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Ferguson v. City of Charleston: Gatekeeper of the Fourth Amendment's "Special Needs" Exception

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FERGUSON V. CITY OF CHARLESTON: GATEKEEPER OF THE FOURTH AMENDMENT'S "SPECIAL NEEDS" EXCEPTION

I. FACTS

A. Motivations for Policy M-7

Remember the war on drugs? Numerous policies ("Just Say No" and Drug Free School Zones) were designed to protect the nation's children from the dangers of addiction. D.A.R.E. officers debuted in schools and peeing in a cup for drug screening became a normal part of going out for the team. Policy M-7 was a urine-screening rubric adopted by the Medical University of South Carolina for identifying and assisting cocaine users among their prenatal patients.

In the late 1980s and early 1990s, discussions within the medical community began to reflect a greater societal concern over increased drug use and its effect on children specifically. Medical journals published telling research studies documenting a national epidemic. In South Carolina a number of these studies focused on prenatal drug use. Results indicated that approximately 15,000 babies suffering from in-utero exposure to illegal drugs were born in that state every year.

In particular, South Carolina became most concerned with the social, physical, and economic costs of maternal cocaine use on the mother, child, and the state as a whole, including serious health impacts, increased need for neonatal intensive care, social services, foster care, and special education services, increased family stress, and reduced maternal bonding. Additionally, the cost of caring for one crack-addicted infant until the age of one year commonly exceeded $50,000. Severely exposed infants (especially those sustaining brain damage) required permanent lifetime care costing in excess of one million dollars per infant.

In 1998 employees of the Medical University of South Carolina (MUSC) noted increased use of cocaine among mothers receiving prenatal care at their facility. Concerned about cocaine-related health

3. Id. at 5.
4. Id. at 4.
5. Id. at 5.
6. Id.
risks to the fetus and mother, MUSC began routinely screening urine samples from patients meeting one of six indicators of maternal cocaine use. Mothers testing positive were referred to drug treatment programs. However, very few referred patients followed through with the program, and after just four months the policy was generally deemed ineffective.

B. Designing of Policy M-7

MUSC began to consider ways to increase the effectiveness of its policy. Nurse Shirley Brown, MUSC’s obstetrics case manager, heard a news broadcast explaining that police in Greenville were arresting pregnant cocaine users on child abuse charges and believed the possibility of such prosecution could be used to make the counseling offered by MUSC more attractive to addicts. Nurse Brown discussed her idea with MUSC general counsel, Mr. Good, who contacted Charleston’s Solicitor, Mr. Condon. An inter-agency task force was organized by Solicitor Condon, including representatives from MUSC, local law enforcement, the County Substance Abuse Commission, and the Department of Social Services. “POLICY M-7,” a set of guidelines for “management of drug abuse during pregnancy,” was the result of task force discussions. Policy M-7 was adopted separately by MUSC. It provided the hospital with a procedure for identifying and assisting pregnant drug users, beginning with urine screening of patients meeting at least one of nine medical criteria, maintaining a chain of custody for samples, educating mothers testing positive about the dangers of prenatal drug abuse to themselves and their fetus, and referral to substance abuse clinics. “Most important, it added the threat of law enforcement intervention that ‘provided the necessary leverage to make the policy effective.’” If a patient failed to follow-up with substance abuse treatment or tested positive a second

9. Id.
10. Ferguson, 121 S. Ct. at 1284; Respondents’ Brief at 6, Ferguson, 121 S. Ct. 1281 (2001) (No. 99-936).
13. Ferguson, 121 S. Ct. at 1285.
14. Id.
15. Id.
16. Id.
17. Ferguson, 121 S. Ct. at 1285 (quoting Respondents’ Brief at 8).
time, Mr. Condon's office was notified and the mother was arrested. 18 Initially, if a patient tested positive during or after labor, police were notified immediately as well (regardless of whether she had received prenatal treatment at MUSC). 19 This aspect of the policy was modified in 1990 to allow a patient testing positive during labor to avoid arrest by consenting to substance abuse treatment. 20 MUSC considered M-7 to be very effective. During M-7's implementation, 223 of 253 women initially testing positive completed substance abuse programs and did not test positive a second time. 21

