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Eleftheria Keans
leftykeans@yahoo.com

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STUDENT INTERROGATIONS BY SCHOOL OFFICIALS: OUT WITH AGENCY LAW AND IN WITH CONSTITUTIONAL WARNINGS

ELEFThERIA KEANS*

Abstract: When public school students admit to violating of school rules to their principals, they may also be admitting to a violation of criminal law. Increasingly, principals share these confessions with local law enforcement and the students are charged in a criminal proceeding. Because principals, knowing the evidence will be turned over to law enforcement per school policies, are seeking evidence to use against their students, these students should be so warned before an interrogation with their principal. Though most prior case law involving student interrogations has been decided under agency law, the Supreme Court's decision in *Ferguson v. City of Charleston* suggests a new framework to analyze student interrogations by school officials. *Ferguson* dealt with a Fourth Amendment search, but suggested the same analysis would be applicable in Fifth Amendment cases. Because Fourth Amendment school cases often value the same factors as in the *Ferguson* analysis, *Ferguson's* test, which requires constitutional warnings when state actors seek out incriminating evidence, should also be applied in Fifth Amendment school cases.

INTRODUCTION

Imagine you are a public high school student who has brought marijuana to school. You sell some of the drugs to a fellow student, who is caught with them and gives the principal your name as her source.¹ The principal takes the confiscated marijuana to the local police department and informs the police that, upon her return to school, she is planning to question you.² The principal calls you to her office, explains to you that she has reason to believe you are carrying drugs, and

* Articles Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2006–2007). Thanks to my mom for showing me the importance of social justice and action, and to all my students from Marshall Fundamental Secondary School (Pasadena, California) for the many, many lessons they taught me.

¹ See generally *State v. Tinkham*, 719 A.2d 580 (N.H. 1998). All of the facts in this Introduction come from *Tinkham*. See *id.* at 580, 581, 582.

² See *id.* at 581.

asks you to empty your book bag.³ You comply.⁴ The principal finds a small wooden container with a peculiar odor, which she seizes and explains will be turned over to the police.⁵ After this search, the principal tells you that another student has implicated you as selling drugs in the school parking lot which you confirm.⁶ You fill out a student-referral form to give your version of events.⁷ After doing so, the principal informs you that you will be suspended for five days and that further action will likely be taken against you.⁸ Then the principal contacts the police, tells them about the suspicious item she confiscated as well as the details of her conversation with you, and gives them your written confession.⁹

Eventually, you are charged with selling marijuana to another student on school property.¹⁰ At your trial, you move to suppress the wooden container and the student-referral form.¹¹ You claim the search that revealed the wooden item was unconstitutional and that your version of events (essentially, a confession) on the student-referral form was given without *Miranda* warnings.¹² Unfortunately, the law on school searches is well-established; courts only require that searches by school officials be reasonable under the circumstances, so the motion is denied and the ruling is later affirmed on appeal.¹³

You might think, however, that your argument for the suppression of your statement has a good chance of success. After all, the principal had already given the police potentially incriminating evidence and informed them that she was going to question you, specifically.¹⁴ From her statements to you and to the police, it was clear that the principal had every intention of turning any further evidence over to the police.¹⁵ You have watched enough television to know that anything you say to the police "can and will be used against you in a court of law," but

³ *See id.*

⁴ *See id.*

⁵ *See id.* at 582.

⁶ *See Tinkham*, 719 A.2d at 581.

⁷ *See id.* at 582. A student-referral form is used when disciplinary action is taken against a student and provides space for both the student and administrator to explain their versions of the events at issue. *See id.*

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.* at 582.

¹¹ *See Tinkham*, 719 A.2d at 581.

¹² *See id.* *See generally* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

¹³ *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985); *Tinkham*, 719 A.2d at 584.

¹⁴ *See Tinkham*, 719 A.2d at 581.

¹⁵ *See id.*

you were talking (and confessing) to your principal—not a police officer.¹⁶ You knew you might be punished for violating school rules, but you never considered that anything you told your principal might be used against you in a criminal situation.¹⁷ Indeed, if you had, perhaps you would not have admitted anything or filled out a student-referral form without first speaking to a lawyer, such as the kind police on television shows always offer suspects when reciting *Miranda* rights.¹⁸ Unfortunately for you, however, school officials do not have to give students any type of *Miranda* warnings before they conduct interrogations, even if they have every intention of turning over evidence to the police, just as your principal had.¹⁹ As a result, your motion is denied and the denial is upheld on appeal.²⁰

Lest you think you just happened to be in an unfriendly jurisdiction, you should know that many jurisdictions have similarly ruled that school officials do not need to give *Miranda* warnings before questioning students.²¹ Courts have ruled this way based on two lines of reasoning. First, because school officials are not law enforcement officers and do not have the same objective or purpose as law enforcement officers, they are not per se required to give *Miranda* warnings.²² Second, if school officials are acting as agents of law enforcement at the time of the interrogation, courts will only require *Miranda* warnings in specific situations.²³ This basis of analysis is somewhat misleading, however, because courts rarely find that such an agency relationship exists.²⁴

Without dispute, school officials and society have an important and legitimate interest in preventing drug distribution, or any crime for that matter, on school property.²⁵ And, as the Supreme Court and many state courts have found, school officials should have more latitude than

¹⁶ See *id.* at 581–82.

¹⁷ See *Miranda*, 384 U.S. at 444.

¹⁸ See *id.*

¹⁹ See *Tinkham*, 719 A.2d at 584.

²⁰ See *id.*

²¹ See, e.g., *In re Navajo County Juvenile Action No. JV91000058*, 901 P.2d 1247 (Ariz. Ct. App. 1995); *In re Corey L.*, 203 Cal. Rptr. 359 (Cal. Ct. App. 1988); *Commonwealth v. Snyder*, 597 N.E.2d 1363 (Mass. 1992); *State v. Biancamano*, 666 A.2d 199 (N.J. Super. A.D. 1995); *In re Brendan H.*, 372 N.Y.S.2d 473 (Fam. Ct. 1975); *In re Drolshagen*, 310 S.E.2d at 927 (S.C. 1984).

