

**A FEMINIST FOURTH AMENDMENT?: CONSENT, CARE, PRIVACY,
AND SOCIAL MEANING IN *FERGUSON V. CITY OF CHARLESTON***

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I. INTRODUCTION

In *Ferguson v. City of Charleston*,¹ a public hospital engaged in warrantless, suspicionless urine testing of selected poor, pregnant women for signs of cocaine use. A woman who tested positive was warned that she would face criminal prosecution if she did not enter substance abuse treatment. Moreover, even if she did enter a treatment program, she would be referred for criminal prosecution if she tested positive a second time or missed an appointment with a drug abuse counselor. The program had been jointly designed by the Hospital, that is, the Medical University of South Carolina (MUSC), and by the local police. Ten women arrested under the policy brought a civil suit against the Hospital and others.

The United States Supreme Court held that, absent patient consent, this testing program violated the Fourth Amendment to the United States Constitution. The Hospital had argued that the urine testing was done for a beneficent civil administrative purpose: to get cocaine-addicted pregnant moms off of drugs. Such administrative searches are often permitted absent a warrant or individualized suspicion.² The Court conceded that the drug abuse treatment purpose was indeed therapeutic, but concluded that the state's *primary* "programmatic" purpose was criminal law enforcement, thus presumptively requiring probable cause and a warrant.³ Rather than simply striking down the program, however, the Court remanded the case to the lower courts to determine whether there was sufficient evidence to support the jury's conclusion that the women had consented to the urine testing.⁴ Although the Court therefore purported not to resolve the consent question, the Court offered the lower courts guidance on how they should go about resolving the consent issue. That guidance, stated in a single brief paragraph of the Court's opinion, had radical implications, or so this article will argue.

There was no question that the women had signed two general hospital consent forms before being tested.⁵ But none of those forms or other media specifically informed the patients that they would be tested for cocaine for the spe-

1. 532 U.S. 67 (2001).

2. See ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 349-51 (1997) (defining "administrative searches" as those done for purposes other than criminal prosecution and explaining the significance of the high Court's so labeling a search).

3. See *Ferguson*, 532 U.S. at 80-82.

4. As of this writing, the courts on remand of the consent issue had received briefs and heard oral argument but not yet rendered a final decision. See, e.g., Appellants' Supplemental Reply Brief, *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999) (No. 97-2512) (on remand from the United States Supreme Court).

5. See Respondents' Brief at 38-41, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936).

cific purpose of turning the results over to the police for criminal prosecution absent prompt and successful treatment.⁶ The women were, however, not physically coerced into signing the forms, nor were any pre-signature threats made to get them to do so.⁷

Under prior case law defining consent under the Fourth Amendment, simple “voluntariness”—the absence of coercion—was all that was required.⁸ Without altering this general definition, however, the Court applied a new consent definition specific to this case, leaving open the possibility of applying this new definition to selected other cases as well.⁹ This new definition required, in addition to voluntariness, that consent to search be “knowingly and intelligently made.”¹⁰ In other words, the patients must understand more precisely what it was they were consenting to and what were its consequences.¹¹ Moreover, the Court cited as support for this conclusion *Miranda v. Arizona*,¹² a Fifth Amendment case embracing a more vibrant notion of consent, a notion that the Court had earlier rejected as too limiting for the state in the Fourth Amendment context.¹³

In this article, I will argue that the Court’s rationale is best understood as reflecting various insights from feminist theory. Specifically, the Court saw the definition of consent as turning on context rather than on a universal notion identical under all circumstances. Critical aspects of that context were the nature of the human relationships involved—primarily the doctor-patient and mother-child relationships—as well as the complexity of human emotion, the power inequalities between the parties, and the social meanings of their actions.¹⁴ The Court at least implicitly gave patient and parental autonomy great weight, and was offended by paternalistic notions that a more powerful social actor, here, the Hospital, knows what is best for, and therefore can take advantage of, the less powerful social actors, the patients. By asking the “woman question”—that is, taking into account the experiences and values of women—

6. See *id.* at 39 (arguing, on MUSC’s behalf, that “[t]here is no precedent in this Court’s Fourth Amendment search and seizure jurisprudence which imposes any . . . requirement that the searching agency inform the consenting party that the results of the search will be turned over to law enforcement.”).

7. See generally Petitioners’ Brief, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936) (making no such claim in its summary of the facts, even though they were of course recited in a fashion most favorable to the cause of the pregnant women).

8. See TASLITZ & PARIS, *supra* note 2, at 381-92 (summarizing consent to search doctrine case law).

9. See *infra* Parts II – III (explaining the ways in which the *Ferguson* Court’s definition of consent was “new,” that is, seemingly a departure from prior case law).

10. See *Ferguson*, 532 U.S. at 85 (concluding that hospital employees who obtain evidence from their patients of the latter’s criminal conduct “for the specific purpose of incriminating those patients” have “a special obligation to make sure that the patients are fully informed of their constitutional rights, as standards of knowing waiver require. Cf. *Miranda v. Arizona*, 384 U.S. 436 (1966).”).

11. See *infra* text accompanying notes 84-114.

12. 384 U.S. 436 (1966).

13. See TASLITZ & PARIS, *supra* note 2, at 660-63 (explaining that a waiver of *Miranda* rights of silence or counsel must be made “voluntarily, knowingly, and intelligently”); see *infra* text accompanying notes 62-70 (*Miranda*-like test originally rejected by the Court in the Fourth Amendment context).

14. See *infra* Part III.

by engaging in practical reasoning that is more sensitive to situation and context than is usually true in the law; and by exploring social meanings as ways for exacerbating and exploiting power inequalities, the Court acted consistently with the best of feminist legal method.¹⁵

Indeed, Justice Scalia, without using the word “feminist,” seemed to realize this in his dissent and was horrified. He therefore placed consent at the center of his own opinion.¹⁶

The Court’s other holding, that the urine testing involved a criminal-investigation-related, rather than an administrative, purpose, is also illuminated by feminist theory. The Court declared that the beneficent, *subjective intentions* of the state actors are irrelevant. What mattered was that the state’s “programmatic purpose” was aimed at investigating crime.¹⁷ Yet what does “programmatic purpose” mean if it does not include subjective intentions? The Court did not say. Instead, the Court emphasized the deep involvement of the police in creating and monitoring the testing program and the use of the threat of criminal prosecution to attain the end of public safety.¹⁸ But the latter circumstance is likely present in all admittedly criminal investigatory searches,¹⁹ yet it is hard to see what the former (degree of police involvement) has to do with “purpose.” Police are the enforcers in other areas, such as drunk driving roadblocks, that the court treats as administrative in nature.²⁰ Police involvement alone is therefore not the key. This murky state of affairs can be clarified if “programmatic purposes” are those most plausibly attributed to the state actors *by their audience*, that is, by the rest of society. Such attributions turn on the common social meaning of particular conduct in our political culture.²¹ Some feminists have long understood how the social meanings of action create our social world. Hostile environment sexual harassment, for example, such as posting photographs of nude women about a male-dominated workplace, is fairly perceived by women as marking them as inferior to men, women being more about body

15. On the distinguishing characteristics of feminist method, see Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

16. See *infra* Part III.F (analyzing Scalia’s dissent).

17. See *infra*, text accompanying notes 218-28 (analyzing of the Court’s idea of “programmatic purposes” in detail).

18. See *Ferguson*, 532 U.S. at 80-86 (“Moreover, throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy.” *Id.* at 82. The policy further crossed the line onto the boundaries of ordinary criminal searches by undertaking to test patients for the specific and immediate purpose of incriminating them.)

19. Cf. *Ferguson*, 532 U.S. at 87-88 (Kennedy, J., concurring in the judgment) (“By very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence,” the threat of evidence discovery partly being designed to deter criminal conduct.). Justice Kennedy does, however, find the extensive involvement of law enforcement in the *design* of the policy, combined with the explicit threat of arrest to implement the policy’s purportedly civil objectives, as demonstrating a criminal-investigation, rather than administrative, programmatic purpose. See *id.* at 86-88. His disagreement with the majority turned on other grounds, discussed *infra* text accompanying notes 237-51.

20. See TASLITZ & PARIS, *supra* note 2, at 368-70 (drunk driving roadblocks as administrative seizures, despite Court’s occasional rhetoric to the contrary).

21. See *infra* Part IV (summarizing feminist social meaning theory and its application to the *Ferguson* case).

than mind, more about play than work.²² Similarly, to label someone a “criminal suspect” in our society is to mark them as outsiders who need to be “brought down a peg,” thereby teaching them respect for others and for society’s moral and legal code.²³

In *Ferguson*, the underlying conduct was drug abuse, and that is far more stigmatizing, more of a “true crime,” in our culture than is drunk driving.²⁴ Even worse, however, there were implicit or explicit charges of child abuse.²⁵ For the *Ferguson* plaintiffs to use illegal drugs to harm their own future children violated powerful social understandings about the almost sacred nature of motherhood.²⁶ Furthermore, the plaintiffs were both black and poor, implicating cultural images of such women’s being by nature bad mothers, inherent criminals who, by their misconduct, foist the costs of childcare and further future crime on the rest of us, the “responsible hardworking” mass of society.²⁷ Finally, the police did not simply implement the program in *Ferguson* but in fact helped to create it, including guiding hospital employees to care for evidence in a way that would maximize its chances of trial admissibility.²⁸ This combination of

22. See generally MARGARET A. CROUCH, THINKING ABOUT SEXUAL HARASSMENT: A GUIDE FOR THE PERPLEXED 141-74 (2001) (summarizing various feminist theories justifying legal prohibitions against hostile environment sexual harassment, of which the “dominance” theories are most in tune with what I have labeled “social meaning”). The term “social meaning” is mine, but I think that it accurately captures the focus of many feminists on the sometimes subconscious social meanings attributed to human conduct as instantiating gendered oppression. For a recent synthesis of ideas in this area, see Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001). I make no claim that feminists are the only thinkers to embrace social meaning approaches, but only that they have been among the most consistent and persuasive of such theorists. See Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 177-78 (1999) [hereinafter *What Feminism*] (elaborating on a similar point but in the context of evidentiary theory). Furthermore, they more often emphasize social meanings associated with gender, one of the two foci (consent definition being the other) of this article. Outstanding work in social meaning is being done by others, including former neo-conservative commentators, but focusing on other sources of discrimination, such as racial bias. See generally GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002) (identifying subconscious racial stereotyping and racial stigma as the source of much modern racial discrimination and disparity).

23. For a synthesis of much more traditional work, outside the feminist rubric, on the communicative functions of criminal punishment, see Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 MARGINS 305 (2001) [hereinafter *Civil Society*]. For a concise summary and critique of feminist social meaning theories concerning the political function of pornography as illustrative of the social meaning approach, see CAROL SMART, FEMINISM AND THE POWER OF LAW 114-37 (1989).

24. See Part V.B.1-2.

25. The Policy in *Ferguson* provided for charging a patient who was 27 or fewer weeks pregnant with simple possession; 28 or more weeks with possession and distribution to a minor (the fetus); and one testing positive at the time of delivery with neglect of a child. *Ferguson*, 532 U.S. at 72-73; see also *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997), cert. denied, 523 U.S. 1145 (1998) (holding that the ingestion of cocaine during the third trimester of pregnancy constitutes criminal child neglect under South Carolina law).

26. See Part V.B.4 (discussing motherhood’s meaning in modern American culture).

27. See *infra* text accompanying notes 600-04 (discussing how race and class complicate allegations of “unmotherly” conduct).

28. See *Ferguson*, 532 U.S. at 71-72 (“[The Policy] stated that a chain of custody should be followed when obtaining and testing urine samples, presumably to make sure that the results could be used in subsequent criminal proceedings.”).

forces—the grave nature of the crime of drug abuse, the criminal violation of motherhood norms, class and racial fears of inherent criminality, and the unusual extent of police involvement in the program’s creation and implementation—carried a clear social meaning: a stigma akin to that carried by allegations of the worst sort of crimes. Feminist social meaning theory thus helps both to explain and to critique the Court’s often unconvincing and contradictory efforts to distinguish “administrative” from “criminal-investigation-related” purposes.

My use of the term “feminism” is not meant to simplify the term’s complex and multiple meanings.²⁹ I define “feminism” as any way of looking at the world that draws on women’s historical and current life experience as a source for learning and growing.³⁰ Men can, therefore, be “feminist.”³¹ There are many different schools of feminist thought, and I neither defend nor eschew any particular such school here.³² Rather, I draw eclectically on feminist writings about consent and social meaning. I can do so because my purpose is simply to demonstrate that *Ferguson’s* significance is best clarified by recognizing its implicit embrace of precisely those aspects of feminist theory identified here. The Court did not seek ideological consistency or purity. Moreover, conflicts among the various schools of thought are often exaggerated.³³ Thus, the purported dichotomy between those feminist scholars who celebrate female “difference” from men and those who stress male power and unequal resource access is often a flawed one.³⁴ As I have explained elsewhere, perceptions of women’s modest power, dependency, and over-reactive emotions may be what accounts for many of the differences in both women’s behavior and men’s perceptions of that behavior.³⁵ Therefore, both “difference” and “dominance” feminism are right.

29. See, e.g., *What Feminism*, *supra* note 22, at 175-77 (concisely summarizing the different analytical approaches of “cultural,” “radical,” and “liberal” feminists); see generally FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993) (anthology collecting excerpts of articles authored by leading feminist scholars taking very different approaches to the subject); WILLIAM N. ESKRIDGE, JR., GAY LAW: CHALLENGING THE APARTHEID OF THE CLOSET 239-323 (1999) (examining the ways in which queer theory offers its own unique perspective on the insights of feminism).

30. Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 8-9 (1998) [hereinafter *Feminist Approach*] (“By ‘feminism’ I mean any theory that draws on the lives of women or seeks to emancipate them from oppressive social constraints imposed by gendered roles, rules, and expectations.”).

31. See generally WHO CAN SPEAK? AUTHORITY AND CRITICAL IDENTITY (Joan Roof & Robyn Wiegman eds., 1995) (collecting essays debating when, if ever, members of one group can speak for another). I note that I do not purport to speak for anyone but myself, though I do hope to have learned from the insights of female feminists sufficiently to add my voice to the conversation that they have begun.

32. See *infra* sources cited notes 279-302, 463-500 and accompanying text.

33. See, e.g., ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 67-69 (1999) [hereinafter RAPE AND CULTURE] (explaining why “essentialist” and “social constructivist” approaches to feminist linguistics are complementary rather than dichotomous); *Feminist Approach*, *supra* note 30, at 8-10 (defending a “pragmatic postmodern feminism” that fuses the best of the insights of modernist and postmodernist feminist thinking).

34. See *What Feminism*, *supra* note 22, at 175-76 (explaining how traditional distinctions among difference, power, and liberal feminist theories often blur or are irrelevant to much modern feminist jurisprudence).

35. See RAPE AND CULTURE, *supra* note 33, at 69-80 (describing mechanisms by which gendered stereotypes affect both women’s linguistic behavior and the credibility accorded their speech by their audiences, including juries as rape trial audiences).

Before wading into the depths of the Court's *Ferguson* decision, however, a recitation of some more detailed relevant facts in the case is necessary.

II. FERGUSON'S FACTUAL BASIS: "HELPING" ADDICTED MOMS

In April 1988, MUSC, the Medical University of South Carolina, a public hospital, began ordering drug screening of maternity patients suspected of using cocaine.³⁶ A patient testing positive was referred by MUSC staff to the county substance abuse commission for counseling and treatment. Despite these referrals, the incidence of prior cocaine use did not decline.

Four months later, Nurse Shirley Brown, the case manager for the MUSC obstetrics department, learned that the Charleston solicitor had begun to prosecute pregnant drug users who tested positive at their child's birth. Nurse Brown promptly contacted the Hospital's general counsel, who in turn sent a letter to the County Solicitor inquiring about "what, if any, . . . [the] Medical Center needs to do to assist you in this matter" of prosecuting drug-addicted new mothers?³⁷ The Solicitor responded by organizing initial meetings resulting in a task force consisting of representatives of MUSC, the police, the County Substance Abuse Commission, and the Department of Social Services. That task force eventually adopted a Search Policy dealing with the Management of Drug Abuse During Pregnancy. The Policy originated in internal memoranda by law enforcement agencies.³⁸ The Policy was implemented at only one Charleston hospital—MUSC, which served a large number of African-American, economically disadvantaged clients.³⁹ The Policy also applied only to cocaine use and not to

36. My summary of the facts here is largely drawn from the high Court's *Ferguson* opinion, 532 U.S. at 69-76. I add pinpoint cites only where my summary also builds on another source, such as the briefs of the parties and amici in the case, or where I quote directly from the Court's opinion.

37. *Id.* at 71 n.3 (quoting the MUSC General Counsel's letter to the County Solicitor).

38. Petitioners' Brief at 2-4, *Ferguson* (No. 99-936). The County Solicitor organized the initial policy-planning meetings, chose the participants, issued the invitations, and described his plan to prosecute pregnant women using cocaine. See *Ferguson*, 532 U.S. at 69-71. He ultimately formed a task force consisting of representatives of the police, MUSC, the County Substance Abuse Commission, and the Department of Social Services. *Id.* at 71-72. The task force's deliberations led to the Hospital's adoption of Policy M-7.

39. See Petitioners' Brief at 21, *Ferguson* (No. 99-936). The Policy was only applied at MUSC, the "one hospital in Charleston whose patient population was predominantly African-American." *Id.* The *Ferguson* patient petitioners were nine African-American women and one white woman. *Id.* at 1. The jury found in favor of MUSC and the other respondents on a statutory racial discrimination claim, finding insufficient evidence of *intentional* racial discrimination, with the District Court ruling again in MUSC's favor in finding that disparate racial impact did not establish the statutory claim for race discrimination. See Respondents' Brief at 11, *Ferguson* (No. 99-936). That portion of the verdict and that ruling were not appealed. *Id.* However, amici argued that disparate racial impact was relevant to the "reasonableness" of the search, an issue that was appealed, an argument not addressed in the Supreme Court's opinion. See Motion for Leave to File an Amicus Curiae Brief and Brief of the NARAL Foundation et al. as Amici Curiae in Support of Petitioners at 23 n.16, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936) [hereinafter NARAL Brief]. Because I here address only the consent search doctrine and the administrative/criminal search purpose distinction, and because the Court found the search in *Ferguson* to be an ordinary criminal one, I do not in this article attempt to engage in the flexible and detailed reasonableness balancing of state and individual interests that an administrative search finding would require. See TASLITZ & PARIS, *supra* note 2, at 349-51 (describing reasonableness methodology for administrative searches).

other illegal drugs.⁴⁰

Under the Policy, hospital staff had discretion to identify selected maternity patients for cocaine screening based on the presence of at least one of nine criteria.⁴¹ The Policy also provided detailed guidance on how to maintain a proper chain of custody in conducting the tests.⁴² Under the initial version of the policy, women testing positive during or just after labor triggered immediate notification of that fact to the police by the hospital and the patient's prompt subsequent arrest.⁴³ Some women were in fact arrested while still in pain and bleeding from childbirth.⁴⁴ However, women testing positive during pregnancy, but well before labor's onset, were not reported to the police for arrest unless the women tested positive for cocaine a second time or failed to keep an appointment with a substance abuse counselor.⁴⁵

In 1990, the policy was altered at the Solicitor's request to treat all positive testers alike so that even women first testing positive during or after childbirth were given an opportunity to avoid arrest by participating in drug treatment. The Policy also contained forms for the patient to sign and procedures for the police to follow upon a patient's arrest. Those procedures included a scale of charges, more serious ones to be lodged the later the stage of the pregnancy, and encouraged police to interrogate the arrestee to discover the source of the drugs. But other than providing for substance abuse counseling, the Policy made no mention of any change in prenatal care for the mother or special medical treatment for the newborn.⁴⁶

Maternity patients signed general hospital consent forms. Those forms included consent to necessary testing, including urine testing, conducted for the purpose of medical treatment.⁴⁷ But that form did not contain an express consent declaring that positive test results could be revealed to the police for the purposes of criminal prosecution.⁴⁸ Moreover, each patient was shown a Patient Handbook stating that "medical records and all communication pertaining to

40. See Petitioners' Brief at 11, *Ferguson* (No. 99-936) ("Respondents also designed the Policy to focus on cocaine to the exclusion of other illegal drugs or legal drugs that could harm the fetus.").

41. *Ferguson*, 532 U.S. at 71 n.4. Those criteria included lack of, or incomplete or late, prenatal care; intrauterine fetal death; preterm labor without an obvious cause; intrauterine growth retardation; previously known drug or alcohol abuse; and unexplained congenital abnormalities. See *id.* The patients' sympathizers argued that several of these criteria were "thinly veiled proxies for low socioeconomic status or race." For example, poor women often have inadequate access to prenatal care and, thus, are singled out for urine-testing for cocaine use because they are poor. See NARAL Brief at 23-24, *Ferguson*, (No. 99-936). Only one or more of the nine criteria had to be met to subject a patient to testing. *Ferguson*, 532 U.S. at 71.

42. *Id.*

43. *Id.*

44. Petitioners' Brief at 8, *Ferguson* (No. 99-936).

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

46. *Id.*

47. Respondents' Brief at 9, *Ferguson* (No. 99-936) (summarizing consent procedures).

48. Reply Brief for Petitioners at 13-17 nn.19-22, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936) (describing alleged consent procedures in greater detail and concluding that "none of the evidence proffered by Respondents to establish consent . . . told the patients that the hospital would turn their medical records over to law enforcement agents if they revealed evidence of drug use.").

your care are also treated as confidential.”⁴⁹ However, all maternity patients received educational information about the harmful effects of prenatal drug abuse, and each patient also signed a statement acknowledging that she had received counseling.⁵⁰ And a public service announcement was made about the new testing program shortly after the Policy’s adoption, but this announcement also did not mention that medical records concerning positive test results would be turned over to the police, though the announcement did declare that sticking with the treatment program would protect them from arrest.⁵¹ If a patient tested positive, only then was she provided with a letter from the Solicitor’s Office warning her that she was required to attend substance abuse and prenatal appointments.⁵² Patients’ testing positive were also tracked as part of the Suspected Child Abuse and Neglect or “SCAN” meetings at which Solicitors’ office, police, hospital, and Department of Social Services’ personnel discussed suspected child abuse.⁵³

Although the Policy on its face applied to all hospital maternity patients, it was enforced only at the high-risk clinic in the obstetrics/gynecology department and not in the family practice department or other hospital clinics.⁵⁴ Of the thirty women ultimately arrested under the Policy, twenty-nine were African-American.⁵⁵ Furthermore, Nurse Brown, who was critical to the Policy’s creation and later everyday implementation, admitted that she viewed interracial relationships as “against God’s way” and noted in the charts of pregnant white women if their partners were black.⁵⁶ Nurse Brown also raised the option of sterilization for black women testing positive for cocaine, but not for white women.⁵⁷

49. *Id.* at 14 n.17.

50. Respondents’ Brief at 9, *Ferguson* (No. 99-936).

51. *See* Reply Brief for Petitioners at 16 n.22, *Ferguson* (No. 99-936).

52. *Id.* at 16 n.20. Four of the patients were never shown the Solicitor’s Letter. *Id.* The Policy itself, however, expressly provided for using the threat of criminal law enforcement to give MUSC “leverage” in obtaining patient compliance with drug treatment. *Ferguson*, 532 U.S. at 71. After a positive drug test, patients also received a “To Our Patients” letter stating that MUSC will “take action” and “ask for help” if patients continue using drugs or halt treatment but again did not disclose that confidential medical information would be revealed to the police. Reply Brief for Petitioners at 16 n.21, *Ferguson* (No. 99-936). When arrests were made, the Solicitor often used a “carrot and stick” approach, following arrest by diversion into mandatory drug treatment. *See id.* at 5-6. Respondents noted in their brief that 253 patients tested positive, 30 of these failed initially to complete treatment, 28 of them arrested but handled through pretrial intervention, and only two (neither of whom was a Petitioner) being prosecuted upon continued failure to comply with treatment. Respondents’ Brief at 10, *Ferguson* (No. 99-936). Even these last two women, Respondents note, were ordered to complete treatment as a condition of probation rather than being sentenced to a jail term. *Id.* At least one patient, according to Petitioners, however, was “deliberately deceived and misled,” with MUSC telling her that her “urine was being tested to determine if she was dehydrated.” *See* Reply Brief for Petitioners at 16, *Ferguson* (No. 99-936).

53. Petitioners’ Brief at 15 n.11, *Ferguson* (No. 99-936).

54. *See id.* at 12.

55. *See id.* at 13. Sixty-eight percent of the women testing positive for any drug were African-American, but ninety percent of those testing positive specifically for the only drug to which the Policy applied—cocaine—were African-American, thus alone establishing, in the Petitioners’ view, a prima facie case of disparate impact discrimination. *See id.* at 12-13.

56. *See id.* at 13 n.10.

57. *Id.*

Ten of the women arrested pursuant to the Policy filed suit against the City of Charleston, law enforcement officials, MUSC representatives and others involved in the creation or implementation of the Policy.⁵⁸ Although there were several theories of liability advanced, the primary one was that the urine tests were non-consensual, warrantless, suspicionless searches contravening the Fourth Amendment.⁵⁹ The district court as a matter of law rejected the defense that the tests were reasonable administrative searches. However, the district court instructed the jury to enter a verdict for the defendants if the jury believed that the plaintiffs had consented to the tests, and the jury did indeed find in favor of the defendants.⁶⁰

Plaintiffs appealed, arguing that the evidence was not sufficient to support the jury's finding of consent. The United States Court of Appeals for the Fourth Circuit affirmed on the ground that the tests were reasonable administrative or "special needs" searches divorced from the intent to aid criminal law enforcement. Thus, the Fourth Circuit never reached the issue of consent.⁶¹

The United States Supreme Court granted certiorari solely on the "special needs" issue. The Court reversed the Fourth Circuit on that issue and remanded for a determination on the consent issue. Nevertheless, the Court and Justice Scalia in dissent had much to say about the legal standard for determining consent. Understanding the significance of the Court's view on the special needs and consent issues requires understanding some of the earlier case law on these questions. The next section of this article begins that task by starting with the meaning of "consent."

III. THE UNITED STATES SUPREME COURT'S OPINION

A. *Schneckloth* Voluntariness as Consent

In *Schneckloth v. Bustamonte*,⁶² the United States Supreme Court expressly rejected the idea that constitutionally valid consensual searches require a waiver of Fourth Amendment rights. Waivers of constitutional rights must be "knowing, intelligent, and voluntary," that is, based on an awareness of the rights being relinquished and of their significance, yet nevertheless freely foregoing their protection.⁶³ Because consensual searches are justified on policy grounds rather than grounds of waiver, therefore, the Court required that consensual searches merely be voluntary. The Court offered two reasons for equating voluntariness with consent. First, the Court had required strict waiver standards only for trial and pre-trial rights necessary to ensuring the fairness of the trial itself. Yet Fourth Amendment rights are, according to the Court, "of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of

58. *Ferguson*, 532 U.S. 73-74.

59. *See id.*

60. *Id.* at 73-74 n.6.

61. *See id.* at 73-76.

62. 412 U.S. 218 (1973).

63. *Id.* at 235-45.

truth at a criminal trial.”⁶⁴ There is, therefore, “no likelihood of unreliability in an uncoerced search or seizure case.”⁶⁵

Second, “the community has a real interest in encouraging consent,”⁶⁶ said the Court, for the resulting search may yield necessary evidence for the solution and prosecution of crime.”⁶⁷ Nothing in the Fourth Amendment is meant to discourage citizens from aiding in the apprehension of criminals.