C. M-7 Conflicts with Civil Rights

Ten women who sought obstetrical care at MUSC and were searched under Policy M-7 filed suit against the City of Charleston, law enforcement officials, and MUSC trustees and personnel. 22 Two of these women, Lori Griffin and Sandra Powell, were screened in 1989 before the M-7 modifications and were not presented with drug treatment as an option to avoid arrest. 23 Ms. Griffin, 8 months pregnant, was arrested when she came to MUSC for prenatal care. She spent the final three weeks of her pregnancy in a jail cell from which she was transported back and forth to the hospital for further care. 24 Ms. Powell was searched upon her arrival to MUSC in labor. She was handcuffed in her hospital gown after giving birth and transported to jail. 25 The remaining eight plaintiffs received a "Solicitor's Letter" at the time of testing positive, explaining the urinalysis results and stating: "If you fail to attend Substance Abuse and Pre-Natal Care you will be arrested by Charleston City Police and Prosecuted by the Office of the Solicitor." 26 Seven were later arrested. 27

Plaintiffs challenged M-7's validity on a number of grounds including equal protection, invasion of privacy, and state tort law prohibiting the abuse of process in administering administrative poli-

19. Ferguson, 121 S. Ct. at 1285.
20. Id.
24. Id. at 7
25. Id. at 8.
26. Id.
27. Id. at 10.
cies. However, the matter on appeal was limited to plaintiffs' claim that M-7 advanced "warrantless and nonconsensual drug tests conducted for criminal investigatory purposes." Defendants countered that petitioners had consented to urine screening and that even absent consent, such searches were justified by non-law enforcement purposes under the "special needs doctrine."

D. Procedural History

The district court submitted plaintiffs' Fourth Amendment claim to the jury on the question of whether the 10 women had consented to urinalysis. The jury found that plaintiffs had consented to the searches. The district court rejected defendants' special needs defense, determining as a matter of law that the searches were not carried out by medical personnel for independent medical purposes. "Instead, the police came in and there was an agreement reached that the positive screens would be shared by police." Plaintiffs appealed, arguing that there was insufficient evidence to support the jury's finding of consent.

Conversely, the Court of Appeals for the Fourth Circuit did not address the issue of consent. Instead, the circuit court determined that M-7 furthered "special government needs beyond the normal need for law enforcement." The court based its holding on the district court's finding that "MUSC personnel conducted the urine drug screens for medical purposes wholly independent of an intent to aid law enforcement efforts." Applying the balancing test enumerated in special needs precedent, the majority explained the rising use of

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29. Ferguson, 121 S. Ct. at 1286.
30. Id.
32. Ferguson, 121 S. Ct. at 1286.
33. Id.
34. Ferguson, 186 F.3d at 476.
35. During oral argument Justice O'Connor suggested to Respondents' counsel that perhaps there was a question as to the sufficiency of evidence with regard to women who came to the hospital only for labor. She questioned the legitimacy and informed and voluntary nature of signing "consent" forms under such circumstances. Oral Argument at 42, Ferguson, 121 S. Ct. 1281 (2001) (No. 99-936).
36. Ferguson, 186 F.3d at 476 (quoting Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989)).
37. Id. at 477.
coca ine by pregnant women among MUSC's patients and associated health problems "created a special need beyond normal law enforcement goals." In balancing government and individual interests, the court stated M-7 "effectively advanced the public interest" and the "intrusion suffered by [plaintiffs] was minimal." Resolving the issue in favor of the defendants, the majority concluded "a balancing of these factors clearly demonstrates that the searches conducted were reasonable and thus not violative of the Fourth Amendment."