²² See *Tinkham*, 719 A.2d at 583.

²³ See *id.* at 583–84.

²⁴ See *id.*; see also *Navajo Co. Juvenile Act. No. JV91000058*, 901 P.2d at 1249; *Snyder*, 597 N.E.2d at 1369; *Brendan H.*, 372 N.Y.S.2d at 477.

²⁵ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

law enforcement officers when investigating offenses on school property because of the unique nature of public schools.²⁶ School officials have a “custodial and tutelary responsibility” for their students, and are responsible for maintaining a safe and orderly environment that is conducive to learning.²⁷ Because of this responsibility, school officials are necessarily allowed to closely supervise their students and enforce rules that would be unenforceable against adults, or even minors outside of the school setting.²⁸ At the same time, however, the Supreme Court’s decision in *Ferguson v. City of Charleston* reveals that the Court is wary of non-law enforcement actors seeking out evidence with a primary objective of turning that evidence over to law enforcement.²⁹ Looking back to the real-life facts that introduced this Note, what was the principal’s intent? Although she certainly intended to keep her campus drug free, she also had a clear intent to turn any evidence over to law enforcement.³⁰ Because of her goal to assist law enforcement, the principal should have given the student the appropriate constitutional warning under the reasoning of *Ferguson*.³¹

This Note takes a fresh look at school interrogations after the *Ferguson* decision, exploring how that case should change the area of interrogations by school officials. The Note concludes that the *Ferguson* decision provides the proper framework for analyzing school interrogations and that the decision requires school officials to give constitutional warnings in some school-based interrogations. Part I examines the *Ferguson* decision and its resulting test. Part II argues that the *Ferguson* decision should be applied in the school context based on other Supreme Court decisions about school-based constitutional rights. Part III provides external support for applying the *Ferguson* decision in school interrogation cases based upon the close relationship between school officials and law enforcement, as evidenced by crime reporting statistics and school policies. Part IV addresses some concerns application of the *Ferguson* test could have on the practicalities of school officials should they be required to provide constitutional warnings in student-interrogations.

²⁶ See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830 (2002); *Vernonia*, 515 U.S. at 655; *T.L.O.*, 469 U.S. at 340; *Tinkham*, 719 A.2d at 582.

²⁷ See *Earls*, 536 U.S. at 830; *Vernonia*, 515 U.S. at 656; *T.L.O.*, 469 U.S. at 339.

²⁸ See *Earls*, 536 U.S. at 830; *Vernonia*, 515 U.S. at 656; *T.L.O.*, 469 U.S. at 339.

²⁹ See 532 U.S. 67, 83, 85 (2001).

³⁰ See *Tinkham*, 719 A.2d at 581.

³¹ See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

I. *FERGUSON* AND ITS AFTERMATHA. *Introduction to Ferguson*

In *Ferguson v. City of Charleston*, state hospital workers administered drug tests to pregnant women without the women's consent.³² The testing was implemented after hospital staff became concerned about a perceived increase in the number of pregnant women using drugs.³³ If a woman received a positive test result, she would be referred to a drug treatment program with the county substances abuse commission.³⁴ During the time of the testing, there was no noticeable decline in the number of pregnant women testing positive.³⁵ Then, a nurse at the hospital heard a news report that police would arrest pregnant drug users and informed the hospital's general counsel, who in turn contacted the Charleston Solicitor, to offer the hospital's assistance in any future criminal actions the police might be taking against pregnant drug users.³⁶ The Solicitor set up a task force, consisting of representatives of law enforcement, the hospital, the County Substance Abuse Commission, and the Department of Social Services.³⁷ The task force produced a twelve-page policy manual, "POLICY M-7," which explained the new policy entitled "Management of Drug Abuse During Pregnancy."³⁸ The policy outlined the hospital's role in identifying patients suspected of drug use, the chain of custody that should be used for the urine samples used to test for drug use, the referral process for those women that tested positive to place them in a substance abuse clinic, and the threat of criminal prosecution and sanctions to "provide[] the necessary 'leverage' to make the policy effective."³⁹

The Supreme Court ruled that "POLICY M-7" violated the pregnant women's Fourth Amendment right to be free from nonconsensual, warrantless, and suspicionless searches.⁴⁰ First, the Court found that because the hospital was a state hospital, its employees were governmental actors and therefore limited by the Fourth Amendment.⁴¹

³² *Ferguson*, 532 U.S. at 70.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 70, 71.

³⁷ *Ferguson*, 532 U.S. at 69, 71.

³⁸ *Id.* at 71.

³⁹ *Id.* at 72.

⁴⁰ *Id.* at 86.

⁴¹ *Id.* at 76.

Next, the Court found that a urine test was a search for Fourth Amendment purposes.⁴² Finally, the Court applied a search balancing test, weighing the privacy intrusion against the governmental interest in preventing drug use among pregnant women, and ruled in favor of the women.⁴³

In the first part of the balancing test, the Court found that the degree of invasion of privacy was quite substantial because the test results were turned over to a third-party.⁴⁴ The Court compared and distinguished the drug testing regime in *Ferguson* to four prior drug testing cases it had considered.⁴⁵ The distinguishing factor in *Ferguson* was that the hospital staff had turned over test results to law enforcement, a third-party, for criminal sanctions.⁴⁶ In *Treasury Employees v. Von Raab*, the Court found that drug tests for U.S. Customs Service employees seeking promotion to certain high-level positions were constitutional, and in *Vernonia School District 47J v. Acton* (discussed later in depth), the Court held that requiring public high school athletes to submit to drug testing in order to participate on a school sports team was constitutional.⁴⁷ Neither in *Von Raab* nor *Vernonia* were the results of the drug tests turned over to law enforcement.⁴⁸ Therefore, using test results within an organization solely to deny a promotion or participation in extracurricular athletics is a lesser privacy intrusion than when test results are given to law enforcement for criminal sanctions.⁴⁹ The *Ferguson* decision made a distinction between internal (within job or within school) sanctions and external (criminal justice) sanctions.⁵⁰ Furthermore, in the prior drug testing cases, there were protections to ensure that the test results were not revealed to third-parties, including law enforcement.⁵¹ In comparison, not only did the *Ferguson* policy not provide protections against test results being revealed to third-parties, part

⁴² *Ferguson*, 532 U.S. at 76.

