camara v. Municipal Court*⁷⁹ that Fourth Amendment protections were extended to civil administrative searches as well.⁸⁰ *Camara* involved a lessee who refused to permit a municipal housing inspector to enter and inspect his premises without a search warrant.⁸¹ Justice White, writing for the majority, reiterated that the purpose of the Fourth Amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."⁸² He concluded that civil "administrative searches of the kind at issue . . . are significant intrusions upon the interests protected by the Fourth Amendment."⁸³

Despite the importance of Fourth Amendment protections, the Court in *Camara* acknowledged the difficulty of carrying out administrative civil searches (like area-wide health and safety inspections) based on a system of individualized suspicion.⁸⁴ Thus, the Court relaxed the standard of probable cause⁸⁵ and instead focused on creating a reasonableness standard to determine the existence of probable cause by balancing the government's need to search against the individual's privacy interest.⁸⁶ The majority observed that "because the inspections are neither personal in nature nor *aimed at the discovery of evidence of crime*, they involve a relatively limited invasion of . . . privacy."⁸⁷ This distinction developed into the administrative inspection exception.⁸⁸ This exception to the Fourth Amendment's

criminal action may not, save in very limited and closely confined situations, be seized without a judicially issued search warrant").

79. 387 U.S. 523 (1967).

80. *Id.* at 530 ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.").

81. *See id.* at 526-27.

82. *Id.* at 528.

83. *Id.* at 534.

84. *Id.* at 535-37.

85. *Id.* at 538-39 (concluding that "it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied").

86. *Id.* at 539 ("The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard."). "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.*; *see also* Buffaloe, *supra* note 76, at 534 (noting that "the Court for the first time departed from the requirement of a warrant supported by probable cause" and instead used a balancing test to determine the reasonableness of the search).

87. *Camara*, 387 U.S. at 537 (emphasis added) (concluding that because the governmental interest at stake outweighed any individual privacy interest, the inspections were reasonable searches supported by probable cause).

88. *See* Buffaloe, *supra* note 76, at 533-36 (discussing the development of the administrative inspection exemption).

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warrant and probable cause requirement provided a judicial inroad for the eventual creation of the special needs exception.⁸⁹

B. Creation of the Special Needs Exception

In the seminal special needs case, *New Jersey v. T.L.O.*,⁹⁰ decided in 1985, the U.S. Supreme Court considered the issue of warrantless school searches.⁹¹ In *T.L.O.*, the State brought delinquency charges against a fourteen-year-old high school freshman (T.L.O.), after a search of her purse by the assistant vice principal revealed a small amount of marijuana and further evidence of drug-dealing.⁹² T.L.O. contended that the principal's search violated the Fourth Amendment and moved to suppress the evidence found in her purse.⁹³ Justice White, writing for the majority, stated that application of the Fourth Amendment in a school setting "requires some easing of the restrictions to which searches by public authorities are ordinarily subject."⁹⁴ Justice White maintained that because a warrant and probable cause requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools," school officials were excused from obtaining a warrant to search students under their authority.⁹⁵ Justice White also applied the balancing test from *Camara*,⁹⁶ determining that the public interest was best served by lowering the applicable level of suspicion needed for a school search from probable cause to one of reasonableness.⁹⁷

89. *Cf. id.* at 536 (observing that the "special needs cases differ radically from the administrative inspection cases"). Additionally, "[w]hile the administrative cases involve essentially limited, nonpersonal investigations, the special needs cases are full-fledged searches aimed at discerning evidence of individual wrongdoing." *Id.*

90. 469 U.S. 325 (1985).

91. *See id.* at 327-28.

92. *Id.* at 328-29. The additional evidence included "a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing." *Id.* at 328.

93. *Id.* at 329.

94. *Id.* at 340.

95. *Id.*

96. Refer to Part III.A *supra* (discussing development of the administrative inspection exception).

97. *T.L.O.*, 469 U.S. at 341.

[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.
Id.

While the majority opinion created the basic framework for the special needs exception, it was Justice Blackmun's concurring opinion that fully elaborated on the parameters of the doctrine and ultimately coined the phrase "special needs."⁹⁸ Troubled by the majority's eagerness to apply a balancing test as "the rule rather than the exception,"⁹⁹ Justice Blackmun cautioned the Court that "[o]nly 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."¹⁰⁰ Thus, while Justice Blackmun agreed with the majority that the unique nature of school discipline did indeed constitute a special need, he advised the Court not to proceed with the balancing test between governmental and private interests until such a special need was first identified.¹⁰¹

The Court employed Justice Blackmun's discourse on special needs as doctrine only two years later in *O'Connor v. Ortega*.¹⁰² Dr. Ortega, a state hospital psychiatrist and physician, brought suit against his employer after his office was searched for evidence of possible misconduct and several items were removed from his desk and file cabinets—items that were later used in administrative proceedings resulting in his dismissal.¹⁰³ Justice O'Connor, writing for the majority, began by acknowledging that "[s]earches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment."¹⁰⁴ The majority then proceeded to invoke the rule articulated by Justice Blackmun's concurring opinion in *T.L.O.*, implying that a special need existed to excuse the warrant and probable cause requirement for searches conducted by government employers.¹⁰⁵ Applying the *Camara/T.L.O.* balancing test,¹⁰⁶ the Court weighed the

98. See *id.* at 351 (Blackmun, J., concurring in the judgment).

99. *Id.* at 352 (Blackmun, J., concurring in the judgment).

100. *Id.* at 351 (Blackmun, J., concurring in the judgment) (emphasis added).

101. See *id.* (Blackmun, J., concurring in the judgment).

102. 480 U.S. 709, 725–26 (1987) (holding that the search of a government employee's office for evidence of misconduct is reasonable under the special needs exception).

103. *Id.* at 712–14. The search occurred while Dr. Ortega was on administrative leave during an investigation of his alleged misconduct. *Id.* at 713. The hospital staff justified the search on the grounds that they were acting to make sure hospital property was secure. *Id.*

104. *Id.* at 715.

105. *Id.* at 722 ("Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.")

106. Refer to notes 86, 97 *supra* (discussing the Court's application of the balancing

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employee's legitimate expectation of privacy against the government's need for supervision and efficient control of the workplace, concluding that the appropriate standard to apply to a workplace search is one of reasonableness.¹⁰⁷

In *Griffin v. Wisconsin*,¹⁰⁸ the Court's next special needs decision, probation officers searched the home of Griffin, who was on probation, without a search warrant.¹⁰⁹ The probation officers discovered a gun that was later used as evidence to convict Griffin on a weapons offense.¹¹⁰ Justice Scalia, writing for the majority, concluded that "[a] State's operation of a probation system, like its operation of a school, government office or prison, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."¹¹¹ Justice Scalia identified the supervision of probationers as the special need, making a warrant and probable cause requirement "impracticable."¹¹² Therefore, Justice Scalia determined that the appropriate standard to apply in cases of probationer searches was one of "reasonable suspicion."¹¹³ Despite the fact that evidence seized from Griffin's home eventually led to a criminal conviction,¹¹⁴ the Court's opinion did not fully address the issue of whether the special need asserted was truly beyond the normal need for law enforcement, likely implying that the unique nature of the

test).