Plaintiffs appealed again and the United States Supreme Court granted certiorari on the limited issue of the applicability of the special needs doctrine to these facts. The Supreme Court concluded that the special needs doctrine did not apply and remanded the case back to the Fourth Circuit for a ruling on whether the evidence presented at trial was sufficient to support the jury's finding of consent. The majority of the Court differentiated the facts presented in Ferguson from prior special needs case law, explaining that in earlier cases the "special need" justifying warrantless searches was separate from the State's general interest in law enforcement. "In this case... 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." The Court focused on the M-7 policy itself to determine the purpose "actually served" by MUSC searches and compared this actual "primary purpose" to a "general interest in crime control." In particular, the Court noted Policy M-7 describes procedures for maintaining the chain of custody, the range of possible charges, and protocol for police notification.

II. DISCUSSION

A. The Special Needs Doctrine Generally

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." The purpose of the Fourth Amendment,

39. Ferguson, 186 F.3d at 479.
40. Id.
41. Id.
43. Ferguson, 121 S. Ct. at 1293.
44. Id. at 1289.
45. Id. at 1290.
46. Id.
47. Id.
as expounded by the Supreme Court, is to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." The Supreme Court has validated suspicionless searches where they are designed to meet "special needs beyond the normal need for law enforcement." The Supreme Court has noted the government's interest in keeping customs agents, who are on the "frontline" in the war on drugs, from being susceptible to bribery and blackmail.

Once a special need is identified, a court must balance that governmental interest against the invasion on an individual's privacy and personal security incurred by the search. This balance is resolved as a matter of law. Considerations analyzed in this balancing test con-
sist of the strength of an individual's privacy expectation in the affected location or act, the invasiveness of the search, the existence of an adversarial, cooperative, or supervisory relationship between the searcher and individual, the use to be made of collected information, the effectiveness of the search in furthering government interest, evidence that the evil giving rise to the "special need" has occurred in the past or is presently occurring, and the exigency of the situation or practicality of obtaining probable cause under the circumstances.

Even in cases where the balancing test is resolved in favor of the individual, evidence obtained by the search may still be admitted in judicial proceedings. Whether an exclusionary rule applies involves two additional questions: whether the evidence was seized in violation of the Fourth Amendment, and whether its exclusion is the appropriate remedy. Both questions must be answered in the affirmative to exclude the evidence.

B. The Effect of Ferguson

1. Multiple or Ultimate Purposes & "Special Need"

Ferguson both shrinks and clarifies the scope of the "special needs" doctrine by establishing a gateway question in this area of Fourth Amendment law. After Ferguson, it is clear that a governmental agency defendant must establish that its "primary purpose" in conducting a suspicionless search was divorced from general law enforcement purposes. Multiple and ultimate purposes do not create the existence of a "special need." Indeed, they may be fatal. "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. In our opinion, this distinction is critical.

65. Skinner, 489 U.S. at 626.
67. Veronia, 515 U.S. at 658 n.2.
68. Id. at 630.
70. Edmond, 531 U.S. at 38.
71. New Jersey v. T.L.O., 469 U.S. at 333.
72. Id.
73. Ferguson, 121 S. Ct. at 1291.
74. Id.
75. Id.
The possibility that a search scheme may have dual purposes, one aimed at civil or social good and one intended to promote the general interests of law enforcement, is a scenario that the Supreme Court had explicitly declined to consider until Ferguson. For example, in Skinner, the Court "[left] for another day" the question of "whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme," including mandatory drug screening results from employees involved in rail yard accidents or certain safety violations, would remove the searches from the special needs exception.76 Additionally, in City of Indianapolis v. Edmond, the Court took pains to point out that it "express[ed] no view on the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car."77 Throughout its opinion, which held that drug interdiction checkpoints on highways are impermissible, the Court referenced two prior cases suggesting searches to remove drunk and/or unlicensed drivers from the roads may be permissible.78