Consequently, although decided only seven years after the Fifth Amendment decision in *Miranda v. Arizona*,⁶⁸ the *Schneckloth* Court rejected any requirement of *Miranda*-like warnings to validate consent to search under the Fourth Amendment. The *Schneckloth* Court explained that the circumstances under which consent searches are sought—on highways and in homes and offices—involved “informal and unstructured conditions” far removed from the incommunicado interrogation in a police-dominated atmosphere that worried the *Miranda* Court.⁶⁹

Of course, the *Schneckloth* Court further explained, the provision of warnings is one relevant factor in determining the voluntariness of consent under the totality of the circumstances. Similarly, the suspect’s age, lack of education, low intelligence, and the use of physical punishments, such as deprivations of food or sleep, are relevant to the voluntariness inquiry.⁷⁰

Nevertheless, in practice, invalidating a purportedly consensual search as coerced under the *Schneckloth* test is notoriously unlikely absent the most extreme of circumstances. One study thus revealed that between January 1, 1989, and April 15, 1995, the United States Court of Appeals for the District of Columbia Circuit found voluntary consent in every instance in which it was challenged.⁷¹ These holdings included one case in which a twenty-four-year-old defendant with only a tenth-grade education had on four prior occasions refused consent to police requests to search, only to be searched anyway each time; another case in which the young, foreign-born, poorly educated defendant lacked fluency in English and was ignorant of his rights; and a third case in which a ninth-grade drop-out with an IQ only six points above mental retardation was reading at only a second-grade level and suffering from borderline personality disorder.⁷²

Police deception is also relevant to voluntariness, yet the courts tolerate a significant degree of deception. The high Court in at least two cases, *On Lee v. United States*⁷³ and *Hoffa v. United States*,⁷⁴ has itself held that the use of under-

64. *Id.* at 242.

65. *Id.*

66. *Id.* at 243.

67. *Id.*

68. 384 U.S. 436 (1966) (requiring among other things, that police warn suspects of their rights to silence and to counsel before being interrogated while in custody).

69. 412 U.S. at 232.

70. *See id.* at 226.

71. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 32 (1999) (relying on Ray O’Brien, *Consent Search Abuse in Poor and Minority Communities* (May 17, 1995) (unpublished manuscript on file with Professor David Cole)).

72. *See* COLE, *supra* note 71, at 32.

73. 343 U.S. 747 (1952).

cover agents did not protect individuals against their own misplaced confidence in the agents, who turned out to be “false friends.”⁷⁵

The *Schneckloth* test has been criticized on numerous grounds. Notably, the need for evidence derived from consensual searches is argued to be less than the need to obtain confessions; this is so because much physical evidence can be obtained without the suspect’s consent while a confession never can.⁷⁶ Additionally, commentators argue, it is unclear why protecting the fundamental right to privacy is less important than the fundamental right to a fair trial.⁷⁷ Finally, these same commentators note, the Court has previously stated that “‘no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights.’”⁷⁸

Despite these criticisms, the Court recently re-affirmed *Schneckloth* and its notion of voluntary consent as fully consistent with citizen ignorance.⁷⁹ The Court did so in *Ohio v. Robinette*.⁸⁰ *Robinette* involved a traffic stop for speeding, after which the officer decided not to ticket the driver. After making that decision, the officer still continued the stop, ordering the driver out of his car and obtaining consent to search. The Ohio Supreme Court concluded that the continued interaction between the officer and the driver constituted a seizure because an ordinary person would not have discerned that the forcible stop had been completed and evolved into a mere voluntary encounter—that is, one that the driver could freely have chosen to end. Because the Ohio Court believed that “a ‘consensual encounter’ immediately following a detention is likely to be imbued with the authoritative aura of the detention,”⁸¹ that Court adopted a bright-line rule requiring officers completing traffic stops to warn drivers that they are free to leave *before* the officers seek consent to search.

The United States Supreme Court reversed, concluding that it would be “unrealistic” to require such a per se warning, citing *Schneckloth* and remanding to the Ohio courts for further proceedings.⁸² Those proceedings were to be consistent with the high Court’s instruction that the validity of consent is to be determined on a case-by-case basis in which awareness of rights is only one rele-

74. 385 U.S. 293 (1966).

75. For a summary of additional United States Supreme Court Fourth Amendment case law embracing police use of deception, see TASHLITZ & PARIS, *supra* note 2, at 109-12.

76. WAYNE LAFAVE, CRIMINAL PROCEDURE 234 (3d ed. 2000).

77. *See id.*

78. *See id.* (quoting *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964)).

79. COLE, *supra* note 71, at 30 (making similar point).

80. 519 U.S. 33 (1996).

81. *State v. Robinette*, 653 N.E.2d 695, 699 (Ohio 1995).

82. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). As this article went to press, the Court also decided *U.S. v. Drayton*, which held, in part, that purported consensual searches of bus passengers by plainclothes police officers involved in routine drug interdiction efforts were “voluntary” under the Fourth Amendment, on the facts before the Court. The Court rejected any per se rule requiring bus passengers in that or similar settings to be warned of their right not to cooperate and to refuse consent. 122 S.Ct. 2105 (2002). Last term, the Court also had the opportunity to elaborate further on the consent-to-search doctrine in the course of upholding a warrantless search of a probationer’s apartment but declined to do so. *See U.S. v. Knights*, 534 U.S. 112 (2001). Nothing in *Knights* or *Drayton* alters any of my analysis in this article.

vant factor and the subjective intentions of the officer regarding whether he was engaging in a forcible stop or a voluntary encounter are irrelevant.⁸³

B. The *Ferguson* Court: The Return to Waiver

It was thus somewhat startling when the *Ferguson* Court, while purporting not to resolve the question whether the maternity patients voluntarily consented to their urine's being searched, gave the following guidance to the lower courts concerning how to handle the consent question upon remand:

The fact that positive [urine] test results were turned over to the police. . .provides an affirmative reason for enforcing the strictures of the Fourth Amendment. 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*. Cf. *Miranda v. Arizona*, 384 U.S. 436 (1966).⁸⁴

This instruction was startling in part because it seemingly rejected *Schneckloth's* equation of voluntariness with consent, instead requiring that consent also be knowing and intelligent. Furthermore, the *Ferguson* Court cited *Miranda* as support, an analogy expressly rejected by the *Schneckloth* Court.⁸⁵ Fully understanding *Miranda's* meaning is thus necessary to clarifying the radical implications of the *Ferguson* Court's reliance on *Miranda*.

C. Mirandizing *Schneckloth*: Autonomy and Equality Re-enter Center Stage

It is important to stress that there were at least four separate holdings in *Miranda*. First, the Court held that the Fifth Amendment's privilege against state-compelled self-incrimination applied at the police stationhouse as well as at the courthouse. Second, interrogation in the stationhouse or its functional equivalent is inherently compelling. Third, overcoming that inherent compulsion partly required both the provision of the now-familiar warnings so often seen on television crime shows *and* affirmative evidence that the warnings were adequately understood and knowingly, intelligently, and voluntarily waived by

83. The Court also follows, in administrative search cases, what might be called a "pseudo-consent" doctrine. Administrative search cases often involve a suspect's "consenting" to the search as a condition for continued employment or continued participation in a school activity. See TAsLITZ & PARIs, *supra* note 2, at 349-70 (summarizing case law). Yet the Supreme Court rarely resolves these cases under the consent-to-search doctrine, though the Court does consider "consent" relevant to the reasonableness balancing process for administrative searches. See *id.* This different treatment of consent from the role that it plays in ordinary criminal searches is likely a recognition that "consenting" in response to the threat of being fired is not truly "voluntary," though nevertheless constituting a kind of "pseudo-consent" that favors a finding that the search is reasonable. See *infra* text accompanying notes 246-51 (noting Justice Kennedy's adoption of a similar position, though he does not use the term "pseudo-consent").

84. 532 U.S. at 84-85 (second emphasis added).

85. See *supra* text accompanying notes 68-70 (discussing *Schneckloth* Court's rejection of a *Miranda*-like approach in the Fourth Amendment context); TAsLITZ & PARIs, *supra* note 2, at 660-74 (explaining *Miranda's* requirement of a knowing, voluntary, and intelligent waiver).

the suspect. Merely hearing and even understanding the warnings were not enough to establish waiver.

Finally, overcoming compulsion also required the creation of a *Fifth Amendment* right to counsel before and during questioning. The Sixth Amendment's express right to counsel applies only after formal adversarial proceedings have begun, usually by the state's filing a criminal complaint—a time well after the completion of most custodial interrogations.⁸⁶ Yet the *Fifth Amendment* nowhere mentions a right to counsel.⁸⁷ Nevertheless *Miranda* created such a right during questioning as essential to protecting the core Fifth Amendment right to be free from compulsion. Absent adequate warnings and an affirmative knowing, intelligent, and voluntary waiver of rights, or the provision of counsel upon request, questions may not even be posed, much less can answers be coerced, under *Miranda*.⁸⁸

The *Miranda* Court's recognition of inherent compulsion stemmed from a clear-eyed understanding of police interrogation practices and suspect vulnerability. Police are trained to isolate a suspect so that he feels at their mercy, to use deception and false legal advice, as well as the good cop/bad cop and other psychological techniques to obtain confessions.⁸⁹ "Such an interrogation environment," said the Court, is "created for no purpose other than to subjugate the will of his examiner. . . . To be sure, this is not physical intimidation, but it is equally destructive of human dignity."⁹⁰ Simultaneously, police aggressions, according to the Court, "[trade] on the weakness of individuals."⁹¹ That is because "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described. . . cannot be otherwise than under compulsion to speak."⁹² Warnings, said the Court, help both to make the individual aware of his rights and of at least some important consequences of waiving them. Warnings and police expression of an ability to proceed only if the suspect affirmatively waives his rights also send the message that the police will indeed honor the subject's rights rather than treating them as an empty formalism.

86. See Stephen J. Schulhofer, *Reconsidering Miranda*, in THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 106-18 (Richard A. Leo & George C. Thomas, III eds., 1998) (describing *Miranda*'s holdings as staged in three steps). Accord WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 55-58 (2001) (also describing *Miranda* as predicated on three separate holdings). I have described four separate holdings because that better captures the aspects of *Miranda* to which its critics object. See TASLITZ & PARIS, *supra* note 2, at 595-86, 624-28, 636-45 (summarizing criticisms of *Miranda* and comparing *Miranda*'s Fifth Amendment right to counsel and affirmative waiver requirements to the narrower scope of the Sixth Amendment right to counsel).

87. See U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself.").

88. See JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 132-33 (1993) (criticizing *Miranda* for prohibiting not only the compelling of suspects' answers but also barring even asking them questions).

89. See *Miranda*, 384 U.S. 436. For an excellent summary of the status of police interrogation techniques at the time that *Miranda* was decided and of their continued status today see WHITE, *supra* note 85, at 25-39, 76-107.

90. 384 U.S. at 457.

91. *Id.* at 455.

92. *Id.* at 461.

Yet, said the Court, “[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege. . . .”⁹³ Counsel’s consultation with his client before and during questioning ensures that the individual’s “right to choose between silence and speech remains unfettered throughout the interrogation process.”⁹⁴ Furthermore, counsel’s mere presence can reduce the risk of police coercion and raise the chances that any statement given will be trustworthy.

Nor, explained the Court, should the financial ability of the individual affect the scope of the rights involved. The privilege against self-incrimination applies to everyone, regardless of income. Indeed, the Court continued, given estimates of 50-90% indigency among felony defendants, limiting *Miranda*’s counsel rights to those who can afford to pay for them would render the Court’s decision “of little significance.”⁹⁵

The original *Miranda* opinion was obviously concerned with suspect autonomy and equality.⁹⁶ The Court recognized that encouraging autonomy, in the sense of the power to reflect rationally on one’s circumstances and to choose the best course of action, is central to any sound system of liberal justice.⁹⁷ But such autonomy is “not so easily bestowed on disadvantaged persons,” who may lack the talent, education, and privilege to make truly autonomous choices.⁹⁸

93. *Id.* at 469.

94. *Id.*

95. 384 U.S. at 472.

96. Professor Kent Greenawalt has made this point, arguing that *Miranda* was rooted in concepts of human dignity and that:

[D]ignity affects how people should act toward each other. Most especially, dignity precludes humiliating treatment. In a liberal democracy the concept of dignity is closely related to ideas of respect, individuality, autonomy, tolerance, and equality. To recognize the dignity of liberal citizens involves acknowledgement of their independence of choice, their power to define for themselves the kinds of persons they will be and the lives they will lead. Dignity is something that is to be accorded all citizens, not only some; and in some basic respect, equality of status is prerequisite for equal dignity.

R. Kent Greenawalt, *The Right to Silence and Human Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 192, 193 (Michael J. Meyer and William A. Parent eds., 1992). Professor Greenawalt goes on to explain why police interrogation practices can endanger human dignity:

From the moral point of view, pressures and tricks designed to get suspects to confess are much more questionable than inferences from silence and dismissal. When law enforcement officers browbeat suspects, play on their weaknesses, deceive them as to critically relevant facts, such as whether a suspected confederate has confessed, or keep them in a hostile setting, the officials intentionally manipulate the environment to make rational, responsible choice more difficult. Such tactics hardly accord respect for autonomy and dignity, and they work unevenly by undermining the inexperienced and ignorant and by having little effect on the hardened criminal.

Id. at 206. Much the same might be said of police interrogation practices in obtaining “voluntary consent” to search. See *COLE*, *supra* note 71, at 27-34.

97. See KEVIN M. CROTTY, *LAW’S INTERIOR: LEGAL AND LITERARY CONSTRUCTIONS OF THE SELF* 96-100 (2001).

98. *Id.* at 99.

The warnings can help by providing some information. Yet, as one thoughtful commentator has explained:

One possible reason why the *Miranda* court considered the right to counsel so important may be that the lawyer is the very paradigm of rational autonomy—educated, knowledgeable, capable of reflecting and reaching reasoned decisions. The lawyer's presence may be felt to supply otherwise disadvantaged suspects with all the marks of autonomy and voluntariness life has effectively denied them.⁹⁹

Philosopher Michel Foucault, admittedly speaking of circumstances other than police interrogation, recognized that encouraging confession is a way for a culture to discipline citizens into conforming with social mandates.¹⁰⁰ What is unique about the self is deep in the interior life of the individual, a uniqueness exposed by the interrogation of experts who try to quell what is unique about that person and move him toward the normal.¹⁰¹ In a sense, Foucault views protection of our inner thoughts and guilty secrets as a form of privacy. When only we are aware of our unusual thoughts and experiences, we continue to claim them as our own. But when they are exposed to an unwanted gaze, we grow ashamed of our difference and feel compelled to think like others.¹⁰² As with many other sorts of privacy violations, confession re-defines our identity and limits.¹⁰³ Foucault might, however, not recognize the idea of a confession resulting from an overborne will. All individual identity is partly defined by what society has made us. To confess at society's urging is but one more way in which a "detainee. . . already. . . pervasively shaped by the state" is further molded.¹⁰⁴

Jurgen Habermas, on the other hand, views confession as essential to reflecting and choosing about how to live.¹⁰⁵ The power of tradition to control our

99. *Id.*

100. *Id.* at 100-01 (so reading Foucault); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 58-70 (1980) (describing our society as a "confessing society"); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 221-24 (Alan Sheridan, trans. 1979) (discussing use of confession and the disciplines to shape the individual). See generally ALAN HUNT & GARY WICKHAM, *FOUCAULT AND THE LAW* (1994) (summarizing Foucault's thinking on the law).

101. See CROTTY, *supra* note 97, at 100-01.

102. See, e.g., Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 65-68 (2000) [hereinafter *Emotions in Date Rape*] (discussing privacy as protecting against conformism); see generally Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 L. & CONTEMP. PROBS. (forthcoming 2002) [hereinafter *Privacy and Human Emotions*] (articulating a renewed vision of "privacy's" meaning under the Fourth Amendment); JEFFERY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000) (articulating a theory of privacy based on the metaphor of the "unwanted gaze").

103. See *Privacy and Human Emotions*, *supra* note 102, at 126-35 (privacy and individual and group identity).

104. CROTTY, *supra* note 97, at 102.

105. See *id.* at 103-04 (applying Habermas's theories to custodial confessions); JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 96-97 (1996) (discussing extralegal forms of confession, as in psychoanalysis or autobiographies). Further illumination on the psychological functions served by confession, including custodial confessions, is to be found in modern literature. See Peter Brooks, *Storytelling Without Fear? Confession in Law and Literature*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 114-34 (Peter Brooks and Paul Gewirtz eds., 1996).

lives in the modern world has declined. We must therefore consciously choose among plural visions of the good life.¹⁰⁶ Freely chosen confessions enable us to confront, reflect upon, and thus shape our inner soul.¹⁰⁷ Confessions are thus necessary to self-examination and autonomous choice, aiding self-realization, freedom, and the expansion of life opportunities. Correspondingly, on this view the voluntariness and rational choice involved in confession are essential to furthering, rather than limiting, human freedom.¹⁰⁸

For both Foucault and Habermas, however, the “self” is not a prepolitical fact but has a history shaped by society and the state.¹⁰⁹ Furthermore, *compelled* confessions in both of their theories serve as powerful ways to undermine the individual’s autonomy and uniqueness that are purported to be central to the modern liberal state.¹¹⁰

Miranda is thus an effort to respect individual autonomy and the equal worth of persons. It is perhaps a half-hearted effort, because it is unclear whether warnings and waiver alone—which happen in most interrogations—can ever relieve the compulsion inherent in uncounseled, incommunicado police questioning.¹¹¹ Empirical data on *Miranda*’s effectiveness is not comforting.¹¹² Moreover, the Court has repeatedly cut back on *Miranda*’s scope and stringency while simultaneously re-affirming its core holdings.¹¹³ Skeptics see *Miranda* as an ineffective compromise between the needs of the state and those of the indi-

106. See CROTTY, *supra* note 97, at 103-06.

107. See *id.* at 103-04.

108. See *id.*

109. See *id.* at 104-05.

110. See *id.* at 96-106; Jean Hampton, *Retribution and the Liberal State*, 5 J. CONTEMP. LEGAL ISSUES 117, 142 (defining autonomy as central to the liberal state).

111. See WHITE, *supra* note 86, at 116-24 (addressing *Miranda*’s failures).

112. What constitutes the relevant data and its meaning are highly contested. See, e.g., THE MIRANDA DEBATE, *supra* note 86, at 169-248 (collecting many of the competing studies and positions); Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 CRIM. L. BULL. 293 (2001) (critiquing the empirical analyses of the primary academic opponent of *Miranda*, Paul Cassell, and collecting citations to other well-known critics of Cassell); Paul Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction From False Confessions*, 22 HARV. J.L. & PUB. POL’Y 523 (1999) (setting forth Cassell’s most recent empirical analyses and citing to his earlier work). Professor Welsh White has recently documented the many ways in which interrogators have successfully adapted to *Miranda*, minimizing its effectiveness in safeguarding individual autonomy. See WHITE, *supra* note 86, at 76-101. Accordingly, he recommends a number of reforms to aid in making at least some of the original aims of *Miranda* into reality. *Id.* at 190-215.

113. See WHITE, *supra* note 86, at 60-75, 117-18, 221. White summarizes his position thus:

When *Miranda* was decided, the Warren Court undoubtedly believed that its safeguards would provide significant protection for suspects subjected to custodial interrogation, with the result that interrogators would obtain significantly fewer incriminating statements. During the thirty-five years that *Miranda* has been in effect, however, the post-*Miranda* Court has weakened *Miranda*’s safeguards. And as *Miranda*’s safeguards have become weaker, interrogators have become increasingly sophisticated in developing strategies designed to overcome *Miranda*’s remaining obstacles. As a result, interrogators are able to induce suspects to waive their *Miranda* rights in the great majority of cases

Id. at 221. See TASLITZ & PARIS, *supra* note 2, at 639-703 (reviewing the case law narrowing *Miranda*’s scope); see also *United States v. Dickerson*, 530 US 426 (2000) (nevertheless reaffirming *Miranda*’s core holdings).

vidual.¹¹⁴ Nevertheless, it is clear that *Miranda* is an effort, however flawed, to provide some protection for human autonomy and equal worth beyond the minimal protection offered by the *Schnecko* voluntariness test's prohibition against coercion. *Ferguson*, by explicitly citing *Miranda*, thus seems to be a radical break with *Schnecko*.

D. Contextualizing Consent

But appearances can be deceiving. No one seriously believes that the Court has quietly overturned decades of post-*Schnecko* voluntariness jurisprudence nor radically altered the overall balance of power between criminal defendants and the state.¹¹⁵ A more likely explanation is that the Court recognized that the consent test must vary with the nature of the human relationships impinged upon by the state.¹¹⁶ In *Ferguson*, two relationships were particularly important: that between the physician and his patient and that between the parent and her child.

1. The Physician-Patient Relationship

The relationship-specific nature of the analysis was underscored by the briefs of amici. The Rutherford Institute, a pro-life organization, stressed the centrality of the physician's duties of trust and loyalty to his patient, which have "been established in medicine from time immemorial. . . . The Hippocratic Oath [itself requires the physician to declare], 'What I may see or hear in the course of treatment, which on no account must be spread abroad, I will keep to myself, holding such things shameful to be spoken about.'"¹¹⁷ Confidentiality encourages timely patient revelation of information needed for the physician to design a sound treatment plan.¹¹⁸

But sound treatment can be effective only if physician and patient collaborate.¹¹⁹ That requires patient trust.¹²⁰ A patient who trusts his doctor is more likely to comply with the doctor's advice.¹²¹ Furthermore, breach of that trust and confidentiality in the case of cocaine addiction—an addiction that is recognized by the medical community as a disease—can have ill consequences for

114. For an extended expression of this skepticism, see WHITE, *supra* note 86.

115. Cf. WHITE, *supra* note 86, at 112-24 (arguing that the current conservative Court reaffirmed *Miranda* partly because the Court had already so eviscerated the original *Miranda* protections as to render them minimal roadblocks in the state's war on criminals).

116. For a discussion of the importance of human relationships to feminist legal analyses, see *infra* text accompanying notes 279-339.

117. Motion for Leave to File Brief and Amicus Curiae of the Rutherford Institute in Support of Petitioners at 11-12, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936) [hereinafter Rutherford Institute Brief] (quoting the Hippocratic Oath).

118. See *id.* at 12-13.

119. See *id.*

120. See *id.* at 12 ("The AMA Principles of Medical Ethics, II and IV among others, mandate physician-patient trust as the foundation for medical treatment."); see also AMA, Current Opinions of the Council on Ethical and Judicial Affairs (1980) (establishing the medical profession's foundational ethical principles in the AMA Principles of Medical Ethics).

121. See Rutherford Institute Brief at 12-13, *Ferguson* (No. 99-936); Christine Cassel, *Confidentiality: An Illusion and a Sacred Trust*, 7 AAMC REP. 1, 1-2 (July 1998).

both the patient's health and her life prospects. Criminal prosecution or even its threat is a "mode of 'treatment'" that "actually elevates the burden of suffering on the maternal patient by imposing the considerable mental and emotional distress of pending prosecution, and hence elevates the burden on the fetal patient as well."¹²² Moreover, explained the Institute:

Because of the significance of a positive drug screen for the patient, the rights of patients to autonomy and privacy have important implications for screening of asymptomatic persons. If confidentiality is not ensured, test results may affect a patient's employment, insurance coverage, or personal relationships. Testing during pregnancy is especially problematic, because clinicians may be required by state laws to report evidence of potentially harmful drug or alcohol use in pregnant patients.¹²³

The American Medical Association (AMA) concedes that breaches of confidentiality are sometimes necessary to protecting public health and safety.¹²⁴ But those breaches should be narrow in scope and content, disclosed to the fewest possible persons to achieve the necessary ends.¹²⁵ Therefore, in the Institute's opinion, confidentiality should be breached to release patient information to law enforcement agencies *only* pursuant to a court order supported by clear and convincing evidence that disclosure was necessary to serve a legitimate law enforcement need more important than protecting privacy and where alternative means for serving that need are unavailable.¹²⁶ The physician-patient relationship, the Institute concluded, therefore distinguishes urinalysis of pregnant patients from everyday encounters with an airport or courtroom metal detector or a border check:

It is more than the expectation of personal privacy that arises out of modesty; it is the expectation that a health care facility and a treating physician and staff are trustworthy confidantes. More than the act of taking urine for testing without consent is at stake. What is at stake is the expectation that our doctors will not work against us and on behalf of the state.¹²⁷

Other amici, such as the AMA, readily embraced a similar position to that of the Institute. At the core of the doctor-patient relationship, argued the AMA, "lies trust and openness between the patient and the physician."¹²⁸ The AMA used

122. Rutherford Institute Brief at 20, *Ferguson* (No. 99-936).

123. *Id.* at 11; *see also* Cassel, *supra* note 121 (promoting patient confidence in the security of her disclosures is critical to accurate history-taking because "[t]he history may include very sensitive information about such potential chemical dependency or substance abuse, sexual practices, emotional disturbances, and other things that would be threatening to the patient's emotional stability or even livelihood if they were disclosed.").

124. *See* AMA, Code of Medical Ethics, E-10.01(4), Fundamental Elements of the Physician-Patient Relationship (1994) ("The patient has the right to confidentiality. The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest.").

125. *See* Rutherford Institute Brief at 16-17, *Ferguson* (No. 99-936).

126. *See id.*

127. *Id.* at 18.

128. *See* Motion for Leave to File Brief as Amicus Curiae and Brief Amicus Curiae of the AMA in Support of Neither Party at 11, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936) [hereinafter AMA Brief].

religious language, noting that “[w]ithout complete faith in the sanctity of the discussions with their physicians, patients will be reluctant to disclose potentially incriminating behaviors, even if such disclosures are necessary to receive diagnosis or treatment.”¹²⁹ The AMA distinguished drug addiction from mandatory physician reporting of other sorts of patient criminal conduct and of imminent harm threatened by or to their patients because, unlike in those other areas, with addiction, the behavior *is* the disease.¹³⁰ Early patient disclosure aids both pre- and post-natal treatment and promotes safe delivery.¹³¹ The clear implication was that, absent the clearest of patient statements to the contrary, patient consent to disclosure of confidential information should not be found.

2. Paternalism and the Parent-Child Relationship

Amici’s arguments concerning the parent-child relationship were often closely tied to concepts of patient and parental autonomy, which were contrasted with the evils of paternalism.¹³² The Hospital’s position was essentially that it knew better than did the patients how to care for the patients’ health and that of their children. Amici squarely rejected these arguments.¹³³

Paternalism has often been defined as “imposing. . . constraints on an individual’s liberty for the purpose of promoting his or her own good.”¹³⁴ Restated, paternalism is “interference with a person’s liberty of action justified by reasons referring exclusively to the welfare. . . of the person being coerced.”¹³⁵ Paternalism therefore involves intervention in another’s life for his own good even if he does not truly consent.¹³⁶ Paternalism can be overt or subtle. Often it involves taking advantage of another’s vulnerabilities, manipulating their emotions, or playing on their ignorance to get them to do what their guardian deems to be right.¹³⁷

The major objection to paternalism is that it limits autonomy or self-determination, respect for which is “a cornerstone of liberal legal theory and of the American political system.”¹³⁸ The capacity to make rational choices is an

129. See *id.* at 11.

130. See *id.* at 11 n.2.

131. See *id.* at 12-21.

132. See Rutherford Institute Brief at 19 & n.29, *Ferguson* (No. 99-936). See generally AMA Brief, *Ferguson* (No. 99-936). See *infra* notes 149-52 and accompanying text (analyzing additional briefs of amici); see also FIONA RANDALL & R. S. DOWNIE, PALLIATIVE CARE ETHICS: A COMPANION FOR SPECIALISTS 39-47 (1999) (favoring the “partnership model” of the carer-patient relationship because only it adequately respects the autonomy needs of both parties, treats both as equals, and best furthers the primary aim of serving the patient’s “total good”).

133. See, e.g., Rutherford Institute Brief at 19-22 & n.29, *Ferguson* (No. 99-936) (emphasizing both patient and parental autonomy as being inconsistent with the Hospital’s cocaine-testing program).

134. William L.F. Felstiner & Ben Pettit, *Paternalism, Power, and Respect in Lawyer-Client Relations*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 135, 136 (Joseph Sanders & V. Lee Hamilton, eds. 2001).

135. Gerald Dworkin, *Paternalism*, in MORALITY AND THE LAW 108 (R. A. Wasserstrom ed. 1971).

136. See JOHN H. KULTGEN, AUTONOMY AND INTERVENTION: PATERNALISM IN THE CARING LIFE 63 (1996).

137. See Felstiner & Pettit, *supra* note 134, at 137-38.

138. Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 512 (1990).

integral part of the autonomy ideal, as I explained in my analysis of *Miranda*.¹³⁹ The failure to accord another autonomy denies them respect as equal human beings, which should be a part of all human relationships.¹⁴⁰ Silas Wasserstrom put it this way:

[F]rom the professional's point of view the client is seen and responded to more like an object than a human being, and more like a child than an adult. The professional does not, in short, treat the client like a person; the professional does not accord the client the respect that he or she deserves. And these, it is claimed, are without question genuine moral defects in any meaningful human relationship.¹⁴¹

Procedural justice research suggests that clients are most satisfied when they believe that a professional has treated them fairly. If clients perceive paternalism as limiting their participation in making key choices about the services that they receive, they will view the relationship as less fair and will therefore be less satisfied, regardless of the substantive outcome.¹⁴²

That professionals have more knowledge and power than their clients is, however, often simply a reality.¹⁴³ Yet there is an alternative to paternalism even in unequal power relations. The more powerful party can instead seek to empower the vulnerable, heal the wounded, dialogue with them honestly, give them undiluted attention, and promote their self-respect.¹⁴⁴ In short, the stronger party can actively work to bring power and autonomy to the weaker party.¹⁴⁵ That can be a far more attractive model for the professional-client relationship and the state-citizen relationship, as several amici maintained.

