

FERGUSON V. CITY OF CHARLESTON AND CHILD WELFARE

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How far can a public hospital go to encourage drug-using prenatal patients to accept treatment for their addictions? Not so far as to provide law enforcement with the results of the patients' positive drug screens, if the hospital performed the drug screens without the consent of the patients. In *Ferguson v. City of Charleston*,¹ the U.S. Supreme Court held that doing so without probable cause or search warrants runs afoul of the Fourth Amendment, and the Court remanded the case for a determination as to whether the patients had in fact consented to the searches.² The Court found that, despite the contrary reasoning of the Fourth Circuit, the hospital's intention to use the threat of arrest and prosecution to force the women into drug treatment did not bring the practice within the ambit of the "special needs" doctrine, and so the Fourth Amendment's prohibition against searches applied.³

The final result here is a relief for privacy advocates. The specter of doctors and other medical personnel working in concert with police to gather evidence against women seeking prenatal care, presumably in confidence, is an unnerving one. While the hospital had developed a list of nine criteria that would trigger a cocaine toxicology screen, the list was disjunctive, so that a urine screen would be conducted if the patient presented with something as vague as "incomplete prenatal care" or "pre-term labor of no obvious cause." The indefinite nature of the criteria make it clear that nearly any pregnant woman, not only one presenting a clear indication of drug problems, could have had her privacy invaded under the hospital's policy.

But that such a practice could go unchecked for a period of time is perhaps less surprising in light of an underlying case. In *Whitner v. State*,⁴ South Caro-

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1. 532 U.S. 67 (2000).

2. In *Ferguson*, nine women brought suit against the City of Charleston when the Medical University of South Carolina and the Charleston City Police Department adopted a program wherein the hospital administered drug screening tests to certain women who sought prenatal care at the hospital. When the program was first adopted, a positive test result could be immediately turned over to the police and the police would then arrest the pregnant woman. The program was eventually modified so that the hospital asked any pregnant woman that tested positive for cocaine use to choose between arrest or a drug rehabilitation program. The program itself did not address medical treatment for the children born to women who tested positive. *Id.*

3. *Id.* at 78 (noting that the "special needs" doctrine provides for a balancing test that weighs the individual's privacy interest against the special need that supports the governmental intrusion).

4. 492 S.E.2d 777 (S.C. 1997).

lina's Supreme Court specifically held that a woman's guilty plea to criminal child neglect for the act of smoking crack cocaine during the third trimester of her pregnancy was appropriate. The Court claimed that the plain rules of statutory construction required that it read the word "child" as it appeared in the statute⁵ to include "viable fetus." The Court also reviewed decisions in the wrongful death and feticide arenas, as well as sections of the child welfare code, to support its construction of the term.⁶ While the *Ferguson* Court only mentions *Whitner* in its second footnote, this case in fact provided the means by which criminal complaints were lodged against many of the patients in the *Ferguson* case. Thus, the legal status of the fetus is intrinsic to the *Ferguson* case.

These cases raise a local question: pre-*Ferguson*, would North Carolina law have allowed for such a practice? The status of a fetus differs from one area of the law to another here.⁷ The North Carolina Constitution has been interpreted to exclude a fetus as a person.⁸ Nor will killing a fetus support a charge of manslaughter,⁹ though intentional injury to a pregnant woman resulting in harm to the fetus can elevate the criminal charges filed.¹⁰ However, a viable fetus is a person whose claim falls within the purview of the wrongful death statute,¹¹ and a fetus can take in an estate as if born.¹²

On the whole it seems unlikely that the *Ferguson* facts could have arisen in North Carolina. Though the representatives of individuals killed in utero may pursue wrongful death actions and children can acquire certain property rights in utero, in the more relevant areas of North Carolina constitutional and criminal law, the courts have stopped short of declaring that a fetus is a person. If a

5. S.C. CODE ANN. § 20-7-50 (Supp. 2001).

6. See *Whitner*, 492 S.E.2d at 779-80.

7. For an exhaustive review of the status of a fetus under North Carolina law, see Tony Hartsoe, *Person or Thing - In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169 (1995).

