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THE SPECIAL NEEDS DOCTRINE AFTER *FERGUSON* v. *CITY OF CHARLESTON*

I. INTRODUCTION

States have the burden of keeping the public safe, while at the same time, respecting individuals' privacy rights. The Founding Fathers recognized these competing interests and created the Fourth Amendment to the Constitution to impose limits on the state's intrusion into private life. To protect individuals' privacy rights, the Founding Fathers wrote in the Fourth Amendment that "no [w]arrants shall issue, but upon probable cause."¹ However, the Supreme Court of the United States has recognized exceptions to this general rule requiring probable cause to conduct a search.² Under certain circumstances, such as the need to keep drugs out of schools;³ the effective implementation of a probation system;⁴ or the need to keep illicit drug users from operating dangerous vehicles,⁵ special needs justify a departure from the Fourth Amendment's probable cause requirement.⁶ This exception is called the special needs doctrine.⁷

Since *New Jersey v. T.L.O.*, the Supreme Court has recognized a special needs exception to the probable cause requirement imposed by the Fourth Amendment.⁸ Essentially, this exception recognizes that a state's "special needs" justify a search predicated on less than the Fourth Amendment probable cause requirement when the objective serves "non-law enforcement ends."⁹ To determine whether such a search is reasonable, the interests of the government must be balanced against the individual's privacy interests.¹⁰

Recently, the Supreme Court discussed the special needs doctrine in *Ferguson v. City of Charleston*.¹¹ In *Ferguson*, the Medical University of South Carolina (MUSC), a state hospital, tested pregnant women for

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1. U.S. CONST. amend. IV.
 2. See *infra* Part II.
 3. See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).
 4. See *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987).
 5. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989).
 6. See *supra* notes 3-4 and accompanying text; see also *Griffin*, 483 U.S. at 873 (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)).
 7. See *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).
 8. *Id.* (Blackmun, J., Concurring).
 9. *Ferguson v. City of Charleston*, 532 U.S. 67, 74 (2001).
 10. *Id.* at 74 n.7 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995); *Griffin*, 483 U.S. at 873; *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion); *T.L.O.*, 469 U.S. at 351).
 11. 532 U.S. 67 (2001).

cocaine use without their knowledge.¹² Women who tested positive for cocaine use were charged with criminal child abuse.¹³ The Court ruled that MUSC's drug testing program violated the women's Fourth Amendment right to freedom from unreasonable search and seizure.¹⁴ The majority reasoned that because the hospital worked with the police during the testing period, and threatened criminal prosecution, the "immediate objective" of the drug testing program was to "generate evidence for law enforcement purposes."¹⁵ Accordingly, MUSC's drug testing policy did not fit into the category of the "special needs" doctrine.¹⁶

Notwithstanding *Ferguson*, the special needs doctrine has been characterized as inconsistent.¹⁷ *Ferguson* adds to the confusion because it is the first decision to focus on a program's immediate objective, rather than its ultimate objective.¹⁸ This approach is contrary to prior case law and raises questions as to whether the state may use ordinary law enforcement techniques when it is pursuing special needs beyond the scope of ordinary law enforcement.

This Comment proposes that courts should look to the ultimate purpose, rather than the immediate objective of the program.¹⁹ Furthermore, the courts should not invalidate a special needs program simply because it involves an element of law enforcement. Rather, the courts should determine whether law enforcement is an *incidental*, rather than *integral*, part of the special needs program.²⁰

In Part II, this Comment examines the development of the special needs doctrine and the unresolved questions regarding the doctrine's scope and use. Part III attempts to answer these questions by first ana-

12. *Id.* at 70-73.

13. Under South Carolina law, a viable fetus is considered a person, particularly in cases where the mother ingests cocaine. *Id.* n.2. In such a case, South Carolina's Supreme Court has held that ingesting cocaine during the third trimester constitutes criminal child neglect. *Id.* (citing *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1995), *cert denied*, 523 U.S. 1145 (1998)). If the pregnancy was 27 weeks or less, the patient was to be charged with simple possession. *Ferguson*, 532 U.S. at 72. If a woman "delivered 'while testing positive for illegal drugs,' she was also to be charged with unlawful neglect of a child." *Id.* at 72-73.

14. *See id.* at 84.

15. *Id.* at 83.

16. *Id.* at 84.

17. *See generally* Jennifer E. Smiley, *Rethinking The "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 Nw. U. L. REV. 811, 826-28 (2001) (discussing several other inconsistencies in the special needs doctrine and how it has led to confusion in the lower courts); Sean Anderson, *Individual Privacy Interests and the "Special Needs" Analysis for Involuntary Drug and HIV Tests*, 86 CAL. L. REV. 119, 147-48 (1998) (discussing inconsistency among lower courts when applying the special needs doctrine).

18. *See infra* Parts II and III.C.3.

19. *See infra* Part III.C.3.

20. *See infra* Part III.C.4.

lyzing the types of state interests that fall under the special needs doctrine. Furthermore, Part III examines when and how normal law enforcement techniques, such as arrest and prosecution, may be used in the implementation of a special needs search policy. Finally, Part IV summarizes the proposed answers to the unresolved questions setting forth criteria under which to determine whether a less-than-probable-cause search falls under the special needs doctrine.

II. BACKGROUND FACTS AND LEGAL DOCTRINE

A. *Balancing the Public Interest Against Privacy Interests*

The Fourth Amendment states “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon *probable cause*.”²¹ This does not require, however, that all searches be conducted pursuant to a warrant issued upon probable cause. As the court wrote in *Camara v. Municipal Court*, “*reasonableness* is . . . the ultimate standard” for determining whether a search is conducted in a manner that violates the Fourth Amendment.²² As the Supreme Court stated in *Camara*, “[u]nfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”²³ In balancing the need to search against the invasion of an individual’s privacy rights, the Supreme Court has held that a search predicated on less than probable cause, or without a warrant, may still be deemed constitutional “[when] special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”²⁴

This is the paradigm in which special needs cases are decided. The Court must determine whether, given the compelling nature of particular societal needs, it would be “impracticable” to require authorities to adhere to the probable cause-warrant requirement.²⁵ This is not a static test; rather, it requires that the courts determine whether, given the competing interests at stake, the public interest is best served by a reasonableness standard that falls short of the probable cause-warrant requirement.²⁶ The outcome is fact-sensitive, and as illustrated below, the Court has reached varied conclusions given the varied interests at stake.²⁷

21. U.S. CONST. amend. IV (emphasis added).

22. 387 U.S. 523, 539 (1967) (emphasis added); see also *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

23. 387 U.S. 523, 536-37 (1967).