The Rutherford Institute declared, "Respondent's clinical approach, which adopts an outlook of paternalism toward the maternal and fetal patient, has been largely rejected by the medical community."¹⁴⁶ Where the doctor's duties to prevent harm and to act for the patient's greater good conflict in the physician's view with patient autonomy, "paternalism has been rejected in favor of patient authority."¹⁴⁷ Part of the reason for this rejection is that "[p]articipating in decisions increases patients' sense of control, self-determination, and adherence to care plans."¹⁴⁸ Similarly, the ACLU, NOW, and a host of other organizations filed a brief condemning the Hospital's paternalistic assertions that it had a special interest in protecting the health of pregnant patients and its insisting that

139. See *supra* text accompanying notes 86-113.

140. Richard A. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 19 (1975).

141. See *id.*

142. See Felstiner & Pettit, *supra* note 134, at 139; J. Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296-401 (1996).

143. See Felstiner & Pettit, *supra* note 134, at 142-43.

144. See SARA LAWRENCE-LIGHTFOOT, RESPECT: AN EXPLORATION 10-14 (1999).

145. See *id.*

146. See Rutherford Institute Brief at 19 n.29, *Ferguson* (No. 99-936).

147. *Id.*

148. Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?*, 273(22) JAMA 1781 (1995).

drug screens are necessary for the management of pregnant patients.¹⁴⁹ “Like other paternalistic rationales,” these organizations concluded:

...[T]his one cannot withstand scrutiny. The MUSC policy is punitive, not therapeutic, resting as it does on both the threat and the reality of arrest and imprisonment of noncompliant patients. A therapeutic policy cannot depend on coercion, for competent individuals in this society have the right to accept or reject medical treatments.¹⁵⁰

These same organizations stressed as well that pregnancy—and thus the health of the fetus—did not diminish the woman’s privacy interest. The state “does not stand in loco parentis to pregnant women.”¹⁵¹ Relying on the line of abortion and contraceptive rights cases that recognize a pregnant woman’s autonomy to control decisions about her own body despite her husband’s and the state’s interest in potential human life, the ACLU concluded that, “Any purported justification for excepting pregnant women from the Fourth Amendment’s general protection against unreasonable searches must ultimately rest on an outmoded view of women as mere incubators of the fetus and mothers to their children, subjecting women, on that basis, to otherwise unconstitutional intrusions into their privacy.”¹⁵²

The pro-life Rutherford Institute preferred to rest its argument on the Fourteenth Amendment’s parental right to control one’s children’s medical care and nurture, both before and after birth. “A mother’s relationship with her child, whether born or unborn, is considered a fundamental right that cannot be denied absent due process.”¹⁵³ For the Institute, only individualized suspicion of abusive behavior constitutes the “due process” that justifies interfering with these fundamental parental rights, even where the health of the fetus is concerned.¹⁵⁴ Several amici also recognized that so respecting parental autonomy made it more, not less, likely that treatment would improve the health of both mother and child.¹⁵⁵

Strictly speaking, these arguments of amici focused more on the strength of the individual’s privacy interests than on the question of consent. But for the Court and many parties and amici, privacy and consent were inseparable: absent valid consent, a suspicionless invasion of these maternity patients’ privacy was constitutionally untenable.¹⁵⁶

149. See Motion for Leave to File and Brief Amicus Curiae of the American Civil Liberties Union, et al., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936) [hereinafter ACLU Brief].

150. *Id.* at 11 n.2.

151. *Id.* at 8.

152. *Id.* at 10.

153. Rutherford Institute at 22, *Ferguson* (No. 99-936).

154. See *id.*

155. See *id.* at 19-20; AMA Brief at 11-12, *Ferguson* (No. 99-936).

156. See *infra* text accompanying notes 172-84 (analyzing Justice Scalia’s accurate summary of the *Ferguson* Court’s views on privacy and consent).

E. On Advantage-Taking and Voluntariness

Apart from whether these women gave knowing and intelligent consent, the women and amici raised arguments consistent with the idea that the purported patient consent in the *Ferguson* case was not even voluntary.

Both the Petitioners in their Reply Brief and NARAL as amici noted that many of the nine factors used to decide whom to test for cocaine “were thinly veiled proxies for low socioeconomic status or race. . . .”¹⁵⁷ NARAL in particular quoted the testimony of one witness, who said, “Women who are poor have very little access to prenatal care, so that if you say, well, you didn’t get prenatal care and so we’re going to test your urine for drugs, what you’re saying is you’re poor, we’re going to test your urine for drugs.”¹⁵⁸ This same witness testified that some of the criteria were associated with a wide range of problems other than cocaine use and were unduly vague.¹⁵⁹ Moreover, he noted that “where vague standards are used to identify drug users in this context, African-Americans are disproportionately targeted because of prejudices and preconceptions, even though the rates of substance use during pregnancy are similar across racial groups.”¹⁶⁰

Similarly, the Hospital tested only for cocaine use rather than other illegal, potentially harmful drugs. Yet African-American women abusing drugs are significantly more likely to do so via cocaine than are drug abusers of other races.¹⁶¹ Indeed, here the Policy was applied almost entirely to economically disadvantaged African-American women.¹⁶² Nurse Brown, who had expressed demeaning views about African-Americans, boasted that, “she dictated which patients should be tested.”¹⁶³

Moreover, the “second chance” aspect of the Policy stacked the deck against the poor. Thus Ms. Ferguson herself requested outpatient treatment so that she would be free to care for her children, yet was “arrested for not going to the inpatient unit on the very day she was supposed to start outpatient treatment. . . . Because the majority of women seeking prenatal care at the hospital were poor, . . . they had difficulties availing themselves of the ‘treatment’ offered.”¹⁶⁴

Additionally, the treatment offered was in fact not well designed to deal with the special problems of *pregnant* drug addicts.¹⁶⁵ That design failure was significant concerning the intrusiveness and thus the reasonableness of the searches because pregnant women are harmed by cocaine urine testing in spe-

157. NARAL Brief at 23, *Ferguson* (No. 99-936). See Reply Brief for Petitioners at 8 n.11, *Ferguson* (No. 99-936) (noting, for example, that “poor women as a group have very little access to prenatal care,” yet that is one of the nine criteria for testing).

158. See NARAL Brief at 23-24, *Ferguson* (No. 99-936) (quoting testimony of Dr. Ira Chasnoff).

159. *Id.* at 24.

160. *Id.*

161. *Id.* at 25.

162. See *id.*

163. See *id.* at 24.

164. NARAL Brief at 15, *Ferguson* (No. 99-936).

165. See *id.*

cial ways.¹⁶⁶ But that failure adequately to confront the special circumstances facing pregnant women was also relevant to establishing that the search was involuntary, a reality that harmed African-American women as a group and not merely individual patients. Thus, NARAL explained, “drug search policies such as Respondents’ add fuel to the minority mistrust of the medical profession that has existed historically because of incidents like the Tuskegee Study, in which syphilis-afflicted African-American men were systematically denied treatment in the name of science.”¹⁶⁷

Moreover, as Petitioners explained, six of the women prosecuted were uninsured patients when admitted, who were asked to sign consent forms while they were in labor.¹⁶⁸ Respondents “deliberately deceived and misled at least one patient by telling her that her urine was being tested to determine if she was dehydrated.”¹⁶⁹ Because not one of the consent forms was clear about the true ultimate nature and use of the urinalysis test results, argued Petitioners, all purported patient consent indeed resulted from deception.¹⁷⁰ Therefore, Petitioners explained,

Respondents have not carried their burden of establishing “whether consent can be voluntary, in a constitutional sense, when given by an indigent, uninsured woman in labor, who is dependent on medical care provided by the state’s public hospital.” [citations omitted]. Even if the patients had known that signing the consent to medical treatment would expose them to chemical surveillance and criminal prosecution, the emergency medical context in which their consent was obtained was inherently coercive. Thus, their signature on a standard hospital consent form did not suspend the warrant and probable cause requirements of the Fourth Amendment.¹⁷¹

F. Justice Scalia’s Dissent: Fidelity to Precedent and to the Premises of Paternalism

Justice Scalia, in his dissent, showed a clear-eyed understanding of the radical break in consent-to-search precedent that the majority’s opinion represented. Scalia was candid about the majority opinion’s premises and implications in a way that the Court itself was not.¹⁷²

There was no claim here that the urine was forcibly extracted. Therefore, according to Justice Scalia, there were only three conceivable bases for the contention that the patients’ consent to taking their urine was invalid: first, that the patients were coerced by their necessitous circumstances; second, that the consent was uninformed because the patients were not told that the urinalysis

166. *See id.* at 15-17.

167. *Id.* at 26; *see also* CHARLES M. CHRISTIAN, BLACK SAGA: THE AFRICAN-AMERICAN EXPERIENCE: A CHRONOLOGY 458-59 (1999) (“U.S. health officials had used Blacks as guinea pigs in a forty-year syphilis experiment. . . in what came to be popularly known as the Tuskegee Syphilis Study.”).

168. Reply Brief for Petitioners at 17-18, *Ferguson* (No. 99-936).

169. *Id.* at 16.

170. *Id.* at 15-16.

171. *Id.* at 15.

172. *See Ferguson*, 532 U.S. at 91-104 (Scalia, J., dissenting) (joined by Chief Justice Rehnquist and Justice Thomas).

would include tests for cocaine; and third, that the consent was uninformed because the patients were not told that positive cocaine test results would be provided to the police.¹⁷³

Justice Scalia correctly recognized that the latter two arguments were flatly inconsistent with prior high Court precedent. Scalia explained that reliance on *Miranda's* knowing waiver standard was inapposite.¹⁷⁴ To the contrary, argued Scalia, *Hoffa v. United States*¹⁷⁵ and the subsequent line of undercover agent cases unequivocally established that under the Fourth Amendment the use of deception to obtain evidence is perfectly acceptable. That deception may include misrepresentation about the purposes for which that evidence will be used, including obtaining it with the hidden purpose of turning the evidence over to the police. Nor does it matter that the deception is undertaken by a partner in a relationship of trust. “Abuse of trust,” Scalia explained, “is surely a sneaky and ungentlemanly thing, and perhaps there should be (as there are) laws against [some] such conduct by the government.”¹⁷⁶ But, he continued, that “is immaterial for Fourth Amendment purposes. . . .”¹⁷⁷

Scalia recognized, however, that the majority’s decision did not wholly overturn the secret agent precedent. Rather, it “open[ed] a hole in our Fourth Amendment jurisprudence, the size and shape of which is wholly indeterminate.”¹⁷⁸ Scalia’s fear was precisely that the majority had made the nature of the human relationships involved, the social context of the events, and the fine points of human emotions relevant to deciding what should be the constitutional test for a consensual search. It would be bad enough, Scalia argued, if the confidential relationship guarded by the Court were at least one protected by law. But South Carolina does not even recognize a physician-patient privilege.¹⁷⁹ The Court, by its failure to provide further guidance, thus:

... [L]eaves law enforcement officials entirely in the dark as to when they can use incriminating evidence from “trusted” sources. Presumably the lines will be drawn in the case-by-case development of a whole new branch of Fourth Amendment jurisprudence, taking yet another social judgment (which confidential relationships ought not to be invaded by the police) out of democratic control, and confiding it to the uncontrolled judgment of this Court—uncontrolled because there is no common-law precedent to guide it. I would adhere to our established law, which says that information obtained through violation of a relationship of trust is obtained consensually, and hence is not a search.¹⁸⁰

Finally, Justice Scalia rejected the argument that “the patients were coerced to produce their urine samples by their necessitous circumstances, to wit, their need for medical treatment of their pregnancy.”¹⁸¹ Said Scalia,

173. *Id.* at 93.

174. *Id.* at 94.

175. 385 U.S. 293 (1966).

176. *Ferguson*, 532 U.S. at 94.

177. *Id.*

178. *Id.* at 95.

179. *See id.*

180. *Id.*

181. *Ferguson*, 532 U.S. at 1299.

If that was coercion, it was not coercion applied by the government—and if such nongovernmental coercion sufficed, the police would never be permitted to use the ballistic evidence obtained from treatment of a patient with a bullet wound. And the Fourth Amendment would invalidate those many state laws that require physicians to report gunshot wounds, evidence of spousal abuse, and (like the South Carolina law relevant here. . .) evidence of child abuse.¹⁸²

Justice Scalia thus rejected any notion that governmental advantage-taking of necessitous suspect circumstances could ever constitute state action. He also ignored the majority's insistence that it was not overturning the sorts of laws that he mentioned but merely requiring probable cause and a warrant, valid consent, or some other recognized warrant exception to justify reporting laws' enforcement. He similarly ignored the fact that reporting laws generally merely alerted law enforcement to begin an investigation independently to develop probable cause for an arrest.¹⁸³ Overall, Scalia dismissed the context-and-relationship sensitive, equality-enhancing, autonomy-respecting approach of the majority. For Scalia, there was no need for a remand to determine the sufficiency of the evidence to support the jury's finding of consent. There was no question that the pregnant women at MUSC were not forcibly compelled to part with their urine. Having done so, they "passed and abandoned it," losing any continuing privacy interest in the liquid.¹⁸⁴ Subsequent testing and distribution of test results were thus not even searches. No further consent was needed.

G. Administrative Searches and Social Meaning

1. Case Law Background

The second major conclusion of the *Ferguson* Court, namely that the urine-testing of the pregnant patients was an ordinary criminal-law-enforcement search, requiring probable cause and a warrant, and not a more flexible administrative search, similarly requires some background on the difference between these two types of searches.

"Administrative searches and seizures" are those conducted for a purpose other than enforcing the criminal law.¹⁸⁵ Where searches of a person are involved, administrative searches are usually described as justified by "special needs" beyond those of ordinary criminal law enforcement.¹⁸⁶ For an administrative search or seizure, the Court eliminates or modifies the warrant requirement, the probable cause requirement, or both.¹⁸⁷ Furthermore, warrantless,

182. *Id.*

183. See Reply Brief for Petitioners at 6 n.9, *Ferguson* (No. 99-936) ("[Under the reporting statute], the state is still put to the test of substantiating the accusation by conducting an investigation that may require it to obtain a search warrant.").

184. *Ferguson*, 532 U.S. at 92-93. Scalia goes on further to clarify his objections to the majority opinion. "In sum, I think it clear that the Court's disposition requires the holding that violation of a relationship of trust constitutes a search." *Id.* at 96 n.4.

185. See TAsLITZ & PARIS, *supra* note 2, at 349.

186. *Id.* at 349-52.

187. See *id.* at 349.

suspicionless searches are generally permitted only for administrative and not ordinary criminal-law-enforcement-related searches and seizures.¹⁸⁸

Of course, even criminal-law-enforcement-related searches sometimes modify the probable cause and warrant requirements, but never to the point of completely eliminating both such requirements. Thus, for example, in *Terry v. Ohio*,¹⁸⁹ the Court engaged in a similar sort of balancing test to that used in the administrative search context. The *Terry* searches and seizures were, however, unquestionably done to investigate suspected criminal activity. For brief, minimally intrusive “stops” for criminal investigation and brief pat-down “frisks” for weapons, therefore, the Court eliminated the warrant requirement.¹⁹⁰ But the Court did not eliminate the individualized suspicion requirement, albeit lowering its bar to permit intrusions on mere reasonable suspicion rather than probable cause.¹⁹¹ Yet the Court has repeatedly completely eliminated both the warrant and individualized suspicion mandates for drug testing in certain contexts, precisely on the ground that the state was then merely engaging in an administrative search.¹⁹²

There is a line of cases, primarily approving random, suspicionless roadblocks, that purport to rely on *Terry* and its progeny rather than on the special needs or administrative search cases.¹⁹³ Yet the Court has recently made clear that these cases as well turn on the existence of a purpose to serve some goal other than enforcing the criminal law.¹⁹⁴ That goal, once recognized, in turn justifies a balancing test ultimately endorsing abdication of the individualized suspicion requirement in favor of random searches and seizures. Rephrased, despite its protestations to the contrary, the Court treats suspicionless roadblocks as administrative searches.¹⁹⁵

Several years ago, in *Whren v. United States*,¹⁹⁶ the Court declared that an officer’s subjective intentions were irrelevant under the Fourth Amendment, *except in determining whether a search is an administrative one*.¹⁹⁷ *Whren* therefore suggested that subjective intentions to serve goals other than criminal law enforcement defined a search as an administrative intrusion.¹⁹⁸ But, more recently, the Court has rejected this position, stating that “programmatic purposes”—which are apparently something other than state actors’ subjective intentions—are

188. See *id.* at 349-50.

189. 392 U.S. 1 (1968).

190. See *id.* at 30.

191. See TAsLITZ & PARIS, *supra* note 2, at 333, 340-42.

192. See *id.* at 364-68.

193. See *id.* at 368-70.

194. See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding that random roadblock stops to uncover evidence of illegal drug possession had criminal investigation as their primary “programmatic purpose,” thus being subject to the usual criminal case search and seizure rules, in contrast to the permissible warrantless, suspicionless drunk driving roadblocks).

195. See TAsLITZ & PARIS, *supra* note 2, at 368-70.

196. 517 U.S. 806 (1996).

197. *Id.* at 810.

198. See TAsLITZ & PARIS, *supra* note 2, at 350, 363, 393-96.

what matter.¹⁹⁹ Although the Court has not defined “programmatic purposes” explicitly, I will argue shortly that it has done so implicitly.

The problem for a test that turns on programmatic purposes, however defined, is that many searches and seizures have dual purposes.²⁰⁰ Sometimes the Court has squarely addressed this problem and sometimes it has not. In *Michigan Dept. of State Police v. Sitz*,²⁰¹ for example, the Court upheld a suspicionless sobriety checkpoint. The Court upheld these brief warrantless stops because of the Court’s conclusion that “the checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers. . . .”²⁰² rather than at collecting evidence of criminal conduct.

Yet the very same observations that would justify longer detention of a driver to protect roadway safety—for example, an officer’s smelling alcohol on the driver’s breath and administering an ultimately failed sobriety test—automatically establish probable cause to believe that the criminal offense of driving under the influence of alcohol has occurred.²⁰³ But the Court did not see this lurking dual purposes question as a troubling one. The Court has recently stated that where there are dual purposes, the “primary purpose” must be to achieve a goal other than criminal law enforcement for the administrative search and seizure or similar exceptions to apply.²⁰⁴ Yet it is unclear why the drunk driving roadblock in *Sitz* should be viewed as having a primarily civil rather than criminal investigative purpose. Nor is it clear why a difference in purposes justifies more lax Fourth Amendment standards. On the other hand, just this past term the Court, in *City of Indianapolis v. Edmond*,²⁰⁵ struck down a highway checkpoint on the ground that its “primary purpose” was the “discovery and interdiction of narcotics.”²⁰⁶ That case seemed relatively clear as to purpose because the checkpoints did not serve any immediate interest of roadway safety. The roadblocks sought to uncover evidence of criminal drug possession, not drug use while driving. That point also seems to affect how we weigh state against individual interests. Still, while *Edmond*, which struck down the suspicionless checkpoints as primarily motivated by the desire to investigate criminal conduct, was correctly decided, it shed little light on why *Sitz*—in which the police definitionally sought evidence of the crime of drunk driving—should instead be seen as having a *civil purpose*.

199. *E.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding that programmatic purpose of drug interdiction roadblock was criminal investigation); see *infra* text accompanying notes 213-36. Although the apparent subjective purpose of the police and hospital workers in doing cocaine testing of pregnant women was to improve their health and that of their future children, the *Ferguson* Court saw the primary programmatic purpose as being criminal investigation. *But see infra* note 458 (analyzing a more recent case introducing some ambiguity regarding whether subjective purposes can ever matter).

200. *See New York v. Burger*, 482 U.S. 691 (1987) (auto junkyard records inspection had dual purposes of protecting the market in legitimate auto parts and aiding criminal investigation into stolen auto parts); TASLITZ & PARIS, *supra* note 2, at 352-53, 363, 370.

201. 496 U.S. 444 (1990).

202. *Id.* at 451.

203. *See TASLITZ & PARIS, supra* note 2, at 370.

204. *See sources cited supra* note 199.

205. 531 U.S. 32 (2000).

206. *Id.* at 34.

The special needs cases preceding *Ferguson* that involved drug and alcohol testing did not raise difficult dual purposes problems and thus shed no light on the apparent inconsistency between *Edmond* and *Sitz*. In not one of the pre-*Ferguson* drug-testing cases was evidence turned over to criminal law enforcement agents.²⁰⁷

In *Skinner v. Railway Labor Executives Ass'n*,²⁰⁸ the Court thus upheld the validity of Federal Railroad Administration regulations that mandated blood and urine drug testing of employees involved in certain train accidents or similar tests for employees violating certain safety rules. Results were used to improve safety, but were not provided to criminal law enforcement.

In *National Treasury Employees Union v. Von Raab*,²⁰⁹ the Court also upheld a United States Customs Service program requiring mandatory urinalysis for applicants for three types of jobs or promotions: those involving drug interdiction, those requiring the carrying of firearms, and those in which the employee would handle classified documents. Test results could not be used in criminal prosecutions of the employee without the employee's consent.

Similarly, In 1995, in *Vernonia Sch. Dist. 47J v. Acton*,²¹⁰ the Court upheld the constitutionality of a suspicionless random drug-testing program required for

207. See generally TASILTZ & PARIS, *supra* note 2, at 364-68 (summarizing case law).

208. 489 U.S. 602 (1989).

209. 489 U.S. 656 (1989).

210. 515 U.S. 646 (1995). Literally as I put my final edits on this piece into the mail, the Court decided *Board of Educ. v. Earls*. No. 01-332, 2002 U.S. Lexis 4882 (U.S. June 27, 2002). There, the Tecumseh, Oklahoma School District adopted a Student Activities Drug Testing Policy requiring all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. Students must, under the policy, take a drug test before participating in the extracurricular activity, submit to random drug testing while participating, and agree to be tested any time upon reasonable suspicion. The policy was applied in practice to the school choir, marching band, academic team, and national honor society. The policy thus had a much wider scope than that in *Vernonia*. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). Nevertheless, the Court saw the factual distinctions to be without a difference. Relying on *Vernonia*, the Court upheld the Tecumseh School District policy. In doing so, the Court emphasized that "the test results are not turned over to any law enforcement authority. Nor do the test results lead to the imposition of discipline or have any academic consequences." *Earls*, 2002 U.S. Lexis 4882, at *5. Indeed, noted the Court, "the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities." *Id.* *Ferguson* therefore still stands alone as the only special needs drug-testing case in which evidence was turned over to criminal law enforcement authorities.

This article addresses the consent-to-search doctrine and the question of how to distinguish between administrative searches and those devoted to ordinary criminal investigation. The *Earls* Court addressed neither point directly. Rather, the Court's focus was on how to engage in reasonableness balancing once the decision has been made that a search indeed has administrative or special needs purposes. That is a matter largely beyond the scope of this article, other than some brief ruminations in this article's conclusion. Accordingly, I need not discuss the rich *Earls* opinion much further here.

One additional point, however, is worth noting briefly. Justice Ginsburg, in a dissenting opinion joined by Justices Stevens, O'Connor, and Souter, rejected the majority's conclusion that the school district's program had a "voluntary" character because the students are *not required* to participate in extracurricular activities. Ginsberg explained:

Participation in such activities is a key component of school life, essential in reality for students applying to college, and for all participants, a significant contributor to the breadth and quality of the educational experience. [citations omitted]. Students "volunteer" for extracurricular pursuits in the same way they might volunteer for honors classes:

students participating in high school or grade school interscholastic athletics in Vernonia, Oregon. The results of the test were disclosed only to a limited class of school personnel who had a need to know. The results were again not turned over to criminal law enforcement.

Finally, in *Chandler v. Miller*,²¹¹ the Court struck down a Georgia statute requiring drug testing for designated state employees, so the question whether the results could be shared with criminal law enforcement did not matter. Moreover, in none of these four cases were criminal law enforcement agents involved in the creation or administration of the testing programs, so the significance of such involvement was not addressed. The *Ferguson* case therefore confronted the Court for the first time with an arguably dual purpose drug-testing program and, in addition, one with significant criminal law enforcement involvement in its creation.

I posit that the most significant factor in choosing which of several purposes for creating a drug-testing program is the “primary” one, is the social meaning associated with the program. If the most likely meaning plausibly given to the program by the wider citizenry is one involving catching and condemning criminal offenders, then the search’s primary purpose is criminal law enforcement. If, on the other hand, the meaning most likely to be adopted by the citizenry is some less morally-stigmatizing civil goal, then the search’s purpose is primarily administrative.²¹² Differences in likely social meaning do not explain all the subtleties of the case law; distinctions in the strength of the privacy interests involved also seem to matter. But, after *Ferguson*, the analysis of social meaning in identifying a search as serving criminal or, instead, civil law enforcement purposes must be understood as taking center stage.

2. The Majority Opinion

The *Ferguson* Court held that the urine-testing program for maternity patients had as its primary purpose the investigation of criminal activity. In so holding, the Court drew a distinction between “ultimate goals” and “immediate objectives.”²¹³ The ultimate goal, said the Court, “may well have been to get the women in question into substance abuse treatment and off of drugs. . . .”²¹⁴ But the “immediate objective of the searches was,” in the Court’s view, “to generate evidence *for law enforcement purposes* in order to reach that goal.”²¹⁵ In other, the

They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them.

Earls, 2002 U.S. Lexis 4882, at *43 (Ginsberg, R., dissenting). The dissent is not here relying on the consent-to-search doctrine, but it does suggest that there is a sort of “consent continuum,” with the degree of consent, though not itself validating an administrative search, nevertheless remaining a relevant factor in reasonableness balancing. This approach, we will see, is in fact consistent with views expressed by Justice Kennedy in his concurring opinion in *Ferguson*. See *infra* text accompanying notes 246-51. For the *Earls* dissenters, the degree of “consent” was so small on the facts before them as to weigh significantly *against* the drug-testing program’s reasonableness.

211. 520 U.S. 305 (1997).

212. See *infra* Part IV (examining implications of feminist social meaning theory for dual-purposes searches and seizures).

213. *Ferguson*, 532 U.S. at 82-84.

214. *Id.*

215. *Id.*

Policy was designed to ensure the use of criminal law enforcement or its threat as the means for achieving the end of protecting the health and safety of cocaine-addicted pregnant women and their fetuses. The Court continued:

In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment. Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs."²¹⁶

The last sentence of this quote is particularly illuminating. Read literally, that final sentence for the first time adds to the primary purpose inquiry a new requirement for classifying a search as administrative: the search must not extensively involve criminal law enforcement officials in its design and implementation. Elsewhere, however, the Court instead uses language suggesting that the degree of law enforcement involvement is not a separate inquiry, but rather a critical fact in gauging what is the state's primary purpose.²¹⁷ The Court also suggests at yet another point that the degree of law enforcement involvement may at least sometimes be what distinguishes subjective purposes of state officials from the supposedly more objective "programmatically ones" that are legally controlling. Thus, the Court explained, "As respondents have repeatedly insisted, their motive was benign rather than punitive. Such a motive cannot justify a departure from Fourth Amendment protections, *given the pervasive involvement of law enforcement in the development and application of the MUSC policy.*"²¹⁸ Indeed, the Court declared, the "stark and unique fact that characterizes this case is that Policy M-7 was designed to obtain evidence of criminal conduct that would be turned over to the police and that could be admissible in subsequent criminal prosecutions."²¹⁹ The Court explained,

To say that any therapeutic purpose did not disappear is simply to miss the point. What matters is that under the new policy developed by the solicitor's office and MUSC, law enforcement involvement was the means by which that

216. *Id.*

217. Thus the Court, in explaining the need to engage in a "close review" of the Policy's primary purpose, said:

In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose. . . In this case, as Judge Blake put it in her dissent below, "it . . . is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers. . ." [citation omitted]. Tellingly, the document codifying the policy incorporates the police's operational guidelines. It devotes its attention to the chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests. Nowhere, however, does the document discuss different courses of medical treatment for either mother or infant, aside from treatment for the mother's addiction.