107. *O'Connor*, 480 U.S. at 725–26 (holding that "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances").

108. 483 U.S. 868 (1987).

109. *Id.* at 870.

110. *Id.*

111. *Id.* at 873–74.

112. *Id.* at 875–76 ("Supervision, then, is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large."). Justice Scalia went on to argue that "[a] warrant requirement would interfere . . . with the probation system" by effectively replacing probation officers with magistrates for the purpose of determining the degree of supervision required. *Id.* at 876. Justice Scalia further noted that "the delay inherent in obtaining a warrant" would decrease the effectiveness of probation officials responding to possible misconduct. *Id.* "[A] probable-cause requirement would [also] reduce the deterrent effect of the supervisory arrangement" because a probationer could avoid detection as long as his illegal activities "were sufficiently concealed as to give rise to no more than reasonable suspicion." *Id.* at 878.

113. *Id.* at 878–80 (concluding that "the probation regime would . . . be unduly disrupted by a requirement of probable cause").

114. *Id.* at 872 (relating that after Griffin's motion to suppress the evidence seized during the search was denied, Griffin was convicted by a jury of a firearms violation and sentenced to prison for two years).

probation system makes it distinguishable from a routine search by law enforcement.¹¹⁵

The next two special needs cases heard by the Court, *Skinner v. Railway Labor Executives' Association*¹¹⁶ and *National Treasury Employees Union v. Von Raab*,¹¹⁷ expanded the scope and impact of the exception by removing the need for individualized suspicion when determining the reasonableness of a search. In *Skinner*, the Court examined the constitutionality of regulations promulgated by the Federal Railroad Administration (FRA) mandating blood and urine tests for employees involved in certain train accidents.¹¹⁸ Justice Kennedy, writing for the majority, cited a strong governmental interest in “regulating the conduct of railroad employees to ensure safety” as a special need that could justify a departure from the warrant and probable cause requirement.¹¹⁹ According to Justice Kennedy, the warrant requirement, in particular, was a burden “likely to frustrate the governmental purpose behind the search.”¹²⁰ The majority also dispensed with the requirement of probable cause by balancing the diminished privacy interests of railroad employees¹²¹ with the government’s interest in preventing drug use by employees involved in safety-oriented tasks.¹²² Ultimately, the majority concluded that the blood and urine tests were reasonable under the circumstances.¹²³ In reaching this conclusion, the majority broke new ground by holding that the blood and urine tests satisfied the Fourth Amendment’s reasonableness requirement absent individualized suspicion.¹²⁴

115. *Id.* at 876 (noting it is “clear that the special needs of Wisconsin’s probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by ‘reasonable grounds’”).

116. 489 U.S. 602 (1989).

117. 489 U.S. 656 (1989).

118. *Skinner*, 489 U.S. at 606.

119. *Id.* at 620.

120. *Id.* at 623 (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 533 (1967)). The Court was especially concerned with the speed at which alcohol is eliminated from the blood stream, and the difficulties railroad supervisors might have with “the intricacies of . . . Fourth Amendment jurisprudence.” *Id.*

121. *Id.* at 627 (finding that “the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees”).

122. *Id.* at 627–28 (noting that the employees who are subjected to drug testing “discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences”).

123. *Id.* at 633.

124. *Id.* at 624 (“[W]here 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

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The Court's decision in *Von Raab* concerned similar testing of U.S. Customs Service employees who were seeking promotions to positions that entailed drug interdiction or the use of a firearm.¹²⁵ The Court reaffirmed that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component" of a reasonable Fourth Amendment search.¹²⁶ In *Von Raab*, the warrant and probable cause requirement, along with any requirement of individualized suspicion, gave way to a special governmental need to deter drug use among employees eligible for promotion to sensitive positions within the Customs Service.¹²⁷ Balancing the reduced expectations of privacy afforded to Customs Service employees¹²⁸ against the compelling governmental interest in safety and the effective prevention of drug smuggling, the Court concluded that urine testing was reasonable under the circumstances.¹²⁹ In a brief but important statement, the Court noted that the "Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement" because "results may not be used in a criminal prosecution of the employee without the employee's consent."¹³⁰

Returning to the context of school searches, the Court in *Vernonia School District 47J v. Acton*¹³¹ upheld random urinalyses for student-athletes as reasonable special needs searches under the Fourth Amendment.¹³² Relying on *T.L.O.*, the Court reaffirmed that a special needs exception to the warrant and probable cause requirement exists in the public school context.¹³³ Once again, the Court balanced the diminished privacy

reasonable despite the absence of such suspicion."). The majority explained that testing employees after a major accident can provide valuable information as to the potential causes of those accidents, while "[a] requirement of particularized suspicion . . . would seriously impede [the railway's] ability to obtain this information," given that "the scene of a serious rail accident is chaotic" and often prevents a determination as to which members of a train crew contributed to the accident. *Id.* at 630-31.

125. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 659-60 (1989).

126. *Id.* at 665.

127. *See id.* at 665-66.

128. *See id.* at 672 (declaring that the nature of the employees' duties are such that they "reasonably should expect effective inquiry into their fitness and probity").

129. *See id.*

130. *Id.* at 666. The fact that employee consent was required begs the question: What would happen if the Customs Service *did* turn over positive results to law enforcement authorities without employee consent?

131. 515 U.S. 646 (1995).

132. *Id.* at 648, 664-65.

133. *Id.* at 653 (noting that "the warrant requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed, and strict adherence to the requirement that searches be based upon probable cause would undercut the substantial need of teachers and administrators for freedom to maintain

expectations of school children¹³⁴ against the importance of deterring drug use and preventing drug-related injuries by student-athletes in concluding that the searches in question met the general requirement of reasonableness.¹³⁵

In 1997, after almost twelve years of favorable precedent,¹³⁶ the Court struck down its first special needs search. *Chandler v. Miller*,¹³⁷ the last special needs case decided before *Ferguson*,¹³⁸ concerned a Georgia statute that required drug testing for all candidates seeking certain state offices.¹³⁹ The Court found that these warrantless, suspicionless searches violated the Fourth Amendment because the special need asserted by the State was not substantial enough.¹⁴⁰ Distinguishing the facts of *Chandler* from prior special needs cases involving suspicionless drug tests, the Court explained that because the State could not present evidence of either a drug problem or high-risk, safety-sensitive tasks performed by candidates, the need asserted was merely “symbolic” rather than “special.”¹⁴¹ Notably, the Court explicitly cautioned against reading the *Von Raab* decision as “opening broad vistas for suspicionless searches,” perhaps demonstrating a desire to limit or rein in special needs decisions in the future.¹⁴² Subsequently, the drug testing of pregnant mothers in *Ferguson* provided the Court with another opportunity to limit the expansion of the special needs exception.

order in the schools” (alteration in original) (quotation marks omitted) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985)).