24. See *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

25. See *id.* (Blackmun, J., concurring).

26. See *id.* at 341.

27. See *infra* Parts II.B-E.

B. New Jersey v. T.L.O.

In *New Jersey v. T.L.O.*, a high school freshman was caught smoking cigarettes in the girls' lavatory.²⁸ After being taken to the principal's office, T.L.O. denied smoking cigarettes, and the assistant vice principal demanded to see her purse.²⁹ The assistant vice principal found a pack of cigarettes and a package of cigarette rolling papers commonly used to roll marijuana cigarettes.³⁰ The assistant vice principal continued to search the purse and found marijuana, paraphernalia, and evidence that T.L.O. was dealing to other students.³¹ T.L.O. was suspended,³² and the state brought delinquency charges against her in Juvenile Court.³³

The Supreme Court held that searching T.L.O.'s purse for marijuana did not violate the student's Fourth Amendment right to freedom from unreasonable search and seizure, even though the principal's search was based only on *reasonable suspicion*.³⁴ The majority opined that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."³⁵

In a concurring opinion, Justice Blackmun agreed with using the balancing test to determine whether a search based on less-than-probable-cause is reasonable.³⁶ However, Justice Blackmun said that the balancing test should only be used when a court is confronted with "a special law enforcement need for greater flexibility."³⁷ Justice Blackmun opined 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

28. *Id.* at 328.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 329 n.1.

33. *T.L.O.*, 469 U.S. at 325.

34. *Id.* at 343.

35. *Id.* at 341. The Court also gave an extensive list of cases where it adopted a standard that is lower than probable cause. *Id.* This illustrates that the less - than - probable - cause requirement is not novel to Fourth Amendment jurisprudence. *See id.*; *see also* *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (holding warrantless border searches at routine checkpoints are consistent with the Fourth Amendment); *Terry*, 392 U.S. at 30 (holding that "[a police officer] is entitled to the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him"); *Camara*, 387 U.S. at 538 (holding a warrantless search as part of a municipal housing inspection program reasonable under the Fourth Amendment).

36. *See T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

37. *Id.* (quoting *Florida v. Roger*, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)).

entitled to substitute its balancing of interests for that of the Framers."³⁸

When analyzing subsequent special needs cases, the Supreme Court adopted Justice Blackmun's balancing approach.³⁹ His concurring opinion became the foundation for the special needs doctrine.⁴⁰

C. *Subsequent Special Needs Developments*

Two years after *New Jersey v. T.L.O.*, the Supreme Court used Justice Blackmun's special needs balancing test to decide *Griffin v. Wisconsin*.⁴¹ In *Griffin*, the defendant, a convicted felon, was placed on probation after being found guilty of disorderly conduct and other related charges.⁴² While Griffin was on probation, his probation officer received information from a detective that Griffin may have guns in his apartment.⁴³ Under the authority of an administrative regulation,⁴⁴ the probation officers searched Griffin's apartment and found a handgun.⁴⁵ Griffin was charged and convicted of being a felon in possession of a handgun.⁴⁶ The Court upheld the search predicated on "reasonable grounds," rather than the stricter probable cause standard.⁴⁷

Justice Scalia, writing for the majority, held that operating a probation system, like a school or other state institution, "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."⁴⁸ After concluding that a probation system is a special need of the state, the Court balanced the probationer's diminished expectation of privacy⁴⁹ against the state's need to successfully operate a probation system.⁵⁰

38. *Id.*

39. *See, e.g., Ferguson* 532 U.S. at 72 n.7.

40. *See id.*

41. *See* 483 U.S. at 873-74; *see infra* text accompanying notes 49-52.

42. *Griffin*, 483 U.S. at 870.

43. *Id.* at 871.

44. *Id.* at 870-71 (citing Wis. ADMIN. CODE §§ 328.16(1), 328.21(4) (1981)). These administrative regulations allowed probation officers to search probationers' homes without a warrant so long as a supervisor approved the search, and the search was predicated on "reasonable grounds" for believing the probationer may be in possession of contraband. *Id.*

45. *Griffin*, 483 U.S. at 871.

46. *Id.* at 872.

47. *Id.*

48. *Id.* at 873-74.

49. The majority focused on the fact that probation falls on the spectrum of criminal punishment, and, therefore, probationers have more restricted liberty and a more diminished expectation of privacy than the average citizen. *Id.* at 874. Justice Blackmun, the first justice to articulate the special needs doctrine, actually dissented in this opinion because he disagreed that probationers have a diminished expectation of privacy in their homes. *Id.* at 884 (Blackmun, J., dissenting).

50. *See id.* at 876-77.

The Court concluded that it is too impracticable to require a magistrate-issued warrant based on probable cause to search a probationer's home.⁵¹

Two years after *Griffin*, the Supreme Court decided *Skinner v. Railway Executives' Assn.*⁵² and *Union National Treasury Employees v. Von Raab.*⁵³ In *Skinner*, the United States Department of Transportation, under the authority of the Federal Railroad Act,⁵⁴ tested all on-duty employees, who were involved in an "impact accident," for drug or alcohol use.⁵⁵ The Court borrowed language from *Griffin* and concluded that

The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."⁵⁶

Additionally, the Court noted that the purpose of the drug testing was to prevent railway accidents and casualties, and not to prosecute the railway employees.⁵⁷

In *Von Raab*, the United States Customs Service implemented a policy that required all employees applying for a promotion to pass a drug test.⁵⁸ It is important to note that if an employee tested positive for drug use, the employee was subject to immediate dismissal from the Customs Service; however, the results would not be forwarded to any agency for prosecution without the written consent of the employee.⁵⁹ The employee's union filed suit alleging, *inter alia*, that the program violated the Fourth Amendment rights of employees seeking promotions.⁶⁰

The Supreme Court held that the state has a substantial need to ensure that employees in sensitive positions, such as customs officers,

51. See *Griffin*, 483 U.S. at 876-77. Justice Scalia analogized requiring warrants to search probationers' homes with that of requiring parents to obtain warrants to search a minor child's room. See *id.* Justice Scalia compared the probation officer to a parent and wrote: "[a probation officer] is an employee of the State Department of Health and Social Services who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer." *Id.* at 876.

52. 489 U.S. 602 (1989).

53. 489 U.S. 656 (1989).

54. 45 U.S.C. § 431(a) (repealed 1994).

55. *Skinner*, 489 U.S. at 609.

56. *Id.* at 620 (quoting *Griffin*, 483 U.S. at 873 - 74).