Ferguson, 532 U.S. at 81-82.

218. *Id.* at 84-85.

219. *Id.* at 85-86.

therapeutic purpose was to be met. Policy M-7 was, at its core, predicated on the use of law enforcement. The extensive involvement of law enforcement and the threat of prosecution were, as respondents admitted, essential to the program's success."²²⁰

Of what did this extensive entanglement consist? Notably, concluded the Court, the document codifying the Policy closely details the chain of custody requirements, the range of possible criminal charges, and the logistics of police notification and arrests.²²¹ Yet nowhere does that same Policy document discuss different courses of medical treatment for either mother or infant apart from treating the mother's addiction.²²² Furthermore, police and prosecutors decided who would receive the drug screening reports and what information they would include.²²³ Law enforcement officials also helped in determining the procedures to be used in urinalysis.²²⁴ They had access to Nurse Brown's medical files on those testing positive, attended substance abuse team meetings, received copies of team documents, regularly discussed patient progress with the team, and took pains to coordinate the timing and circumstances of arrests with Hospital staff.²²⁵ For all these reasons, concluded the Court, "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."²²⁶

Finally, the Court believed that the "invasion of privacy in this case is far more substantial"²²⁷ than in its four earlier special needs drug testing cases. Said the Court:

The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of the results to third parties. The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of these tests will not be shared with nonmedical personnel without her consent. . . . In none of our prior cases was there any intrusion upon that kind of expectation.²²⁸

The degree of the privacy interests invaded was not as critical to the Court's decision as was the degree of law enforcement involvement. Nevertheless, the nature and size of the privacy interests involved mattered, especially in distinguishing other cases seemingly inconsistent with the *Ferguson* Court's opinion.

For example, in *Griffin v. Wisconsin*,²²⁹ the Court upheld a warrantless search of a probationer's home by his probation officer upon mere reasonable suspi-

220. *Id.* at 83 n.20.

221. *See id.* at 81-82.

222. *Ferguson*, 532 U.S. at 81-82.

223. *Id.* at 82.

224. *Id.*

225. *Id.* at 82.

226. *Id.* at 80.

227. *Ferguson*, 532 U.S. at 78. For a detailed analysis of how to gauge the extent of a privacy invasion, see *Privacy and Human Emotions*, *supra* note 102.

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

229. 483 U.S. 868 (1987).

cion. A probation officer would seem to be an agent of criminal law enforcement. The *Ferguson* Court distinguished *Griffin* partly on the ground that probationers have a lesser expectation of privacy than does the public at large.²³⁰ Similarly, in *New York v. Burger*,²³¹ the Court upheld a legislative scheme permitting police officers to conduct warrantless, purportedly administrative searches of the records and property of vehicle dismantling businesses in a quest for stolen vehicle parts, the possession of which was, of course, also a crime. Again, the *Ferguson* Court distinguished *Burger* partly on the ground that it “involved an industry in which the expectation of privacy in commercial premises was ‘particularly attenuated’ given the extent to which the industry in question was closely regulated.”²³² Additionally, the Court distinguished the “handful of seizure cases. . . which. . . applied a balancing test to determine Fourth Amendment reasonableness”²³³—that is, the suspicionless border, drunk driving, and drug interdiction roadblock cases. The Court distinguished the interdiction cases partly by the unexplained earlier assertion that they simply did not involve “special needs,” but also because “those cases involved roadblock seizures, rather than ‘the intrusive search of the body or the home.’”²³⁴

Nowhere did the Court explain why its new focus on excessive entanglement with law enforcement mattered, what involvement was too much, or why privacy interests were relevant to choosing which category of purpose to place the search into—administrative or criminal. Moreover, the Court did not address the reason why privacy is no longer only relevant to determining how to weigh interests once we decide that administrative reasonableness balancing applies. Justice Scalia, in dissent, found the majority’s efforts to distinguish earlier case law unpersuasive, as do I.²³⁵ First, however, it is important to examine Justice Kennedy’s concurrence, in which he found the majority’s distinction between “immediate” and “ultimate” goals unworkable but its focus on excessive entanglement wise.²³⁶

3. Justice Kennedy’s Concurrence

a) The Opinion

Justice Kennedy begins his concurrence in the judgment by declaring that the distinction between ultimate and immediate goals is “lack[ing] foundation in our special needs cases.”²³⁷ To Justice Kennedy, all the Court’s special needs cases turned on what the majority would now call the policy’s ultimate goals. For example, he noted,

[I]n *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602 (1989), had we employed the majority’s distinction, we would have identified as the relevant need

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

231. 482 U.S. 691 (1987).

232. 532 U.S. at 83 n.21.

233. *Id.*

234. *Id.*

235. *Id.* at 91-104 (Scalia, J., dissenting) (joined by Chief Justice Rehnquist and Justice Thomas).

236. *Id.* at 86-91 (Kennedy, J., concurring in the judgment).

237. *Ferguson*, 532 U.S. at 87.

the collection of evidence of drug and alcohol use by railway employees. Instead, we identified the relevant need as “[t]he Government’s interest in regulating the conduct of railroad employees to ensure [railroad] safety.” *Id.* at 620. In *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the majority’s distinction should have compelled us to isolate the relevant need as the gathering of evidence of drug abuse by would-be drug interdiction officers. Instead, the special needs the Court identified were the necessities “to deter drug use among those eligible for promotion to sensitive positions within the [United States Customs Service] and to prevent the promotion of drug users to those positions. *Id.* at 666. In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), the majority’s distinction would have required us to identify the policy as furthering what today’s majority would have termed the policy’s ultimate goal: “detering drug use by our Nation’s schoolchildren,” and particularly by student-athletes, because “the risk of immediate physical harm to the drug user or those with whom he is playing sport is particularly high.”²³⁸

Justice Kennedy’s point was that “[b]y very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence.”²³⁹ That this is so, he said, “reveals nothing about the need it serves.”²⁴⁰ Put another way, procuring evidence has until today, in his view, “not been identified as the special need which justifies the search.”²⁴¹

Nevertheless, Justice Kennedy concurred in the judgment because of the substantial involvement of law enforcement in the policy from its inception. None of the earlier special needs cases could, in his view, fairly be read to “sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate civil objectives.”²⁴² The Court waived the traditional probable cause and warrant requirements in earlier special needs cases on the “explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.”²⁴³ Here, by contrast, the Hospital acted “as an institutional arm of law enforcement for purposes of the policy.”²⁴⁴ Although the policy “may well have served legitimate needs unrelated to law enforcement,” he declared, “it had as well a penal character with a far greater connection to law enforcement than other searches sustained under our special needs rationale.”²⁴⁵

Significantly, however, Justice Kennedy went on to discuss the role of consent in special needs cases. Indeed, he said, “[a]n essential distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences (e.g., dismissal from employment or disqualification from playing on a high school sports team) will follow from refusal.”²⁴⁶ Such consent does not automatically

238. *Ferguson*, 532 U.S. at 87.

239. *Id.*

240. *Id.* at 88.

241. *Id.*

242. *Id.*

243. *Ferguson*, 532 U.S. at 88.

244. *Id.*

245. *Id.* at 88-89.

246. *Id.* at 90-91.

resolve the matter in favor of the state, as would be the case with ordinary criminal searches, because “the consent was not voluntary in the full sense of the word.”²⁴⁷ Consent demanded as a condition of employment or participation in an activity, while not true or complete consent, therefore still bore “upon the reasonableness of the whole special needs program.”²⁴⁸ Justice Kennedy thus bemoaned the “artificial context” of the consent issue not being squarely before the Court.²⁴⁹ “Had we the prerogative to discuss the role played by consent, the case might have been quite a different one,” he maintained, even if it were only consent “with the special connotation used in the special needs cases. . . .”²⁵⁰ Justice Kennedy seems to be suggesting the possibility that even if the Court ultimately finds some sort of consent but obtained by a refusal otherwise to treat the patients, that consent might render the searches reasonable. On the other hand, he insisted that he had no preconceived notions and was not addressing whether limits might be imposed on the use of the evidence if it turned out to have been obtained with the patient’s consent.²⁵¹

b) Kennedy’s Confusion

Justice Kennedy’s critique of the application of the “immediate/ultimate purpose” distinction to the four earlier special needs drug-testing cases is not entirely persuasive. He is correct that in every special needs case, the immediate purpose is to obtain evidence. But that was not the majority’s point. The purpose of the Hospital in *Ferguson* was to obtain evidence specifically for the purpose of threatening to prosecute or actually prosecuting women who tested positive for cocaine. In none of the other special needs drug cases was the evidence obtained for the purpose of aiding the state in using its criminal justice system to coerce compliance with behavior serving a health, safety, or other social goal purportedly independent from criminal law enforcement, as Kennedy concedes. Indeed, in none of the earlier cases was criminal prosecution even a possibility before the Court.²⁵²

Most ordinary criminal cases also serve goals other than criminal prosecution, such as protecting people’s safety from assailants, their financial stability from thieves, or their health from charlatans.²⁵³ There seems to be little logical

247. *Id.* On this point, Justice Kennedy is correct. See *infra* text accompanying notes 279-457 (applying feminist consent theory to the *Ferguson* facts).

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

249. *Id.*

250. *Id.*

251. See *id.*

252. See *supra* text accompanying notes 207-11 (summarizing case law).

253. Cf. *Burger*, 482 U.S. at 712-13. The Court in *Burger* said:

[A] State can address a major social problem *both* by way of an administrative scheme and through penal sanctions, Administrative statutes and penal laws may have the same *ultimate* purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem. . . .

In *United States v. Biswell*, we recognized this fact that both administrative and penal schemes can serve the same purposes by observing that the ultimate purposes of the [administrative] Gun Control Act were “to prevent violent crime and to assist the states in regulating the firearms traffic within their borders.” It is beyond dispute that certain state penal laws had these same purposes.

difference in purpose between prosecuting a defendant for possessing cocaine, but with the understanding that the charges will be dismissed if the offender completes a drug treatment therapy program, and requiring an addicted mother to obtain such treatment or face later criminal prosecution. In both cases, the threat of criminal prosecution is the intended means for saving the addict from her addiction.²⁵⁴ The earlier special needs drug-testing cases, which did not involve the prospect of criminal prosecution at all, do not therefore seem to me to be the hard ones, though I will shortly offer some reasons below for this assertion other than my own sense that most people's likely intuitions would agree with me about this point.

The hard cases are instead the roadblock and other dual purposes cases. Although the Court has insisted that the roadblock cases do not involve special needs, the Court admits that both types of cases turn on the presence or absence of a primary purpose other than criminal law enforcement.²⁵⁵ Absent unusual circumstances like impending terrorist acts, the Court also agrees that ordinary criminal searches presumptively require probable cause and a warrant or one of the recognized exceptions to those requirements.²⁵⁶ No such presumption governs cases where the purpose of the search is to serve a civil goal.²⁵⁷ Purported differences in the degree of invasion of an individual's Fourth Amendment interests in roadblock and special needs drug-testing cases should thus not be the critical factor distinguishing administrative from ordinary criminal searches. Primary purpose, suggests the Court's pre-*Ferguson* case law, is a far more important consideration. But neither logic nor psychology can determine which purpose is "primary" and which "secondary." Value judgments are ultimately involved.

The roadblock cases illustrate this last point. In those cases, the very evidence sought—that of drunk driving—establishes a crime. The clear purpose of the state in such cases seems simultaneously and equally to protect roadway safety and to prosecute criminally those who endanger that safety, the Court's protestations to the contrary notwithstanding.²⁵⁸

Unlike the majority, Justice Kennedy arguably sees the degree of law enforcement involvement in creating and implementing a search policy as an *independent concern* from determining primary purpose.²⁵⁹ Yet this does not explain

Id. (citations omitted). I do not cite the *Burger* case to approve of either its specific holding (that there was indeed an administrative search there involved), or its distinction between "ultimate" and "subsidiary" purposes. Rather, the above quote merely emphasizes that criminal prosecutions often simultaneously serve arguably "civil" purposes as well.

254. See *infra* text accompanying notes 568-77 (discussing "drug courts," criminal courts combining punishment with therapy).

255. See *supra* notes 195-206 and accompanying text.

256. See *Edmond*, 531 U.S. at 37.

257. See TASLITZ & PARIS, *supra* note 2, at 349-51.

258. See *id.* at 368-70 (summarizing roadblock cases).

259. Justice Kennedy is admittedly ambiguous on this point, see *Ferguson*, 532 U.S. at 86-88, but the better interpretation of his position is that purpose and law enforcement involvement are *independent* inquiries. For example, he emphasizes that none of the Court's precedents sanctioned the routine inclusion of law enforcement as an integral part of a program that "seeks [i.e., is intended] to achieve legitimate, civil objectives." *Id.* at 88. Nevertheless, he declares, despite this intention, extensive law enforcement involvement gives the search "as well a penal character. . . ." *Id.* at 89.

the roadblock cases. In every roadblock case, criminal law enforcement agents played *the* major role in designing and administering the policies.²⁶⁰ With one extreme exception, the Court has nevertheless upheld suspicionless, warrantless roadblocks.²⁶¹ None of these seizures can be deemed free of extensive law enforcement involvement, yet they were upheld as valid administrative searches.²⁶² But in *Ferguson*, there were either two equal purposes—one administrative, one criminal—or, in the ordinary sense of the term, the major motivating force was a beneficent civil goal: to help drug-addicted women get off cocaine. These purposes, combined with extensive law enforcement involvement, still resulted in striking down the searches as ordinary criminal-law-enforcement-related intrusions. My position, explained in Part IV of this article, is that this apparent inconsistency can be explained in two ways: first, as in the area of consent, the Court saw the nature of the human relationships involved as important; second, the degree of social stigma between the cases varied. Even the threat of a purportedly justified criminal prosecution of a mother, especially a poor, African-American mother, for child abuse carries enormous social stigma that prosecutions for drunk driving where no one is hurt still do not. Moreover, non-consensual criminal-investigation-related searches of pregnant women by their doctors invade sacred parent-child and doctor-patient relationships that are not invaded with seized suspected drunk drivers.²⁶³ The feminist focus on human relationships, emotions, power inequalities, and social meaning therefore once again offers the best explanation of *Ferguson*'s meaning.²⁶⁴

It was precisely these sorts of concerns which Justice Scalia rejected in his dissent.

H. Justice Scalia's Dissent Revisited

Although, as discussed earlier, Justice Scalia believed that the urine tests of the pregnant women were consensual and that provision of the test results to the police did not constitute a search, he nevertheless argued in the alternative that the testing was a "special needs" search.²⁶⁵ The district court's finding of fact that the goal of the testing policy "was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child"²⁶⁶ was binding upon the high Court unless clearly erroneous.²⁶⁷ In Justice Scalia's view, that finding was amply supportable.

Justice Scalia rejected the majority's argument that the "*addition* of a law-enforcement-related purpose *to* a legitimate medical purpose destroys applica-

260. See TASLITZ & PARIS, *supra* note 2, at 368-70 (summarizing roadblock cases).

261. See *id.* (summarizing case law). The one extreme exception is *Edmond*, 531 U.S. 32 (explaining that drug interdiction roadblocks clearly served the primary purpose of criminal law enforcement rather than civil purposes, such as protecting driver and passenger safety, because the searches sought evidence of illegal drug use and not evidence of drug intoxication at the time of driving).

262. See TASLITZ & PARIS, *supra* note 2, at 368-70.

263. See *infra* text accompanying notes 514-604.

264. See *infra* Part V.A.

265. See *Ferguson*, 532 U.S. at 98-99.

266. *Id.* at 98 (quoting App. to Pet. for Cert. at A-38).

267. *Id.*

bility of the 'special needs' doctrine."²⁶⁸ "[T]hat is quite impossible," Justice Scalia continued, "since the special-needs doctrine was developed, and is ordinarily employed, precisely to enable searches *by law enforcement officials* who, of course, ordinarily have a law enforcement objective."²⁶⁹

Justice Scalia illustrated this conclusion by analogy to *Griffin v. Wisconsin*.²⁷⁰ *Griffin*, as mentioned earlier, involved a warrantless search of a probationer's home by a probation officer. That officer was prompted to search by a tip he had received from a detective, reporting that the probationer illegally possessed a firearm. The probation officer conducted his search accompanied by the police and indeed found a weapon, leading to the probationer's trial for its unlawful possession. The Court affirmed a denial of the probationer's motion to suppress because the special need of assuring his compliance with the terms of his release justified the warrantless search. The Court noted that the probation officer is not:

[T]he police officer who normally conducts searches against the ordinary citizen. He 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. . . . In such a setting, we think it reasonable to dispense with the warrant requirement.²⁷¹

Justice Scalia thought that *Griffin* squarely controlled *Ferguson*:

Like the probation officer, the doctors here do not "ordinarily conduct searches against the ordinary citizen," and they are "supposed to have in mind the welfare of the mother and child." That they have in mind in addition the provision of evidence to the police should make no difference. The Court suggests that if police involvement in this case was in some way incidental and after-the-fact, that would make a difference in the outcome. . . . But in *Griffin*, even more than here, police were involved in the search from the very beginning; indeed, the initial tip about the gun came from a detective. Under the factors relied upon by the [*Ferguson*] Court, the use of evidence approved in *Griffin* would have been permitted only if the parole officer had been untrained in chain-of-custody procedures, had not known of the possibility a gun was present, and had been unaccompanied by police when he simply happened upon the weapon. Why any or all of these is constitutionally significant is baffling.²⁷²

Justice Scalia further rejected the effort to distinguish *Griffin* on the ground that probationers have lesser privacy expectations than does the general public. Even if that is true, that observation, said Scalia, is irrelevant to his central point: that the presence of a law enforcement purpose does not exclude application of the special needs doctrine. Scalia thus also rejected Justice Kennedy's argument in concurrence that the special needs cases "do not sustain the active use of law enforcement. . . . as an integral part of a program which seeks to achieve legitimate, civil objectives."²⁷³ Said Justice Scalia:

268. *Id.* at 99.

269. *Id.*

270. 483 U.S. 868 (1987).

271. *Id.* at 876-77.

272. 532 U.S. at 101.

273. *Id.* at 88 (Kennedy, J., concurring).

Griffin shows that is not true. Indeed, *Griffin* shows that there is not even any truth in the more limited proposition that our cases do not support application of the special-needs exception where the “legitimate, civil objectives” are sought only *through* the use of law enforcement means. (Surely the parole officer in *Griffin* was using the threat of reincarceration to assure compliance with parole.)²⁷⁴

Justice Scalia might be saying that whenever there are dual purposes—one administrative, the other criminal-investigation-related—the former always controls. If so, he would be correct to view *Griffin* and *Ferguson* as inconsistent. Both should have been denominated “special needs” searches. But such an approach would be flatly inconsistent with the Court’s express emphasis on choosing a “primary” purpose as the governing one.²⁷⁵ If Justice Scalia is implicitly focusing on social meaning, however, then his reading of the meanings likely to be perceived by society’s ordinary citizens would also render the *Griffin* and *Ferguson* cases inconsistent. He sees both *Griffin* and *Ferguson* as involving do-gooders (probation officers who rehabilitate, doctors who heal) and who are strong enough to use “tough love” to help their charges.²⁷⁶ Both should therefore be viewed as administrative searches.

But the Court majority had a very different implicit view of the social meaning associated respectively with the *Griffin* and *Ferguson* searches. For the majority, probation officers are indeed “do-gooders.” But the *Ferguson* doctors worked hand-in-hand with the police to use threats, and the actuality, of criminal prosecution of pregnant women for abusing their unborn children, an action imposing precisely the sort of dramatic stigma associated with the criminal justice system, despite the likely similarity in the subjective intentions of both probation officers and medical personnel to aid needy others.²⁷⁷ If this characterization of social meaning is accepted, the two cases require the very different results embraced by the majority; the two opinions are, therefore, fully consistent.

My own view is that ordinary citizens and even elites would understand searches by probation officers as criminal-investigation-related, though I have

274. *Id.* at 102 (Scalia, J., dissenting).

275. *See supra* text accompanying notes 213-36.

276. *See Ferguson*, 532 U.S. at 103-04, where Scalia declared,

When the doctors and nurses agreed to the program providing test results to the police, they did so because (in addition to the fact that child abuse was required by law to be reported) they wanted to use the sanction of arrest as a strong incentive for their addicted patients to undertake drug-addiction treatment. And the police themselves used it for that benign purpose, as is shown by the fact that only 30 of 253 women testing positive for cocaine were ever arrested, and only 2 of those prosecuted. . . . It would not be unreasonable to conclude that today’s judgment, authorizing the assessment of damages against the county solicitor and individual doctors and nurses who participated in the program, proves once again that no good deed goes unpunished.

See also id. at 101 (characterizing probation officers as those supposed to have probationers’ welfare in mind and the *Ferguson* doctors as those supposed to have the welfare of mother and child in mind).

277. *See infra* Part V.

no empirical data to support my intuition.²⁷⁸ If I am right, then *Griffin* was wrongly decided. But if I am wrong, then *Griffin* and *Ferguson* are, contrary to Justice Scalia's view, quite consistent.

I will return to the question of social meaning in Part V. For now, having examined the relevant doctrine concerning consensual and administrative searches, I further explore *Ferguson's* significance by examining applicable feminist theory, beginning with feminist understandings of "consent."

IV. FEMINISM AND THE CONSENT TO SEARCH

Feminist theory on the meaning of "consent" in sexual assault and sexual harassment cases often reflects an understanding of consent that is strikingly similar to that embodied in the *Ferguson* majority's opinion on the consent-to-search doctrine under the Fourth Amendment.²⁷⁹ Under the current law defining rape, for example, the absence of force or its threat is generally equated with the presence of consent.²⁸⁰ Consent and voluntariness thus mean the same thing, with voluntariness defined as the absence of physical coercion or its equivalent. Many feminists reject this "masculine" notion of voluntariness. Instead, coercion is seen to inhere in a broader set of threats of economic or reputational, and

278. Noted criminal law scholar R.A. Duff, for example, rejects the idea that probation officers provide merely therapeutic, rather than punitive, services. See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 99-105 (2001). Duff explains:

The first and basic element [of probation] is supervision. The offender is required to report regularly to his probation officer. This enables her to keep a formal check on his behavior, and provides a structure within which he can seek and she can offer advice and help in avoiding future criminal conduct. *It is a punishment*—a burden imposed on him by the court for his offense. Implicit in it is the censure that his crime deserves. That censure, as thus communicated, makes clear the implications of his crime: for this punishment tells him that his commission of the crime cast doubt on his commitment to the community's public values (the values embodied in the criminal law), threatening to undermine the mutual trust on which the community depends; he must therefore subject himself to a kind of supervision that other citizens need not accept. But it is a punishment that looks to the future. Through this supervision he will, we hope, come to face up to the need to amend his future conduct and be helped to show how to achieve such amendment.

Id. at 101.

279. Some feminist theorists entirely reject the idea that the absence of consent should be central to the law of sexual assault or sexual harassment. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 245 (1989) ("Rape should be defined as sex by compulsion, of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime."); STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 82-83 (1998) (suggesting that MacKinnon would easily find compulsion given her view of sharp power inequalities favoring men in virtually all heterosexual relationships and seeing her idea of "compulsion" as very different from the idea of "consent."). I need not explore here the wisdom of these theories. My concern is to define "consent," so I necessarily rely on feminist theorists who find the consent concept viable and go about the task of giving it meaning.

280. See, e.g., SCHULHOFER, *supra* note 279, at 114 ("In the existing law of rape, it remains perfectly legal for a man to use coercive pressure to compel a woman's consent to sex. Flagrant threats are treated as part of the permissible repertoire of sexual bargaining, provided they steer clear of arousing fear of physical harm."); Andrew E. Taslitz, *Patriarchal Stories: Culture Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S ST. 387, 422-24, 448-53 (1996) [hereinafter *Patriarchal Stories*] (explaining the cultural and psychological processes that makes the current law-in-action denominate sex as "non-consensual" only if obtained by the use of a significant measure of force).

not only physical, harm.²⁸¹ Indeed, even some offers, although not rising to the level of “threats,” can be seen as “coercive,” exploiting certain women’s vulnerabilities and weaker bargaining position, vulnerabilities often partly created by the men whose conduct is challenged.²⁸² Every situation involves limited choices and pressures to favor one option over another.²⁸³ How much and what sorts of pressures and option limitations are unacceptable, rendering the choice involuntary, is a value-laden exercise.²⁸⁴ For many feminists, the value of female sexual autonomy is sufficiently high that it must be protected against particularly powerful sorts of economic and social manipulation that can overbear a woman’s will.²⁸⁵ Thus, if the boss of a mother of two who is struggling to pay her rent offers to give the woman an undeserved promotion in exchange for sexual favors, that exploits the woman’s financial vulnerability, rendering her choice not truly voluntary.²⁸⁶ Careful attention to gendered power imbalances, and to circumstantial evidence of the case-specific maldistribution of parties’ power, as well as the availability of a keen sensitivity to the role of emotion in human interaction, characterizes the feminist approaches to “voluntary” sexual contact.²⁸⁷

More importantly, however, is that, for feminists, voluntariness is a necessary but not sufficient condition for consent.²⁸⁸ Consent is partly a performative, permission-giving *act* that alters the moral relationship between two parties such that one obtains a privilege to do what he otherwise would have no right to do.²⁸⁹ But that act must also be accompanied by an appropriate quality of will—a fully informed, deliberative choice.²⁹⁰ Because consent involves deciding what

281. See SCHULHOFER, *supra* note 279, at 82-83 (summarizing some of the relevant theories); KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION 53-56 (1996) (summarizing radical feminist theories that view “rape as degradation” in a context of widespread power inequalities).

282. See, e.g., SCHULHOFER, *supra* note 279, at 137-67 (defining coercive sexual offers); BURGESS-JACKSON, *supra* note 281, at 95-102 (discussing the significance of “manipulated vulnerability”—victim vulnerability deliberately created by the wrongdoer, and “non-manipulated vulnerability”—created by circumstances, including culture—in conservative, liberal, and radical theories of rape).

283. See *Patriarchal Stories*, *supra* note 280, at 422.

284. See *id.*

285. See SCHULHOFER, *supra* note 279, at 139-64 (recounting various ways in which economic and social power can undermine female sexual autonomy).

286. See *id.* at 141-45, 161 (offering a series of analogous examples).

287. See *id.* at 139-64 (demonstrating these qualities). See generally *Emotions in Date Rape*, *supra* note 102 (emphasizing the importance of human emotions and power imbalances in understanding the law of rape).

288. See, e.g., DAVID ARCHARD, SEXUAL CONSENT 43-45 (1998) (explaining that valid consent requires the capacity to do so, adequate information concerning all material facts, and voluntariness). See generally *Emotions in Date Rape*, *supra* note 102 (arguing that reasonable, affirmative communicative efforts to determine a woman’s wishes should be necessary in proving any man’s consent defense to a charge of rape).

289. See Brenda M. Baker, *Understanding Consent in Sexual Assault*, in A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 49, 51-52 (Keith Burgess-Jackson ed., 1999) (adopting such a formulation of “consent”); cf. ARCHARD, *supra* note 288, at 3-6 (explaining that consent requires a positive, intentional act in addition to cognitive, dispositional, and volitional states of mind).