⁴³ *See id.* at 69, 78, 86.

⁴⁴ *See id.* at 78.

⁴⁵ *See id.* at 77, 78.

⁴⁶ *See id.*

⁴⁷ *See Ferguson*, 532 U.S. at 77; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *Treasury Employees v. Von Raab*, 489 U.S. 656, 665–66 (1989).

⁴⁸ *See Vernonia*, 515 U.S. at 658; *Von Raab*, 489 U.S. at 665–66.

⁴⁹ *See Ferguson*, 532 U.S. at 69, 77, 78.

⁵⁰ *See id.* at 72, 78.

⁵¹ *See id.* at 80 n.16. For example, in *Von Raab*, test results were not used in a criminal prosecution of the employee without the employee's consent, and, in *Vernonia*, test results were disclosed to a limited number of school personnel "who have a need to know" and not turned over to law enforcement. *See Vernonia*, 515 U.S. at 658; *Von Raab*, 489 U.S. at 665–66.

of the policy intended to actively turn the results over to law enforcement.⁵²

The prior cases were further distinguished by looking at the governmental interest in the testing program.⁵³ In the prior cases, a clear distinction existed between the governmental interest in the specific testing regime and a general governmental interest in law enforcement of drug laws.⁵⁴ For example, in *Vernonia*, a clear governmental interest in deterring drug use among student-athletes existed, separate from any potential law enforcement interest in punishing student-athletes for drug use.⁵⁵ Similarly, in *Von Raab*, the government had a clear interest in not promoting an employee who used drugs to a sensitive high-level government position, divorced from a general interest in pursuing a criminal prosecution of an employee who tested positive.⁵⁶ Additionally, in *Skinner v. Railway Labor Executives' Ass'n*, the government tested federal railroad employees for drug use “not to assist in the prosecution of [those] employees, but rather to ‘prevent accidents,’” which again reflects the independence of the governmental interest in testing from the law enforcement interest in enforcing drug laws.⁵⁷

By contrast, in *Ferguson*, the primary governmental interest was the use of law enforcement to coerce patients into treatment; thus, this governmental interest was indistinguishable from a general interest in law enforcement.⁵⁸ The policy itself blurred the line between a governmental interest in ending drug use among pregnant women and a governmental interest in drug law enforcement, as it included very specific information about the chain of custody of test results, possible criminal sanctions for violations of the policy, and the logistics of police notification and arrest of women who tested positive.⁵⁹ Additionally, the city attorney and local police were involved at every stage of the crea-

⁵² See *Ferguson*, 532 U.S. at 72.

⁵³ See *id.* at 79, 80.

⁵⁴ See *id.*

⁵⁵ See *id.* at 69, 80 n.16; *Vernonia*, 515 U.S. at 658. The Court was concerned about the risk of “immediate physical harm” to student athletes (and their opponents) who used drugs while participating in school sports. See *Vernonia*, 515 U.S. at 662.

⁵⁶ See *Ferguson*, 532 U.S. at 80 n.16; *Von Raab*, 489 U.S. at 665–66.

⁵⁷ See *Ferguson*, 532 U.S. at 80 n.16; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620–21 (1989). The fourth prior drug testing case, *Chandler v. Miller*, examined required drug tests of candidates running for certain state offices, a testing program the court found to be unreasonable and unconstitutional. 520 U.S. 305, 312 (1997).

⁵⁸ See *Ferguson*, 532 U.S. at 80.

⁵⁹ See *id.* at 82. In fact, one of the lower court judges wrote, “[I]t . . . is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers.” See *id.*

tion and implementation of the policy, even when determining the criteria for which pregnant women would be tested.⁶⁰ These factors only emphasized that neither the hospital staff nor the government's interest in the testing program was primarily motivated by a medical concern for the detection and treatment of drug use among pregnant women, but instead revealed that the primary interest was to locate and secure evidence against potential criminal defendants.⁶¹ Although the ultimate goal may have been to help pregnant drug users stop using, the "immediate objective . . . was to generate evidence for law enforcement purposes."⁶² This was a crucial distinction because law enforcement always serves a greater goal; thus, the Court reasoned that if this testing regime were constitutional, then any non-consensual, suspicionless search would also be constitutional because there could always be a purported non-law enforcement "ultimate" goal.⁶³

Finally, the Court analyzed the immediate objective of the testing, and found a critical distinction between happening upon evidence and seeking out evidence.⁶⁴ The hospital employees, like any private citizen, might inadvertently acquire evidence in the course of routine conduct (or routine prenatal treatment) and choose to turn that evidence over to police.⁶⁵ This is significantly different from the situation in *Ferguson*, where hospital employees sought out evidence "for the specific purpose of incriminating" their patients and coercing them into treatment.⁶⁶ Because of this distinction, the Court reasoned that when non-law enforcement actors seek out incriminating evidence, they have a "special

⁶⁰ *See id.*

⁶¹ *See id.* at 82–84.

⁶² *See Ferguson*, 532 U.S. at 69, 82, 83, 84.

⁶³ *See id.*

⁶⁴ *See id.* at 84–85.

⁶⁵ *See id.* Compare this with *United States v. Chukwubike*, 956 F.2d 209, 211 (9th Cir. 1992), where a doctor extracted balloons from a patient, tested them, found they were filled with heroin, and later turned the test results over to police. The doctor performed surgery to remove the balloons and tested them for medical reasons, including to determine what substances might have leaked into the patient in order to provide proper treatment. *See id.* at 212. The doctor later chose to turn the balloons and the test results over to police. *See id.* at 211. Here, the doctor performed the surgery and tests as a part of necessary treatment for a potential overdose and later chose to turn over the evidence to police, unlike in *Ferguson* where the drug tests, performed for a nominal medical reason, were conducted primarily to collect evidence to turn over to police. *See id.* at 212.