57. *Id.* at 620-21 (citing 49 CFR § 219.9 (1987)).

58. See 489 U.S. at 660.

59. *Id.* at 663.

60. *Id.*

are not using illegal drugs.⁶¹ The Court also reasoned that because employees who tested positive were not subject to prosecution, the drug testing program was designed to serve the state's needs beyond ordinary law enforcement.⁶² Therefore, the Court balanced the state's special need against the customs officers' privacy rights and concluded that the need outweighed the customs officers' privacy interests.⁶³ The Court reasoned that the program utilized several safeguards to minimize the intrusion into the employee's privacy interests.⁶⁴ Requiring the Customs Service to obtain search warrants based on probable cause would interfere with the its mission.⁶⁵ The Court also generalized that requiring the government to obtain a warrant for every work-related intrusion would severely impair its governmental function because every employee matter would become a constitutional concern.⁶⁶

In 1995, the Supreme Court decided *Vernonia School District 47J v. Acton*.⁶⁷ In *Acton*, an Oregon school district implemented a policy of randomly testing student athletes for drug use.⁶⁸ The school targeted student athletes because of their status as role models for the other students, and the faculty believed that student athletes were behind the sudden increase in drug use at the high school.⁶⁹ If a student tested positive for drug use more than once, he or she had the option of enrolling in a six week program.⁷⁰ If a student refused to obtain treatment, he or she would be suspended from playing on student athletic teams.⁷¹

James Acton, a seventh grader in the Vernonia School District, was denied a place on the football team because his parents refused to sign the test consent form that was required to be eligible for student athletics.⁷² The Actons filed suit asking for declaratory and injunctive relief on the grounds that the drug testing policy violated Actons'

61. *Id.* at 666.

62. *Id.*

63. *Von Raab*, 489 U.S. at 668.

64. *See id.* at 672 n.2 (noting that the Custom Service's drug testing program only tested for specific drugs, and that employees were not required to disclose any medical information unless the employee tested positive for such specified drug use).

65. *See id.* at 666-67. Justice Kennedy, writing for the majority, opined that "[t]he Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions." *Id.* at 667.

66. *See id.* at 666.

67. 515 U.S. 646 (1995).

68. *Id.* at 648.

69. *See id.* at 648-49.

70. *Id.* at 651.

71. *Id.*

72. *Id.*

Fourth and Fourteenth Amendment rights.⁷³ The Supreme Court held the drug testing policy did not violate the Fourth Amendment.⁷⁴

The Court held that although prior cases such as *Skinner* and *Von Raab* characterize the state's special need as "compelling," courts should not view this as a fixed standard.⁷⁵ Justice Scalia, writing for the majority, held that state interest must be *important enough* to justify the search.⁷⁶ Whether the school district's sudden increase in student drug use constituted a compelling governmental interest was irrelevant. The Court held that the interest was *important enough* to justify the random drug testing.⁷⁷ The Court also balanced the nature of the intrusion and the diminished expectation of privacy of students, particularly when they voluntarily try out for athletics, and concluded that the random drug testing was reasonable, and therefore constitutional.⁷⁸

The first time the Supreme Court did not uphold a special needs search was in *Chandler v. Miller*.⁷⁹ The Court found a Georgia law requiring political candidates to take drug tests to be an unreasonable search, and thus, violated the Fourth Amendment.⁸⁰ A group of libertarian party candidates brought suit on the grounds that the Georgia law violated their First, Fourth and Fourteenth Amendment rights.⁸¹ The Court agreed with the candidates and ruled that, "Georgia's requirement that candidates for state office pass a drug test . . . does not fit within the closely guarded category of constitutionally permissible suspicionless searches."⁸²

The Court, per Justice Ginsburg, held that the state failed to show a special substantial need that is important enough to override the individual's privacy interest and depart from the Fourth Amendment's normal requirement of probable cause and individual suspicion.⁸³ The majority reasoned that the state did not demonstrate that the statute was enacted as a result of fear or suspicion that state officials were involved in illegal drug use, or any other articulable *concrete* danger.⁸⁴ The statute was merely enacted under the belief that drug use is not compatible with holding public office.⁸⁵ This is the first time the

73. *Acton*, 515 U.S. at 651.

74. *Id.* at 664-65.

75. *Id.* at 661.

76. *Id.*

77. *Id.*

78. *Id.* at 664-65.

79. 520 U.S. 305 (1997).

80. *See id.* at 323.

81. *Id.* at 310.

82. *Id.* at 309.

83. *See id.* at 320.

84. *See id.* at 321-22.

85. *See Chandler*, 520 U.S. at 322. The Court characterized the need to test political candidates for drug use as being "symbolic," opposed to "special."
Id.

Court required the state to show an actual, rather than abstract, danger that required a departure from the traditional probable cause warrant standard of the Fourth Amendment.⁸⁶

D. *Ferguson v. City of Charleston*

The Supreme Court revisited the special needs doctrine in *Ferguson v. City of Charleston*.⁸⁷ In this case, a public hospital, The Medical University of South Carolina (MUSC), became concerned with an alarming increase in the number of pregnant patients abusing cocaine.⁸⁸ The hospital had previously adopted a policy of testing patients' urine who were suspected of using cocaine.⁸⁹ The hospital was also referring patients who tested positive to counseling and treatment.⁹⁰ Despite counseling and treatment, however, cocaine use did not recede.⁹¹

Unhappy with the results from counseling and treatment, MUSC's general counsel made arrangements to refer the pregnant patients who tested positive for cocaine use to the City Solicitor for prosecution.⁹² The patients were never told that they were being tested for cocaine use.⁹³ Initially, the policy was to refer any positive test result to the City Solicitor for prosecution, but the policy was later modified to forward test results to the City Solicitor for prosecution only if the patient failed to comply with drug treatment recommendations.⁹⁴

In a divided opinion,⁹⁵ the Supreme Court held that testing the pregnant women for cocaine use without their knowledge,⁹⁶ and pros-

86. See generally Robert D. Dodson, *Ten Years of Randomizing Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 271 (2000) (giving an in-depth history of special needs case law, prior to *Ferguson*, and discussing the impact of *Chandler*).

87. 532 U.S. at 78-79.

88. *Id.* at 70.

89. *Id.*

90. *Id.*

91. *Id.*

92. See *id.* at 70-71. South Carolina law recognizes a viable fetus as a person. *Id.* at 70 n.2. Accordingly, the South Carolina Supreme Court held that ingesting cocaine during the third trimester constituted criminal child neglect. *Id.*

93. See *Ferguson*, 532 U.S. at 76.

94. *Id.* at 72.