134. *Id.* at 657 (noting that students, and especially student-athletes, have a lesser expectation of privacy due to constant minimal invasions such as pre-season physical examinations, changing, and showering in locker rooms).

135. *Id.* at 664–65 (“Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia’s Policy is reasonable and hence constitutional.”).

136. Refer to notes 90–135 *supra* and accompanying text (discussing special needs jurisprudence prior to *Chandler*).

137. 520 U.S. 305, 322 (1997).

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

139. *Chandler*, 520 U.S. at 308.

140. *Id.* at 318 (“Our precedents establish that the 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. . . . Georgia has failed to show . . . a special need of that kind.”).

141. *Id.* at 321–22.

142. *Id.* at 321.

C. *Ferguson's Place in the Development of the Special Needs Exception*

Unlike prior special needs case law, the *Ferguson* decision cuts to the very heart of what makes a special needs search “special,” thereby justifying the suspension of the warrant and probable cause requirement. In a very limited context,¹⁴³ Justice Blackmun’s concurrence in *T.L.O.* implicitly identified two possible types of searches that could be conducted pursuant to the Fourth Amendment—the prevailing “normal needs” search conducted by police as per the normal needs of law enforcement, and the exceptional “special needs” search serving those purposes “beyond the normal need for law enforcement.”¹⁴⁴ It is in this context that Justice Blackmun’s seminal special needs analysis from *T.L.O.* should be read.¹⁴⁵ His concurrence was not intended to weaken the warrant and probable cause requirement of the Fourth Amendment, but rather “to reaffirm the general rule requiring a warrant and probable cause,” with a very narrow exception for non-law enforcement related searches.¹⁴⁶ Special needs case law has continually reiterated this theme of *T.L.O.*, taking care to identify the non-prosecutorial or non-law enforcement nature of a qualifying special needs search.¹⁴⁷

143. I stress limited context because there are numerous other exceptions to the warrant and probable cause requirement of the Fourth Amendment. Refer to note 2 *supra* (listing a number of searches that may be conducted without a warrant).

144. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment); see also *Buffaloe*, *supra* note 76, at 543–44 (distinguishing the theories behind a normal search for criminal evidence and a special needs search for wrongdoing).

145. See *T.L.O.*, 469 U.S. at 351 (1985) (Blackmun, J., concurring in the judgment).

146. See *Buffaloe*, *supra* note 76, at 537–38. In order to emphasize the exceptional circumstances required to justify the application of the special needs doctrine, Justice Blackmun actually dissented in two decisions rendered after *T.L.O.* See *Griffin v. Wisconsin*, 483 U.S. 868, 881 (1987) (Blackmun, J., dissenting) (arguing that the majority opinion failed to recognize that the identification of an exceptional circumstance is a “threshold determination” that should be made before application of the balancing test); *O’Connor v. Ortega*, 480 U.S. 709, 741 (1987) (Blackmun, J., dissenting) (“[O]nly when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a ‘balancing’ test to formulate a standard of reasonableness for this context.”).

147. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (distinguishing the drug testing of student-athletes from criminal evidentiary searches, which would generally require probable cause); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (“It is clear that the Customs Service’s drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee’s consent.”); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 620–21 (1989) (justifying the use of toxicological tests under the special needs exception because those tests did not “assist in the prosecution of employees”); *O’Connor*, 480 U.S. at 724 (explaining that public employers were not expected to adhere to the probable cause requirement, “at least when the search

However, *Ferguson* was the first opportunity for the Court to fully dissect the scope of Justice Blackmun's concurrence in *T.L.O.* Special needs precedent had been limited factually to situations where law enforcement was neither directly nor indirectly involved in the contested search,¹⁴⁸ and where criminal prosecution was not an immediate purpose or result of the search.¹⁴⁹ As the discussion below illustrates, the majority in *Ferguson* attempted to flesh out the parameters of Justice Blackmun's special needs definition, especially with regard to the role of law enforcement in a search.¹⁵⁰

The *Ferguson* Court wisely identified a common theme in the prior special needs cases, namely that the special need asserted "was one divorced from the State's general interest in law enforcement."¹⁵¹ However, the majority likely recognized that searches could be conducted under the guise of the special needs exception, despite having a law-enforcement related purpose.¹⁵² Thus, the majority's opinion is an attempt to ferret out these dubious special needs searches. The majority explains that the ultimate goal of any criminal search will almost always be tied to a greater societal purpose.¹⁵³ Therefore, relying on this greater societal purpose to justify a special needs search will effectively circumvent *T.L.O.*'s foundational question on law enforcement involvement.¹⁵⁴ As a result, the majority reasons, at an *initial*

is not used to gather evidence of a criminal offense"); *T.L.O.*, 469 U.S. at 341 n.7 ("This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question."); see also Buffaloe, *supra* note 76, at 546–48 (describing the Supreme Court's historical treatment of non-prosecutorial searches).

148. But see *Griffin*, 483 U.S. at 870 (holding that a warrantless search by probation officers fell within the special needs exception). Refer to notes 108–15 *supra* (discussing the unique nature of the *Griffin* decision).

149. Refer to Part III.B *supra* (discussing the creation and development of the special needs exception). While none of the searches in prior special needs decisions were conducted with or at the behest of police officers, some of the searches did in fact lead to criminal prosecutions.

150. Refer to notes 144–46 *supra* and accompanying text (discussing Justice Blackmun's original characterization of the role of law enforcement in a special needs search).

151. See *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001).

152. See *id.* at 72 & n.5 (recognizing that although the policy was termed "conditional," in reality the hospital immediately advised police of positive test results).

153. See *id.* at 83–84.

154. *Id.* at 84 ("Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose."). In fact, the State in *Ferguson* identified its special need, or ultimate goal, as "protecting the health of both mother and child." See *id.* at 81.