290. See Patricia Kazan, *Sexual Assault and the Problem of Consent*, in VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES 27, 27-41 (Stanley French et al. eds., 1998) (arguing that the soundest model of consent is both performative and attitudinal, the latter requiring adequately informed choice); see also ARCHARD, *supra* note 288, at 43-44 (arguing that *informed* choice, especially as it re-

combination of act and will should alter moral obligations and legal rights, the choice of the standard for finding consent and the rules for proving it must vary with context.²⁹¹ Some feminists argue for especially high standards of sexual consent because of the serious psychological and social consequences for the parties; the need to offset the women's relative vulnerability and physical, psychological, social, or financial disadvantage relative to many men; and the importance of reinforcing a newly-emerging conception of the woman's self as an autonomous adult whose self-determined choices about what happened to her body merit respect.²⁹² Moreover, these feminists see sexual interaction as being not only about the individuals involved but also about men and women as a group.²⁹³ Higher standards of consent give women more sexual bargaining power, in turn giving them a greater ability successfully to struggle for economic, intellectual, and political independence.²⁹⁴ The fate of the group in the battles of sexual politics is at stake.²⁹⁵

For similar reasons, other feminists press for a high evidentiary burden for proving consent in addition to a muscular definition of sexual consent itself. As one theorist explains, "the greater the harms that would result from acting on the false assumption that consent has been given, the better grounded should be the belief that it has been."²⁹⁶ This observation is especially apt where, as with sexuality, the understanding of a social conventions' meaning is open to differing interpretations (such miscommunication often occurring between men and women) and the possibility of directly confirming or refuting a particular interpretation easily available, perhaps by asking whether a nod means "yes" or just "maybe."²⁹⁷ High standards of proof require clear, affirmative indications of a "yes" rather than its presumption from conventional norms.²⁹⁸ Wearing a low-cut dress, downing a few drinks, and not verbally protesting against an aggressive male's escalating sexual overtures is therefore insufficient to establish the woman's consent.²⁹⁹

Even those feminists who are less willing to heighten the substantive and procedural concepts governing sexual consent are likely ready to do so for inter-

lates to what it is that a person consents to being exposed, should be central to proving legal consent); Baker, *supra* note 289, at 56.

291. See, e.g., Baker, *supra* note 289, at 60-64 (arguing for a variable, context-specific notion of consent).

292. See *id.* at 60-61.

293. See, e.g., *Emotions in Date Rape*, *supra* note 102.

294. See, e.g., LINDA HIRSHMAN & JANE LARSEN, *HARD BARGAINS: THE POLITICS OF SEX* 3-4 (1998) (arguing that the law has always played a role in apportioning sexual bargaining power between men and women).

295. Cf. *RAPE AND CULTURE*, *supra* note 33, at 134-48 (discussing group impact resulting from individual rape trials).

296. ARCHARD, *supra* note 288, at 15.

297. See *id.* at 14-15; SCHULHOFER, *supra* note 279, at 58-62 (explaining that men and women may on average make sharply different assumptions about when a woman's conduct signals her consent).

298. See ARCHARD, *supra* note 288, at 15-16, 28 (summarizing the "good reasons" for adopting a contextual affirmative consent approach); SCHULHOFER, *supra* note 279, at 99-113, 267-73 (sexual autonomy requires an affirmative consent standard).

299. See SCHULHOFER, *supra* note 279, at 269-70 (using similar example).

actions in certain settings or particular relationships where the male-female power imbalance is significant and severe, as it may be for a woman employee facing a male-dominated management.³⁰⁰

These feminists' general analyses of consent provide useful guidelines for better understanding the consent-to-search doctrine explored in *Ferguson*. Critically, many feminist thinkers draw analogies to the idea of informed consent in the doctor-patient relationship of obvious relevance in *Ferguson*.³⁰¹ Informed consent to medical procedures is a requirement rooted partly in the right to *bodily* autonomy; informed consent to erotic contact is an aspiration rooted partly in the suggested and related right to *sexual* autonomy.³⁰²

A. Informed Consent

Sex matters to our core sense of identity.³⁰³ Sex is often about far more than just physical pleasure. Sex opens us up to physical and emotional vulnerability. That self-exposure is one critical way to explore a particular set of human relationships critical to a meaningful life.³⁰⁴ Sex is a way to express love, to procreate, to start a family.³⁰⁵ The individual's quest for a mate or life partner; the social contest over gay rights; the obsession with romantic love in songs, movies, literature, and plays all reflect the centrality of sexual interaction in humans' lives.³⁰⁶

300. Feminists who oppose heightened standards in rape cases "worry that treating passivity or ambivalence as *non*consent will 'patronize' women, who should be assumed capable of asserting their own wishes." SCHULHOFER, *supra* note 279, at 269. But laws against sexual harassment can be justified by the female victim's need for personal retribution, hardly a hallmark of passivity, and workplace imbalances can be seen as turning on case-specific economic disparities, rather than on stereotyped notions of female passivity. See Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 MARGINS 305, 324-30, 342-54 (2001) (discussing retribution and sexual harassment). Although sexual harassment has implications for women as a group, see *id.* at 342-54, the concept can also be understood as defending against individual power disparities to which either sex can be subjected. See SCHULHOFER, *supra* note 279, at 172-73 (making a similar point, while noting that it is nevertheless statistically rare for men to be workplace harassment victims). Professor Schulhofer has described the dynamics of the economic disparity:

Even when a subordinate feels able to rebuff her boss's attentions, his advance can cast a cloud over their working relationship. The subordinate may be left feeling physically self-conscious and professionally vulnerable, sensing that she was placed in a sexual role and that her professional boundaries were not respected. She may worry that she will no longer receive desirable assignments, that her work won't be evaluated fairly, that promotions she might have gained will now go to others. Yet her only alternative may be to submit.

Id. at 173.

301. See *infra* text accompanying notes 332-38.

302. *Id.*

303. See DAVID A.J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGUES* 172-75 (1999) (explaining how gender and sexual orientation are central to key aspects of personal identity).

304. See ARCHARD, *supra* note 288, at 19-22.

305. See *id.* at 21.

306. See *id.* at 21 (discussing sex and personal relationships); RICHARDS, *supra* note 303, at 172, 75 (discussing gay rights); *Patriarchal Stories*, *supra* note 280, at 429-65 (discussing media, myths, and sexuality's centrality).

Sex is also about power.³⁰⁷ If death is, in practice, the penalty for female but not male adultery, as is still true in some cultures, wives will be reluctant to leave their homes because of the dangers of suspicious contact with other men.³⁰⁸ If the heterosexual majority abhors homosexual acts, openly gay citizens risk ostracism and job discrimination, while closeted gays may avoid political activity for fear of exposure.³⁰⁹ When women have little say over when and how they will engage in sexual activity, they may cling to otherwise unsatisfying male lovers rather than risk being alone on the streets, and their lack of sexual choice itself marks them as a degraded caste of citizens, unworthy of equal access to economic and political power.³¹⁰

The right to sexual autonomy—to decide whether and when we become sexually intimate with another—is therefore seen by feminists as among the most important of personal rights and liberties.³¹¹ Autonomy is the right to self-rule. Random, careless, misinformed, or coerced choices are not acts of true self-

307. See *Patriarchal Stories*, *supra* note 280, at 394-429 (reviewing social and psychological processes by which sexual interactions negotiate power relationships).

308. See Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281 (2002) (discussing two asylum claims by Pakistani women whose husbands accused them of adultery, therefore physically abusing them and forcing them to leave their homes, making them vulnerable to possible criminal prosecution, which, under Pakistan's then-governing interpretation of Sharia law, could subject the women to flogging or being stoned to death); Azizah Yahia al-Hibri, *Muslim Women's Rights in the Global Village: Challenges and Opportunities*, 15 J.L. & RELIG. 37, 62 n.144 (2001) (noting that varying interpretations of the Prophet Mohammed's words arguably equate adultery, in some scholars' view, with "leaving the marital home without permission").

I am not an Islamic scholar and take no position on what the Prophet meant or what Sharia means. Indeed a complex system of proof can make actual conviction for adultery difficult even where death is a possible penalty. See Kathryn Christine Arnold, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343, 1364 n.108 (2001) (Islamic law calls for four male witnesses or repeated confessions to prove adultery). Moreover, in theory similar penalties may, in some nations giving Sharia law a conservative interpretation, be equally imposed upon men and women. See Edna Boyle-Lewicki, *Need Worlds Collide: The Hudud Crimes of Islamic Law and International Human Rights*, 13 N.Y. INT'L L. REV. 43, 66 (2000). However, the law on the books and the law in practice can be very different. See John R. Schmertz and Mike Meier, *House of Lords Finds Two Pakistani Women Entitled to Asylum in England Because Official Pakistani Discrimination Against Women Establishes Gender As "Particular Social Group" Under U.N. Convention and Protocol on Refugee Status*, 5 INT'L L. UPDATE 78, 1007-08 (1999) (although Pakistani law purported to prohibit discrimination on grounds of sex, there is strong discrimination against married women, who are subordinate to their husbands, husbands who frequently charge their wives with adultery, which may result in whipping or stoning; where the most severe punishments are involved, the evidence of women is not even admissible; half the women prisoners in Pakistan have been arrested on adultery-like charges under which they can be held for years without any evidence of their crime).

309. See *Privacy and Human Emotions*, *supra* note 102 (tracing connection between expanded gay privacy rights and growing gay political power); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 13-138 (1999) (tracing the history of the "apartheid of the closet").

310. See RAPE AND CULTURE, *supra* note 33, at 134-48 (explaining how rape and rape law-in-practice limit women's access to economic and political power); see also *Patriarchal Stories*, *supra* note 280, at 397-400 (summarizing social science information on how women's autonomy is restricted by their fear of rape).

311. See SCHULHOFER, *supra* note 279, at 99-101.

governance but rather of other-governance, or reflective of an impaired capacity for self-initiated law.³¹² Autonomy therefore minimally requires mental competence and an awareness of options and of information sufficient to enable the individual intelligently to choose among the range of available alternatives.³¹³ Many philosophers would go further, requiring the availability of a significant array of reasonable alternatives and extensive information about the pertinent facts, along with freedom from deception and preferences and capacities undistorted by overwhelming cultural influences.³¹⁴ Adequate education and a culture supportive of introspection are also essential to the deliberation that self-rule requires.³¹⁵

True consent therefore requires knowledge of precisely to what it is you are consenting and what that entails.³¹⁶ You need not know everything, but you must know everything that would make a real difference to whether and to what you would consent, including awareness of what may happen to you and to others as a consequence.³¹⁷

Vulnerability to, and dependence upon, another can make the idea of informed choice even more important.³¹⁸ An eleven year old child who accepts her father's representations that sex between them is natural and will bring them closer suffers from a lack of accurate and complete information, an insufficient capacity for deliberation, *and* a betrayal of her father's trust.³¹⁹

The problem of date rape can sometimes be understood as a failure to ensure the presence of a woman's *informed* consent. The man might sincerely believe, based on the woman's actions, that she has consented when indeed she has not. That confusion may stem from very different understandings of the meaning of certain actions, a gendered communication gap.³²⁰ Preconceptions of the males as the sexual aggressors, women as the passive recipients, linger still.³²¹ A woman may believe that she has adequately conveyed her non-consent, but the man perceives that she is playing coy and persists. She may interpret that persistence as indicating that he does not care about her lack of consent, thereby becoming frightened and submitting to his will.³²² At least one survey study supports this scenario. In a 1992 survey, 22% of American women reported at least one incident in which they felt that they were forced to have sex. But only 3% of American men felt that they had ever forced sex on any

312. See RAPE AND CULTURE, *supra* note 33, at 139-40 (defining individual and collective self-rule and exploring their diminishment by current procedural and substantive rape laws).

313. See SCHULHOFER, *supra* note 279, at 105.

314. See *id.* at 105-06.

315. See *id.*

316. See ARCHARD, *supra* note 288, at 46.

317. *Id.*

318. See Baker, *supra* note 289, at 56-57.

319. *Id.*

320. See SCHULHOFER, *supra* note 279, at 58-61.

321. See *Emotions in Date Rape*, *supra* note 102, at 24-31 (summarizing social science on this point).

322. See SCHULHOFER, *supra* note 279, at 62; Robin Weiner, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 147-49 (1983).

woman.³²³ Either those three percent are extraordinarily geographically mobile and sexually active, or there is a good deal of “unintended” rape going on.

A clear warning to a woman could avoid this sort of misunderstanding. Such a warning might require the man in the particular instance to say, “Do you understand that I am assuming the following set of conventions and that if you behave in the following way (for example, “seeming to protest but then silently submitting when I persist”), I will take that as a sign of your consent?” Of course, this strikes us as absurd, too formal for a romantic relationship and surely devoid of spontaneity. But a similar result can be achieved, and has been proposed, in another fashion: communicative sex or the requirement of an affirmative “yes.”³²⁴ Such a standard simply requires a man not to proceed with a sexual act in the face of mere silence or submission. The man must either spontaneously receive an affirmative “yes,” either by words or by unequivocal actions, such as the woman’s moving the man’s hand to her genitalia, or must ask the woman for such an expression as to *that particular act*.³²⁵ An affirmative “yes” to one sort of sexual act does not adequately respect sexual autonomy if it is taken as consent to all other sexual acts. Consent to act “A” is not consent to act “B” unless the consentor understood that consequence to follow.³²⁶

Other options are possible. We might rely on “quasi-consent”—the idea that the woman *should have known* that certain of her actions would be relied upon by the man as indicating consent.³²⁷ Many women do in fact, studies show, engage in precisely the coy, “feigned resistance” that many men imagine.³²⁸ But given the diversity of women’s understandings of sexual behavior, the importance of the right to sexual autonomy, and the grave dangers of physical, social, and psychic harm to the women, it seems wiser to place the risk of error on the man, at least up until the point that the man has made proper efforts to obtain, and has received, a clear, affirmative “yes.”³²⁹

A third solution—privileging the man’s actual perceptions—like the second solution, which privileges his reasonable perceptions—suffers from a similar flaw: it safeguards the man’s right to sexual autonomy but not the woman’s.³³⁰ I have spoken so far, for simplicity’s sake, of the man’s seeking an affirmative “yes.” But the same test should apply to the rarer instance in which the woman wrongly believed that the man was consenting to the woman’s sexual aggres-

323. See ROBERT T. MICHAEL ET AL., *SEX IN AMERICA* 221 (1994).

324. See *Emotions in Date Rape*, *supra* note 102, at 4-8, 52-64 (defining and defending communicative sexuality); SCHULHOFER, *supra* note 279, at 254-73 (defending an “affirmative yes” standard that does not necessarily require a verbal yes but does require some equivalent action).

325. See SCHULHOFER, *supra* note 279, at 254-73 (discussing affirmative yes standard); ARCHARD, *supra* note 288, at 6-7 (explaining that consent to a particular sexual act is not consent to all others).

326. See ARCHARD, *supra* note 288, at 6-10. Archard favors communicative sexuality and an affirmative yes standard primarily for couples who are strangers or are uncertain about the status of their relationship. See *id.* at 27-28, 146-47.

327. See *id.* at 13-14.

328. See SCHULHOFER, *supra* note 279, at 63-65 (summarizing social science); *Emotions in Date Rape*, *supra* note 102, at 24-27 (similar).

329. See *Emotions in Date Rape*, *supra* note 102, at 52-54. Accord ARCHARD, *supra* note 288, at 9-10, 14-16.

330. See *Emotions in Date Rape*, *supra* note 102, at 30-31.

sions. Each must seek clear communication from the other if the sexual autonomy of both is to be honored.³³¹

This feminist reliance on informed consent draws heavily from the law's development of similar concepts concerning a patient's consent to medical procedures.³³² Medical procedures, especially invasive ones, implicate the right to bodily autonomy.³³³ Like violation of the right to sexual autonomy, violation of bodily autonomy can cause grievous physical, emotional, social, and economic pain.³³⁴ A serious but successful surgery can mean months of painkillers, physical therapy, high doctor's bills, social isolation, strained marital and parental relationships, and lost time from work. A botched operation can be far worse, confining the patient to a lifetime in a wheelchair and perhaps years of self-pity, struggling to regain the respect of self and others.³³⁵ Moreover, just as a sexual relationship may place a woman in a vulnerable situation so that she trusts her lover not to do what she does not want, so does a patient trust a doctor only to proceed with the procedures the patient desires and in a fashion that the patient fairly understands as protecting his own interests.³³⁶ Finally, just as women's understandings of sexual conventions and sexual desires vary, so may patients' understanding of what they will undergo and its value and consequences vary.³³⁷ Rather than too easily risk error, the doctor should encourage a fully informed patient choice.³³⁸

Increasingly, therefore, an adult patient's right to decide what should be done to his or her body, not the doctor's choices or assumptions, determine what constitutes informed consent.³³⁹ In *Canterbury v. Spence*,³⁴⁰ for example, Judge Spottswood Robinson, III explicitly rejected "good medical practice," that is, "what a reasonable practitioner would have supplied," as the test for what information the doctor must reveal.³⁴¹ Judge Robinson impliedly recognized that the patient's right to bodily autonomy is not honored if *the doctor's reasonable perceptions control*. Instead, Justice Robinson required the doctor to provide all in-

331. See *id.* at 24-27, 74-76 (explaining that both men and women must be judged responsible for their sexual emotions and actions, though it is most often men who will be in the role of aggressor). Whether the absence of an affirmative "yes" requires criminal or merely civil penalties is not a matter that I need to address here because it is the meaning of "consent" rather than the proper remedies for its violation that is one of this article's chief concerns. Compare SCHULHOFER, *supra* note 279, at 283-84 (proposing criminal statute), with Baker, *supra* note 289, at 63-65 (arguing that an affirmative "yes" is a desirable sexual ideal but expects too much of men to justify criminal punishment).

332. See, e.g., Baker, *supra* note 289, at 51-54, 58 (analogizing to medical consent).

333. See *id.* at 58-61.

334. See *id.*; SCHULHOFER, *supra* note 279, at 229-48.

335. Having recently suffered through an ultimately successful gall bladder operation and recovery from an unrelated knee injury, I have had personal experience with the physical, financial, and emotional costs of even a well-done surgery. The costs of a poorly done surgery are far higher.

336. See Baker, *supra* note 289, at 58-61.

337. See *id.* (explaining how individual choice by patients as to treatment and women as to sexual activity are analogous).

338. See *id.* at 53-54 (arguing that absent efforts to fully inform the patient, the risk of error concerning consent should fall on the physician); see also SCHULHOFER, *supra* note 279, at 271 (arguing that the burden of avoiding error as to sexual consent should fall on the initiator, usually the man).

339. See Baker, *supra* note 289, at 58.

340. 464 F.2d 772 (D.C. Cir. 1972).

341. *Id.* at 786.

formation pertinent to the patient's decision about treatment. His rationale: "The patient's right of self-decision shapes the boundaries of the duty to reveal."³⁴² His opinion represents the general shift from physician authority in decision making to a "more collaborative model in which patient autonomy is emphasized."³⁴³ That autonomy includes control (with rare exceptions) over what will be done with the information derived from various bodily intrusions and tests.³⁴⁴ Privacy concerns are indeed a major consequence of medical testing, having implications for employment prospects, insurability, and social standing.³⁴⁵ A complex web of ethical rules and statutory and case law works to protect patients' privacy rights.³⁴⁶ Informed consent to medical procedures therefore requires knowledge of what tests and procedures will be done, for what purposes, and with what consequences for privacy and long-term emotional, physical, social, and financial help.³⁴⁷ It is this broad and generous conception of informed medical consent guided by the right to bodily autonomy that inspired feminists to adopt a similar approach to protecting sexual autonomy.³⁴⁸

The state's violation of the Fourth Amendment privacy rights of the *Ferguson* patients can similarly have enormous consequences for the women involved. Exposure of their drug addiction, especially to the police, can deprive these women of their freedom, weaken or distort their relationship with their children, stigmatize them, and make their future employment prospects all that much dimmer.³⁴⁹ Significantly, the state does so by piggybacking on the very doctor-patient relationship whose special nature requires a robust informed consent jurisprudence. Breach of doctor-patient trust is likely to have particularly ill effects on patients' future trust in physicians, willingness to seek medical help, and willingness to follow doctors' directives.³⁵⁰ Moreover, female patients relying on gynecologists and obstetricians, who must let doctors explore intimate body parts and who rely on the doctors to protect the fetuses' young lives, are particularly dependent on their physicians, likely to trust them, and vulnerable to poor decisionmaking or to manipulation.³⁵¹ Protection of their bodily,

342. *Id.*

343. Baker, *supra* note 289, at 61.

344. See *supra* notes 123-32 and accompanying text.

345. See *supra* notes 123-32 and accompanying text.

346. See sources cited *supra* notes 117-24 and accompanying text.

347. See sources cited *supra* note 117-24 and accompanying text; cf. *Privacy and Human Emotions*, *supra* note 102, at 129-34, 150-56 (discussing harms from privacy invasion, especially by unwanted disclosure of information).

348. See Baker, *supra* note 289, at 53-63 (relying on the medical analogy); Stephen Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 74-75 (1992) (similar).

349. See *supra* text accompanying notes 463-604 (parties' arguments); see also *infra* text accompanying notes 542-59 (discussing social meaning of, and methods for, punishing cocaine-addicted mothers).

350. See generally AMA Brief, *Ferguson* (No. 99-936) (making similar points in the specific context of drug-addicted pregnant patients); Rutherford Institute Brief at 19 n.29, *Ferguson* (No. 99-936) (arguing that it is widely accepted that the free flow of information between doctor and patient to enable informed patient decisions increases patients' sense of control and willingness to adhere to care plans).

351. Cf. SCHULHOFER, *supra* note 279, at 229-48 (discussing how female patients are likely to be especially vulnerable when seeing gynecologists, fertility specialists, and similar sorts of physicians).

sexual, and parental autonomy requires, in a feminist perspective (which also honors birth and motherhood), at least the protections provided by requiring fully informed consent.³⁵²

B. Paternalism

The Hospital in the *Ferguson* case argued for a weaker notion of consent than that adopted by the Court, the Hospital at least implicitly relying on paternalism.³⁵³ “Paternalism” is, in common sense terms, simply the idea of one person acting as a parent toward another.³⁵⁴ The paternalist believes that he or she knows what is best for a dependent other and therefore should be able to make decisions for that other.³⁵⁵ “Paternalism” is often viewed pejoratively when it characterizes the relationship between two adults because it infantilizes one of them.³⁵⁶ Yet adults sometimes voluntarily submit to significantly paternalistic relationships, such as rank-and-file soldier to officer, student to teacher, or adult child to frail, aging parent.³⁵⁷ Similarly, paternalistic arguments justify much

352. On the social significance of birth and motherhood, see *infra* text accompanying notes 589-604.

353. See *supra* text accompanying notes 132-56.

354. 11 OXFORD ENGLISH DICTIONARY 336 (2d. ed. 1989) (defining “paternalism” as “the principle of acting in a way like that of a father to his children”).

355. Cf. ALAN WERTHEIMER, EXPLOITATION 273-74 (1996) (defining paternalism as “a fiduciary model . . . under which the primary responsibility for securing B’s welfare lies with A rather than B”). Wertheimer continues: “This is particularly so in professional contexts, where the quality of the professional’s service is one that the consumer cannot easily or successfully monitor or in cases where it is predictable that strong emotions, such as fear or grief, will distort one’s judgment.” *Id.* at 274. Similarly, Keith Burgess-Jackson explains, liberals do “not oppose interference [with individual choices] if the consent given is less than voluntary, for in that case, by definition, one is not acting autonomously.” KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION 169 (1996). However, one type of voluntariness-reducing factor is “defective belief (which impairs cognition. . . .)” *Id.* at 169-70. This view that the state must interfere if choices are ill-informed or confused is known as “soft paternalism,” which, in Jackson’s view, “is consistent with, and perhaps required by, liberalism.” *Id.* at 169.

356. Cf. GILLIAN BROWN, THE CONSENT OF THE GOVERNED: THE LOCKEAN LEGACY IN EARLY AMERICAN CULTURE 16 (2001) (“Thus, along with the familiar and venerable phrase ‘consent of the governed,’ the most prominent idea in the founding of the United States is independence from the past, famously embodied in the figure of the rightfully rebellious child of autocratic parents.”). Southern slavery, for example, was partly defended on the paternalistic ground that whites knew what was best for their black “children,” white rule thus “uplifting” the slaves. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1325-32 (2000).

357. See WERTHEIMER, *supra* note 355, at 273-74 (“Consider paternalism. If people attach importance to their choices because those choices are instrumental to their welfare, then contractors will reasonably want some protection from their propensity to make bad or irrational choices—if it is possible to identify such cases in a reasonable way and if that protection does not cast doubt on their *general* competence. For that reason, there are some contexts in which the contractors may opt for a fiduciary model of their transactions with others. . . .”). Professor Wertheimer notes that this sort of consensual paternalism characterizes professional contexts, and I have offered in text analogous examples in which I believe that the logic of consensual paternalism controls. See *id.* at 274. Wertheimer further explains that consent legitimates transactions, *id.* at 271, including paternalistic ones. See *id.* at 273-74.

government regulation, such as protecting unwary consumers from dangerous products or uninformed choices.³⁵⁸

In medicine, the paternalistic idea is that patients are simply incapable of making fully informed, rational judgments about certain aspects of their care.³⁵⁹ The paternalist physician, for example, might seek a patient's consent to all "necessary" medical testing, leaving the decision about what constitutes "necessity" to the doctor's skilled judgment.³⁶⁰ Something close to this sort of argument was made by the Hospital in *Ferguson*.³⁶¹ The argument is also one long well-received in the medical community.³⁶² But the trend in that same community has been toward ever-increasing patient autonomy.³⁶³

Properly understood, however, the dichotomy between paternalism and autonomy is misleading. The political thought of John Locke is often said to have been among the animating intellectual currents involved in the American Revolution.³⁶⁴ Locke's emphasis on the "consent" of the governed seemed a blow against the monarchical version of paternalism, which saw the sovereign as parent to his subjects.³⁶⁵ But Locke did embrace a very different sort of "paternalism" that was central to his political worldview.

For Locke, the "law of opinion" determines what is virtue and what is vice.³⁶⁶ Changing opinion is a crucial activity in a consensual society because opinion organizes behavior.³⁶⁷ Real consent is always informed, both working with and representing opinion.³⁶⁸ The means for keeping the public well-informed so that reasoned struggle and informed choice can continue in the realm of public opinion mattered greatly to Locke.³⁶⁹ Self-determination required knowledge and its twin, consent, and the people tacitly consented to a

358. See Jeffrey A. Gauthier, *Consent, Coercion, and Sexual Autonomy*, in A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE 71, 83 (Keith Burgess-Jackson ed., 1999) ("[M]ost workers reasonably accept paternalistic interventions that protect them against harmful decisions that they would likely be compelled to make when they are not sufficiently free or informed to make autonomous ones.").

359. See FIONA RANDALL & R.S. FOWNIE, PALLIATIVE CARE ETHICS: A COMPANION FOR ALL SPECIALISTS 40 (2d ed. 1999) ("The traditional doctor-patient relationship was one of benevolent paternalism. In other words, doctors thought they should act in a loving and fatherly way towards their patients, who were often ill-informed and uneducated.").

360. Cf. *id.* at 129-32. Doctors sometimes withhold information that a patient has not explicitly requested when the doctor deems such incomplete revelation to be for the patient's own good. *Id.*

361. See Rutherford Institute Brief at 19 n.29, *Ferguson* (No. 99-936) (so characterizing the Hospital's position); ACLU Brief at 11 n.2, *Ferguson* (No. 99-936) (similar).

362. See RANDALL & DOWNIE, *supra* note 359, at 40.

363. See *id.* at 40-47; Rutherford Institute Brief at 19 n.29, *Ferguson* (No. 99-936) ("Respondents' clinical approach, which adopts an outlook of paternalism toward the maternal and fetal patient, has been largely ignored by the medical community.").

364. See BROWN, *supra* note 356, at 3-4; GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 59 (2002) (explaining that the heritage of liberal thought drawn on by the colonists included the writings of philosopher John Locke).

365. See BROWN, *supra* note 356, at 16-19.

366. See *id.* at 5.

367. See *id.*

368. See *id.* For an excellent summary of Locke's political thought, see D. A. LLOYD THOMAS, LOCKE ON GOVERNMENT (1995).