⁶⁶ *See Ferguson*, 532 U.S. at 80, 85. In fact, some of the hospital staff questioned their role of acting like law enforcement officers in the policy. *See id.* at 85 n.24. Though they noted that medical personnel might legally or ethically be required to report some criminal activity to law enforcement, the staff still questioned the propriety of the "active pursuit of evidence to be used against individuals presenting for medical care." *See id.*

obligation” to make sure the subjects of the purposeful evidence collection are “fully informed about their constitutional rights, as standards of knowing waiver require.”⁶⁷ This conclusion—that non-law enforcement actors, when seeking out evidence, should give constitutional warnings—was a radical departure from previous jurisprudence on who must give constitutional warnings and in which situations these warnings must be provided.⁶⁸ Thus, the *Ferguson* decision has important ramifications in areas other than drug testing cases, such as in Fifth Amendment school interrogation cases where school officials seek out evidence (often, written confessions) from their students.⁶⁹

B. *The Ferguson Test*

The *Ferguson* analysis produced the following workable test: when non-law enforcement actors are collecting evidence with the intent to assist law enforcement, constitutional rights are implicated and constitutional warnings are necessary to prevent any violations of these rights.⁷⁰ To help determine the intent of the actor, courts consider two factors: whether the evidence collected is turned over to police for criminal sanctions or only used for internal sanctions, and whether the actors had a general crime control motive when they acted (an ultimate or immediate goal analysis).⁷¹

C. *Ferguson and Agency Law*

The Court reached its decision in *Ferguson* by applying a balancing test, just as in the prior drug testing cases decided by the Supreme Court.⁷² In doing so, the Court retained intact the balancing test crite-

⁶⁷ See *id.*

⁶⁸ See *id.* at 85; see also *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1363, 1369 (Mass. 1992); *State v. Tinkham*, 719 A.2d 580, 581 (N.H. 1998). Generally, private citizens are not required to give *Miranda* warnings, nor adhere to other constitutional limitations. See *United States v. Reed*, 15 F.3d 928, 930–31 (9th Cir. 1994). All state actors are bound by constitutional protections, and the category of state actors includes the state hospital workers in *Ferguson*, public school employees, OSHA inspectors, and building inspectors. See *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001); *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985).

⁶⁹ See *Ferguson*, 532 U.S. at 85; see also *Miranda*, 384 U.S. at 444; *Snyder*, 597 N.E.2d at 1363, 1369; *Tinkham*, 719 A.2d at 581.

⁷⁰ See *Ferguson*, 532 U.S. at 83–85.

⁷¹ See *id.*

⁷² See *id.* at 78; see also *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 822 (2002); *Vernonia v. Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *Treasury Employees v. Von Raab*, 489 U.S. 656, 663 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989).

ria, but also considered other factors, such as the separation (or lack thereof) of the governmental interests in the testing program and in general crime control and the intent and motive of the testers, both of which were important factors in the prior cases.⁷³ The Court's consideration of additional factors in *Ferguson* may lead to a wider application of the *Ferguson* test than if that case had been decided under agency law.⁷⁴ Generally, constitutional protections (such as the Fourth Amendment's prohibition of unreasonable searches or the Fifth Amendment's prohibition of compelled self-incriminating statements) only mitigate governmental intrusions, not intrusions by private individuals.⁷⁵ The exception is when private individuals act as instruments or agents of the government, and, if they act as such, even private individuals are constrained by constitutional mandates.⁷⁶ To determine whether a private individual is an agent that must adhere to constitutional requirements, courts look to two factors: (1) whether the government knew of and acquiesced to the intrusive conduct and (2) whether the private party performing the search intended to assist law enforcement efforts as opposed to inadvertently assisting law enforcement while furthering his or her own ends and goals.⁷⁷ *Ferguson* could have been an easy case in which an agency relationship was found between the hospital staff and law enforcement based on existing agency law without expanding agency law analysis.⁷⁸

Though the lower court found an agency relationship between a hotel manager who intended to assist law enforcement in a drug investigation, the Court could have found an agency relationship between the hospital staff and law enforcement, based upon the hospital staff's intent to seek out evidence against patients.⁷⁹ In *United States v. Reed*, the court found an agency relationship between a hotel assistant manager and local police.⁸⁰ The hotel worker contacted police about a guest who he believed was using the hotel to sell drugs, and asked that a po-

⁷³ See *Ferguson*, 532 U.S. at 78; see also *Earls*, 536 U.S. at 822; *Vernonia*, 515 U.S. at 658; *Skinner*, 489 U.S. at 621; *Von Raab*, 489 U.S. at 663.

⁷⁴ See *Ferguson*, 532 U.S. at 77-78; *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994); *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981); *United States v. Gomez*, 614 F.2d 643, 645 (9th Cir. 1979).

⁷⁵ See *Reed*, 15 F.3d at 930-31.

⁷⁶ See *id.* at 931.

⁷⁷ See *id.*

⁷⁸ See *Ferguson*, 532 U.S. at 79, 82.

⁷⁹ See *id.* at 82; *Reed*, 15 F.3d at 931. As of yet, there have been no reported cases testing agency law in Fifth Amendment, *Miranda*-interrogation cases. See *Reed*, 15 F.3d at 933; *Walther*, 652 F.2d at 791; *Gomez*, 614 F.2d at 645.