8. *Stam v. North Carolina*, 275 S.E.2d 439 (N.C. 1981) (involving a challenge to the use of public tax dollars to fund abortions, in part on the grounds that the fetus was entitled to due process before deprivation of life). The North Carolina Supreme Court upheld the trial court's grant of summary judgment and its specific finding that a fetus is not a legal "person" within the meaning of the North Carolina Constitution. *Id.* The North Carolina Court of Appeals had reached the same conclusions below in *Stam v. State*, 267 S.E.2d 335 (N.C. Ct. App. 1980).

9. *State v. Parsons*, 374 S.E.2d 123 (N.C. 1989) (involving a defendant who was indicted for killing "a nameless living female fetus which was in the body of its mother" after a fetus was killed in a car accident). The trial court dismissed this case for failure to allege a material element of manslaughter, specifically, that defendant killed a living human being, and the State's second indictment alleging that the defendant killed "a living human being, Kandy Renae Greer, a viable but unborn female child" was dismissed as collaterally estopped by the first attempt. *Id.*

10. Under N.C. GEN. STAT. § 14-18.2 (2001), a defendant who causes injury to a woman he knows to be pregnant which results in the miscarriage or stillbirth of the fetus is guilty of a crime one level elevated above that which he committed against the woman. The statute specifically excludes permitted abortions and, more significantly, acts committed by the woman herself. It appears the *Ferguson* plaintiffs would not have been subject to criminal charges in North Carolina under this statute.

11. See *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1989); see also *Greer v. Parsons*, 405 S.E.2d 921 (N.C. Ct. App. 1991), *aff'd*, 416 S.E.2d 174 (N.C. 1992).

12. N.C. GEN. STAT. § 41-5 (2001); see also *Mackie v. Mackie*, 52 S.E.2d 352 (N.C. 1949) (establishing that such property rights attach 280 days before the child's birth).

fetus is not a person, then it follows that the drug-using pregnant woman cannot be charged with a crime against it.

While most of us would applaud the result in *Ferguson*, the case most definitely raises a concern: if the woman is not criminally charged, what happens to the resulting child? Surely we can all agree that a pregnant woman's use of illegal substances does not bode well for the child's health--nor for the woman's parenting abilities. It is appropriate in these situations to involve child welfare professionals.

In North Carolina, any person or institution suspecting that a child is abused, neglected or dependant must report that case to the local child welfare authority.¹³ Hospital personnel that conduct a proper, medically-indicated toxicology screen on a newborn, then, may feel obliged under the law to report the child's positive test result and surrounding circumstances to the county Department of Social Services, which is required to conduct an investigation into all reports of abuse, neglect and dependency.¹⁴ North Carolina's definition of a neglected child is extremely broad, including a child "who does not receive proper care, supervision, or discipline," and "who lives in an environment injurious to the juvenile's welfare."¹⁵ South Carolina's definition is similarly broad.¹⁶

In either state, then, an investigation into the circumstances of a newborn with a positive toxicology is likely to uncover additional factors that will bring the case within the definition. At that point services can be offered to the mother if appropriate. This was the alleged goal of the tactics employed by the hospital staff in *Ferguson*, but clearly a child welfare investigation after birth of a child does not carry quite the same coercive overtone as a threat of criminal prosecution while a woman is still pregnant.

Should it become necessary to remove the child for its own safety, criminal charges are still not required. Child welfare agencies file their actions in civil rather than criminal court.¹⁷ As the trend in child welfare is toward a less punitive, more family-centered, co-operative approach that can involve multiple responses,¹⁸ social work professionals view criminal court as the last forum likely to result in abstinence from drugs and therefore better parenting. Social workers as well as adherents to the Fourth Amendment can applaud the *Ferguson* decision.

13. N.C. GEN. STAT. § 7B-301 (2001).

14. N.C. GEN. STAT. § 7B-302(a) (2001).

15. N.C. GEN. STAT. § 7B-101(15) (2001).

16. S.C. CODE ANN. § 20-7-490(2) (2001).

17. N.C. GEN. STAT. §§ 7B-101(6), -200 (Supp. 2001); S.C. CODE ANN. §§ 20-7-490(20), -736(A) (Supp. 2001).

18. See generally Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, 8 THE FUTURE OF CHILDREN 104 (1998).