369. See BROWN, *supra* note 356, at 5.

government by not rebelling.³⁷⁰ By the time that Lockean thought was used to define the Constitution, American political thinkers adapted the word “consent” to convey not just its ideal conception but also the difficulties of achieving the continuing self-determination that consent implied.³⁷¹

The very inclusion in the *Federalist Papers* of the specifying adjective “voluntary” in the phrase “voluntary consent of a whole people” suggests the uncertain relation of consent to individual freedom. The fact that consent—the pre-eminent act of individual authorization—requires the supplementation of volition implies that consent by itself is not necessarily a self-determined act. In addition to appearing with the auxiliary of will, consent usually appears in affiliation with knowledge and experience: as in the tandem concepts of informed consent and the age of consent. Consent would seem to become representative of agency only in conjunction with will and knowledge that the self does not invariably possess.³⁷²

For Locke, consent validated not only political obligation but other sorts of obligation too. Feminist legal scholars remind us that Locke derived his political theory from, and linked it to, his conceptions of childhood and of mutual child-parent obligations.³⁷³ For Locke, each person has, upon his birth, a right to consent to or reject another’s rule. A child is therefore born with agency.³⁷⁴ Parental rule stems from the child’s “weak and helpless” condition and initial lack of “Knowledge or Understanding.”³⁷⁵ But this is a temporary “sort of rule” that disappears when the child acquires the knowledge and capacity to use reason to exercise his natural right to consent.³⁷⁶ The child is born with property in himself, to be held in trust by the parent until the child can manage it on his own.³⁷⁷ Because this property is held in trust, the parent’s rule is limited by his obligation to nurture and educate the child toward self-rule:

The Bonds of this [child’s] Subjection are like the Swaddling Cloths they are wrapt up in, and supported by, in the Weakness of their Infancy. Age and reason as they grow up, loosen them till at length they drop quite off, and leave a man at his own free Disposal.³⁷⁸

Locke continues:

The *Power*, then, *that Parents have* over their Children, arises from that *Duty* which is *Incumbent* on them, to take care of their *Off-spring*, during the imperfect state of *Childhood*, to inform the *Mind*, and govern the *Actions* of their yet

370. See *id.* at 6-8 (discussing Locke’s views on autonomy and informed consent); THOMAS, *supra* note 368, at 34-42, 57-87 (discussing Locke’s views on tacit consent and rebellion).

371. See BROWN, *supra* note 356, at 17.

372. *Id.* at 18.

373. *Id.* at 15-45. Professor Brown’s emphasis on the implications of Lockean thought for women and for children qualifies Brown, in my view, as a clear feminist historian. See *id.* at 109-23 (on the “feminization” of Lockean consent).

374. See *id.* at 20-21.

375. John Locke, *The Second Treatise*, in TWO TREATISES OF GOVERNMENT ch. VI, §56, at 323 (Peter Laslett ed., 1960).

376. See BROWN, *supra* note 356, at 22.

377. See *id.*

378. LOCKE, *supra* note 375, ch. VI, §55, at 322.

ignorant nonage till reason shall take its Place, and ease them of that Trouble, is what the Children want, and the Parents bound to. . . .³⁷⁹

Revolutionary era Americans were often either directly or indirectly aware of Locke's vision of the child as having independent agency.³⁸⁰ Lockean concepts, though altered somewhat, underlay much early American thinking about how to raise children and about the ultimately political nature of childhood and education.³⁸¹ The flip side of parental rule, when translated to the political obligations of adults toward their sovereign, was that the sovereign was an "abusive parent" if he did not bend his rule toward the goal of the child's independence.³⁸² Moreover, that power lapses when knowledge comes.³⁸³ King George, having ignored these lessons, was no longer entitled to rule his American "children."³⁸⁴

Lockean consent, several scholars have noted, has implications for medical concepts of consent.³⁸⁵ The patient is to be seen as sovereign over himself, possessed of active powers.³⁸⁶ Even the anesthetized individual "consents" to what is necessary to restore his mental faculties of choice and authorization.³⁸⁷

Under such a view, the patients in *Ferguson* may indeed initially have lacked the knowledge and capacity to make informed judgments about testing. But that simply imposed on the physicians the obligation to give the patients the information, emotional support, and guidance necessary to enabling the patients to make informed choices. Because these were adult patients, but financially and emotionally dependent on the Hospital, it would take relatively little effort for the Hospital to meet its duty to enable patient capacities for self-determination rather than to make choices for the patient. Once so enabled, the Hospital's rule would have lapsed.³⁸⁸ By not making serious enough efforts to aid the pregnant women's independent, rational decisions, the Hospital misunderstood the true nature of "paternalism": the obligation to raise a dependent other to self-rule.³⁸⁹

C. The Role of Necessitous Circumstances

1. Threats, Offers, and Coercive Offers

One way to read the facts in *Ferguson* is that there were two distinct stages of "consent": first, the uninformed consent to all necessary medical testing, re-

379. *Id.* § 58, at 324 (emphasis in original).

380. See BROWN, *supra* note 356, at 20-29.

381. See *id.* at 15-45.

382. See *id.* at 16-17.

383. See *id.* at 20-21.

384. See *id.* at 16.

385. See BROWN, *supra* note 356, at 28; Elaine Scarry, *Consent and the Body*, 21 NEW LITERARY HISTORY 860, 868 (1990).

386. See sources cited *supra* note 385.

387. See sources cited *supra* note 385.

388. See *supra* text accompanying note 373-84 (discussing Lockean view that parental rule lapses when child is fully informed).

389. See BROWN, *supra* note 356, at 20-21.

sulting in a patient's surprise dirty urine screen; second, the very informed patient agreement to enter into a drug treatment program and submit to additional drug screens in exchange for not being prosecuted for the first drug test's "dirty" results.³⁹⁰ The immediately preceding two sections of this article argued that the first stage was constitutionally invalid. Uninformed consent is no consent at all. But what about the second stage of the process? Invalidating an informed but unpleasant choice might seem to turn on the distinction between "threats" and "offers."

A "threat" is commonly defined as leaving its recipient worse off. A threat narrows the range and desirability of the options available to the victim.³⁹¹ "Your money or your life" leaves a robbery victim no real choice whether to comply with his assailant's demands, thus invalidating the victim's "consent" to part with his money.³⁹²

An offer, by contrast, is frequently described as leaving its recipient better off. The offer expands the number and desirability of the options available to the offeree.³⁹³ If a male college student in one class says to a female college student in another class, "Go out with me, and I'll take you to see the most sought-after play on Broadway—*The Producers!*," that arguably gives the female student a desirable option (seeing the play) that she previously lacked.

Sometimes, however, the parties may have very different perceptions about whether the new options created are desirable or not. This is particularly true with sexual relationships, which are governed by highly contested norms and in which male and female on-average perceptions may differ widely.³⁹⁴ If a man in a new heterosexual relationship tells the woman that he will end the relationship unless she agrees to greater sexual intimacy, he may see that as an offer to continue dating her in the future in exchange for her meeting his sexual needs.³⁹⁵ But she may expect the level of sexual involvement normally to escalate slowly, at a pace giving her comfort. Therefore, she may experience his insistence on quickening the pace as a threat to end their relationship unless he complies with her demand.³⁹⁶ Although this is not the sort of threat ordinarily deemed worthy of control by the law, the example illustrates how characterizing something as a

390. See *supra* text accompanying notes 36-61 (summarizing *Ferguson* facts).

391. See SCHULHOFER, *supra* note 279, at 126. Some authors reject this definition of a threat as option-narrowing, for example, because it can be hard to tell the impact on options and because asymmetrical power relations may create undue pressure for the subordinate party to accept a particular-but-undesirable option even if the numbers of choices available are in some ways increased. See, e.g., Larry May & Edward Soule, *Sexual Harassment, Rape, and Criminal Sanctions*, in *A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE* 188-90 (Keith Burgess-Jackson ed., 1999) (making similar points in the context of sexual harassment). These critics have a point, but little purpose would be served in my pursuing it because, for my purposes here, I can as readily state my position in the more traditional terms denoted by offer and threat as by using the critics' understandings.

392. See SCHULHOFER, *supra* note 279, at 121 (using the "money or your life" example).

393. See *id.* at 126.

394. See *id.* at 121-29.

395. See *id.* at 121.

396. See *id.*

threat or an offer may require choosing among conflictive perspectives on normative grounds.³⁹⁷

Rape law currently primarily regulates only threats and, even then, only threats of, or the actual infliction of, physical injury.³⁹⁸ For example, John Biggs of Pennsylvania convinced his 17 year old daughter to have sexual intercourse with him and to keep the act secret by threatening otherwise to distribute nude photographs of the daughter.³⁹⁹ Yet Biggs could not be convicted of blackmail because he obtained sex, not money; and could not be convicted of rape because he threatened public humiliation, not physical harm.⁴⁰⁰ Feminists have long argued that threats of reputational and especially economic harm can be almost equally as coercive as physical force.⁴⁰¹ Moreover, the power of a threat can be substantially increased in certain settings and certain dependent relationships.⁴⁰² That power can be directly used—as where a doctor threatens to withhold his needed services from a patient unless she consents to having sex with him.⁴⁰³ But, especially in these sorts of dependent and unequal relationships, coercion can be exercised indirectly. Thus, what looks like a legitimate offer can in fact be a coercive offer, one fairly perceived as implying a threat.⁴⁰⁴

Sexual harassment laws illustrate the point. Suppose that a male manager does not threaten to block a female employee's deserved promotion in exchange for sex. Instead, he offers her an *undeserved* promotion in exchange for sex. That sounds like an offer, plain and simple, because the employee is granted a

397. See ARCHARD, *supra* note 288, at 53 (arguing that the correct test for threats is whether they leave the recipient “no reasonable alternative” to compliance, an ultimately normative question that may at best be resolved by appeal to shared understandings). Leo Katz offers a helpful hypothetical to make a similar point in the Fourth Amendment context:

Ask yourself whether the following case involves an illegal search and seizure: the police stop a traveler at an airport because he resembles the Drug Enforcement Agency's courier profile. Stops on the basis of such profiles [let us assume] have been ruled unconstitutional. Notwithstanding this ruling, the police tell the traveler that unless he consents to be searched they will detain him until they have obtained a search warrant. The traveler consents. The robbery analogy makes clear why this consent will be found coerced and hence invalid. The traveler was being asked to buy back (through his consent to the search) what was already his: the right not to be detained.

LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 138-39 (1996); see also SCHULHOFER, *supra* note 279, at 123 (arguing that regardless of whether a woman perceives an action as a threat, the decisive question in deciding whether the law should agree with her is “whether the inducement would take from the woman anything she is legally entitled to have” and that in the dating situation, the man's offer to continue dating the woman only if she agrees to have sex with him does not violate any such entitlement).

398. See SCHULHOFER, *supra* note 279, at 52.

399. See *Commonwealth v. Biggs*, 467 A.2d 31 (Pa. Super. Ct. 1983).

400. See *id.*; SCHULHOFER, *supra* note 279, at 7 (analyzing *Biggs* case).

401. See, e.g., *Civil Society*, *supra* note 300, at 350-54, 379-84 (discussing sexual harassment laws and economic and emotional harms). See generally LEORA TANENBAUM, *SLUT! GROWING UP FEMALE WITH A BAD REPUTATION* (1999) (describing a “sluttish” reputation as coercively imposing “feminine” sexual values).

402. See SCHULHOFER, *supra* note 279, at 139-48 (cataloging examples).

403. See *id.* at 234.

404. See *id.* at 146 (offering “iron fist in a velvet glove,” that is, a masked threat; implied threats for more zealous enforcement of rules; and indirect threats in the apparent form of an offer as examples).

positive option, promotion, to which she would otherwise not have access. Yet, because of the stark power imbalance and the substantial discretion and room for judgment accorded managers, the female employee might reasonably fear that a “no” will later result in subtle and hard-to-prove retaliation, the “iron fist in the velvet glove.” She may worry that she will start receiving poor evaluations or be denied raises or challenging work. The offer operates in practice as a threat.⁴⁰⁵

The involvement of the state, especially of criminal law enforcement, creates a similar danger of coercive offers. A threat of more zealous, if otherwise legitimate, law enforcement can be powerfully coercive. The police often have tremendous discretion to enforce varying laws to varying degrees. Even where they theoretically lack such discretion, being expected to enforce a particular law “to the letter,” in practice they often retain discretion. Citizens thus understand that they may face criminal law enforcement only or primarily if they in some way incur an officer’s ire.⁴⁰⁶ A threat (express or implied) to retaliate by meticulous law enforcement if an “offer” is refused thus denies the target “the right to impartial determination of the issue on the merits (i.e., whether to enforce the law. . .).”⁴⁰⁷

Thus, if a police officer demands money for not making an arrest where the failure to arrest is a clear dereliction of duty, that seems at first blush to make the “offeree” better off, receiving a benefit (non-prosecution) to which he was not otherwise entitled. But the recipient of the offer could reasonably understand that an officer has countless opportunities to look for other infractions and may fear this officer’s doing so if his offer is rejected.⁴⁰⁸

Liberal feminist thinkers see such power imbalances as most seriously abused, thus invalidating consent, in situations of “manipulated vulnerability.”⁴⁰⁹ Manipulated vulnerability occurs when the offeror creates the situation that limits the offeree’s options.⁴¹⁰ Consequently, if a man skilled in wilderness survival invites a novice female camper into the depths of a snow-covered forest on a “practice” hike, then threatens to leave her alone to die unless she has sex with him, she is in one sense made better off by his offer: she has a chance to live that she would otherwise lack once in the woods without his help.⁴¹¹ But he intentionally created the very danger from which she now seeks to escape for the very purpose of limiting the number and desirability of her choices so that his offer would look more attractive. Liberal thinkers see such offers as inherently coercive.⁴¹²

405. See *id.* at 135 (similar example and analysis); May & Soule, *supra* note 391, at 189 (arguing that an offer to give a financially-needy female at-will employee job security in exchange for sex, which leaves a woman who cannot afford even brief unemployment with no serious alternatives but submission, is more a threat than an offer).

406. See SCHULHOFER, *supra* note 279, at 139-40.

407. *Id.* at 140.

408. See *id.* at 141-42 (articulating this example).

409. See BURGESS-JACKSON, *supra* note 281, at 98-99.

410. See *id.*

411. See *id.* at 95 (analogous example).

412. See *id.*

Each of these aspects of coercive offers—a power disparity, express or implied threats of overzealous criminal law enforcement, and manipulated vulnerability—are present in *Ferguson*. The pregnant women in *Ferguson* were poor, relatively unsophisticated in the law, and heavily dependent on their trusted physicians to see them through the vulnerability of childbearing and birth.⁴¹³ A number of them were asked to consent while in labor.⁴¹⁴ Few prosecutions of these pregnant women for child abuse based on drug usage were likely until the Hospital took the initiative to work arm-in-arm with the police to craft a program of testing and prosecution.⁴¹⁵ By starting this program and encouraging the women unknowingly to participate in testing for illegal drug use, the Hospital created the very situation of limited choice and maximum vulnerability to which the women later objected: the choice to submit to criminal prosecution now or to enter forced drug therapy and face the risk of prosecution later. Moreover, the club used to pressure the women into therapy for drug abuse was an expressed willingness of the police to refrain from what the law permitted—prosecution for child abuse—in exchange for entering a therapy program. The counterpart understanding expressed by the state, via the Hospital, was its intention to prosecute the women to the fullest extent of the law unless they submitted to the state's demands. In short, the state threatened to prosecute weaker parties, the patients, based on incriminating information that the state obtained by manipulating the patients' confidential relationship with their trusted doctors.⁴¹⁶ That is not consent.

2. Exploitation and Quasi-Coercion

The validity of consent may also be undermined if it is obtained by exploiting the victim. Exploitation invalidates consent wholly apart from whether the victim's choice is an informed one or whether the offer can reasonably be understood as involving veiled threats.⁴¹⁷ Exploitation arises from a stronger

413. See *supra* text accompanying note 39.

414. See *supra* note 44 and accompanying text.

415. See *supra* text accompanying notes 36-61 (summarizing *Ferguson* facts). Although I do not address the point here because it does not draw specifically on feminist theory, the *Ferguson* facts also suggest an “unconstitutional conditions” analogy. See TASHLITZ & PARIS, *supra* note 2, at 499-503. The idea would be that it is unacceptable to burden the exercise of a constitutional right to privacy with the condition that such exercise is impliedly permitted only at the cost of forfeiting the only affordable and available medical treatment for the pregnant mothers and their unborn children. See *id.* (articulating an information costs analysis as the best way to understand United States Supreme Court case law on when, if ever, the privilege against self-incrimination prohibits questioning under the threat of non-criminal sanctions).

416. See Baker, *supra* note 289, at 55 (defining exploitation); WERTHEIMER, *supra* note 355, at 208 (describing an exploitative transaction as one whose terms or substance are unfair).

417. See WERTHEIMER, *supra* note 355, at 208; Baker, *supra* note 289, at 55 (defining exploitation); see also ARCHARD, *supra* note 288, at 61-63 (explaining that the core understanding of exploitation is where one side takes unfair advantage of another, the risk of which is especially great in professional relationships involving dependence, trust, and emotional intimacy). Archard gives the example of a patient who must,

[O]pen herself up, lay herself bare, share significant confidences with her doctor. . . . So the professional relationship is itself one in which the client is dependent upon her professional, it is one in which the client herself may be vulnerable, and it is conducted in a manner which requires trust and openness.

party's benefiting from a weaker party's vulnerabilities that are caused by background conditions rather than by the stronger party himself.⁴¹⁸ Those background conditions arise from unfair institutional arrangements.⁴¹⁹ A nation in which all means of production are owned by the state exploits a starving worker by offering him a bare subsistence wage. His choice is illusory. If he wishes to avoid starvation, he must accept the offer that ensures him life, albeit a hard one, barely a life at all.⁴²⁰

A simple disparity in bargaining power does not in itself constitute exploitation.⁴²¹ If a wealthy law firm offers a highly paid position but involving long hours to a single, pregnant, underpaid legal aid attorney, that offer may be hard to refuse. Nevertheless, the offeree has reasonable alternatives to accepting the law firm's conditions. The lawyer might value time with her future child more than money, thus staying in her current job, though that may mean counting pennies. Alternatively, in a reasonably robust employment market, she may search for a middle ground, patiently awaiting a better, if not well-paying, job with reasonable hours. The law firm may be unwilling to alter its offer because many other talented young lawyers are willing to accept it as is. But the offer is not exploitative.⁴²²

"Exploitation is standardly distinguished from coercion, because it does not constrain desires or choices but depends upon them like strings to be played."⁴²³ Offering a hungry homeless man minimum wage to work at a gru-

Id. at 61.

418. See Jeffrey A. Gauthier, *Consent, Coercion, and Sexual Autonomy*, in *A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE* 77, 81 (Keith Burgess-Jackson ed., 1999).

419. See *id.*

420. This hypothetical follows from the logic of Gauthier's position. See *id.* at 81-85.

421. See WERTHEIMER, *supra* note 355, at 223, 264-65, 269-72 (arguing that neither unfairness nor flawed consent flow from mere unequal gain or inequality of bargaining power, nor do hard circumstances alone invalidate consent, though consent may be vitiated if, for example, such circumstances give rise to over or underestimating benefits and risks). Professor Wertheimer argues that the fairness of a transaction should be judged based upon the hypothetical market price that an unpressured and fully informed buyer would pay, a price set by neither party taking special advantage of another party's special vulnerabilities. See *id.* at 230-34. Whether or not Professor Wertheimer's test is the correct one, it does highlight the case-specific and partly normative nature of the inquiry to determine when a transaction is unfair and thus exploitative.

422. This hypothetical follows from Professor Wertheimer's explanation of why inequality of bargaining power does not alone invalidate consent. See *id.* at 223-26. Wertheimer explains that individual exploitation can cause collective harm. See *id.* at 245. Thus if one member of a group could, for example, somewhat alleviate this hard circumstance by accepting a nevertheless exploitative offer, that may lead to exploitation of others in the group and, over time, to the worsening of conditions for all. Yet if all group members resist exploitation, all may eventually obtain non-exploitative offers with better over-all results for the entire group. See *id.* at 245-46. Accordingly:

[U]nder such circumstances, allowing oneself to be exploited may be individually rational but *collectively* self-defeating. If this is so, in refusing to accept A's [exploitative] proposal, B [as an exploited group member] is simply doing her part—at some personal sacrifice—in upholding this set of beliefs. She is refusing to free-ride on the willingness of others to refuse to allow themselves to be exploited. From this perspective, one does not refuse to be exploited to get a better deal for oneself. One refuses to be exploited because one owes it to others. In seeing why fairness matters, then, we may also see something about its moral weight and force.

Id.

423. Baker, *supra* note 289, at 55.

eling, health-endangering job expands his options and offers him the things he may most want—work and money. Yet that offer is indeed exploitative.⁴²⁴

The hallmark of exploitation is that it radically limits reasonable alternatives because of the constraints imposed by “unfair” (a term to be defined shortly) social institutions.⁴²⁵ Philosopher Norman Daniels calls offers made to those victimized by such conditions “quasi-coercive”:

The intuition underlying calling unfair or unjust restrictions of options “quasi-coercive” is that they involve diminished freedom of action of the same sort, which is glaring in the central cases of coercion. A central difference may be in the mechanism through which freedom of action is diminished. We do not have the direct and invasive intrusion into the choice space of the individual, which is present in central cases of coercion, for example when the mugger exceeds his rights by pointing a gun at my head. Instead, we have an indirect, yet pervasive, erosion of that space as a result of unjust or unfair social practices and institutions.⁴²⁶

A related idea involves extending an offer to someone whose traits of character make them less likely to become informed or less able to see the other options that do exist. Those character traits may not necessarily be caused by unjust social conditions, yet advantage-takers may still be seen as “preying on the weak.”⁴²⁷ Adults obtaining young teens’ “consent” to appear in pornography is exploitative because the teens have not yet developed the full capacity for reasoned judgment that we expect in adults. If, of course, a character trait is significantly *created by* unjust social conditions, advantage taking of that trait seems closer to the core idea of exploitation.⁴²⁸

Radical feminists reject the liberals’ distinction between manipulated and non-manipulated vulnerability. Radicals find preying on a vulnerability morally objectionable regardless of who caused it.⁴²⁹ Suppose that Richard’s brother Dick creates a vulnerability, perhaps by abandoning a novice female camper in the woods—an example that I discussed earlier. If Richard followed Dick, saw

424. *See id.*

425. *See* Jeffrey A. Gauthier, *Consent, Coercion, and Sexual Autonomy*, in *A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE* 71, 79-81 (Keith Burgess-Jackson ed., 1999).

426. Norman Daniels, *Does OSHA Protect Too Much?*, in *MORAL RIGHTS IN THE WORKPLACE* 51 (Gertrude Ezorsky ed., 1987).

427. Professor Archard points out that Richard offering Mary an obscenely large amount of money to sleep with him is probably viewed as an offer while Richard’s promising dire consequences if Mary does not sleep with him is probably viewed as a threat. *See* ARCHARD, *supra* note 288, at 55-57. Yet in both cases human action renders one choice more desirable than the other. One way to explain our different reactions is that they reflect different perceptions of the *victim’s* character. *See id.* at 57. Archard explains that “[t]error excuses where greed does not. This is not to deny that both may be irresistible motives to action; it is to find the first but not the second an estimable trait of character. *Id.*

428. Archard thus points out once again that mere bargaining power disparity does not alone establish exploitation. *See id.* at 58-60. But, for example, extreme poverty might hamper her character in such a way that she lacks the will to refuse—a harm to character that may be seen as so extreme as to establish her incomplete capacity to consent under the circumstances. *See id.* at 58-60. Alternatively, she may be seen as suffering from the sort of “special vulnerability” being manipulated by Richard that is at the core of the definition of exploitation.

429. *See* BURGESS-JACKSON, *supra* note 281, at 99-100.

the abandoned woman's fear, then offered to rescue her only if she had sex with Richard, how does that suddenly render the woman's agreement consensual?, query the radicals.⁴³⁰

If the reply is to say that what really matters is whether the woman's vulnerability arises from deliberate human agency or instead from accident or nature, that, say the radicals, is no reply at all. Illustratively, "all poverty can, on a plausible account, be attributed to human action, at least in the sense of being a foreseeable consequence of certain human actions."⁴³¹

Indeed, argue the radicals, all men are collectively responsible for women's physical and economic vulnerability. This is so because all men, no matter how well intentioned, benefit from, and in small ways reinforce and encourage, female vulnerability.⁴³² Rape fear thus may make women afraid to venture out at night without a man and willing to tolerate a peaceful but insensitive man for fear of loss of his protection or of more dangerous alternative suitors.⁴³³ Men who accept these benefits (rather than still working to be more caring and sensitive) thus become complicitous in supporting an oppressive status quo.⁴³⁴

Liberals raise various objections to the radical stance. Notably, the radicals' logic seems to suggest that *all* heterosexual interaction is by definition non-consensual.⁴³⁵ Relatedly, the only solution is to await the general overthrow of unjust gendered social institutions.⁴³⁶

But there is a middle-ground alternative between the liberal and radical extremes. Our legal system already recognizes that it may be feasible and wise for the law to intervene, even under conditions of generalized oppression, only in alleviating the worst abuses under unjust social conditions.⁴³⁷ Moreover, because those abuses arise from advantage taking by those who have not significantly contributed to creating the background injustices, it may make little sense to subject those beneficiaries to criminal punishment.⁴³⁸ Rather, the solution may be to prevent some parties' unjust enrichment at another's expense while alleviating the worst social injustices.⁴³⁹

The labor market illustrates the point. The Occupational Safety and Health Administration ("OSHA") prohibits employers from even making certain offers to employees, such as "hazard pay" for agreeing to exposure to certain sorts of technologically eliminable risks, for example, to certain levels of toxins.⁴⁴⁰ Work-

430. See *id.* at 95-96 (suggesting this example).

431. ARCHARD, *supra* note 288, at 55-56.

432. See BURGESS-JACKSON, *supra* note 281, at 100.

433. See *Patriarchal Stories*, *supra* note 280, at 395-400.

434. See *id.* at 399-400 (discussing the benefits "good men" receive from rape fear); *Emotions in Date Rape*, *supra* note 102, at 52-58 (discussing the dangers of the sexually insensitive male personality).

435. See SCHULHOFER, *supra* note 279, at 83.

436. See *id.* at 53, 107 ("Truly voluntary consent, as [radicals] Muehlenhard and Schrag conceive it, exists for none of us in this lifetime.").

437. See Gauthier, *supra* note 418, at 79-82 (using labor law as an example).

438. See SCHULHOFER, *supra* note 279, at 107 ("And we can condemn the social constraints as unjustified without being logically compelled to condemn her male partner's behavior as improper.").

439. See Gauthier, *supra* note 418, at 82-85.

440. See *id.* at 81-83.

ers might welcome such offers as a better alternative than unemployment. But what they are welcoming is a new but undesirable option in an otherwise even harder world. Any worker that refuses such an offer will be replaced by one who accepts it, eventually leading all into degraded circumstances.⁴⁴¹ On the other hand, the employer needs workers to keep his company operating. By OSHA's barring hazard pay offers, companies can hire workers at all only by providing safer working conditions.⁴⁴² One of the worst abuses of unregulated capitalism is avoided without the need for revolution against the entire system, even if a more just system can be conceived.

The no-hazard pay rule illustrates a broader principle for avoiding exploitative offers. One kind of non-exploitative offer made under unjust social conditions is crafted by seeking a hypothetical market price that an unpressured and fully informed buyer would make.⁴⁴³ Rephrased, the market price must be one in which neither party takes special advantage of the other's special vulnerabilities or decision-making incapacities.⁴⁴⁴ The state's mandating such an offer involves paternalism at its best. The state prohibits certain kinds of offers on a vulnerable party's behalf in order to increase the number of *desirable* alternatives and amount of information available to him. That restriction on his freedom of choice thus ultimately enhances his autonomy.⁴⁴⁵

Sexual interaction can be conceived of as (in part) a market exchange. Legal rules that prohibit certain extreme sexually exploitative offers and mandate full exchange of information about sexual intentions seek to shift the terms of sexual bargaining in favor of the otherwise more vulnerable party.⁴⁴⁶ That is still a sort of liberal solution because it does not mandate certain outcomes. As with OSHA, sexual conduct liability rules limit some choice to enhance overall autonomy, while leaving wide room for continued bargaining.⁴⁴⁷ Martha Chamallas thus defines a sexual offer as legitimate only if "the target would have initiated the encounter had she been given the choice."⁴⁴⁸ Lois Pineau offers a test for whether a particular offer meets this standard: Did the parties make reasonable communicative efforts to determine one another's desires and intentions?⁴⁴⁹ Just as an employer is not excused by his ignorance of how workplace conditions affect employee health, so must a male sexual aggressor be deemed reckless and culpable for his failure to make reasonable efforts to de-

441. See *id.* at 82-85.

442. See *id.* at 81-84. See generally LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* (1998) (viewing sexual interactions as bargains in which state has always taken a regulatory interest in the relative power of the parties).