⁸⁰ See 15 F.3d at 930, 933.

lice officer come to the hotel while the manager checked the room.⁸¹ Accompanied by two police officers, the manager entered the room and began looking around, even opening drawers and a latched briefcase.⁸² The first prong of the agency test was easily met because the officers knew of and acquiesced to the search; they were present during the search, did nothing to discourage the search of the room occupant's personal belongings beyond what was required to protect hotel property, and were in the role of lookout rather than incidental bystander.⁸³ The lower court held that the second prong was met because the manager did not have a legitimate motive for the search "*other than crime prevention.*"⁸⁴ This was shown by the manager's continued search of the room even after he had established that the room was in good condition, which was his alleged motive for entering the room.⁸⁵ Because, however, there was no need to open drawers or the briefcase to ensure there was no damage to hotel property, the court concluded that the manager had intended to assist law enforcement and that the proffered reason of protecting hotel property was only a pretext to enter the room to search for drugs.⁸⁶ Furthermore, the court noted that the manager's motivation of general crime prevention was not a legitimate, independent motivation and thus could not be saved from meeting the second prong by offering crime prevention as his purpose.⁸⁷

By contrast, in *United States v. Gomez*, when an airline employee opened a suitcase in the presence of police officers and found drugs, there was not an agency relationship because the airline employee acted to further airline policy, not to assist law enforcement, even though the police officers knew of and acquiesced to the search.⁸⁸ A police officer noticed a suitcase, without any identification information on it, that had fallen off the luggage conveyor belt.⁸⁹ The officer notified the airline's supervisor who took the suitcase into a back room, accompanied by two police officers, and proceeded to open the suitcase to identify the owner.⁹⁰ When the supervisor had trouble opening the suitcase, one of the officers assisted him by tapping the lock, which

⁸¹ See *id.* at 930.

⁸² See *id.*

⁸³ See *id.* at 931.

⁸⁴ See *id.* at 932.

⁸⁵ See *Reed*, 15 F.3d at 931, 932.

⁸⁶ See *id.* at 933.

⁸⁷ See *id.* at 932.

⁸⁸ See 614 F.2d 643, 644–45 (9th Cir. 1979).

⁸⁹ See *id.* at 644.

⁹⁰ See *id.*

caused it to open.⁹¹ The supervisor continued opening the suitcase and saw a gun, at which point he turned the suitcase over to the police who were standing with him.⁹² The police continued to search the suitcase and found cocaine.⁹³ Although the first prong of the agency test was met because the police officers knew of the search and even assisted in the search by helping unlock the suitcase, the second prong was not met.⁹⁴ The airline supervisor's motive for opening the suitcase was to further his company's policy of attempting to reunite lost luggage with its owner, rather than to assist law enforcement.⁹⁵ Thus, the airline employee's legitimate, independent motivation for the search saved the action from becoming a governmental search by an agent.⁹⁶

Applying the agency test to the facts of *Ferguson*, the Court easily could have found an agency relationship.⁹⁷ First, the government knew of and acquiesced to the search (drug tests) because they had helped to formulate and implement the drug testing policy, thus meeting the first prong of the agency test.⁹⁸ The Solicitor and police were "pervasively" involved at every stage of the testing program, from determining which women would be tested to coordinating arrests of women who tested positive.⁹⁹ Second, the Court found that members of the hospital staff intended to assist law enforcement by administering the tests, rather than conducting the tests for their own purposes of detecting and ending drug use among pregnant women.¹⁰⁰ The Court compared the hospital staff's ultimate and immediate objectives and found that, although helping pregnant drug users was an ultimate (and worthy) goal, the immediate goal of the hospital staff was to obtain evidence of criminal conduct to turn over to police.¹⁰¹ So, while there was a professed legitimate motive for the search, it was not an independent motivation to "further [the hospital's] own ends," and thus satisfying the second prong of the agency test.¹⁰²

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *Gomez*, 614 F.2d at 645.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981); *Gomez*, 614 F.2d at 645.

⁹⁷ See *United States v. Reed*, 15 F.3d 928, 932 (9th Cir. 1994); *Walther*, 652 F.2d at 792; *Gomez*, 614 F.2d at 645.

⁹⁸ See *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001); *Reed*, 15 F.3d at 931.

⁹⁹ See *Ferguson*, 532 U.S. at 82, 85.

¹⁰⁰ See *id.* at 82-83; *Reed*, 15 F.3d at 931, 932.

¹⁰¹ See *Ferguson*, 532 U.S. at 82-84.

¹⁰² See *id.* at 83-85; *Reed*, 15 F.3d at 931.

Therefore, if *Ferguson* had been evaluated under agency law, the hospital staff likely would have been found to have acted as agents of law enforcement.¹⁰³ If the court found an agency relationship, then the hospital staff would have to adhere to the same constitutional mandates as law enforcement in a criminal search situation.¹⁰⁴ Therefore, the hospital staff in *Ferguson* would have needed to obtain warrants before conducting the drug tests and would have had to give constitutional warnings, the same conclusion the Court reached (though using a different analysis).¹⁰⁵ A decision on the basis of agency law would have significantly limited the impact of the *Ferguson* decision.¹⁰⁶ As shown, if *Ferguson* had been decided using agency law, there would be no extension of current jurisprudence on school-based interrogations by school officials because the facts of *Ferguson* can easily be shown to meet the two prongs of the agency test.¹⁰⁷ Instead, however, the actual *Ferguson* decision has left the case and its test applicable in a wider array of situations than had the decision been based on agency law.¹⁰⁸ The *Ferguson* decision focused on whether non-law enforcement actors intended to assist law enforcement by collecting evidence, considering both whether the collected evidence was turned over (or whether the party intended to turn it over) to police and what the actors' motivation was (general crime control or not).¹⁰⁹ Put differently, the *Ferguson* rule is essentially only the second prong of the agency test, along with guidance as to how to determine the actor's motive.¹¹⁰

However, nothing in *Ferguson* suggests that the Court was formulating a new test for agency consisting of only the second prong; in fact, the decision does not even mention agency law or consider whether the hospital staff acted as agents when it conducted the drug tests.¹¹¹ This is significant because most school interrogation cases are analyzed using agency law.¹¹² Almost without exception, when a student-defendant tries to suppress a statement made to a school official (usually a principal or vice principal) that was later turned over to law enforcement and

¹⁰³ See *Ferguson*, 532 U.S. at 83–85; *Reed*, 15 F.3d at 932, 933.

¹⁰⁴ See *Reed*, 15 F.3d at 932–33.

¹⁰⁵ See *Ferguson*, 532 U.S. at 85; *Reed*, 15 F.3d at 933.

¹⁰⁶ See *Ferguson*, 532 U.S. at 85; *Reed*, 15 F.3d at 933.