The awkward procedural posturing in which the Court considered Ferguson indicates its deliberate intent to clarify "special needs" at the time it issued certiorari. The Court declined to consider whether or not the ten plaintiffs had consented to urinalysis. Generally, the presence or absence of consent is a threshold question in a Fourth Amendment claim, since one cannot have a reasonable expectation of privacy concerning information they have consented to share.79 Instead, the Court assumed consent was absent, despite the district court jury finding to the contrary. The Court considered whether in the absence of individualized suspicion, urinalysis screening of the pregnant patients for cocaine use was permissible under a "special needs" analysis.80 The questions received by counsel for the respondent, who spent a substantial amount of time discussing consent in oral argument, made it clear that the Court was not interested in considering the consent issue.81 To be fair, the Supreme Court noted that the Fourth Circuit also circumvented the issue of consent, affirming the district court solely on "special needs grounds."82

76. Skinner, 489 U.S. at 621 n.5.
77. 531 U.S. at 47 n.2.
81. Id.
82. Ferguson, 121 S. Ct. at 1286.
Court’s decision in Ferguson corrected confusion in the special needs doctrine’s application not only in the Fourth Circuit, but in all other circuits as well.

2. State Actors & Primary Purpose

An example of the confusion surrounding application of the special needs doctrine prior to Ferguson is the Second Circuit’s opinion in Kia P. v. McIntyre. Kia P. gave birth to her daughter Mora at Long Island College Hospital (LICH) on March 27, 1993. LICH tested Mora’s urine for drugs shortly after birth due to Kia’s disclosures that she had abused cocaine in the past, that she was HIV positive, that she had a history of tuberculosis and syphilis, and that she had not received adequate prenatal care. The test indicated the presence of methadone in Mora’s urine. The hospital’s mandated reporter notified the New York State Central Registry for Child Abuse of the results, and that agency notified the city’s Child Welfare Administration (CWA). Kia was discharged from the hospital on March 29, 1993, but was not allowed to take Mora home because the hospital wished to monitor her for methadone poisoning and because Ms. P. was being investigated by the CWA for child abuse. The hospital held Mora until April 6, 1993, at which time independent, outside testing of the sample indicated there was no methadone in Mora’s urine and she was cleared for medical discharge. Mora was then held two additional days by the hospital pending notice of the CWA’s decision whether or not to seek custody of the child. She was finally released to Kia on April 8, the same day the CWA notified the LICH it would not seek custody.

Kia P. filed suit claiming, among other things, that Mora was seized and removed from her parents’ custody pursuant to LICH and city policies in violation of the Fourth Amendment. The district

83. Kia P. v. McIntyre, 235 F.3d 749 (2d Cir. 2000).
84. Id. at 751.
85. Id.
86. Id.
87. Id.
88. Id. Ms. Morance, the hospital’s mandated reporter, told Kia, “I have to talk to . . . CWA. Your daughter has a social hold on her.” You can “come and see [your] daughter and feed her” but you cannot take her home or stay here yourself. Kia P., 235 F.3d at 752.
89. Id. at 753. Both Kia and her husband submitted to voluntary drug screening during this period and tested negative. Id.
90. Id.
91. Id.
court applied a "special needs" balancing test to the facts and found as a matter of law that the seizure was reasonable.\textsuperscript{92} The circuit court affirmed in an opinion focusing mainly on the presence or absence of state action.\textsuperscript{93}

The Second Circuit held: "[t]he traditional definition of acting under color of a state law requires that the defendant . . . have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."\textsuperscript{94} LICH was owned and administered by a private corporation and the Second Circuit found that while LICH was acting to provide necessary medical care to Mora, it was not a state actor.\textsuperscript{95} However, the court determined that after Mora's medical clearance on April 6, she was being held by the hospital "solely pending action by the CWA" for its convenience.\textsuperscript{96} LICH was a state actor during this period.\textsuperscript{97} The circuit court then determined that LICH acted reasonably in not discharging Mora because the seizure was brief and the exigencies of the situation made it difficult for LICH to determine the proper course of action.\textsuperscript{98}