443. See WERTHEIMER, *supra* note 355, at 230.

444. See *id.*

445. See Gauthier, *supra* note 418, at 82-83.

446. See generally HIRSHMANN & LARSON, *supra* note 442.

447. See *id.* at 3-6, 268-70; Gauthier, *supra* note 418, at 82-85.

448. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 836 (1988).

449. See *Emotions in Date Rape*, *supra* note 102, at 4-8, 45-55 (summarizing and re-interpreting Lois Pineau's views).

termine the impact of his conduct on a woman.⁴⁵⁰ Culpable ignorance of sexual intentions is exploitative.

All the above analysis of course begs the questions, “When are social conditions unjust, and when are offers under such conditions unfair?” I need not explore the difficult and contested intellectual terrain harboring general answers to these questions. Virtually all theorists who have addressed the matter agree that relationships of vulnerability, dependence, and trust can create the kind of impaired decision making capacity most subject to exploitation.⁴⁵¹ Professional relationships, doctor-patient interaction in particular, raise this danger.⁴⁵² A patient must “open herself up, lay herself bare, and share significant confidences with her doctor.”⁴⁵³ An ill patient is emotionally vulnerable, and this may be especially so for a pregnant mom-to-be because of the risks of the intimacy of the parent-child relationship. Poverty stemming from social injustice may also be exploitative, but this should most clearly be so where that poverty deprives a pregnant patient of any medical treatment options but one.⁴⁵⁴ When even the risk of exploitation is so high, as it is under these circumstances, state intervention is called for.⁴⁵⁵ When the state conspires with the doctors to bring the threat of the full force of the state’s criminal justice system to bear to ensure patient compliance with state-mandated behaviors and the evisceration of patient privacy, the exploitation is all that more severe.⁴⁵⁶

Finally, I am not ignoring the value of the child’s life and health. Those concerns are relevant in weighing the competing interests of the state and the individual suspect in conducting the reasonableness balancing that the constitution requires. But the fetus’ health is irrelevant to whether the mother has validly consented to the loss of her otherwise constitutionally protected privacy interest.⁴⁵⁷

450. See *id.* at 45-55 (Pineau’s views as establishing a negligence standard requiring reasonable communicative efforts by the man to determine the woman’s intent); GAUTHIER, *supra* note 418, at 82.

451. See, e.g., ARCHARD, *supra* note 288, at 21, 55-62.

452. *Id.* at 61-62.

453. See *id.*

454. For a discussion of the effect of poverty on consent, see *supra* notes 157-70 and accompanying text.

455. Cf. Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 762-65 (1999) [hereinafter *Racist Personality*] (stating that conduct creating a sizeable risk of racial oppression is morally condemnable and, under appropriate circumstances, should be the basis for legal liability); *Emotions in Date Rape*, *supra* note 102, at 45-55 (discussing why certain conduct creating a significant risk of gendered oppression should be subject to criminal liability).

456. See *supra* text accompanying notes 36-61 (summarizing *Ferguson* facts).

457. These observations flow from still-more-basic ones: that, once the Fourth Amendment applies, the reasonableness of a non-consensual search requires balancing governmental against individual interests. See TASLITZ & PARIS, *supra* note 2, at 349 (summarizing reasonableness balancing). The nature of the balancing may more easily favor the state for administrative searches, but whether there is an administrative search in the first place turns on the state’s purposes, as section V will explain, not the relative size of the defendant’s and the state’s interest. See *id.* at 350.

V. ADMINISTRATIVE SEARCHES AND SOCIAL MEANING

The *Ferguson* Court's majority opinion continued to embrace the idea that the state's purpose is what distinguishes an administrative search from an ordinary criminal investigatory one. Yet the Court rejected the notion that the subjective purposes of state actors control.⁴⁵⁸ Instead, what matters is the state's "programmatically purpose," which the Court concluded was, in the case before it, criminal investigation.⁴⁵⁹ This conclusion is at first surprising because it contradicts the likely subjective intentions at work. The Hospital and the police very likely see themselves as protecting the health and safety of the pregnant women and their soon-to-be-children rather than as wreaking retribution. The credible threat of punishment may thus have been seen by these state actors simply as a motivator to ensure that parent and future child received medical help. Yet the Court found the "programmatically purpose" to be pursuit of a *criminal* investigation.⁴⁶⁰ What explains this apparent contradiction? The Court never clearly defined "programmatically purpose." But the Court did consider the extent of police involvement in creating and implementing the hospital's search program to be critically relevant in determining whether such a purpose existed.⁴⁶¹

My argument in the penultimate part of this article is that the apparent contradiction can be resolved, and the "programmatically purpose" phrase sensibly defined, by embracing the radical feminist insight that the meaning of human actions both partly constitutes and contributes to the functioning of social systems. The *Ferguson* majority was right to categorize the hospital's searches as ordinary criminal ones because that is the social meaning most fairly ascribed to the state's actions. The heavy involvement of the police sent the message that the program's purpose was punitive and retributive. The program created the sort of stigma associated with the criminal justice system, a stigma amplified by the twin aspects of the conduct involved: the alleged use of drugs *and* the violation of governing conceptions of "good" motherhood.⁴⁶²

458. See *supra* text accompanying notes 36-61 (summarizing *Ferguson* majority opinion). There is some confusing language in a recent high Court case, *United States v. Knights*, 534 U.S. 112 (2001). There, the Court upheld what it ultimately concluded was an ordinary criminal-investigation-related search but upon mere reasonable suspicion. In doing so, the Court declared in dictum, "With the limited exception of some special needs and administrative search cases, [citation omitted] 'we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.' [citation omitted]" *Id.* at 593. The actual individual motivations test seems inconsistent with the Court's recent emphasis elsewhere on "programmatically purposes." See *supra* text accompanying notes 213-36. The "individual motivations" language could thus be the result simply of careless writing. On the other hand, the *Knights* opinion does not say "with the exception of *all*" special needs and administrative search cases but rather with the exception merely of "some" of them. That might suggest that the Court sometimes applied a "programmatically purpose" and sometimes an "actual individual officer's motivation" test. If this is so, however, the Court has never stated so directly nor laid out guidelines for choosing when each test applies. Furthermore, regardless of what the Court says it is doing, in practice its case holdings and rationales are also inconsistent with an actual motivations test. See *supra* text accompanying notes 185-212. In any event, the social meaning of actions is what separates criminal from administrative searches and is, I submit, the most normatively desirable approach to administrative searches.

459. See *supra* text accompanying notes 213-36.

460. See *supra* text accompanying notes 213-36.

461. See *supra* text accompanying notes 213-36.

462. For details, see *infra* text accompanying notes 588-604.

A. Feminism and Social Meaning

It is a hallmark of much radical feminist theory that the creation of shared social meanings both partly constitutes and creates social oppression.⁴⁶³ Meanings are, of course, conveyed through language and other symbols. It is not the subjective and perhaps idiosyncratic meanings given human action by individuals that matter but rather the widely shared meanings that create a common culture.⁴⁶⁴ These meanings often operate at a subconscious level.⁴⁶⁵ Furthermore, law and legal actors are part of the social system of meaning, playing important roles in reflecting and reaffirming, or instead modifying, shared understandings.⁴⁶⁶

Feminist philosopher Drucilla Cornell, for example, argues that we are born into the world mired in social meanings based on group membership.⁴⁶⁷ When the doctor announces, “It’s a girl,” she activates a host of assumptions about what that means. Those assumptions will forever affect the way that others behave toward, and conceive of, the child and how she in turn behaves toward others and conceives of herself.⁴⁶⁸ Those conceptions are both cognitive and affective, for emotions guide our choices of to what to pay attention in the world and what value to assign it.⁴⁶⁹ In the case of women and other oppressed groups, “degradation,” the devaluing of women as equal human beings, is a frequent part of current systems of social meaning.⁴⁷⁰ Cornell therefore embraces psychoanalysis as a useful critical tool because it helps in understanding how “symbolic systems come to hold sway and how they are governed inevitably by social fantasies.”⁴⁷¹

Group affiliation is both inevitable and desirable, however, argues Cornell.⁴⁷² Liberation lies in freeing individuals to revise their group affiliations—to

463. See, e.g., PATRICIA HILL COLLINS, *FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE* 49, 54, 80, 83 (1998) (arguing that elite control of public discourses, the distilling of persons into their marketplace images, and the symbolic wounds of hate speech all help to constitute an oppressive social structure); DRUCILLA CORNELL, *JUST CAUSE: FREEDOM, IDENTITY, AND RIGHTS* 3-7, 21-24, 137-39 (2000) (arguing that we are defined by the social and symbolic worlds around us, so feminist politics requires imaginative acts envisioning a new world as essential to social resistance); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Stereotypes*, 74 S. CAL. L. REV. 747 (2001) (synthesizing feminist scholarship collectively demonstrating that much gendered oppression stems from meanings embracing the devalued worth of women); *Feminist Approach*, *supra* note 30 (suggesting that thought itself may be understood as an interpretative act).

464. See sources cited *supra* note 463.

465. See Chamallas, *supra* note 463, at 772-82.

466. See generally *RAPE AND CULTURE*, *supra* note 33 (offering an extended defense of this point in the context of rape trials).

467. See CORNELL, *supra* note 463, at 5.

468. See *id.*

469. See *id.* at 7. For a detailed analysis of the implications of human emotions fundamentally turning on cognitive evaluations of value, including what is worth our attention, see MARTHA NUSSBAUM, *UPHEAVALS OF THOUGHT* (2002).

470. See CORNELL, *supra* note 463, at 22; Chamallas, *supra* note 463, at 772-82.

471. See CORNELL, *supra* note 463, at 24.

472. See *id.* at 137.

choose them, rather than having them imposed—and to affect their meaning.⁴⁷³ Humans grow into unique individuals only in the context of webs of relationships.⁴⁷⁴ Individuation into unique personhood requires true autonomy in which each of us differentiates ourselves from stereotyped meanings.⁴⁷⁵ Protecting the “imaginary domain” that allows us to conceive of and thus choose other selves is essential to human freedom.⁴⁷⁶ Law is liberating, in Cornell’s view, when it protects that domain while discouraging the degrading meanings and physical violence that violate respect for others’ worth.⁴⁷⁷ “The law,” says Cornell, “should take a woman’s experience into account by giving her the freedom to define what her experience *means*.”⁴⁷⁸

Feminist law professor Martha Chamallas similarly argues that the major flaw in much mainstream anti-discrimination law is its focus on intentional discrimination.⁴⁷⁹ There are, Chamallas emphasizes, two equally insidious forms of generally *subconscious* bias that deeply harm women and other subordinated groups.⁴⁸⁰ These unconscious processes are forms of cognitive bias.⁴⁸¹ Chamallas focuses in particular on two such biases: “devaluation”⁴⁸² and “biased prototypes.”⁴⁸³ Devaluation involves the systematic devaluing of the worth of a member of a disfavored class.⁴⁸⁴ One example is the increased likelihood of a jury’s imposing a death sentence where the victim in a criminal case is white as compared to where the victim is black.⁴⁸⁵ Professor Randall Kennedy labels this phenomena, “racially selective empathy:” “the unconscious failure to extend to [blacks] the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to [whites].”⁴⁸⁶ “Biased prototypes” are the “stock images, mental portraits, schemas, or cultural scripts. . .that operate to limit the law’s protection of marginal social groups.”⁴⁸⁷ Prototypes are cognitive shortcuts that enable persons to make sense of new situations by categorizing them as in the same class as more familiar, prototypical ones.⁴⁸⁸ Jurors’ precon-

473. See *id.* at 139. See generally LAWRENCE FRIEDMAN, *THE HORIZONTAL SOCIETY* (1998) (suggesting that the freedom to choose group affiliations rather than have them imposed is a growing characteristic of modern civilizations worldwide).

474. See CORNELL, *supra* note 463, at 139.

475. See *id.* at 23; *Racist Personality*, *supra* note 455, at 746-58 (discussing the importance of individualized justice).

476. See CORNELL, *supra* note 463, at 139.

477. See *id.* at 21, 139.

478. *Id.* at 21 (emphasis added).

479. See Chamallas, *supra* note 463, at 747-55.

480. See *id.*

481. *Id.*

482. See *id.* at 755.

483. See *id.* at 778.

484. See Chamallas, *supra* note 463, at 756.

485. See *id.* at 760-61.

486. Randall Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1420 (1988) (quoting Paul Brest, *The Supreme Court, 1975 Term—“Foreword,”* In *Defense of the Anti-discrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976) (alterations and citations omitted in original)).

487. Chamallas, *supra* note 463, at 776.

488. See *id.* at 778.

ception of “real rapists” as strangers leaping from the bushes, for example, makes them skeptical of claims of “date rape.”⁴⁸⁹

Oppositional legal theory thus embraces the idea that changing the oppressive social meanings, whether conscious or not, associated with certain behaviors or groups is an important task of the law.⁴⁹⁰ Insulting meanings must be silenced, liberating ones enhanced. The latter can be accomplished by introducing the very different meaning-perspectives and images of large portions of the subordinated groups into public discourse.⁴⁹¹ This sort of analysis underlies radical efforts to suppress hate speech and pornography while increasing racial minority and female representation in the media, local and national politics, and the everyday centers of power in corporations, educational institutions, and entrepreneurial endeavors.⁴⁹²

Feminist legal scholar Anita Superson indeed argues that altering derogatory social meanings should be the whole point of legal prohibitions against sexual harassment on the job.⁴⁹³ Sexual harassment harms not only an individual woman but also women as a group by instantiating their subordinate status.⁴⁹⁴ It is the message of women’s group inferiority sent by harassing conduct that “interferes with the rights of subordinated-group members to participate equally in society, maintaining their basic sense of security and worth as human beings.”⁴⁹⁵ The meaning of the message is determined not by the victim’s idiosyncratic responses but by the objective fairly attributed social meanings that constitute women’s oppression.⁴⁹⁶ Superson explains:

[W]hat is decisive in determining whether behavior constitutes [sexual harassment] is not whether the victim is bothered, but whether the behavior is an instance of a practice that expresses and perpetuates the attitude that the victim and members of her sex are inferior because of their sex.⁴⁹⁷

This summary of the views of three leading radical feminist thinkers illustrates the ways in which a critical strain in feminist jurisprudence delineates existing social distinctions based on social meaning and advocates harnessing the law’s power to alter those meanings. Importantly, radical feminists do not seek to transcend social meanings, an impossible task.⁴⁹⁸ Many social meanings are

489. *Id.*

490. *See, e.g.,* COLLINS, *supra* note 463, at 47-49 (arguing that group-based points of view must be used to disrupt public “truths” about the groups).

491. *See id.* at 47-49, 52-55, 65-66, 80, 83, 86, 102.

492. *See id.* at 80-86, 102. *See generally* Civil Society, *supra* note 300 (arguing that retribution and equal social valuation best justify laws against hate speech and hostile environment sexual harassment).

493. *See* MARGARET A. CROUCH, THINKING ABOUT SEXUAL HARASSMENT: A GUIDE FOR THE PERPLEXED 147 (2001).

494. *See id.*

495. Mari Matsuda, *Public Response to Hate Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2348, 2348 (1989).

496. *See* CROUCH, *supra* note 493, at 149.

497. Anita M. Superson, *A Feminist Definition of Sexual Harassment*, 24 J. SOC. PHIL. 46, 58 (1993).

498. *See generally* ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW (2001) (arguing that antidiscrimination law really operates to try to change the social meanings that we ascribe to stereotypes and generalizations rather than ignoring

indeed liberating, and the “imaginary domain” must be wide enough to enable persons to choose with which set of meanings they affiliate while participating in meaning-evolution.⁴⁹⁹ Rather, radical feminists make the identification of pre-existing social meanings the first task of legal policymakers. Lawmaking and application must then be guided in part by current social meanings. Where those meanings are degrading, the law must seek to change them, sometimes acknowledging the law’s partial responsibility for creating them. But whatever choices the lawmakers make cannot be made in ignorance of the role of social meanings and norms.⁵⁰⁰

B. Communicative Retributivism

Although radical feminists have been among the earliest and most cogent critics of meaning-blind social theories, other scholars have embraced meaningful philosophies that are fully consistent with the insights of radical feminist thinking. For current purposes, the most important of these scholars are “communicative retributivists.”⁵⁰¹ The idea behind their philosophies is straightforward. Every human action is expressive. Expressive actions that send a message of the recipient’s inferiority to the actor do, or should, evoke retributive anger in the victim and in properly empathetic observers.⁵⁰² For example, a successful gunpoint robbery sends the message that his victim is not of equal worth to the robber. Therefore, the robber can do as he pleases, regardless of the harm that he imposes on his victim.⁵⁰³ This message of diminishment, however, also violates widely shared values of equal human worth that require refraining from physically harming another or forcibly taking his property.⁵⁰⁴ Observers embracing those values experience indignation at the blatant violation of social norms, norms that will lose their unifying power if they are not vindicated.⁵⁰⁵ Criminal punishment brings the criminal down a peg, “putting him in his place.” Such punishment sends society’s message that the offender is of no greater value than his victim.⁵⁰⁶ A mere oral declaration of such value will not do the trick. Only punishment, usually in the form of imprisonment or its threat, has the emotional power to send a message that will be taken seriously, thereby reaffirming social norms.⁵⁰⁷ Retributive punishment is therefore desir-

or eliminating them entirely). See also ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW & SOCIAL EQUALITY* (1996) (similar).

499. See CORNELL, *supra* note 463, at 4-5. See also *id.* at 7 (“Theories of justice that ignore the heart can never deliver on the roses”). “The law should take women’s experience into account by giving her the freedom to decide what her experience means.” *Id.* at 21.

500. See *supra* text accompanying notes 463-96 (summarizing radical feminist views on these issues).

501. See *Civil Society*, *supra* note 23, at 323-30 (defining “communicative retributivism”).

502. See *id.*

503. See *Racist Personality*, *supra* note 475, at 746-58 (explaining degrading messages in violence).

504. See *id.* at 750; *Emotions in Date Rape*, *supra* note 102, at 58-64 (significance of the retributive emotions in protesting against diminishing messages); Taslitz, *Civil Society*, *supra* note 23, at 348-49 (retribution, diminishment, and social bonds).

505. See *Civil Society*, *supra* note 23, at 348-49.

506. See *id.* at 320.

507. See *id.*; ERIC POSNER, *LAW AND SOCIAL NORMS* 108-11 (2001) (discussing punishment and social norms).

able when it vindicates norms that are praiseworthy as a matter of political morality, but retribution is undesirable when the opposite is true.⁵⁰⁸ Punishing the robber makes sense because it affirms both parties' equal worth. But punishing an African American male in the 1950s Jim Crow South for sitting next to a white woman on a bus would reaffirm the reprehensible social norms embracing black inferiority, precisely the opposite of the idea of equal human worth and respect on which communicative retributivism is founded.⁵⁰⁹ In its embrace of meaning identification, the salience of emotions, the centrality of respect, and the dangers of cognitive bias, communicative retributivism is fully consistent with radical feminist social meaning theories, though many such retributivists are self-identified liberals.⁵¹⁰

Merely labeling a crime as such is therefore not what truly makes it a crime. Here, I am not relying on the old *malum in se/malum prohibitum* distinction.⁵¹¹ Social attitudes determine in the first instance what are "true" crimes, meriting significant retributive punishment and being deeply stigmatizing.⁵¹² Even among true crimes, social attitudes concerning each crime's seriousness vary with the conduct at issue.⁵¹³ A comparison between social attitudes toward drunk driving versus drug abuse illustrates the point.

1. Drunk Driving, Social Stigma, and Retribution

It is likely that a majority of Americans engage in at least the occasional recreational use of alcohol.⁵¹⁴ Many Americans also drive.⁵¹⁵ Thus neither drinking nor driving are in themselves socially condemned conduct. Moreover, it is likely that many Americans have, and likely continue to, drive after drinking, though they may not then consider themselves drunk.⁵¹⁶ Drunk driving

508. See *Civil Society*, *supra* note 23, at 330-35.

509. See *id.* at 331.

510. Compare *supra* text accompanying notes 463-96 (radical feminist views), with Jean Hampton, *Correcting the Harms Versus Righting Wrongs: The Goal of Retribution*, 39 U.C.L.A. L. Rev. 1659, 1698-1702 (making the point that communicative retributivism and liberalism are consistent), and R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 41-48 (2001) (fusing liberal and communitarian sources to craft an idea of "political liberal community" and his own variant of communicative retributivism).

511. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 1-2 (4th ed. 2001).

512. *Id.*

513. See *infra* text accompanying notes 514-59.

514. See JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA 3 (1989).

515. No citation seems necessary for this proposition. I have known a handful of adults who did not drive by the time that they were college age. Of this handful, all but two—one of them my mother, the other a colleague at Howard, eventually learned to drive. Both the never-bloomers and late-bloomers spent most of their lives as residents of New York City, where subway and bus services are omnipresent. I suspect that my experience is typical.

516. Cf. Kathy Denton and Dennis Krebs, *From the Scene to the Crime: The Effects of Alcohol and Social Context on Moral Judgment*, 59 J. PERSONALITY & SOC. PSYCH. 242, 247-48 (1990).

When sober, people believe it is wrong to drive impaired. They acknowledge that others succumb to the temptation but believe they would not. But all this changes when they are out drinking. In social drinking contexts, under the influence of alcohol, people moderate both their moral convictions against driving while impaired and their judgments about engaging in this behavior. . . . In typical social drinking contexts, moral judgment appears to be a poor match for habit, convenience, and external behavior cues that favor driving (the sight of one's car; other people getting into their cars).

prohibitions were thus long understood as creating mere “sumptuary” offenses—laws regulating essential personnel expenditures on paternalistic social or moral grounds, such as “blue laws” prohibiting working on Sundays.⁵¹⁷ Significant penalties for violating sumptuary laws were long inconsistent with popular attitudes, leading juries, according to the major study on jury attitudes of the 1960s, to often acquit drunk drivers who have injured no one.⁵¹⁸ Part of the reason for such attitudes was the perception that “since almost everybody is doing it [driving drunk], it seems a violation of the principle of evenhanded justice to single out this particular defendant for prosecution.”⁵¹⁹ Another reason for jury verdicts was jurors’ empathy for accused drunk drivers: “to some extent the jurors see themselves as on trial but for the grace of God, to some extent the jury resents the sumptuary interventions, and to some extent the jury objects to the penalty.”⁵²⁰

In the 1980s, a nationwide campaign against drunk driving began, led by Mothers Against Drunk Driving (MADD).⁵²¹ That movement led to widespread enhancement of criminal penalties for, and enforcement efforts against, drunk driving, combined with educational campaigns about its dangers.⁵²² Yet enforcement efforts seem to wax and wane, likely continuing the perception that there is a low chance of being caught, thus again raising the problem of evenhanded justice.⁵²³ Publicly expressed attitudes may have changed many people, who now, when sober, label drunk driving wrongful behavior.⁵²⁴ These same people’s attitudes frequently change, however, when they have engaged in social drinking.⁵²⁵ Furthermore, despite what sober people may say publicly, a recent study found that between 1958 and 1993 jurors’ leniency—that is, their willingness to acquit—remained substantially unchanged.⁵²⁶ Interestingly, although jurors continue to acquit more frequently than do judges, judicial willingness to acquit has *increased* since 1958.⁵²⁷

The public does support the criminalization of drunk driving, but this is likely due to their belief that such punishments aid deterrence and that civil remedies alone will not do the job.⁵²⁸ Thus one researcher concluded that the public’s cry for retribution is likely to be considerable when “killer drunks” cause accidents, partly because the cost of injury is imposed on “innocent” peo-

Id.

517. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 286 & n.2 (1966).

518. *See id.* at 294-97.

519. *Id.* at 287.

520. *Id.* at 296.

521. *See* GERALD D. ROBIN, *WAGING THE BATTLE AGAINST DRUNK DRIVING: ISSUES, COUNTERMEASURE AND EFFECTIVENESS* 8 (1991).

522. *See id.* at 9-19.

523. *See id.* at 114-17; Rebecca Snyder Bromley, *Jury Leniency in Drinking and Driving Cases, Has It Changed? 1958 Versus 1993*, 20 *LAW & PSYCH. REV.* 27, 32-33 (1996).

524. *See* Denton and Krebs, *supra* note 516, at 247.

525. *See id.* at 247-48.

526. *See* Bromley, *supra* note 523, at 52-53.

527. *See id.* at 52-53.

528. *Cf.* Brandon K. Applegate et al., *Public Support for Drunk-Driving Countermeasures: Social Policy for Saving Lives*, 41 *CRIME AND DELINQUENCY* 171 (2001) (discussing public’s endorsement of legal deterrence and rehabilitation, while also supporting socially-based interventions).

ple, who do not drive drunk.⁵²⁹ Similarly, large percentages of the public favor drunk driving roadblocks to protect public safety.⁵³⁰ Yet substantial percentages of the public oppose any criminal penalties.⁵³¹ Large fines were opposed by over 60% of the public.⁵³² Indeed, for every criminal punishment, a “meaningful percentage of [survey] respondents opposed its use. Further, as the costs of the sanction rose, support decreased: large fines and confiscation or impoundment of the offender’s car—measures that are rather costly to the offender—received considerably less support than less severe sanctions.”⁵³³ The public’s heart likely hardens a bit when drunk driving results in unsafe driving but hardens substantially when accident, injuries, or death results.⁵³⁴ But where there are no ill results, “[t]here seems to be a limit. . . on how far the public wishes to go in the pursuit of deterrence.”⁵³⁵ On the other hand, there is substantial public support for psychological treatment for drunk drivers and even stronger support for spending tax dollars on educational programs and media campaigns.⁵³⁶

The data is admittedly sparse, yet suggests that the public feels little need for retribution against drunk drivers who cause no injuries. Drunk driving generally involves the negligent, rather than the knowing or purposeful, creation of a risk of harm.⁵³⁷ Such soft attitudes toward the crime of drunk driving are consistent with empirical studies and philosophical arguments that negligent conduct does and should elicit the most modest of retributive responses.⁵³⁸ Indeed, significant retributive responses to negligent behavior usually turn on a perception of an accused’s extreme and callous indifference to human suffering as a central and relatively consistent aspect of his character.⁵³⁹ Strong retributive

529. See JACOBS, *supra* note 514, at 4.

530. See *id.*

531. See *id.* at 7.

532. *Id.* at 7.

533. *Id.* at 9.

534. See *id.*

535. JACOBS, *supra* note 514, at 9.

536. See *id.* at 10.

537. For example, in Pennsylvania, a person commits the offense of driving under the influence of alcohol if he either: (1) is in physical control of the movement of a vehicle while under the influence of alcohol to a degree which renders the person incapable of safe driving or (2) is in such control while the amount of alcohol by weight in his blood, if he is an adult, is 0.10% or greater. See 75 PA. CONS. STAT. ANN. § 3731 (2002). Driving while incapable of doing so safely—the first basis for liability—is obviously a prohibition against careless, that is, “negligent,” driving. Driving when your blood alcohol level is 0.10% or greater, with no further inquiry, sounds like strict liability: you are liable even if there is no evidence that your alcohol level impaired your ability to drive safely. A better reading, however, is that the 0.10% rule is but another form of the negligence requirement because anyone drinking enough to have so high a blood alcohol level is creating a significant risk of driving negligently that is not counterbalanced by the social benefits of driving in that condition—a cost-benefit analysis that is the very definition of negligence. See *Emotions in Date Rape*, *supra* note 102, at 45-48 (explaining when formally strict liability offenses are substantively negligence offenses).

538. I am not arguing that negligent conduct never elicits strong retributive responses. See *Emotions in Date Rape*, *supra* note 102, at 45-55 (negligent indifference to a woman’s consent in a rape case fits secular notions of evil). However, negligence ordinarily elicits a far weaker retributive need than does, in ascending order of culpability, recklessness, knowledge, or purpose. See Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 14-16, 20-24 (1993).

539. See *Emotions in Date Rape*, *supra* note 102, at 45-55.

feelings also require a sense that the accused is “Other” than the “good” people and is garbage or excrement to be cleansed from the body politic.⁵⁴⁰ Neither sentiment is likely toward drunk drivers who do no harm. One well-known researcher, attempting to explain the relative lack of scholars’ interest in studying the problem of drunk driving, put it this way:

A. . .hypothesis to explain lack of criminological interest is that drunk drivers do not conform to social psychological images of “crime.” There are no ancient stereotypes of drunk drivers to rival those of murderers, thieves, and terrorists; in fact, drunk drivers are often depicted as feckless and humorous rather than as abhorrent and diabolical. A. . .related hypothesis is that drunk drivers do not conform to sociological images of “criminals.” For the most part, criminology has taken popular opinion and legislative emphasis on lower-class wrongdoing as a given. But drunk driving is not a crime associated with the poor and dispossessed. According to the FBI’s Uniform Crime Reports (UCRs), drunk drivers have the highest percentage of white offenders (90 percent) of any arrest group.⁵⁴¹

Criminal punishment for drunk driving is thus probably more about deterrence than retribution, more about safety than routing evil. As such, drunk drivers who injure no one likely face little of the sort of extreme social stigma ordinarily associated with criminal punishment. This conclusion contrasts sharply with the very different set of public attitudes embraced toward illegal drug use.