¹⁰⁷ See *Ferguson*, 532 U.S. at 83–85; *Reed*, 15 F.3d at 932–33.

¹⁰⁸ See *Ferguson*, 532 U.S. at 85; *Reed*, 15 F.3d at 934; *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981); *United States v. Gomez*, 614 F.2d 643, 645 (9th Cir. 1979).

¹⁰⁹ See *Ferguson*, 532 U.S. at 83–86.

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See cases cited *supra* note 21.

used against the student in a criminal proceeding, courts use agency law to determine whether the school official was required to give *Miranda* rights before the interrogation.¹¹³ In these analyses, courts have found that, at the time of the interrogation, school officials were not acting as agents of police because the police either did not know or acquiesce to the conduct (failing to meet the first prong) or because the school officials acted to further their own ends (failing to meet the second prong).¹¹⁴

If *Ferguson* had relied upon agency law, the decision would not impact school interrogation cases because it would have only reinforced the two-prong test to determine agency, and school officials will almost always be able to claim a non-law enforcement ultimate objective, such as maintaining school discipline and safety.¹¹⁵ But *Ferguson* approached the issue differently by focusing primarily upon the intent of the actor and considering such factors as whether any evidence obtained was turned over to law enforcement and whether that evidence was happened upon or sought out.¹¹⁶ The *Ferguson* test makes a more nuanced distinction than agency law in determining if the actor was intending to assist law enforcement or only intending to further her own legitimate, independent motives.¹¹⁷ Because of this more refined analysis, situations that would have failed the agency test may meet the *Ferguson* test.¹¹⁸ Specifically, the *Ferguson* test is much more likely to be triggered in school interrogation cases, and thus will require constitutional warnings—even when a school official is conducting the interrogation.¹¹⁹ The *Ferguson* test is more easily triggered than agency law in school interrogation cases because of *Ferguson's* consideration of how evidence was obtained, what will happen to that evidence, and the ultimate/immediate goal analysis, all of which cut in student-defendants' favor.¹²⁰

¹¹³ See, e.g., *In re Navajo County Juvenile Action No. JV91000058*, 901 P.2d 1247, 1249 (Ariz. Ct. App. 1995); *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1369 (Mass. 1992); *State v. Tinkham*, 719 A.2d 580, 584 (N.H. 1998).

¹¹⁴ See *Navajo*, 901 P.2d at 1249; *Snyder*, 597 N.E.2d at 1369; *Tinkham*, 719 A.2d at 583–84; *State v. Biancamano*, 666 A.2d 199, 202–03 (N.J. Super. Ct. App. Div. 1995).

¹¹⁵ See *Ferguson*, 532 U.S. at 86; *Snyder*, 597 N.E.2d at 1369; *Tinkham*, 719 A.2d at 583–84; *Biancamano*, 666 A.2d at 202–03.

¹¹⁶ See *Ferguson*, 532 U.S. at 84, 85, 86.

¹¹⁷ See *id.* at 84–85; *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981).

¹¹⁸ See *Ferguson*, 532 U.S. at 84–85.

¹¹⁹ See *id.*; *Snyder*, 597 N.E.2d at 1368; *Tinkham*, 719 A.2d at 584.

¹²⁰ See *Ferguson*, 532 U.S. at 84–85.

II. WHY THE *FERGUSON* TEST, NOT AGENCY LAW, IS THE PROPER TEST IN SCHOOL INTERROGATION CASES

Although the *Ferguson* case itself would likely have come out the same way if decided under agency law, many school interrogation cases would likely not be decided the same under the *Ferguson* test (a topic which is explored more below).¹²¹ But before getting to that analysis, the threshold question is: why should school interrogation cases be analyzed under the *Ferguson* test and factors instead of being analyzed under agency law?¹²² The answer is that the Supreme Court's reasoning in school cases addressing other constitutional rights, such as Fourth Amendment searches, are remarkably similar to the *Ferguson* reasoning.¹²³ Though *Ferguson* dealt with an unconstitutional search, the case itself suggests that it is not limited to only Fourth Amendment concerns, but with all constitutional rights, thus encompassing the Fifth and Sixth Amendment protections at issue in school interrogation cases.¹²⁴ Consequently, if Fourth Amendment-school drug testing cases follow similar analyses as *Ferguson* and that case extends to other constitutional rights, then the *Ferguson* test is the appropriate framework in Fifth Amendment school interrogation cases.¹²⁵

¹²¹ See *id.*; *Snyder*, 597 N.E.2d at 1369; *Tinkham*, 719 A.2d at 584. The *Ferguson* test is only applicable in public schools because, absent an agency relationship, only public employees are subject to constitutional limitations. See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. *Earls*, 536 U.S. 822, 828 (2002); *Ferguson*, 532 U.S. at 76; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

¹²² Compare *United States v. Reed*, 15 F.3d 928, 934 (9th Cir. 1994), *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981), and *United States v. Gomez*, 614 F.2d 643, 645 (9th Cir. 1979), with *Ferguson*, 532 U.S. at 85.

¹²³ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 659. All three cases use a balancing test approach, considering factors such as the scope of the privacy intrusion of the drug tests, the reasons for conducting the tests, and with whom the results were shared. See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 659.

¹²⁴ See *Ferguson*, 532 U.S. at 85.

¹²⁵ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 85; *Vernonia*, 515 U.S. at 658, 659, 660. Neither *Vernonia* nor *Earls* cites *Ferguson*. See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 659. All three cases, however, rely on the same factors as emphasized in *Ferguson*. See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 659. Additionally, *Earls* cites heavily to *Vernonia*, which was an extremely similar case; *Vernonia* affirms drug-testing of athletes and *Earls* affirms drug-testing of students in any extracurricular activities. See generally *Earls*, 536 U.S. 822. Thus, the *Earls* Court may not have needed to address *Ferguson*, which found an adult drug-testing program unconstitutional. See *id.* at 830; *Ferguson*, 532 U.S. at 86.