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stage it is necessary to determine if the *immediate goal* of any search regime is to “generate evidence for law enforcement purposes.”¹⁵⁵ If so, then surely the search in question cannot be one that is “divorced from the State’s general interest in law enforcement”¹⁵⁶ and would therefore not qualify for suspension of the warrant and probable cause requirement through the special needs exception.¹⁵⁷ By evaluating the immediate objective of a special needs search, instead of its ultimate goal, the majority is attempting to prevent law enforcement from usurping a special needs regime while simultaneously claiming that the ultimate purpose is non-law enforcement related. The majority’s reasoning provides the clearest test to date for determining the appropriate level of law enforcement involvement in a special needs search.

Unfortunately, Justice Kennedy confuses the test in his concurrence.¹⁵⁸ Justice Kennedy applies the majority’s immediate purpose test at *each* stage of the special needs analysis, concluding that the “immediate purpose of a search policy will [almost always] be to obtain evidence.”¹⁵⁹ While this observation is certainly true, it does not necessarily mean that the accumulation of evidence is “for law enforcement purposes.”¹⁶⁰ The majority makes this very point in responding to Justice Kennedy’s criticism.¹⁶¹ Under the majority’s test, after a court identifies whether the search was performed to generate evidence for law enforcement purposes, the remainder of the special needs analysis is no different from the doctrine developed in *Skinner*, *Von Raab*, and *Vernonia*—the Court balances the ultimate goal of the search against the privacy interest at issue.¹⁶² Thus, the immediate purpose of a search is examined only at the *initial* stage to disqualify a disguised criminal search from further analysis under the special needs exception.¹⁶³ Despite Justice

155. *Id.* at 82–84.

156. *Id.* at 79.

157. Refer to note 146 *supra* and accompanying text (noting the general requirement of warrant and probable cause).

158. See *Ferguson*, 532 U.S. at 87 (Kennedy, J., concurring in the judgment). Justice Kennedy’s concurrence misapplies the immediate purpose test set forth by the majority. He attempts to apply the majority’s test to the Court’s prior decisions in *Skinner*, *Von Raab*, and *Vernonia*, but his application of the test is flawed. See *id.* (Kennedy, J., concurring in the judgment).

159. *Id.* (Kennedy, J., concurring in the judgment).

160. *Id.* at 83.

161. See *id.* at 83 & n.20. (“In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes.”).

162. Refer to Part III.A–B *supra* (describing the evolution of the special needs balancing test).

163. *Ferguson*, 532 U.S. at 82–84 (focusing initially on the “immediate objective of the searches” rather than on the program’s “ultimate goal”).

Kennedy's discomfort on this point, the rest of his concurrence is in agreement with the majority.¹⁶⁴ Like the majority, Justice Kennedy realizes that the testing policy at issue in *Ferguson* cannot be sustained because "there was substantial law enforcement involvement in the policy from its inception."¹⁶⁵

Regrettably, Justice Scalia's dissenting opinion adds very little to the special needs debate. Rather, Justice Scalia argues that there is no need to reach the question of whether a special need exists because the pregnant mothers consented to the tests.¹⁶⁶ While this might be true, the majority treats the issue of consent as a factual finding, thus allowing the lower courts to decide the issue.¹⁶⁷ Justice Scalia further asserts that the special needs exception is irrelevant because the issue before the Court is one of misplaced trust—the patients entrusted MUSC with the drug tests, and MUSC turned those results over to the police.¹⁶⁸ Yet misplaced trust necessarily presupposes an element of consent, as the patients would first have to consent to the drug test. Although patients ordinarily consent to routine medical tests and procedures, certainly the mothers at MUSC did not consent to a criminal search for cocaine use by law enforcement authorities.¹⁶⁹ In other words, the patients in *Ferguson* may have consented to medical treatment, but they certainly did not consent to a search for evidence of criminal conduct.

On the issue of special needs, Justice Scalia argues that "the addition of a law-enforcement-related purpose to a legitimate medical purpose" should not negate the applicability of the special needs doctrine.¹⁷⁰ Justice Scalia cites *Griffin* for the proposition that the special needs doctrine "was developed, and is

164. See *id.* at 88 (Kennedy, J., concurring in the judgment).

165. *Id.* (Kennedy, J., concurring in the judgment) ("The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives.").

166. See *id.* at 93 (Scalia, J., dissenting) (observing that "[i]t is rudimentary Fourth Amendment law that a search which has been consented to is not unreasonable").

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

168. *Id.* at 93–95 (Scalia, J., dissenting) ("Until today, we have never held—or even suggested—that material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain.").

169. *Id.* at 78 & n.13 (stating that while a patient might "expect that members of the hospital staff [would] turn over evidence acquired in the course of treatment to which the patient had consented" because of mandatory reporting laws, a patient would not "anticipate that hospital staff would intentionally set out to obtain incriminating evidence from their patients for law enforcement purposes").

170. *Id.* at 100 (Scalia, J., dissenting).

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ordinarily employed, precisely to enable searches *by law enforcement officials* who, of course, ordinarily have a law enforcement objective.”¹⁷¹ Justice Scalia’s interpretation of *Griffin* is radically divergent from the special needs precedent established by the Supreme Court in *T.L.O.*, *O’Connor*, *Vernonia*, *Skinner*, *Von Raab*, and *Chandler*.¹⁷² While *Griffin* is an outlier of sorts—involving probation officers who obtained criminal evidence ultimately used for prosecution through a special needs search—it can easily be distinguished on the ground that “probationers have a lesser expectation of privacy than the public at large.”¹⁷³

IV. ANALYZING THE IMPACT OF *FERGUSON* ON THE ROLE OF LAW ENFORCEMENT AND THE USE OF CRIMINAL EVIDENCE OBTAINED DURING A SPECIAL NEEDS SEARCH

Even before the Court’s decision in *Ferguson*, commentators questioned the legitimacy of a special needs search displaying criminal colors.¹⁷⁴ Because the special needs exception was originally formulated to justify only those searches beyond the normal needs of law enforcement, there is little judicial guidance regarding: (1) the extent to which law enforcement may participate in a special needs search, and (2) the proper disposition of criminal evidence uncovered during a special needs search. These issues are of paramount importance, however, because they directly implicate the philosophical underpinnings of the exception, justifying suspension of the warrant and probable cause requirement.¹⁷⁵

171. *Id.* (Scalia, J., dissenting) (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

172. Refer to Part III.A–B *supra* (describing the non-law enforcement related dimensions of the special needs cases).

173. *Ferguson*, 532 U.S. at 79 n.15.

174. See Nuger, *supra* note 4, at 130 (expressing concern that future decisions might “weave the special needs rationale into one of the Fourth Amendment warrant exceptions in criminally-related searches”); Gerald S. Reamey, *When “Special Needs” Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 320 (1992) (“The Court’s opinions give no indication that evidence discovered during these searches is unavailable in the prosecution of criminal activity uncovered by the search.”).