95. Justice Stevens wrote the opinion for the majority, which also included Justices Breyer, Ginsburg, O'Connor, and Souter. Justice Kennedy filed a concurring opinion. Chief Justice Rehnquist, Justice Scalia and Justice Thomas dissented. *Id.* at 69.

96. There was some debate about whether the patients consented to the drug tests. Justice Scalia argued that the patients consented to the search by voluntarily giving their urine specimens to the hospital. *Ferguson*, 532 U.S. at 93-94 (Scalia, J., dissenting). Justice Scalia reasoned that the patients voluntarily entrusted their evidence to the hospital, and the Fourth Amendment does not protect persons who have a mistaken belief that the confidant can be trusted with the evidence. *Id.* at 94. Chief Justice Rehnquist

ecuting them for child neglect, did not fit within the special needs doctrine, and violated the women's Fourth Amendment right to freedom from unreasonable search and seizure.⁹⁷ The majority reasoned that although the *ultimate goal* of the program may have been to protect the health of the fetuses and get pregnant mothers off drugs, the *immediate objective* of the testing was to generate evidence for prosecution.⁹⁸ The majority focused on the extensive law enforcement involvement at every stage of the process.⁹⁹ The majority also emphasized that law enforcement always serves a broader goal, and any suspicionless search could be upheld under the special needs doctrine by analyzing the search in terms of the ultimate social objective of law enforcement.¹⁰⁰

Justice Kennedy concurred in the result, but disagreed with the majority's use of the immediate objective approach.¹⁰¹ Justice Kennedy argued that the distinction the majority makes between the ultimate goal of the program and its immediate objective is inconsistent with prior special needs case law.¹⁰² For example, using this analysis, the majority would have concluded that the goal of the Vernonia School District in *Acton* was to collect evidence of drug use, rather than deterring drug use among school children.¹⁰³

Despite disagreement with the majority's reasoning, Justice Kennedy believed this case fell outside the scope of the special needs doctrine because of the extensive police involvement from the program's inception.¹⁰⁴ Justice Kennedy reasoned that the hospital became an "institutional arm of law enforcement," and the program had a "penal character with a far greater connection to law enforcement than other searches sustained under [the Court's] special needs rationale."¹⁰⁵

Justice Scalia's dissent, as a preliminary matter, opined that the drug testing was a search within the scope of the Fourth Amend-

and Justice Thomas did not concur in this portion of the dissent. The majority left this question of consent to the lower courts because it was not raised in the Court of Appeals of the United States. *Id.* at 77 n.11.

97. *See Ferguson*, 532 U.S. at 84.

98. *Id.* at 82-83.

99. *Id.* at 82.

100. *Id.* at 84.

101. *See id.* at 86 (Kennedy, J., concurring).

102. *Id.* at 87.

103. *See Ferguson*, 532 U.S. at 87 (Kennedy, J., concurring). Justice Kennedy also used the example of the *Von Raab* cases. Kennedy argued that had the Court adopted this approach in deciding the *Von Raab* and *Skinner* case, the Court would have concluded that the state's goal was to collect evidence of drug use, rather than prevent the promotion of drug users to sensitive positions, or prevent drug users from operating locomotives, respectively. *Id.* (Kennedy, J., concurring). In both cases, the Court looked to the ultimate goal of the program. *Id.* (Kennedy, J., concurring).

104. *See id.* (Kennedy, J., concurring).

105. *See id.* at 88-89. (Kennedy, J., concurring).

ment.¹⁰⁶ Justice Scalia analogized the urine with abandoned property and pointed out that the Fourth Amendment does not protect abandoned property.¹⁰⁷ The other dissenting justices did not concur in this portion of the dissent.

Justice Scalia's dissent argued that the hospital's program had a goal of improving the health of the mother and unborn child.¹⁰⁸ In fact, the hospital had already been testing women for cocaine use before it began turning over the results to prosecutors.¹⁰⁹ The dissent found it "incredible" that using the test results to compel patients into treatment, the ultimate goal of the program, becomes a pretext for obtaining evidence for prosecution.¹¹⁰ Additionally, the dissent argued that adding law enforcement to a special need does not destroy the applicability of the special needs doctrine.¹¹¹

E. *Unresolved Questions*

In light of *Ferguson* and other cases applying the special needs doctrine, several of the most important questions are unresolved. First, does the involvement of law enforcement techniques, *e.g.*, arrest and prosecution, remove an otherwise special need of the state from the boundaries of the special needs doctrine? Secondly, should courts look to the special needs program's immediate objective, its ultimate objective, or both? The proceeding section will show that normal law enforcement techniques do not necessarily void an otherwise valid special needs program.¹¹² Finally, based on the case law as a whole, courts should look to the program's ultimate goal, rather than its immediate objective.¹¹³

III. ANALYSIS

A. *Overview*

This section first addresses the types of state special needs interests that fall under the special needs doctrine. It also attempts to answer the unresolved questions raised with the majority opinion in *Ferguson*.¹¹⁴

106. *Ferguson*, 532 U.S. at 92 (Scalia, J., dissenting).

107. *See id.* at 93. Maryland has also adopted this view. *See Venner v. State*, 30 Md. App. 599, 626-27, 354 A.2d 483, 498-99 (1978) (holding that a person has no property rights in discarded human waste).

108. *See Ferguson*, 532 U.S. at 99 (Scalia, J., dissenting).

109. *Id.* at 99 (Scalia, J., dissenting).

110. *Id.* at 99-100 (Scalia, J., dissenting).

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

112. *See infra* Part III.C.2.

113. *See infra* Part III.C.3.

114. *See supra* Part II.E.