Here, the question of state action swallows consideration of purpose. The existence of state action is a plaintiff's gateway into Fourth Amendment claims.\textsuperscript{99} Searches and seizures by state actors generally require probable cause to be reasonable.\textsuperscript{100} However, some searches and seizures may be deemed reasonable without probable cause if they further special needs divorced from the general needs of law enforcement.\textsuperscript{101} \textit{Ferguson} made clear that the defendant's gateway into the special needs defense is the existence of a "primary purpose" beyond law enforcement.\textsuperscript{102} If no other purpose can be fairly said to be central to the policy, then the actors have assumed the role of law enforcement,\textsuperscript{103} and individuals require the same safeguards ensuring fair

\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 755 (quoting West v. Atkins, 487 U.S. 42, 49 (1988)).
\textsuperscript{95} Id. at 756.
\textsuperscript{96} Id. at 757.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 763.
\textsuperscript{99} Ferguson, 121 S. Ct. at 1287.
\textsuperscript{100} Edmond, 531 U.S. at 37.
\textsuperscript{101} Martinez-Fuerte, 428 U.S. at 561.
\textsuperscript{102} Ferguson, 121 S. Ct. at 1292.
\textsuperscript{103} Oral Argument at 29, Ferguson, 121 S. Ct. 1281 (2001) (No. 99-936).
treatment from law enforcement that the warrant clause ensures for police conduct.\textsuperscript{104}

The Second Circuit should have considered LICH's purpose in not discharging Mora when determining what level of safeguard was required to protect her from this state action. Instead, the court determined LICH was a state actor, but did not determine the extent to which the person under which LICH acted permeated its purpose in acting. These are two separate questions, although it is easy to see that they may often have the same answer, especially in the case of private entities that have "become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."\textsuperscript{105} In Kia P., the district court determined that LICH was acting "as part of the reporting and enforcement machinery for CWA, a governmental agency charged with detection and prevention of child abuse and neglect."\textsuperscript{106} This determination satisfied the state actor requirement. The circuit court concluded that LICH refused to release Mora on April 6 "for reasons relating to child abuse and child welfare laws . . . solely pending action by the CWA."\textsuperscript{107} This conclusion answers the primary purpose question, and after Ferguson, precludes defenses based on auxiliary or ultimate purposes such as meeting the "'special needs' of child protection agencies."\textsuperscript{108}

3. Identifying a Primary Purpose

What makes a purpose primary? The United States Supreme Court has declined to take a categorical approach to purpose determinations (e.g., all roadside checkpoints for license/registration verification are primarily for safety purposes, all drug interdiction checkpoints implicate general law enforcement purposes).\textsuperscript{109} Instead, the Court has examined the facts of each case individually.\textsuperscript{110}

a. Programmatic Evidence

In City of Indianapolis v. Edmond, the Court first noted "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individu-

\textsuperscript{104} See Skinner, 489 U.S. at 622; Veronia, 515 U.S. at 653.
\textsuperscript{105} Kia P., 235 F.3d at 757.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 762.
\textsuperscript{109} Edmond, 531 U.S. at 44.
\textsuperscript{110} Id. at 46.
ized suspicion." In Ferguson, the Court relied exclusively on "programmatic" evidence when determining the primary purpose of Policy M-7, examining the document itself: "[t]ellingly, the document codifying the policy incorporate[d] the police's operational guidelines. It devotes attention to the chain of custody, the range of possible criminal charges, and the logistics of police notification and arrest." Policy M-7 did not memorialize any special plans for treating affected mothers or children medically, except for treatment of the mother's addiction through education, referral to drug treatment programs, and continued testing.

In addition to the policy's content, the Ferguson Court was concerned with the process through which the policy was written. Solicitor Condon organized the joint task-force that drafted M-7. He set meeting dates, chose participating organizations, and mailed invitations to their representatives. The Court notes these were the "first steps" to creating a procedure for prosecuting pregnant drug abusers.