175. Justification for suspending the warrant and probable cause requirement during a special needs search has always come by way of the non-criminal nature of that search. If the results of a special needs search could ultimately be turned over to law enforcement, or if law enforcement could participate in the search, the characteristics distinguishing a special needs search from a routine criminal search would no longer seem to apply. See Nuger, *supra* note 4, at 92 (“Noncriminal . . . intrusions have generally been paid greater deference because they are primarily intended to assure compliance with regulatory schemes, not to apprehend and criminally punish offenders.”).

A. *The Extent to Which Law Enforcement May Participate in a Special Needs Search*

Addressing the scope of the special needs exception prior to *Ferguson*, one commentator asked: “[H]ow much police participation makes the probable cause [as opposed to the reasonableness] standard applicable?”¹⁷⁶ In answer to this question, the *Ferguson* majority provides a rather rudimentary tool for determining when law enforcement involvement in a special needs search transforms that search into a criminal one.¹⁷⁷ “While 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.”¹⁷⁸ This language, distinguishing between a program’s “ultimate goal” and “immediate objective,” is the closest thing to a bright-line test offered by the majority.¹⁷⁹ The immediate objective of a search is identified by examining a policy’s primary purpose, placing particular emphasis on law enforcement’s level of entanglement in the search.¹⁸⁰ If the immediate objective of the search appears “ultimately indistinguishable from the general interest in crime control,” the search does not qualify for special treatment under the Fourth Amendment.¹⁸¹

Essentially, the test articulated by the Court is a tool to illuminate pretext and thereby prevent law enforcement from using the special needs doctrine to further its general interest in crime control.¹⁸² As Professor Wayne LaFave explains, by

176. See JOHN WESLEY HALL, 2 SEARCH AND SEIZURE § 38.23, at 525 (3d ed. 2000). Hall discusses what would happen in the special needs context if a law enforcement officer informs a principal that a student is involved with drugs, but the principal searches the student without instigation by or assistance from the police. *See id.*

177. The Court characterizes this test as identifying a special need “divorced from the State’s general interest in law enforcement.” *Ferguson*, 532 U.S. at 79.

178. *Id.* at 82–83 (footnote omitted).

179. *Id.*

180. *Id.* at 84 (describing the primary purpose of the MUSC policy as “us[ing] the threat of arrest and prosecution in order to force women into treatment” and identifying the presence of law enforcement officials “at every stage of the policy”).

181. *Id.* at 81.

182. In prior decisions, the Court had expressed some concern over the potential for law enforcement to usurp the favorable constitutional treatment provided to administrative and special needs searches. *See, e.g., Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 621 n.5 (1989) (noting that while generally “test results might be made available to law enforcement authorities, . . . [respondents] do not seriously contend that this provision, or any other part of the administrative scheme, was designed as a pretext to enable law enforcement authorities to gather evidence of penal law violations” (quotation marks omitted) (quoting *New York v. Burger*, 482 U.S. 691, 716 & n.27, 717

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separating criminal searches from special needs searches, the Court has drawn a line “ensur[ing] that the usual requirements of a warrant and at least reasonable suspicion but more often probable cause are not undermined by concealing ordinary law enforcement activities within special procedures which are deservedly less demanding only because of the special circumstances present.”¹⁸³ Unfortunately, as with any examination of pretext, the outcome is rather fact-specific.¹⁸⁴ Therefore, the majority’s “immediate objective” versus “ultimate goal” test will likely provide few easy answers to practitioners who question the extent of law enforcement involvement in a purported special needs search.¹⁸⁵

After *Ferguson*, it appears logical that police will not be banned completely from participating in a special needs search—provided such involvement does not implicate the general interests of crime control. After all, the *Ferguson* majority would allow medical personnel to turn over to the police test results “inadvertently acquire[d] in the course of routine treatment.”¹⁸⁶ In fact, the Ninth Circuit Court of Appeals recently applied *Ferguson* to an alleged special needs search in the context of a domestic dispute, where police were required to escort a child home and allow her to collect her belongings pursuant to court order.¹⁸⁷ The court concluded that such limited police activity was “outside the ordinary needs of law enforcement” and thus qualified for the special needs exception.¹⁸⁸ However, in another case, the Ninth Circuit recently *invalidated* a special needs search because the “extensive involvement” of federal agents did

(1987))).

183. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.3, at 156–57 (3d ed. Supp. 2002)

184. See *Ferguson*, 532 U.S. at 81–84 (describing the various elements of the MUSC policy in order to illustrate that the immediate purpose was to obtain criminal evidence).

185. See Michael R. Stahlman, *New Developments in Search and Seizure: A Little Bit of Everything*, 2001 ARMY LAW. 20, 32 (analyzing what *Ferguson* might mean for practitioners).

186. *Ferguson*, 532 U.S. at 84–85 (affirming the constitutionality of mandatory reporting statutes).

187. *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1057 (9th Cir. 2002). After police arrested the child’s mother for becoming combative with the officers, they accompanied the child into the house a second time to search for the child’s belongings. *Id.* at 1055. The second entry and search was challenged as violative of the Fourth Amendment. *Id.*

188. *Id.* The Ninth Circuit explained that “[k]eeping the peace while a minor child exercises her rights pursuant to a court order is not akin to typical law enforcement functions.” *Id.* Instead, the officers should be viewed as “serving as neutral third parties acting to protect all parties.” *Id.* Most importantly, the court recognized that the officers did not proceed in an effort to obtain evidence of criminal wrongdoing and that there was no underlying policy “designed to gather evidence of violations of penal laws.” *Id.*

not make a workplace search a “routine file retrieval case under *O’Connor*.”¹⁸⁹

Furthermore, according to the Fifth Circuit in *Roe v. Texas Department of Protective and Regulatory Services*,¹⁹⁰ even the omnipresence of law enforcement is enough to invalidate a special needs claim post-*Ferguson*.¹⁹¹ In *Roe*, a Texas social worker with Child Protective Services (CPS) visually searched a child’s body cavities for signs of sexual abuse.¹⁹² While CPS claimed the search was permitted under the special needs doctrine and identified an ultimate goal of protecting the child’s welfare, the Fifth Circuit found that the search was too “intimately intertwined with law enforcement.”¹⁹³ Interestingly, the court identified the presence of law enforcement by way of statute; Texas law describes a CPS investigation of sexual abuse as both an effort to protect the welfare of a child and “as a tool . . . for gathering evidence for criminal convictions.”¹⁹⁴

Ultimately, the role of law enforcement in a special needs search must be decided on a case-by-case basis.¹⁹⁵ Clearly, police