B. Defining the Special Need

1. Generally

The Supreme Court has never given clear guidance to the courts to help identify what types of state interests fall under the special needs doctrine. The only clear criterion is that the state interest must go beyond the scope of ordinary law enforcement interests.¹¹⁵ However, several cases allow courts to make several other generalizations.¹¹⁶

2. The Interest Must Be Important, Not Compelling

In *Acton*,¹¹⁷ Justice Scalia's majority opinion clarified the standard previously articulated in *Skinner* and *Von Raab*. *Skinner* and *Von Raab* both held that the respective natures of the governmental interests at stake were "compelling."¹¹⁸ Justice Scalia wrote that although previous special needs cases have characterized the state interest as "compelling," it is a mistake to think of this as a fixed standard.¹¹⁹ Instead, Justice Scalia wrote that the interest must merely be "*important enough*" to justify the search at hand.¹²⁰

On its face, this analysis seems to side-step the first stage of special needs analysis. Traditionally, the Court has first focused on the compelling state interest that goes beyond normal law enforcement and proceeded with balancing the interests of the state versus the intrusion on the individual's privacy interests.¹²¹ *Acton*, however, did not involve a program where students were subjected to arrest and prosecution.¹²² Because it was clear that the program was not intended for ordinary law enforcement, the only issue was the importance of the state need.¹²³ Therefore, *Acton* tells us that the first prong of the spe-

115. See, e.g., *Ferguson*, 532 U.S. at 79. This requirement is of little assistance given the Court's recent distinction in *Ferguson* between the intermediate objective and ultimate goal. As discussed above, the Court's distinction between the intermediate purpose and ultimate goal of the special needs program makes it difficult to determine when a state's interest goes beyond the scope of ordinary law enforcement. See *infra* Part II.A.

116. *Chandler*, 520 U.S. at 313-14; *Acton*, 515 U.S. at 660-61; *Griffin*, 483 U.S. at 873-74; see *infra* Parts III.B.2-5.

117. 515 U.S. 646 (1995).

118. See *Skinner*, 489 U.S. at 628 (holding that the government's interest in collecting and testing locomotive operators for drug use without individualized suspicion was compelling); see also *Von Raab*, 489 U.S. at 670 (holding that the government had a compelling interest in ensuring that customs agents, as one of the front lines of drug interdiction, were not drug users themselves).

119. *Acton*, 515 U.S. at 661.

120. *Id.* Justice Scalia held that simply determining whether deterring drug use in public schools is a compelling interest is irrelevant. *Id.* However, he reasoned that deterring drug use in public schools is at least as important as the state interests in *Skinner* and *Von Raab*. *Id.*; see also *supra* note 114.

121. *T.L.O.*, 469 U.S. at 337.

122. See *supra* notes 67-78 and accompanying text.

123. *Acton*, 515 U.S. at 653.

cial needs analysis requires that the state pursue an important interest beyond the scope of law enforcement.¹²⁴ The second prong requires the court to weigh the *important* state interest against the individuals' interests to determine if the search is reasonable.¹²⁵

3. The Danger Must Be Concrete or Imminent

Another characteristic of a special need is that the danger must be concrete. In *Chandler v. Miller*, the Court ruled that a law requiring political candidates to pass a drug test was not based on any particular suspicion that drug abuse was a problem among state office holders.¹²⁶ The Court reasoned that absent any actual danger, there was no special need to conduct suspicionless drug testing.¹²⁷ Given these circumstances, the Court ruled that the testing was a symbolic need, rather than a special need.¹²⁸

The requirement that the state's special need must be to correct an actual, present danger is consistent with prior opinions.¹²⁹ The majority in *Chandler*, however, had to distinguish the present suspicionless drug policy from the suspicionless drug testing policy in *Von Raab*.¹³⁰ The Court devoted a large part of its opinion distinguishing the two cases. The Court distinguished *Von Raab* from *Chandler* because, although there was no documented evidence of a drug abuse problem among customs agents, there was an inevitable danger arising from customs agents abusing drugs.¹³¹ Therefore, the state had a compelling interest in preventing or deterring such abuse.¹³² In *Chandler*, the state failed to show that political candidates' drug use created a compelling, inevitable danger.¹³³ Therefore, the Court seems to adopt

124. *Id.*

125. *Id.* at 652-53.

126. *Chandler*, 520 U.S. at 319.

127. *See id.* at 318-19. The Court also focused on the fact that there was no surprise as to when the drug testing would take place, rendering the program even less effective in promoting a special need, because candidates could temporarily stop using illicit drugs in order to pass the drug test. *Id.* at 319-20.

128. *Id.* at 322.

129. *See generally Acton*, 515 U.S. at 648-49 (noting that there was a significant increase in student drug use and rebellion); *Skinner*, 489 U.S. at 631 (noting that the policy of drug testing after train collisions was adopted in response to evidence of alcohol and drug abuse by employees, and the fact that collisions are linked to drug impaired employees).

130. *See supra* notes 59-68 and accompanying text. In *Von Raab*, there was no indication that Customs Service employees were abusing drugs, or creating any similar danger at the time the program was implemented. *Von Raab*, 489 U.S. at 660 (noting that the Customs Service was "largely drug free").

131. *Chandler*, 520 U.S. at 315-16.

132. *Id.* The Court reasoned that customs agents were on the front line of drug interdiction and needed to carry weapons as part of their duty. *Id.* at 316. Given the nature of their position and mission of the Customs Service, putting a drug user in such a position would pose great danger. *Id.*

133. *Id.* at 318-19.

the rule that the state must show an actual, present threat.¹³⁴ In the absence of a present threat, the state must show that inevitable danger would ensue if a potential threat materializes.¹³⁵

4. Situations Where the Court Will Likely Uphold a Search Policy Under the Special Needs Doctrine

It is clear that state interests fall under the special needs doctrine when the state is operating public institutions such as schools. *T.L.O.* and *Acton* emphasize the state's special need to maintain safe functioning schools.¹³⁶ Similarly, the Court recognized that a state has a special need to effectively operate a probation system. In *Griffin v. Wisconsin*, the Court stated that "[a] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."¹³⁷ Therefore, it can be concluded that a state's need falls under the special needs doctrine when the search is conducted pursuant to the operation of a public institution.¹³⁸

Courts have consistently recognized that the state has a special need to operate its sensitive agencies according to their mission, particularly when public safety could be jeopardized. For example, in *Von Raab*, the Court upheld the suspicionless drug testing of U.S. Customs agents.¹³⁹ In addition, the Court ruled that the U.S. Customs Service has been entrusted with pressing responsibilities and "[the Customs Service] mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions."¹⁴⁰ The Court also noted that requiring every government agency to obtain a warrant based on probable cause would impair its function because every employment issue would rise to the level of a constitutional concern.¹⁴¹

134. *Id.* at 318-22.

135. *See id.* at 320-23.

136. *See generally Acton*, 515 U.S. 646 (focusing on the custodial relationship between school authorities and students and the importance of school officials creating a nurturing environment); *T.L.O.*, 469 U.S. at 340 (noting the important interest of the school administrators in maintaining an environment where learning can take place).

137. *See id.* at 873-74.

138. *See generally id.* at 875-76.

139. *See generally Von Raab*, 489 U.S. 656; *see also supra* notes 58-66 and accompanying text.

140. *Von Raab*, 489 U.S. at 667.