A. *School Drug Testing Cases and the Importance of the Intent of the Actor, Whether Evidence Is Sought Out, and with Whom Evidence Is Shared*

The Supreme Court has found two different school drug testing programs constitutional.¹²⁶ In *Vernonia*, the Court upheld a program that required all middle and high school students to submit to random drug testing as a prerequisite to participating in school-sponsored athletics.¹²⁷ A few years later, in *Earls*, the Court upheld another school district's similar program that required students participating in any extracurricular activity to submit to random drug testing.¹²⁸ In both decisions, the Court found it significant that the tests were conducted to help students who were using drugs, not to catch and punish users.¹²⁹ Further, both school districts used the test results only to exclude certain students from extracurricular activities, not for school discipline, and neither school district shared the test results with any law enforcement agency or other third-party.¹³⁰ This benevolent motivation of the school officials and lack of criminal punishment are the type of considerations factored into the *Ferguson* test.¹³¹

In *Vernonia*, the Vernonia School District implemented a policy that required all student-athletes to submit to random drug testing as a condition of participating in school athletics.¹³² The Supreme Court used a search balancing test and held that the policy was constitutional.¹³³ Preliminarily, the Court found that public school officials are state actors who are constrained by the Fourth Amendment, although they are not held to as high standards of suspicion as law enforcement because of the special circumstances of schools and their responsibility to maintain order and safety.¹³⁴ In the first part of the balancing test, the Court found that students do have an expectation of privacy even in school, but that the expectation is lessened because of the compet-

¹²⁶ See *Earls*, 536 U.S. at 839; *Vernonia*, 515 U.S. at 666.

¹²⁷ See 515 U.S. at 650.

¹²⁸ See 536 U.S. at 825.

¹²⁹ See *id.* at 833, 834, 839; *Vernonia*, 515 U.S. at 658, 666.

¹³⁰ See *Earls*, 536 U.S. at 833, 834, 839; *Vernonia*, 515 U.S. at 658, 666.

¹³¹ See *Earls*, 536 U.S. at 833, 834, 839; *Ferguson v. City of Charleston*, 532 U.S. 67, 84-85 (2001); *Vernonia*, 515 U.S. at 658, 660.

¹³² See *Vernonia*, 515 U.S. at 650.

¹³³ See *id.* at 652, 666. In such balancing cases, the court balances the degree of privacy of the individual searched against the governmental interest in the searching program. See *id.* at 658-61; *Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

¹³⁴ See *Vernonia*, 515 U.S. at 655; see also *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (noting that searches conducted by school officials do not require probable cause, but must be reasonable under all the circumstances).

ing responsibilities that schools have in maintaining order and safety in the educational setting.¹³⁵ In addition, student-athletes have an even lesser expectation of privacy because they are subjected to preseason medical exams and must change and shower in communal locker rooms.¹³⁶ The Court balanced this lessened privacy interest with the governmental interest in detecting and discouraging drug use among students, and particularly student-athletes who would be more prone to injuries because of the mix of drugs and physical activity.¹³⁷

The Court emphasized the concern for student well-being by the fact that the test results were only used to encourage the student to get treatment and were never turned over to law enforcement or even used for any type of school sanction.¹³⁸ The only sanction for a positive test was an immediate re-test; if the second test also came up positive, the school would call a meeting of the student, her parents, and the principal.¹³⁹ At the meeting, the student would be given the option of participating in a six-week treatment program or a suspension from all athletics for the current and following seasons.¹⁴⁰ The Court again emphasized the focus on treatment in the testing program, when it noted, “[T]he search here is undertaken for prophylactic and distinctly *non-punitive* purposes.”¹⁴¹ The high governmental interest balanced with the limited intrusion of a urine test and the students’ lessened expectation of privacy led the Court to find the testing program constitutional.¹⁴²

Likewise, in *Earls*, the Court emphasized the intent of the actors and use of test results (or lack thereof) in finding a policy requiring students who participated in any extracurricular activity to submit to drug testing constitutional.¹⁴³ Again, the Court balanced the degree of invasion of students’ privacy with the governmental interest in maintaining the health, safety, and discipline of students.¹⁴⁴ These governmental interests were separate from a crime control interest because

¹³⁵ See *Vernonia*, 515 U.S. at 656.

¹³⁶ See *id.* at 657.

¹³⁷ See *id.* at 661. The Court also found that, in the Vernonia school district, student-athletes were seen as the leaders of the school and thus discouraging drug use among these students would have a trickle down effect on the rest of the student body. See *id.* at 663.

¹³⁸ See *id.* at 658.

¹³⁹ *Id.* at 651.

¹⁴⁰ *Vernonia*, 515 U.S. at 651.

¹⁴¹ See *id.* at 658 n.2.

¹⁴² See *id.* at 664–65.

¹⁴³ See 536 U.S. 822, 825, 833–34 (2002).

¹⁴⁴ See *id.* at 830–31.

the testing program was “not in any way related to the conduct of criminal investigations.”¹⁴⁵ Test results were never used for school discipline or academic consequences nor turned over to law enforcement, which demonstrates the distinct governmental interests of student health and safety and general drug law enforcement.¹⁴⁶

As in *Vernonia*, the only consequence of a positive drug test in *Earls* was a meeting between the student, her parents, and the principal and possible suspension from extracurricular activities.¹⁴⁷ Because the testing policy applied to all extracurricular activities, not just athletics, the school district (and the Court) could no longer justify the policy by relying upon the special safety and health dangers to athletes engaging in drug use and physical activity.¹⁴⁸ Instead, the Court focused upon students’ somewhat lessened expectation of privacy in school and upon the school and governmental interest in curbing drug use among students.¹⁴⁹ Justice Breyer’s concurrence highlighted this reasoning, noting that the policy’s focus on treatment, counseling, “and avoiding the use of criminal or disciplinary sanctions” were significant factors in finding that the policy did not violate the Fourth Amendment.¹⁵⁰

Thus, in both of the school drug testing cases upon which the Supreme Court has ruled, it has relied, in part, upon the fact that neither policy utilized external criminal sanctions.¹⁵¹ Neither school district turned the drug test results over to law enforcement though they would likely have led to criminal sanctions.¹⁵² Furthermore, neither policy even provided for school sanctions, such as suspension or expulsion from the school, which might normally be associated with

¹⁴⁵ See *id.* at 829.