189. *United States v. Jones*, 286 F.3d 1146, 1150–52 (9th Cir. 2002). While the government argued that the search conducted by agents was “an ordinary file retrieval case” similar to the *O’Connor* special needs decision, the court found that the “immediate goal . . . was to secure documents relevant to a criminal investigation that could be admissible in subsequent criminal prosecutions.” *Id.* at 1151–52. As in *Ferguson*, the court identified the extent of law enforcement involvement throughout the search, noting that “[f]ederal investigators initiated the search . . . directed the search and had . . . employees point out offices and work areas relevant to the subpoena which they then proceeded to search.” *Id.*

In yet another post-*Ferguson* decision, the U.S. District Court for the Eastern District of California called into question the constitutionality of searches conducted pursuant to the DNA Analysis Backlog Elimination Act because of its primary purpose as a “general law enforcement tool.” *United States v. Miles*, 228 F. Supp. 2d 1130, 1141 (E.D. Cal. 2002). The Act required convicted felons on parole or probation to submit to DNA testing, the results of which were provided to the FBI for analysis and indexing in a national database. *See id.* at 1131–32. The Act allowed law enforcement to link DNA evidence found at a crime scene with a suspect already on file. *Id.* at 1132. The court held that “[b]ecause the Act authorize[d] suspicionless searches primarily for general law enforcement purposes,” it did not satisfy the *Ferguson* special needs test. *Id.* at 1140.

190. 299 F.3d 395 (5th Cir. 2002).

191. *Id.* at 406–08.

192. *Id.* at 398–99.

193. *Id.* at 406–07.

194. *Id.* at 407. Judge Smith concluded that the Texas Family Code “deeply involves law enforcement in the investigation” by requiring CPS to notify officials of any child abuse report and by allowing for joint investigations into such allegations of abuse. *Id.*

195. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (focusing on case-specific facts in determining whether the Customs Service’s program was designed to serve the ordinary purposes of law enforcement); *see also Henderson v. City of Simi Valley*, 305 F.3d 1052, 1057 (9th Cir. 2002) (holding that police officers were not performing law enforcement duties simply by escorting and protecting a young girl pursuant to a court order based on “the particular facts of this case”).

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involvement must be limited;¹⁹⁶ however, this limitation does not equate to an absolute exclusion of law enforcement involvement.¹⁹⁷ The most important consideration is whether pretext exists; is a special needs search or testing regime simply a façade for a program with a primary purpose of crime control?¹⁹⁸ If so, the search is invalid and it makes little difference whether law enforcement personnel are active in the program on a day-to-day basis or whether they are present only through statutory requirements.¹⁹⁹

B. Utilizing Evidence Obtained Through a Special Needs Search in Criminal Prosecutions

After *Ferguson*, there appears to be at least one way in which medical personnel can report positive drug test results to law enforcement authorities without attracting constitutional scrutiny: mandatory reporting statutes.²⁰⁰ The *Ferguson* majority was extremely careful not to invalidate the legitimacy of these state statutes, which require doctors to report certain crimes including child abuse. The majority preserved the constitutionality of these statutes by explaining that:

While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.²⁰¹

196. See *United States v. Jones*, 286 F.3d 1146, 1151–52 (9th Cir. 2002) (disallowing a search that was instigated and performed almost entirely by law enforcement officers, where such a search would be permissible if conducted by a public employer in its regular course of business).

197. See *Henderson*, 305 F.3d at 1057 (allowing police to keep the peace by escorting a minor child into her home to collect her belongings).

198. See *Ferguson v. City of Charleston*, 532 U.S. 67, 81–82 (2001) (rejecting the asserted purpose of the testing policy as protecting the health of mother and child because the policy focused on police procedure and chain of evidence protocol).

199. In *Ferguson*, local police were involved in the day-to-day administration of the stricken policy. *Id.* at 82. In contrast, although the statute in *Roe v. Texas Department of Protective and Regulatory Services*, 299 F.3d 395 (5th Cir. 2002), did not involve police per se, it required the notification of and close cooperation with law enforcement officials in child abuse cases. *Id.* at 407.

200. See *Ferguson*, 532 U.S. at 78 n.13, 84–85 (recognizing that state hospital employees may have a duty to report evidence of criminal conduct acquired in the course of routine treatment under state reporting statutes); see also Marrus, *supra* note 17, at 312–16 (discussing state statutes requiring doctors to report child abuse).

201. *Ferguson*, 532 U.S. at 84–85. Justice Kennedy agreed in his concurrence that

Thus, the majority offers a safe harbor from constitutional scrutiny for criminal evidence “inadvertently acquire[d] in the course of routine treatment.”²⁰² This type of evidence could be turned over to police for prosecution,²⁰³ or law enforcement could obtain test results by pursuing the proper channels.²⁰⁴ Presumably, however, if a state-run hospital performs a test with the purpose of informing the police of positive results, the evidence is no longer “inadvertently acquire[d],” and *Ferguson* applies.²⁰⁵ This distinction makes sense because obtaining evidence “for the specific purpose of incriminating”²⁰⁶ patients is, in essence, a criminal search and should be held to the more stringent warrant and probable cause requirement of the Fourth Amendment.²⁰⁷

This discussion leads to an important yet unresolved question in special needs jurisprudence: Can any evidence of criminal wrongdoing obtained during a valid special needs search be used by law enforcement in the prosecution of a defendant? While the *Ferguson* Court addressed the legitimacy of mandatory reporting statutes, it did not specifically address this important question, nor did it need to.²⁰⁸ However, on its face, the special

the majority’s holding did not “call into question the validity of mandatory reporting laws.” See *id.* at 90 (Kennedy, J., concurring in the judgment). Justice Kennedy also appears to illustrate a *Ferguson*-proof route for obtaining test results and using them in criminal prosecutions. See *id.* (Kennedy, J., concurring in the judgment) (observing that after “accept[ing] the premise that the medical profession can adopt acceptable criteria for testing expectant mothers for cocaine use in order to provide prompt and effective counseling to the mother and to take proper medical steps to protect the child,” prosecuting authorities can then “adopt legitimate procedures to discover this information” and initiate prosecutions without invalidating the testing).

202. *Id.* at 84–85.

203. See Marrus, *supra* note 17, at 312–16 (considering whether information obtained as a result of reporting statutes may in fact be used for criminal prosecution of pregnant mothers at the state level). In several states, evidence obtained through reporting statutes is inadmissible; however, a few states allow such evidence to be offered in a criminal case. See *id.*

204. Refer to note 177 *supra* (discussing Justice Kennedy’s explanation of how police may obtain positive test results).