141. *See id.* at 666.

5. Summary

When trying to determine if a state's need is special, it is useful to look at: (1) whether the need serves a purpose other than ordinary law enforcement; (2) whether the need is important; and (3) whether the state's need is in response to an actual threat, or whether imminent danger would ensue if a potential threat materialized. Additionally, the existing body of law shows that the Supreme Court is likely to uphold a special needs case when a state is operating a public institution or agency.¹⁴²

C. *When and How Much Law Enforcement Can Be Involved in the Implementation of a Special Needs Program?*

1. The Unresolved Question

The unresolved question arising from the scope of the special needs doctrine is whether employing ordinary law enforcement methods such as arrest and prosecution in a special needs search renders it unconstitutional. As *Ferguson* demonstrates, the Court is divided.¹⁴³ Based on the case law as a whole, however, ordinary law enforcement techniques such as arrest and prosecution do not necessarily render a special needs search unconstitutional.¹⁴⁴

2. Law Enforcement and Special Needs Searches Before *Ferguson* Do Not Hold that the Presence of Law Enforcement Renders a Special Needs Search Unconstitutional.

The first case to hold that the state could depart from the Fourth Amendment probable cause requirement when pursuing a special interest was *New Jersey v. T.L.O.*¹⁴⁵ In *T.L.O.*, a principal searched a juvenile student's purse [predicated only on reasonable suspicion] and found marijuana.¹⁴⁶ When the contraband was found, school officials notified the police.¹⁴⁷ T.L.O. was suspended from school, and the state brought delinquency charges against her in juvenile court.¹⁴⁸

The police involvement and juvenile court proceedings were not an issue in the case. Admittedly, juvenile proceedings are not

142. See, e.g., *id.* at 656 (upholding a special needs search of U.S. Customs Service agents); *Griffin*, 483 U.S. at 868 (upholding a special needs search in the context of the operation of a state's probation system); *T.L.O.*, 469 U.S. at 325 (upholding a special needs search in a school setting).

143. *Ferguson*, 532 U.S. 67. In *Ferguson*, the majority included Justices Ginsburg, Breyer, Stevens, O'Connor, and Souter. Justice Kennedy filed a concurring opinion. Chief Justice Rehnquist, and Justices Thomas and Scalia dissented. *Id.*

144. See *infra* Part III.C.2.

145. 469 U.S. 325 (1985).

146. See *supra* Part II.B for a more detailed discussion of the facts.

147. *T.L.O.*, 469 U.S. at 328.

148. *Id.* at 329.

prosecutorial in nature, and this may have had some bearing on the case. Nonetheless, the state utilized the police and courts in pursuing the school's special need to operate safe and effective public schools.

In *Griffin*, the Court upheld another special needs search by state probation officers of a probationer's home.¹⁴⁹ In *Griffin*, probation officers found a handgun in Griffin's home, and Griffin, a convicted felon, was charged and convicted of being a felon in possession of a handgun.¹⁵⁰ This case is a clear example of the Court upholding a special needs case that utilized normal law enforcement techniques. Griffin was charged and convicted of a felony and sent to prison as a result of a special needs search predicated only on reasonable suspicion.¹⁵¹

In *Griffin*, the Court held that the state's actions fell under the special need to operate an effective probation system.¹⁵² The dissent disagreed with the majority's use of the balancing test as a substitution for the warrant requirement.¹⁵³ The dissent never argued that the presence of law enforcement invalidates an otherwise legitimate special needs search.¹⁵⁴

In *Von Raab*, the Customs agents' drug test results were not disclosed to the police without the agents' written consent.¹⁵⁵ Positive test results could, however, lead to termination from the Customs Service if the agent could not offer any explanation for testing positive.¹⁵⁶ The fact that dismissed Customs agents were not prosecuted, facially supports the proposition that arrest and prosecution cannot be an element of a special needs search program. Unlike *T.L.O.* and *Griffin*, however, absent any possession or proof of being under the influence while performing his or her duties, it is questionable whether there would be any crime with which to charge the agent.¹⁵⁷ The other cases involve clear instances where the individual is in possession of contraband,¹⁵⁸ which clearly violates a criminal law. This is a significant distinction between *Von Raab* and other cases such as *T.L.O.* and

149. *Griffin*, 483 U.S. at 868; see also *supra* Part II.B.

150. *Griffin*, 483 U.S. at 872.

151. *Id.*

152. See *id.* at 875-76.

153. See *id.* at 881-82. Justice Blackmun, writing for the dissent, wrote:

My application of the balancing test leads me to conclude that special law enforcement needs justify a search by a probation agent of the home of a probationer on the basis of a reduced level of suspicion. The acknowledged need for supervision, however, does not also justify an exception to the warrant requirement, and I would retain this means of protecting a probationer's privacy.

Id. at 882.

154. See *id.* at 881-90.

155. See *Von Raab*, 489 U.S. at 663.

156. *Id.*

157. Compare *Griffin*, 483 U.S. 868 and *T.L.O.*, 469 U.S. 325, with *Von Raab*, 489 U.S. 656.

158. See *Griffin*, 483 U.S. at 871-72; *T.L.O.*, 469 U.S. at 328.

Griffin where the individuals in possession of contraband were prosecuted.¹⁵⁹

In *Skinner*, there was some question as to whether the system set in place by the Department of Transportation allowed the test results to be turned over to authorities for prosecution.¹⁶⁰ The Court made it clear that it thought the drug testing was not a pretext for obtaining evidence, but did not decide whether the use of law enforcement would “impugn” the administrative nature of the program.¹⁶¹

Likewise, in *Michigan v. Sitz*,¹⁶² the Supreme Court held that suspicionless sobriety checkpoints do not violate the Fourth Amendment.¹⁶³ Under this program, drivers who were processed at a sobriety checkpoint that were suspected to be under the influence of alcohol were arrested and prosecuted for driving under the influence of alcohol.¹⁶⁴ This is another instance where the Court upheld a suspicionless seizure that ultimately led to arrest and prosecution.¹⁶⁵

Similarly, the Court has admitted evidence against a defendant that was obtained pursuant to a suspicionless administrative search.¹⁶⁶ In *New York v. Burger*, the Court upheld an administrative search of the defendant’s junkyard made pursuant to a state statute.¹⁶⁷ During the search of the junkyard, police officers found stolen property.¹⁶⁸ Burger was arrested and charged with possession of stolen property.¹⁶⁹ Justice Blackmun, writing for the majority, held that “[we do not] think that this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself.”¹⁷⁰ Furthermore, the Court noted in *Burger* that “[s]o long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact

159. See *Von Raab*, 489 U.S. 656; *Griffin*, 483 U.S. 868; *T.L.O.*, 469 U.S. 325.

160. 489 U.S. at 621 n.5.