Finally, local police were involved in the administration of M-7. They organized a meeting with hospital staff explaining how to preserve a chain of custody. Police were given access to medical files on women receiving substance abuse counseling. The timing of arrests was coordinated closely with patient discharge.

All of these "programmatic" factors, the M-7 document itself, its creation and administration, combined to convince the Court that MUSC had in effect co-opted the job of local law enforcement. The fact that MUSC ultimately wished to secure the health and safety of its patients was not curative. The Court invalidated MUSC's "carrot and stick" method of obtaining fetal and maternal health because the immediate goal of urinalysis was to obtain evidence that would create the stick: threat of immediate prosecution. After Ferguson, it clearly does not matter what state actor carries out the actual search if the immediate purpose is to further general law enforcement interests.

111. Id. at 45.
112. Ferguson, 121 S. Ct. at 1290.
114. Ferguson, 121 S. Ct. at 1284.
115. Id.
116. Id. at 1291 n.19.
117. Id. at 1291.
118. Id.
120. Ferguson, 121 S. Ct. at 1291.
is clearly possible for a professional’s occupation to become no more than a pretext for police activity.\textsuperscript{121}

\textit{b. Subjectivity}

Evidence indicating that MUSC had routinely screened pregnant mothers meeting certain criteria for drug use before adopting Policy M-7 did not dissuade the Court’s belief that MUSC’s practices were primarily punitive.\textsuperscript{122} Nor did the fact that MUSC staff believed they were “maximiz[ing] maternal-fetal health and protect[ing] children.”\textsuperscript{123} As one MUSC employee put it: “[t]his was not supposed to be a punitive policy where we went out and punished people for doing something even though we knew the activity was illegal. What we were trying to do is give those babies a chance to be born normal.”\textsuperscript{124} If anything, the Court was skeptical of the medical appropriateness of Policy M-7, pointing out in oral arguments that such practices were accepted by no other hospitals in South Carolina and four amicus briefs raised serious questions as to the efficacy of such a policy.\textsuperscript{125} Additionally, the Court indicated it could not find a protective purpose in screening patients arriving at MUSC for the first time when they were in labor: “You can’t prevent anything after the child is born.”\textsuperscript{126}

Under regular Fourth Amendment rubric, the Court does not need to consider the subjective intent of the searcher. “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”\textsuperscript{127} In the special needs arena, purpose is a central question. However, concrete, “programmatic” evidence has proved most useful to the Court in determining purpose. The “gravity of the threat alone,” strong social sympathy, and after the fact statements of intent, cannot be dispositive of a searcher’s motivations.\textsuperscript{128}

\textsuperscript{121. Cf. Skinner, 489 U.S. at 621 n.5 (Drug screening for railway employees involved in accidents or safety violations was not a “pretext to enable law enforcement authorities to gather evidence of penal law violations” even though the results may be made available to authorities).}

\textsuperscript{122. Respondents’ Brief at 5-7, Ferguson, 121 S. Ct. 1281 (2001) (No. 99-936).}

\textsuperscript{123. Id. at 7.}

\textsuperscript{124. Id.}

\textsuperscript{125. Oral Argument at 36-39, Ferguson, 121 S. Ct. 1281 (2001) (No. 99-936).}

\textsuperscript{126. Id. at 32.}

\textsuperscript{127. Edmond, 531 U.S. at 45.}

\textsuperscript{128. Ferguson, 121 S. Ct. at 1293.}
c. *State v. Onumonu*

On the night of May 29, 2000, Defendant Onumonu was involved in a three-car accident at an intersection. Officer Lopez responded to the scene and arranged for Ms. Onumonu to be transported to Christiana Hospital. Officer Lopez arrived at the hospital shortly thereafter to continue his investigation at which time hospital employees informed him that Ms. Onumonu’s blood alcohol content (BAC) was .221%. Although no police officer had interviewed Ms. Onumonu prior to this disclosure, Officer Lopez notified his superior of the test results and then requested the medical examiner obtain a blood sample using a departmental blood kit. The second test indicated a BAC of .138% and these results were used to charge Ms. Onumonu with “vehicular assault first degree, two counts vehicular assault second degree, and driving while under the influence of alcohol.” At trial, Ms. Onumonu moved to suppress the results of the blood alcohol test arguing that “the release to the police of the initial BAC test, obtained by a physician at a hospital, violated [her] constitutional rights and violated doctor-patient privilege.” She argued that the second BAC test was rendered illegal by the first.