2. Drug Abuse, Stigma and Retribution

The “War on Drugs” sets its sights not only on the sellers of illegal drugs but also on those who use them.⁵⁴² The current war is part of a longer historically cyclical American pattern of tolerance, then intolerance, for drug use.⁵⁴³ The current cycle of intolerance started in the 1970s and has escalated since.⁵⁴⁴ Leading drug use historian David Musto describes the quality of periods of intolerance thus:

Soon the trend reverses; drug use starts to decline faster and faster. Public opinion turns against drugs and their acceptability begins to evaporate. Gradually, drug use becomes associated, truthfully or not, with the lower ranks of society, and often with racial and ethnic groups that are feared or despised by the middle class. Drugs begin to be seen as deviant and dangerous and become a potent symbol of evil.⁵⁴⁵

540. See *Civil Society*, *supra* note 23, at 355-66.

541. See JACOBS, *supra* note 514, at xxi.

542. See CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 56-59 (1999).

543. See MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 91-93 (1995).

544. See *id.* at 92-94.

545. TONRY, *supra* note 543, at 92-94 (discussing DAVID MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL (exp. ed. 1987)).

Drug offense sentences have accounted for a substantial portion of the trebling of the United States' prison population since 1980.⁵⁴⁶ New laws and enforcement practices foreseeably led to a disproportionate assault on poor minority communities, for example, because such drug users are the easiest to catch in the act given that drug sales in poor neighborhoods most often take place on the street.⁵⁴⁷ This process in turn reinforced images of crime and criminals as evil, in part because they are seen as not of "the people" but rather different, outsiders.⁵⁴⁸

Vilification of drug users is so extreme that scholars have analogized our treatment of users to the treatment of Jews during Nazi Germany. "[I]llicit drug users are portrayed as the source of most crime in America."⁵⁴⁹ As one Arizona detective explained, "Drugs, food stamps and guns are synonymous. If you find one, you'll find the others."⁵⁵⁰ Just as the Nazis labeled Jews disease carriers, so do we label drug users, "[c]rack-using prostitutes" seen as spreading sexually transmitted diseases, including the deadly threat of AIDS.⁵⁵¹ But mere contact with users is deadly, even apart from the literal carrying of disease. Former drug Czar William Bennett explained, "First use invariably involves the free and enthusiastic offer of a drug by a friend. This friend—or 'carrier,' in epidemiological terms—is seldom a hard-core addict. . . . A non-addict's drug use, in other words, is *highly* contagious."⁵⁵² Drug users, like the Jews in Nazi Germany, are portrayed as sexually loose, often homosexual, and enamored of sexual perversions.⁵⁵³ Drug users are often labeled "crazy," engaging in "bizarre and frightening behavior," from staring at the sun until blinded to running naked while throwing dog feces.⁵⁵⁴ Drug users are unfit to survive much less flourish, so we should waste no resources coddling them.⁵⁵⁵ They are not parents, siblings, or children; not friends, co-workers, or religious supplicants. They are, instead, subhuman,⁵⁵⁶ in the words of former President Reagan, creatures whom "[a]ll Americans of good will are determined to stamp out. . . [as] parasites."⁵⁵⁷ Drug users, like the Jews portrayed in Nazi propaganda, are "portrayed as an ever-growing group dangerous to the nation; self-preservation requires a war on

546. See TONRY, *supra* note 543, at 81-82.

547. See *id.* at 96-115.

548. Cf. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Criminal Punishment*, 51 HASTINGS L.J. 829, 858-65 (2000) (drug offenders as "scapegoats" to be banished from the community).

549. RICHARD LAWRENCE MILLER, *DRUG WARRIORS AND THEIR PREY: FROM POLICE POWER TO POLICE STATE* 16 (1996).

550. KANSAS CITY TIMES, June 17, 1989, A1, A18.

551. MILLER, *supra* note 549, at 17.

552. Office of National Drug Control Strategy 10-11 (1989); see also *DRUG POLICY 1989-1990: A REFORMER'S CATALOGUE* 95 (Arnold S. Tebab & Kevin B. Zeese eds., 1989) (critiquing Bennett's position).

553. See MILLER, *supra* note 549, at 18-19.

554. *Id.* at 19.

555. See *id.* at 21.

556. See *id.* at 23.

557. RONALD REAGAN, *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN* (1991).

them.”⁵⁵⁸ That war in turn requires ostracizing them, confiscating their property (forfeiture), and isolating or annihilating them by massively expanding their lengthy incarceration in prisons and jails.⁵⁵⁹ In sharp contrast to the public perception of drunk drivers who cause no injuries to others, drug users are viewed as inherently evil, tainted vermin to be expelled from the body politic.

3. Implications for the Law on Administrative Searches

This difference in the social meaning ascribed to drunk drivers (ordinary folks with lapsed judgment) and drug abusers (true, dangerous criminals of the worst sort) may help to explain apparent inconsistencies in the United States Supreme Court case law distinguishing between administrative and criminal-investigation-related searches and seizures. Remember that this distinction is *not* based on differences in the accused’s subjective mental states but rather on something else.⁵⁶⁰

The Court has treated drunk-driving roadblocks as serving a primarily administrative purpose. This is so even though the very evidence sought to serve that administrative purpose (protecting public safety) is simultaneously and necessarily evidence for use in an all-but-inevitable subsequent criminal DUI prosecution.⁵⁶¹ The Court has alleged that the *imminence* of the danger to public safety is what establishes the primary purposes’ being administrative.⁵⁶² But that makes little sense. The immediacy of a danger may have a logical bearing on the reasonableness of a search, but it does not in any way alter its *purpose*. Moreover, many crimes raise grave and imminent dangers to physical safety (assault, rape, robbery, among many others),⁵⁶³ so that point alone cannot distinguish administrative from criminal law enforcement purposes. If a search’s purpose does not turn on a police officer’s subjective intentions, it can instead best be understood as turning on the wider audience’s—that is, society’s—likely *perceived* intentions, intentions embodied in the commonly understood social function—the social meaning—of the search.⁵⁶⁴ DUI prosecutions are not perceived as serving significant retributive functions, so the administrative purpose of protecting against risks to physical safety can be given preeminence.⁵⁶⁵ On the other hand, the Court recently held in the *Edmond* case⁵⁶⁶ that

558. MILLER, *supra* note 549, at 24.

559. *See id.* at ix-xi. For a powerful analysis of how the War on Drugs destroys individuals and families *see* SASHA ABRAMSKY, *HARD TIME BLUES* (2002).

560. *See supra* text accompanying notes 185-212.

561. *See supra* text accompanying notes 193-205.

562. *See supra* text accompanying notes 200-202.

563. *See, e.g.*, Model Penal Code §§ 211-22 (defining assault, rape, robbery, and other crimes involving generally imminent dangers of bodily or serious bodily injuries).

564. *Cf. Civil Society, supra* note 23, at 330-35 (discussing the importance of exploring likely audience interpretations of criminal actions as the audience’s probable emotional response while condoning such interpretations and responses only when they are consistent with political morality).

565. *See supra* text accompanying notes 514-41.

566. 531 U.S. 32 (2000) (“Only with respect to a smaller class of offenses, however, is society confronted with the type of *immediate, vehicle-bound threat to life and limb* that the sobriety checkpoint in *Sitz* was designed to eliminate.” *Id.* at 43; however, “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an *imminent* terrorist attack” *Id.* at 44.) (emphasis added); *see also, supra* text accompany notes 199-207 (discussing *Edmond*). *But see*

drug interdiction roadblocks serve the primary purpose of serving criminal prosecution, the Court again partly relying on the flawed no-imminent-danger distinction. A more persuasive distinction is the greater social opprobrium attached to drug users captured in the War on Drugs.⁵⁶⁷

The importance of this distinction in social meanings is highlighted by a comparison to drug courts. These courts offer drug offenders, and sometimes other sorts of offenders who happen to have a drug problem, the option of participating in an intensive court-monitored treatment program rather than the normal and complete criminal adjudication process.⁵⁶⁸ Sometimes this option is offered before a plea (successful treatment resulting in case-dismissal), sometimes post-plea, and sometimes post-trial-conviction but pre-sentence.⁵⁶⁹ Drug courts fuse two perspectives on drug use: the moral (drug use is evil) and the therapeutic (drug use is a disease).⁵⁷⁰ Drug courts differ from ordinary criminal courts in being less adversarial, more judicially activist, more reliant on shame and approval, and deeply interventionist in defendants' everyday lives.⁵⁷¹ These courts' stress on therapy makes an accused's emotivist expression—revealing the most intimate details of his family background, sexual relations, and emotional life—central to his rehabilitation.⁵⁷² Correspondingly, it gives courts license to regulate all the areas of a drug user's life, sometimes including random day or nighttime home searches without individualized suspicion.⁵⁷³ The judges often applaud such searches not only because they deter drug use but also because they enable the court to undertake other interventions, such as couples counseling, anger management, parenting classes, and undercutting associations with the “wrong people.”⁵⁷⁴ These interventions may extend for long periods of monitoring—beyond likely prison sentences—where necessary to get a user “straight.”⁵⁷⁵ Such all-encompassing “treatment” is neither experienced by the users as, nor seen by the courts as, truly “voluntary” because a refusal to participate means imprisonment.⁵⁷⁶ The onerous conditions of drug court programs—far more demanding than ordinary probation—are likewise experienced by accused and court alike as retributive.⁵⁷⁷

C.S. Lewis, writing in 1953, described extensive “rehabilitative” efforts by the criminal justice system as anything but true therapy: “The things done to the criminal, even if they are called cures, will be just as compulsory as they were in

Edmond, 531 U.S. at 48 (Rehnquist, J., dissenting) (rejecting imminent physical danger as distinguishing drunk driving from drug interdiction roadblocks).

567. See generally MILLER, *supra* note 549 (analyzing the demonization of drug users in the War on Drugs).

568. See JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 5 (2001).

569. See *id.* at 41.

570. See *id.* at 15-17.

571. See *id.* at 63-84.

572. See *id.* at 170-72, 181-88.

573. See NOLAN, *supra* note 568, at 202-03.

574. *Id.* at 203.

575. See *id.* at 196-98.

576. See *id.* at 199-201.

577. See *id.* at 51-57, 170-71; see also Hampton, *supra* note 510, at 1685, 1687-98 (1992) (discussing the strong retributive component of forced sex therapy for those convicted of sexual assault).

the old days when we called them punishments.”⁵⁷⁸ The American Friends Service Committee similarly has said: “When we punish the person and simultaneously try to treat him, we hurt the individual more profoundly and more permanently than if we merely imprison him for a specific length of time.”⁵⁷⁹ C.S. Lewis again cautioned:

[T]hey are not punishing, not inflicting only healing. But do not let us be deceived by a name. To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of “normality” hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not?⁵⁸⁰

Modern drug courts similarly try to restructure the individual in the image chosen by the state.⁵⁸¹ The bottom line is this: all parties understand that when the criminal courts enter the picture, retribution and the social stigma associated with even potential criminal conviction remain central to even the most “therapeutic” of programs.⁵⁸² The police play an especially important symbolic role in this process. Police serve many functions—order maintenance, citizen assistance, and investigating and prosecuting crime.⁵⁸³ Both because of safety con-

578. C.S. LEWIS, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 224 (June 1953).

579. AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 147-48 (1971).

580. LEWIS, *supra* note 578, at 227.

581. See Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 522-23 (1999) (generally defending the movement yet acknowledging that drug court “requirements may prove more onerous than the traditional court sanctions for the same offense” and “generally obligate a defendant to make more frequent court appearances and force the defendant to undertake forms of treatment which place more burdens on the defendant than normal probation”); see also, NOLAN, *supra* note 568, at 194-204 (summarizing ways in which drug courts seek to restructure the individual).

582. See NOLAN, *supra* note 568, at 205-06. Nolan posits that,

[A]rguably, the drug legalization debate is best framed according to a just desert understanding of the purpose for punishment. From this vantage point, those in favor of legalization view the harsh sentences as disproportional to the offense of drug use. Those opposed to the legalization of drugs argue that involvement with drugs deserves some form of criminal sanction. Those in the middle view certain drug offenses (e.g., selling narcotics to minors) as deserving strict sentences and others (e.g., recreational use of marijuana) as perhaps warranting no penalty at all. Regardless of one's position, the questions are still the same. Are the laws just? Are the sentences proportional to the offense? The contours of the drug legalization debate, as such, rely on a just desert notion of justice. But the drug court circumvents the legalization debate altogether. It does not make drug use a wholly medical matter, because it does not remove the social control of drugs from the legal world. Rather the therapeutic and legal views are intertwined. The drug courts employ the knowledge and expertise of the therapeutic worldview, but in the very center of the criminal adjudication process.

Id.

583. See, e.g., DAVID H. BAYLEY, POLICE FOR THE FUTURE 15-35 (1994) (discussing the investigation and prosecution of crime); SUSAN L. MILLER, GENDER AND COMMUNITY POLICING 99-117 (1999) (examining citizen assistance); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 23-55 (2001) (discussing the maintaining of order). See generally JAMES

cerns and the “not-a-true-crime” nature of DUI, police DUI roadblocks can easily be seen as serving order maintenance and safety protection functions. But drug interdiction roadblocks are more likely seen as policing serving its function of aiding in the investigation and potential prosecution of crime, in effect, the first stop on a road that may lead to the criminal courthouse door.⁵⁸⁴ If that is right, then police involvement in a scheme to gather evidence of drug use in a manner that maximizes the chances of using that evidence in a later criminal trial; that involves the police in close monitoring of “treatment” programs; and that threatens criminal prosecution as the penalty for disobedience—all of which were true in *Ferguson*⁵⁸⁵—should carry similar social stigma. There is little to distinguish the pre-trial coercion of treatment in criminal drug courts from the pre-trial coerced treatment in *Ferguson*.

But the stigma affixed to the women’s conduct in *Ferguson* was amplified still further because the crimes alleged were not simply drug use but child abuse.⁵⁸⁶ That distinction—involving the stigma of violent crimes against one’s child—implicated a serious breach of our deepest concepts of motherhood.⁵⁸⁷ That in turn made the retributive purposes of the actual and threatened punishment associated with the investigatory searches in *Ferguson* all the more powerful.

4. Motherhood’s Meaning

To be a mother in our culture is to take upon oneself the obligations of “preservative love, nurturance, and training” of one’s children as a substantial life responsibility.⁵⁸⁸ Preservation of the child’s physical health and security is historically the preeminent of these demands.⁵⁸⁹ “A mother who callously endangers her child’s well-being is simply not doing maternal work.”⁵⁹⁰ Indeed, when such endangerment is intentional or extreme, the mother becomes a “monster,” a hideous creature whose very survival endangers all that holds society together.⁵⁹¹ Children, hearth, and home collapse when a mother fails to fit her assigned role.

Susan Smith was the classic mother-turned-monster, a “small-town Medea who could not be allowed to live.”⁵⁹² In July 1995, Smith, then aged 23, was convicted by a South Carolina jury of murdering her two children, three-year-old

LARDNER & THOMAS REPPETTO, *NYPD: A CITY AND ITS POLICE* (2000) (tracing changing functions and social roles of the police over time in one of America’s premier cities).

584. See *supra* text accompanying notes 193-205.

585. See *supra* text accompanying notes 36-61 (summarizing *Ferguson* case facts).

586. See *supra* text accompanying notes 24-25 (summarizing crimes alleged in the *Ferguson* case).

587. See *infra* text accompanying notes 26-27.

588. See SARA RUDDICK, *MATERNAL THINKING* 17-18 (1995).

589. See *id.*

590. *Id.*

591. See EDWARD J. INGEBRETSEN, *AT STAKE: MONSTERS AND THE RHETORIC OF FEAR IN PUBLIC CULTURE* 1-17, 99-123 (2001) (defining “monstrosity” and explaining its connection to motherhood). Ingebretsen continues: “In the emotional shorthand of family values, monstrosity lurks, particularly, in those who repudiate gender or fail it—the homosexual or the bad mother.” *Id.* at 121; see also Kennedy, *supra* note 548, at 835-45, 858-68 (2000) (arguing that retributive punishment promotes social solidarity under modern circumstances by marking criminals as “monsters”).

592. INGEBRETSEN, *supra* note 591, at 99.

Michael and fourteen-month-old Alex.⁵⁹³ Nine months earlier, Smith had told police officers that an African-American male forced her out of her car at gunpoint, kidnapping her two children and stealing her car.⁵⁹⁴ Nine days later she confessed to strapping the boys into the car and rolling it into a nearby lake.⁵⁹⁵

The media described her act as “unspeakable,” arguably because it offended our view of children as symbols of the very reason for the existence of culture and family and of the home as a “haven for domestic virtue.”⁵⁹⁶ One scholar summarized the public’s reaction:

Numerous reports vented upon the question, “Why does a mother kill her child?” “A shocked South Carolina town asks: “Why?” intoned the *USA Today*. A woman interviewed on NPR says, “I just can’t imagine any mother doing that.” In some disheartening way, as the narrative cycle concluded in the July, 1995 trial, it seemed clear that the story line was ideologically directed to make such statements possible. . . One headline asked, or rather declared, “Mothers Wonder: How?” Another report notes that Smith (and Pauline Zile [another mom who killed her children]) will suffer “great pain”—not primarily for the deaths of their children but, in addition, for charges even more daunting than these. The two women are guilty of “betraying motherhood,” indeed, but also of betraying the “rest of the country,” and, finally, for “all the frightened little children who will be lost or kidnapped from now on.”⁵⁹⁷

Pregnant addicts, like the women in *Ferguson*, are not seen as much better than baby killers like Susan Smith.⁵⁹⁸ Political scientist Iris Marion Young explains:

The level of passion directed against pregnant addicts often seems higher than that felt for most ordinary criminals. It is not just anyone who has harmed her baby as, for example, by shooting it up with cocaine. It is the child’s *mother*. The mother is supposed to be the one who sacrifices herself, who will do anything for her child, who will preserve and nurture it. That’s what mothering *means*. The rage directed at pregnant addicts unconsciously recalls the feeling that we all had as children of rage toward our mothers who were not always there for us, did not always respond to our needs and desires, and sometimes pursued their own purposes and desires. The mother who harms her child is not merely a criminal; she is a monster.⁵⁹⁹

The stigmatizing rage felt toward pregnant mothers is enhanced when those mothers are black.⁶⁰⁰ Black women are disproportionately more likely than

593. *Id.* at 101.

594. *Id.*

595. *Id.*

596. *Id.* at 102.

597. INGEBRETSEN, *supra* note 591, at 104.

598. See IRIS MARION YOUNG, INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY 77-80 (1997) (explaining that, and why it is so).

599. *Id.* at 77-78.

600. See *id.* at 78. See also Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV L. REV. 1419 (1991) (focusing especially on the policy implications of race intersecting with drug-addicted motherhood). For a more general analysis of the stigmatization of black women more broadly, and black motherhood specifically, see MICHAEL PORTER, *THE CONSPIRACY TO DESTROY BLACK WOMEN* (2001).

white women to be in a lower economic class, bringing them more frequently into contact with state institutions so that they will more probably be punished than will be whites.⁶⁰¹ Black motherhood has from the dawn of the republic been devalued in the white mind.⁶⁰² “In the tradition of American racial attitudes, all black women are by definition not ‘good’ mothers, and it would be best if they did not bear children at all.”⁶⁰³ Black mothers, like the women in *Ferguson*, already bear a stigmatic mark by nature of their skin color.⁶⁰⁴ Black pregnant drug addicts, again like those in *Ferguson*, confirm by their conduct the white assumption that black mothers are inherently unworthy: natural criminals.

The combination, therefore, of race, class, breached motherly obligations, extensive police involvement directed toward prosecution, and the women’s being charged with the “true” crime of drug abuse carried a powerful social message that the drug testing and treatment program in *Ferguson* had the primary “programmatically” purpose of marking the pregnant patients as criminal suspects rather than as subjects of the state’s administrative goals of patient safety and health.

VI. CONCLUSION

The *Ferguson* case is best understood in the light of feminist theory concerning consent and social meaning. Feminist consent theory reveals the importance of a variable notion of consent sensitive to the relative power imbalances between the parties. Moreover, the idea of consent is a robust one, requiring more than simple “voluntariness.” Consent must also be meaningfully knowing and intelligent.⁶⁰⁵ But even voluntariness, feminists teach, requires far more protection than the absence of actual or threatened physical or mental torture. Coercive offers taking advantage of relationships of dependence and trust are involuntary.⁶⁰⁶ In *Ferguson*, physicians took advantage of their poverty stricken patients’ trust and need to obtain their uninformed agreement to certain medical tests. These physicians then used those tests to give the patients offers they could not refuse: mandatory, involuntary therapy or prison.⁶⁰⁷ That is not a “consensual” choice.

This feminist analysis raises broader questions, however, of the wisdom of current consent doctrine. Granted, ordinary police encounters with suspects on streets or buses do not involve the sort of relationship of physician-patient trust present in *Ferguson*. Nevertheless, there is hardly an absence of power imbalances (favoring the state) or implicit coercion in such everyday police-citizen

601. See YOUNG, *supra* note 598, at 78.

602. See *id.*

603. See *id.*

604. See generally CRITICAL RACE FEMINISM: A READER 125-64 (Adrien Katherine Wing ed., 1997) (tracing various ways in which our culture stigmatizes black motherhood).

605. See *supra* Part IV (summarizing feminist consent theory).

606. See *supra* text accompanying notes 281-87 (discussing feminist notions of voluntariness and the importance of threats and coercive offers).

607. See *supra* text accompanying notes 36-61 (summarizing the *Ferguson* facts and analyzing their significance).

interactions.⁶⁰⁸ Nor can the existence of some measure of knowing awareness of the right to say “no” or intelligent appreciation of the consequences of agreeing to a search be entirely ignored in any rational definition of “consent.”⁶⁰⁹ Perhaps “consent” does not identify a one-size-fits-all concept, but neither does it justify equating itself with mere voluntariness, and a weak form of voluntariness at that.

Feminist social meaning theory offers for the first time a coherent way to distinguish between administrative and criminal-investigation-related searches.⁶¹⁰ The Court has said that “programmatic administrative purposes,” not subjective desires, identify a search as “administrative.”⁶¹¹ Yet the irrelevance of subjective purposes skirts this question: what is the alternative? The most plausible perception of the audience at which a suspicionless or low suspicion search is aimed is an alternative, “objective” way to identify a search’s “programmatic” purpose. “Plausible perceptions” can include the idea of social meaning.⁶¹² Drunk driving is technically a crime, but where no person or property is harmed, it neither elicits significant public demands for retribution nor significantly stigmatizes a guilty party’s name.⁶¹³ But drug abusers are perceived as evil social infections to be purged from the body politic.⁶¹⁴ Mothers who abuse their children are considered particularly reprehensible, and this condemnation is magnified for poor black women.⁶¹⁵ Searches of pregnant black drug addicts for evidence of drug abuse presumed harmful to their soon-to-be-born children thus carry the kind of status diminishing stigma associated with ensnarement in the criminal justice system. Such searches are thus best seen as being done for the purposes of criminal rather than administrative prosecution. Although the Court has labeled several types of searches for evidence of drug abuse “administrative,” none of these searches carried the additional stigma of breached maternal obligation, child abuse, and racial and class criminality stereotyping.⁶¹⁶ These are distinctions in social meaning that help to reconcile the apparent inconsistencies in the doctrine.

Nevertheless, a social meaning focus can also call the wisdom of existing doctrine into question. Pressing need, such as avoiding train accidents by

608. See DAVID COLE, *NO EQUAL JUSTICE* 27-34 (2001) (describing the power imbalances in ordinary “consensual” searches).

609. See *supra* text accompanying notes 288-99 (discussing importance of information and understanding to consent).

610. See *supra* Part V.B.3 (discussing significance of social meaning theory for administrative searches summarized).

611. See *Ferguson*, 532 U.S. at 81-84.

612. See *supra* text accompanying notes 463-500.

613. See *supra* Part V.B.1 (discussing minimal social stigma from drunk driving absent injury or accidents).

614. See *supra* Part V.B.2 (discussing how drug abusers today face extreme social ostracism and stigmatization).

615. See *supra* text accompanying notes 600-04 (discussing public images of pregnant black women).

616. See TASLITZ & PARIS, *supra* note 2, at 349-70 (summarizing administrative search cases up to 1997); ANDREW E. TASLITZ & MARGARET L. PARIS, 2001 SUPPLEMENT, *CONSTITUTIONAL CRIMINAL PROCEDURE* 26-40 (2001) (summarizing administrative search cases between and including 1997 and 2001).

stoned engineers, can justify compromising the warrant and probable cause requirements, even for ordinary criminal searches, as the Court recognized in creating the “stop-and-frisk” on mere reasonable suspicion doctrine in *Terry v. Ohio*.⁶¹⁷ But the presumption favoring some sort of individualized suspicion requirement is apparently harder to overcome, and certainly should be harder, in criminal searches than in administrative ones.⁶¹⁸ Searches for drug abuse by suspects who are not pregnant still may carry a significant criminalizing social stigma.⁶¹⁹ To declare such searches “administrative” too easily minimizes their regulation.⁶²⁰ If they are instead located within the *Terry* criminal case reasonableness-balancing methodology, that should at least favor significant *evidence* of a drug problem that actually imminently endangers safety before individualized suspicion can be entirely abandoned.⁶²¹ Thus a case like *Skinner v. Railway Labor Executives Ass’n*,⁶²² in which there was a proven record of intoxication by safety-sensitive personnel, thus endangering passengers and crew, might still sensibly merit a random, suspicionless drug testing program.⁶²³ But a case like *National Treasury Employees Union v. Von Raab*,⁶²⁴ in which there was no equivalent evidence concerning U.S. Customs Service employees, would no longer make sense.⁶²⁵ In any event, a social meaning inquiry more keenly highlights the costs and benefits of searches in a way that should improve the rationality of the reasonableness balancing that the Fourth Amendment requires.⁶²⁶ It reminds us, as does the best of feminist theory, that human emotion, social status, and political and economic power must be taken into account if the law is to achieve both the appearance and reality of justice.⁶²⁷

617. 392 U.S. 1 (1968).

618. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000) (“We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.”). The Court’s recent decision in *Board of Educ. v. Earls* further supports this conclusion. 2002 U.S. Lexis 4882. There, in the context of upholding a school district’s drug-testing program for all students participating in extracurricular activities, including random drug-testing, the Court emphasized that there is no irreducible Fourth Amendment individualized suspicion requirement in the context of special needs searches involving health and safety. See *id.* For more details on *Earls*, see *supra* note 210.

619. See *supra* text accompanying notes 542-59.

620. See TASLITZ & PARIS, *supra* note 2, at 349-70 (discussing the significance of categorizing a search as “administrative”).

621. See *id.* at 318-70 (comparing *Terry* line of cases with those under the administrative search doctrine).

622. 489 U.S. 602 (1989).

623. See TASLITZ & PARIS, *supra* note 2, at 364-65 (analyzing *Skinner*).

624. 489 U.S. 656 (1989).

625. See TASLITZ & PARIS, *supra* note 2, at 365-66 (analyzing *Von Raab*). Post-*Ferguson*, the Court majority apparently continues to disagree with me on this point. See *Board of Educ. v. Earls*, 2002 U.S. Lexis 4882 at *26 (stressing, in relying in part on *Von Raab*, that evidence demonstrating a drug abuse problem is not always necessary to the validity of a testing regime, though finding—as the dissenting Justices did not—ample evidence of such a problem to “shore up the need for. . . [a] drug testing program”).

626. See *id.* at 150-57 (discussing cost-benefit analysis required by Fourth Amendment “reasonableness” balancing).

627. See generally *What Feminism*, *supra* note 22 (summarizing basic tenets of feminist legal theory while illustrating their application to evidence rules at criminal trials).