161. *Id.*

162. 496 U.S. 444 (1990).

163. *Id.* at 455. The Court articulated a three-factor test to determine whether temporary seizures at sobriety checkpoints that are based on less than probable cause are consistent with the Fourth Amendment. *Id.* The Court looked to the following three factors: (1) the state’s interest in preventing accidents caused by drunk drivers; (2) the effectiveness of sobriety checkpoints in achieving that goal; and (3) the level of intrusion on an individual’s privacy caused by the checkpoints. *Id.*

164. *Id.* at 447.

165. *Id.* at 456-57 (Brennan, J., dissenting).

166. See *New York v. Burger*, 482 U.S. 691, 718 (1987) (Brennan, J., dissenting). Police searched a junkyard pursuant to a statute that permitted the inspection of junkyards and automobile dismantlers for proper licensing and documentation relating to the origin of the dismantled automobiles. *Id.* at 693-94.

167. *Id.* at 708.

168. *Id.* at 695.

169. *Id.* at 695-96.

170. *Id.* at 716.

that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself."¹⁷¹

Before *Ferguson*, the Court never held a special needs search, or an administrative search, unconstitutional simply because the search yielded evidence that later led to criminal charges.¹⁷² The Court consistently upheld such searches, as long as the ultimate goal of the search was beyond the normal scope of law enforcement.¹⁷³ *Ferguson*, however, takes a different approach.¹⁷⁴

3. *Ferguson* and the Immediate Objective Approach

In *Ferguson*, the Court devoted extensive time discussing whether the presence of ordinary law enforcement techniques would, borrowing the Court's words from *Skinner*, "impugn the administrative nature of the . . . program."¹⁷⁵ The Court was divided with Justices Stevens, O'Connor, Souter, Breyer, and Ginsburg in the majority, Justice Kennedy concurring, and Justices Scalia, Thomas and Chief Justice Rehnquist dissenting.

The majority focused on the *immediate objective* of collecting evidence rather than the *ultimate goal* of protecting the health of pregnant mothers and unborn children.¹⁷⁶ The majority reasoned that the *immediate objective* of MUSC's drug testing program was to gather evidence of pre-natal cocaine use, even though it was done to serve some broader social purpose.¹⁷⁷ The majority reasoned that all law enforcement is meant to serve some ultimate higher social objective, and looking to that social objective rather than the immediate objective would place all searches under the special needs doctrine.¹⁷⁸

This argument is convincing, but is inconsistent with prior special needs case law. As Justice Kennedy argues in his concurring opinion, the Court has always looked to the ultimate goal of a special needs search policy.¹⁷⁹ Justice Kennedy noted that "[t]he circumstance that a particular search, like all searches, is designed to collect evidence of some sort reveals nothing about the need it serves."¹⁸⁰ In other words,

171. *Id.* at 717-18.

172. *See supra* notes 145-71 and accompanying text.

173. *But see* Carmen Vaughn, *Circumventing the Fourth Amendment Via the Special Needs Doctrine to Prosecute Pregnant Drug Users: Ferguson v. City of Charleston*, 51 S.C. L. REV. 671, 685-88 (suggesting that the reason that the Court upheld convictions in *Griffin* and *Sitz* was because the defendants were put on notice that they may be subject to arrest, whereas in *Ferguson*, there was no notice of the possibility of arrest).

174. *See infra* Part III.C.

175. *See Skinner*, 489 U.S. at 621 n.5.

176. *See Ferguson*, 532 U.S. at 82-83.

177. *See id.* at 83-85.

178. *See id.* at 84.

179. *See id.* at 86-87 (Kennedy, J., concurring).

180. *Id.* at 87-88 (Kennedy, J., concurring).

the state is using the search to serve an underlying interest.¹⁸¹ Whether that evidence is used for prosecution, or for administrative purposes, is a separate issue not raised by Justice Kennedy in his concurrence.¹⁸²

Justice Kennedy points out that the majority should have followed previous holdings in special needs cases and examined the search policy's ultimate goal; instead, the majority only analyzed the search's immediate purpose obtaining evidence.¹⁸³ For example, in *Acton*, this analysis would erroneously conclude the state's special need to be the immediate purpose of obtaining evidence of student-athlete drug use.¹⁸⁴ Rather, the court determined the program's ultimate goal to be deterrence of student drug use.¹⁸⁵ Similarly, the majority's holding in *Ferguson* would have led the Court in *Von Raab* to conclude that the U.S. Customs Service's special need was to obtain evidence of its agents' drug use, rather than the Court's actual interpretation that the special need was to avoid the dangers of having drug abusers in sensitive government positions.¹⁸⁶ Despite disagreement over the majority's analysis, Justice Kennedy concurred with the result because MUSC's policy had substantial law enforcement involvement from its inception.¹⁸⁷

The dissent pointed out that law enforcement involvement has never rendered a special needs search invalid.¹⁸⁸ For support, the dissent relies on *Griffin*.¹⁸⁹ The majority tries to distinguish *Griffin* by claiming that probationers have a lower expectation of privacy than ordinary citizens.¹⁹⁰ As Justice Scalia points out, this is irrelevant to the issue of law enforcement involvement and the scope of the special needs.¹⁹¹ Under special needs analysis, the only time the probationer's diminished expectation of privacy becomes relevant is in the second prong of special needs analysis—balancing the interests of the state versus the privacy interests of the individuals. However, the second prong of the analysis is only reached if the state can first prove it has a need that fits within the scope of the special needs doctrine. Therefore, the majority's reasoning would dispose of *Griffin* before even balancing the state and individual interests.

181. *See id.* 532 at 88 (Kennedy, J., concurring).

182. *See Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring).

183. *See id.* at 86-87 (Kennedy, J., concurring).

184. *Id.* *See generally Acton*, 515 U.S. 646.

185. *Ferguson*, 532 U.S. at 87 (quoting *Acton*, 515 U.S. at 661-62).

186. *Von Raab*, 489 U.S. at 666, *construed in Ferguson*, 532 U.S. at 87 (Kennedy, J., concurring).

187. *See Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring).

188. *See id.* at 100 (Scalia, J., dissenting).

189. *Id.* at 100-01 (Scalia, J., dissenting).

190. *See Ferguson*, 532 U.S. at 79 n.15.

191. *Id.* at 101 (Scalia, J., dissenting).