Superior court Judge Goldstein correctly stated that *Ferguson* held that a state hospital’s performance of diagnostic tests to obtain evidence of a patient’s drug use for law enforcement purposes was an unreasonable search where the patient had not consented and the search was not authorized by a valid warrant. He then differentiated Ms. Onumonu’s case from *Ferguson*, noting that MUSC was a state facility while Christiana was not. In determining whether Christiana was behaving as a de facto state actor, Judge Goldstein considered the hospital’s motivation for performing the initial BAC test. He concluded “[t]here [was] no evidence to suggest that the police, or other governmental agents, compelled the hospital to analyze Defendant’s blood or otherwise acted in a more than passive role in the hospital’s performance” of the search. Judge Goldstein was left with the

130. Id.
131. Id.
132. Id.
133. Id.
134. Id.
135. Id.
136. Id. *at 2.
137. Id.
138. Id. *at 3.
question that the *Ferguson* court explicitly declined to answer. The *Ferguson* court stated: "We do not address a case in which doctors independently complied with reporting requirements."139 Although the superior court ultimately disposed of the issue, determining there was no state action invoking Fourth Amendment protections, its reasoning was based on the *Ferguson* Court's analysis of primary purpose.140 While state action and primary purpose are similar questions, they are separate considerations that should come at different stages of Fourth Amendment scrutiny.

d. Jurisprudential Considerations

The *Ferguson* majority acted to close what they perceived to be a hole in Fourth Amendment jurisprudence through which non-law enforcement parties concerned with social welfare could perform suspicionless searches producing evidence for punitive purposes. The Court stated: "Because law enforcement involvement always serves some broader social purpose or objective, under respondent's view, virtually any suspicionless search can be immunized under the special needs doctrine."141 All that would be required to swallow Fourth Amendment protections is an agent who also seeks one of law enforcement's broader purposes or objectives.142 In *Ferguson*, MUSC acted as just such an agent, collecting evidence from patients for use in criminal prosecution, but seeking ultimately to ensure the health of mother and child.

Purpose inquiries of this nature are challenging. In the Fourth Amendment context, the inquiry gives the odd result of proscribing programs motivated by illicit purposes, while comparable programs carrying out similar searches or seizures will be allowed if motivated by proper purposes.143 This is the effect of *State v. Onumonu*. Hospital staff discovered information about Ms. Onumonu's BAC in the normal course of providing her medical care that they then decided to share with Officer Lopez. Their information supplied officer Lopez with probable cause to conduct his own search.144

139. *Ferguson*, 121 S. Ct. at 1292 n.24.
143. *Edmond*, 531 U.S. at 47.
III. Conclusion

Ferguson closes a gap in Fourth Amendment “special needs” jurisprudence by clarifying and shrinking the exception. Whether or not a search and seizure policy has a “primary purpose” divorced from the general needs of law enforcement is now a gateway question into permissible “special needs” suspicionless searches. This consideration is similar to, but separate from the question of whether there is a state actor, which first invokes Fourth Amendment protections. Primary purposes are best determined by documents memorializing a search or seizure policy, the parties and the method creating the policy, and the way the policy is administered. Subjective intent of individuals, the gravity of perceived harm, and ultimate social good are of little probative value in making this determination. Ferguson’s holding in no way prevents physicians from sharing independently obtained information with police under existing mandatory reporting requirements.

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