205. *Ferguson*, 532 U.S. at 85 (distinguishing between evidence “inadvertently acquire[d]” and evidence acquired for the purpose of incrimination).

206. *Id.*

207. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment) (declaring that a search unsupported by either a warrant or probable cause may nevertheless be constitutional when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable” (emphasis added)). Refer to note 4 *supra* and accompanying text (citing the non-criminal nature of administrative searches as justification for the special needs doctrine).

208. Because the majority ultimately invalidated the search, there was obviously no need to address the circumstance where the results of a valid special needs search ends up in the hands of police. However, had the Court sanctioned a modified drug-testing regime in *Ferguson* as a valid special needs search, there would have been a legitimate

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needs exception would appear to prohibit evidence acquired via the exception (that is, evidence acquired without a warrant or probable cause) from being used in future criminal proceedings.²⁰⁹ This prohibition derives from the basic proposition behind the special needs doctrine that suspension of the warrant and probable cause requirement can only occur when a special need exists beyond the normal need for law enforcement.²¹⁰ Therefore, it would seem entirely inappropriate to suspend the warrant and probable cause requirement on the basis that a special needs search falls outside the normal needs of law enforcement, yet allow the results of that search to be used for the law enforcement purpose of prosecuting criminal behavior.²¹¹ Indeed, allowing for such a loophole would only serve to promote the kind of pretextual commandeering of the special needs regime discouraged by the Court in *Ferguson*.

The Court has continually peppered its special needs case law with caveats pertaining to this very issue.²¹² In *Skinner*, the Court sidestepped a potential answer by “leav[ing] for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the [Federal Railroad Administration’s] program.”²¹³ However, explicit in the *Skinner* Court’s justification for invoking special needs protection was that the testing did not “assist in the prosecution of employees.”²¹⁴ Likewise, in *Von Raab*,

question as to whether or not the results of those tests could be used to prosecute the women involved.

209. Refer to note 207 *supra* and accompanying text (establishing that special needs searches must be divorced from the needs of regular law enforcement).

210. See *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment); see also *Chandler v. Miller*, 520 U.S. 305, 311 (1997).

211. See Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 287–88 (2000) (recognizing that in practice “states have been free to exploit the [special needs] exception by arguing that the absence of probable cause or a warrant is justified because of special needs beyond mere law enforcement”). However, prosecutors have “then turned around to use evidence obtained by virtue of the special needs doctrine precisely for criminal prosecutions.” *Id.* at 288.

212. Refer to notes 164–67 *supra* and accompanying text (expounding upon these caveats).

213. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 621 n.5 (1989).

214. *Id.* at 620–21. The Court did note, however, that “while respondents aver generally that test results might be made available to law enforcement authorities, . . . they do not seriously contend that this provision, or any other part of the administrative scheme, was designed as ‘a pretext to enable law enforcement authorities to gather evidence of penal law violations.’” *Id.* at 621 n.5 (quotation marks omitted) (quoting *New York v. Burger*, 482 U.S. 691, 716 & n.27, 717 (1987)). These comments imply that the Court is less concerned with the occasional prosecution of an employee, as opposed to the routine use of evidence in criminal prosecutions, as a possible indication of pretext.

the Court based its invocation of the special needs exception on the fact that “[t]est results may not be used in a criminal prosecution of the employee without the employee’s consent.”²¹⁵ Additionally, the Court in *Vernonia* emphasized the civil nature of the special needs search at issue by explaining that the results of drug tests performed on student-athletes were not turned over to the police, nor were they used for any internal disciplinary function.²¹⁶ Similarly, in its most recent special needs drug-testing decision, *Board of Education v. Earls*,²¹⁷ the Court again justified the use of the special needs exception on the grounds that “test results are not turned over to any law enforcement authority.”²¹⁸ Nor do they “lead to the imposition of discipline or have any academic consequences.”²¹⁹

These special needs decisions hint at the possibility of evidentiary limitations upon evidence obtained through a special needs search.²²⁰ While the language of these decisions has never explicitly held that test results could not be used in later criminal prosecutions, there is a strong argument that the use of these results should be confined to a purely non-criminal arena.²²¹ One practitioner, Robert Dodson, argues that “[i]f the special needs doctrine is to remain a viable exception to the warrant and probable cause requirements of the Fourth Amendment, then courts should allow evidence obtained from special needs searches to be used only to address the special need that triggers the search.”²²² In his treatise entitled *Search and Seizure*, John

215. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (“It is clear that the Customs Service’s drug-testing program is not designed to serve the ordinary needs of law enforcement.”).

216. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) (“[T]he 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.”).

217. 122 S. Ct. 2559 (2002).

218. *Id.* at 2566–67 (describing the only punitive consequences of a failed test as “limit[ing] the student’s privilege of participating in extracurricular activities”).

219. *Id.* at 2567.

220. *See* Dodson, *supra* note 211, at 277 (asserting that the Court’s rationale in *Skinner*, *Von Raab*, and *Vernonia* “would appear to provide meaningful limitations” on the use of test results in criminal prosecutions). Note that Dodson’s article was published prior to the Court’s decision in *Ferguson*.

221. *Id.* at 277–78 (arguing that use of criminal evidence obtained during the course of a special needs search is both “misguided” and “inconsistent with the Court’s current formulation of the special needs doctrine”); *see also* HALL, *supra* note 176, § 38.5, at 510 (noting that “[t]he good intentions of *T.L.O.* in only applying the ‘special needs exception’ to noncriminal searches soon gave way to the exigencies of suppressing possible criminal behavior”).

222. Dodson, *supra* note 211, at 286. Dodson advocates an exclusionary rule to the special needs doctrine, allowing evidence to be used “only for that special need beyond

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Wesley Hall condemns the judicial mutilation of the special needs doctrine as it was originally formulated in *T.L.O.*, describing use of the exception in many cases as “a burglar tool to get past the Fourth Amendment threshold.”²²³

While acknowledging that there are some questions as to whether or not special needs search results are admissible in criminal prosecutions, Professor LaFave believes the answer is most likely yes.²²⁴ Professor LaFave asserts that the very lack of an exclusionary rule is evidence of the Court’s intent.²²⁵ Moreover, prior to *Ferguson*, it appears that many lower courts had regularly ignored any form of evidentiary limitations and upheld the use of evidence obtained through special needs searches in criminal prosecutions.²²⁶ The pre-*Ferguson* case of *Oman v. Indiana*²²⁷ is such an example. In *Oman*, a firefighter submitted to compulsory drug testing pursuant to a city policy after he was involved in an accident en route to a fire.²²⁸ Acting on a tip, a deputy prosecutor subpoenaed the results of the drug tests.²²⁹ The results revealed that Oman had tested positive for marijuana.²³⁰ Oman claimed that “as a matter of general Fourth Amendment law, the results of employer administrative drug tests can *never* be used as the basis of criminal investigations and trials.”²³¹ However, the Supreme Court of Indiana rejected this contention, asserting that neither *Von Raab* nor *Skinner* prohibit such use.²³² While the court acknowledged that the U.S. Supreme Court had “left open the question of governmental employers using their administrative testing programs to pursue

normal law enforcement activity,” and excluding its use in criminal prosecutions or juvenile delinquency proceedings. *Id.*

223. HALL, *supra* note 176, § 38.5, at 510.

224. LAFAVE, *supra* note 183, § 10.2(g), at 451–52 (citing *Skinner* and noting the absence of any limitation on the dissemination of test results to law enforcement as justification).