The dissent also looks to mandatory disclosure laws to support the use of law enforcement in a special needs search policy. Many states have mandatory disclosure laws that compel doctors, psychologists, and other professionals to report certain types of information that is obtained incidental to treatment.¹⁹² The information obtained by a physician often results in arrest.¹⁹³

4. Reconciling the Immediate Objective Approach Articulated in *Ferguson* with Prior Cases

These competing views can be resolved by Justice Kennedy's concurring opinion in *Ferguson*.¹⁹⁴ Justice Kennedy pointed out that courts have always looked to the ultimate goal of a special needs case, rather than the search itself.¹⁹⁵

First, prior cases have upheld arrests and prosecutions that arise from evidence obtained incidental to special needs searches.¹⁹⁶ Second, the immediate objective analysis is inconsistent with prior rulings.¹⁹⁷

Instead, the Court should look to whether the law enforcement involvement is *incidental*, rather than *integral*, to the ultimate goal of the special needs policy.¹⁹⁸ If the law enforcement involvement is merely incidental, courts should proceed with balancing the interests of the state against the privacy rights of the individual to determine whether the special needs search is reasonable. If the law enforcement involvement is an integral part of the special needs search policy, the court should find that the state's interest does not fit within the special needs doctrine. Accordingly, any search that does not fit within the special needs doctrine must satisfy the probable-cause warrant requirement to be found constitutional.

192. *See id.* at 100 (Scalia, J., dissenting).

193. *See id.* at 80-81.

194. *See id.* at 86-87 (Scalia, J., dissenting).

195. *See Ferguson*, 532 U.S. at 87-88 (Scalia, J., dissenting).

196. *See supra* Part III.C.2.

197. *See supra* Part III.C.3.

198. *See id.* at 101 (Scalia, J., dissenting). Justice Scalia briefly mentions this notion of incidental law enforcement versus integral law enforcement when he is paraphrasing what he believes to be the rationale of the majority. *See id.* (Scalia, J., dissenting).

The majority wrote on this matter the following:

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.

Id. at 84-85.

This approach would discard the *Ferguson* majority's immediate objective analysis.¹⁹⁹ But this approach is consistent with the majority's intent to keep special needs cases beyond the scope of ordinary law enforcement.²⁰⁰ Additionally, this approach is consistent with prior cases that look to the ultimate goal of the special needs policy, rather than the immediate objective? the search itself.²⁰¹

Focusing on incidental, as opposed to integral, law enforcement is also consistent with the mandatory disclosure laws the *Ferguson* dissent calls into question.²⁰² Doctors and other professionals do not conduct their examinations with the express purpose of obtaining evidence.²⁰³ Nonetheless, there are Laws compelling these professionals to disclose such evidence to authorities, even if prosecution ensues.²⁰⁴ Likewise, when a state creates a program in which the administrators of a special needs search take steps to administratively correct the problem that it is seeking to prevent, and law enforcement officials adopt legitimate methods of obtaining the evidence after-the-fact, then the policy should be upheld under the special needs doctrine.²⁰⁵

IV. CONCLUSION

Deciding whether the state can depart from the Fourth Amendment probable cause-warrant requirement²⁰⁶ is a serious constitutional concern, and it requires a consistent body of law. The Fourth Amendment is a cornerstone of our legal system and any relaxation of this restraint on government action should be scrutinized. Recognizing, however, that the Fourth Amendment only protects individuals from *unreasonable* searches, the Supreme Court has upheld departures from the probable cause-warrant standard in several situations,²⁰⁷ in-

199. See *supra* Parts II.D and III.C.

200. See *Ferguson*, 532 U.S. at 79.

201. See *supra* notes 192-93 and accompanying text.

202. See *Ferguson*, 532 U.S. at 100 (Scalia, J., dissenting).

203. See *id.* at 80-81. The Court wrote that "[Physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements, which no one has challenged here." *Id.*

204. See *id.*

205. In his concurring opinion in *Ferguson*, Justice Kennedy articulated similar criteria in the context of the drug tests conducted by MUSC. See *Ferguson*, 532 U.S. at 90 (Kennedy, J., concurring). Justice Kennedy reasoned that if the medical professionals adopted counseling or other methods of helping the patients, and prosecuting authorities adopted legitimate methods of obtaining evidence after-the-fact, then this testing scheme would properly fall under the special needs doctrine. See *id.* (Kennedy, J., concurring).

206. See *supra* Part I.

207. See, e.g., *Terry*, 392 U.S. 1 (holding that a police officer may temporarily detain and conduct a limited search based on articulable suspicion, a standard that is lower than probable cause).

cluding cases where the state is pursuing a special need beyond the scope of ordinary law enforcement.²⁰⁸

The special needs doctrine accommodates these special interests of the state.²⁰⁹ Notwithstanding any criticism of the legitimacy of the doctrine as a whole,²¹⁰ a problem arises when courts are left to determine the scope of state interests that fall under the special needs doctrine.²¹¹ Recently, in *Ferguson*, the Supreme Court confused this doctrine by looking to the immediate objective of a special needs search, holding that the use of ordinary law enforcement placed the search policy outside the scope of the special needs doctrine.²¹²

The Court's holding in *Ferguson* can be reconciled with prior cases, as well as the concurring and dissenting opinions of that case.²¹³ To accomplish this, courts must first decide whether the state's need falls within the scope of the special needs doctrine. In making this determination, courts should examine: (1) whether the need serves a purpose other than ordinary law enforcement; (2) whether the need is important; and (3) whether the need is in response to an actual threat, or imminent danger would ensue if the threat materializes.²¹⁴

Additionally, the presence of ordinary law enforcement methods in a special needs search should not necessarily render the search unconstitutional.²¹⁵ Instead, courts should look to whether the law enforcement is an *incidental*, rather than *integral*, part of the special needs policy.²¹⁶ Finally, courts should look to the policy's ultimate goal, rather than its immediate objective of collecting evidence.²¹⁷ This analysis is consistent with the existing body of law prior to *Ferguson* and strikes the proper balance between individuals' privacy rights and the states burden of maintaining public safety.

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208. *See supra* Part II.

209. *Id.*

210. *See supra* note 19. *See generally* Dodson, *supra* note 88 (discussing the validity of the special needs doctrine prior to the *Ferguson* decision).

211. *See supra* Part III.B.

212. *See supra* Part III.C.

213. *See supra* Part III.C.4.

214. *See supra* Part III.B.

215. *See supra* Part III.C.2.

216. *See supra* Part III.C.4.

217. *See supra* Part III.C.3.