225. *See id.* § 10.2(g), at 452 (“[T]he Court . . . has declined to fashion a special exclusionary rule whereby evidence of crime would be suppressed if discovered in exercising a ‘special’ search authority grounded in safety rather than law enforcement needs.”).

226. *See Dodson*, *supra* note 211, at 277, 278 & n.189 (canvassing lower court decisions that have upheld the use of special needs evidence in criminal prosecutions). *But see* *Pennsylvania v. Kohl*, 615 A.2d 308, 316 (Pa. 1992) (striking down a program testing all drivers involved in major accidents for alcohol or drugs and holding that the admission of evidence obtained as a result of such testing in criminal prosecutions violates the Fourth Amendment).

227. 737 N.E.2d 1131 (Ind. 2000).

228. *Id.* at 1133.

229. *Id.* at 1133–34.

230. *Id.* at 1134.

231. *Id.* at 1143.

232. *Id.*

criminal drug use convictions against employees,” it distinguished an employer’s use of testing from a prosecutor pursuing a criminal investigation via valid compulsory legal process.²³³ Thus, the results of Oman’s administrative drug test could be “used in a criminal prosecution against him, but only if obtained by valid legal process externally initiated from the employment setting.”²³⁴

Does *Ferguson* change the result in *Oman*? Clearly, after *Ferguson*, if employees are tested “for the specific purpose of incriminating those [employees],” the results of the tests cannot be turned over to police.²³⁵ Yet, while the *Ferguson* majority explicitly prohibits a special needs testing regime from serving as a pretext for general crime control, presumably law enforcement may still benefit from the fruits of a special needs search, provided that the use of evidence in a criminal prosecution does not give rise to an inference of pretext.²³⁶ So the answer is: *Ferguson* probably does not change the result in *Oman*. Unless Oman could somehow demonstrate that the city testing policy was a pretext for general crime control, *Ferguson* doesn’t appear to prohibit a prosecutor from externally obtaining the results of a valid special needs search.²³⁷ Thus, a defendant faced with prosecution as a result of evidence obtained during a special needs search probably will be forced to defend on the issue of pretext. Unfortunately, a single instance of criminal prosecution does not appear to transform a drug testing program’s “immediate objective . . . [into] generat[ing] evidence for law enforcement purposes.”²³⁸ In order to make the requisite showing, a defendant will likely need to demonstrate the “routine use in

233. *Id.*

234. *Id.* at 1146–47.

235. *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001).

236. *See Leading Cases*, 115 HARV. L. REV. 326, 334–35 (2001) (commenting that *Ferguson* may not do as much to restrict law enforcement as it first appears). While *Ferguson* places limits on police to the extent that they “may not make the hospital into an ‘institutional arm of law enforcement,’” there is still leeway to use evidence obtained in such a search for criminal purposes. *Id.* at 335.

237. *Ferguson* questioned whether the city’s drug testing policy was a legitimate “special need” search, divorced from any needs of law enforcement, or merely a pretext for gathering evidence. *Ferguson*, 532 U.S. at 82–83. The Court explicitly accepted the notion that evidence of drug use discovered independently of law enforcement objectives, such as by routine examinations by the doctors themselves, could be turned over to the police and used for subsequent prosecution. *Id.* at 84–85. Refer to note 177 *supra* (detailing Justice Kennedy’s *Ferguson*-proof method for obtaining criminal evidence); refer also to notes 197–98 *supra* (citing the absence of any pre-*Ferguson* limitation or exclusionary rule prohibiting use of evidence discovered in a valid “special needs” search for criminal prosecution).

238. *Ferguson*, 532 U.S. at 83.

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criminal prosecutions²³⁹ of evidence obtained pursuant to a valid special needs testing regime. As a result, even after *Ferguson*, a lone defendant prosecuted as a result of evidence obtained through a special needs search will likely have little recourse.

V. CONCLUSION

Ferguson is an important decision because the Supreme Court attempts to give new bite to the original contours of the special needs exception by holding that a special need must be beyond the normal needs of law enforcement. Mission accomplished. After *Ferguson*, drug-testing policies and programs demonstrating an immediate objective of generating evidence for law enforcement purposes should be invalidated. Accordingly, *Ferguson* should prevent, for the most part, police and law enforcement from using the special needs exception to get around the warrant and probable cause requirement for criminal searches. For practitioners and administrators, *Ferguson* means that special needs search regimes must be insulated from law enforcement entanglement, at least to the extent that a policy or program becomes “indistinguishable from the general interest in crime control.”²⁴⁰

Unfortunately, *Ferguson* doesn't have all the answers. While the Court took the opportunity to reinforce the foundation of the special needs exception, the possibility still exists that employees, patients, and even students could be prosecuted based on evidence obtained through a valid special needs search. In this sense, law enforcement benefits from the special needs apparatus without having to comply with the warrant and probable cause requirement of the Fourth Amendment. In the absence of an exclusionary rule preventing evidence obtained during a special needs search from being used to prosecute the defendant, lower courts have already shown a willingness to affirm convictions obtained through the use of such evidence. Should the results of a special needs testing regime ever be used as the basis for criminal prosecutions? It is doubtful that the

239. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 621 n.5 (1989); *see also* *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1057 (9th Cir. 2002) (upholding police officer's actions because of the absence of an underlying policy designed to gather evidence of violations of penal laws); *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 406–08 (5th Cir. 2002) (disallowing statutorily-required police involvement in child abuse cases); *United States v. Miles*, 228 F. Supp. 2d 1130, 1141 (E.D. Cal. 2002) (striking down as unconstitutional a regime of suspicionless DNA testing used solely for law enforcement purposes).

240. *Ferguson*, 532 U.S. at 81 (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)).

Court will answer this question any time soon, if at all. In the short term, however, *Ferguson* solves the bigger problem by preventing the orchestrated and routine use of special needs evidence in criminal prosecutions.

Christopher Mebane