¹⁴⁶ See *id.* at 833–34.

¹⁴⁷ See *id.*; *Vernonia*, 515 U.S. at 658. Upon the first positive drug test, the student could continue to participate in extracurricular activities if she entered drug counseling; upon a second positive test, she would be mandated to undergo drug counseling and be barred from extracurricular activities for fourteen days; upon a third positive test, she would be barred from participating in extracurricular activities for eighty-eight school days or the remainder of the school year, whichever was longer. *Earls*, 536 U.S. at 833–34.

¹⁴⁸ See *Earls*, 536 U.S. at 833–34; *Vernonia*, 515 U.S. at 662. In her dissent, Justice Ginsburg emphasized the difference between the physical risks of student-athletes who are using drugs and the lack of those risks for students in a variety of other extracurricular activities. See *Earls*, 536 U.S. at 846 (Ginsburg, J., dissenting). Justice Ginsburg wrote, “[I]nterscholastic athletics similarly [to adults who choose to work in highly regulated professions such as railroads] require close safety and health regulation; a school’s choir, band, and academic team do not.” *Id.* (Ginsburg, J., dissenting).

¹⁴⁹ See *Earls*, 536 U.S. at 834, 838.

¹⁵⁰ See *id.* at 838–39.

¹⁵¹ See *id.* at 833, 834; *Vernonia*, 515 U.S. at 658.

¹⁵² See *Earls*, 536 U.S. at 833; *Vernonia*, 515 U.S. at 658.

drug use or possession on school property.¹⁵³ The only possible punishments were exclusion from the student's extracurricular activity, and even this could be avoided if the student entered a drug counseling or treatment program.¹⁵⁴ The Court's reliance upon school officials' motivation to help students end their own drug use, rather than a motive of general drug law enforcement, as demonstrated by the lack of criminal and school sanctions, has an important consequence for other scenarios in which the Court must balance school-related constitutional concerns.¹⁵⁵ When constitutional rights are implicated in school policies (as the Fourth Amendment was in the school drug testing cases or the Fifth Amendment in school interrogation cases), courts are unlikely to find an actionable constitutional violation if there is no involvement of the criminal justice system.¹⁵⁶ The converse is also true: courts are more likely to find an actionable in-school constitutional violation if the outcome of the alleged violation includes involvement of the criminal justice system (which in turn raises the constitutional issues in the proper forum, with available remedies, such as use of the exclusionary rule).¹⁵⁷

The *Vernonia* and *Earls* decisions are consistent with *Ferguson*, despite the fact that, in *Ferguson*, the testing program was unconstitutional.¹⁵⁸ In *Vernonia* and *Earls*, the students' test results were only used to encourage students to get help, or alternatively, to bar them from

¹⁵³ See *Earls*, 536 U.S. at 833, 834; *Vernonia*, 515 U.S. at 658. *But see* State v. Tinkham, 719 A.2d 580, 582 (N.H. 1998) (relating that the student was suspended for five days for possessing marijuana on school property).

¹⁵⁴ See *Earls*, 536 U.S. at 833; *Vernonia*, 515 U.S. at 651.

¹⁵⁵ See *Earls*, 536 U.S. at 833, 834; *Vernonia*, 515 U.S. at 658, 661.

¹⁵⁶ See *Earls*, 536 U.S. at 833, 834; *Vernonia*, 515 U.S. at 658, 666. This is not new in constitutional jurisprudence. See *Chavez v. Martin*, 583 U.S. 760, 766–67 (2003). The Supreme Court has frequently held that Fourth, Fifth, and Sixth Amendment violations are not actionable or remediable until criminal proceedings have begun or the evidence illegally obtained is offered at a trial against the criminal defendant. See *id.* For example, in *Chavez*, the Court held that there was no *Miranda* violation until and unless the government sought to use the statement made without a *Miranda* warning at a criminal trial. See *id.* A police officer did not read *Miranda* warnings to Mr. Martinez before questioning him in an emergency room where he was being treated for gunshot wounds. *Id.* at 764. Mr. Martinez filed a 42 U.S.C. § 1983 claim against the officer for violating his Fifth Amendment rights. *Id.* at 756. The Court ruled that the Fifth Amendment could not be the basis for his lawsuit because those rights had not been violated since the statement he gave was never offered against Mr. Martinez in a criminal proceeding. See *id.* at 766–67. However, the Court did hold that Mr. Martinez might be able to proceed in his lawsuit by alleging a due process violation rather than a Fifth Amendment violation. See *id.* at 776.

¹⁵⁷ See *Earls*, 536 U.S. at 833, 834; *Ferguson v. City of Charleston*, 532 U.S. 67, 84–85 (2001); *Vernonia*, 515 U.S. at 658, 666.

¹⁵⁸ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 666.

participating in sports or other extracurricular activities.¹⁵⁹ The results were not used for school sanctions, such as suspensions or expulsion, nor were they turned over to law enforcement for criminal sanctions.¹⁶⁰ This use (or non-use) of the drug test results bolsters the fact that the school officials were not acting with the intent to assist law enforcement, unlike the hospital staff in *Ferguson*.¹⁶¹ Continuing the *Ferguson* analysis, in *Vernonia* and *Earls*, the school officials did not have a general interest in crime control since the test results were never used for school or criminal sanctions.¹⁶² Put another way, the school officials' immediate goal and ultimate goal were the same—to discourage drug use among students.¹⁶³ This is unlike the situation in *Ferguson*, where the hospital staff's immediate goal was to assist law enforcement by collecting and turning over evidence of drug use, even if their ultimate goal was to deter drug use by pregnant women.¹⁶⁴ In both *Vernonia* and *Earls*, the Court applied factors similar to those in the *Ferguson* test, and the reasoning and methods of analysis were similar, producing a consistent methodology, even though the school testing programs were constitutional and the hospital drug testing program was unconstitutional.¹⁶⁵

B. *From the Fourth Amendment to the Fifth Amendment*

Ferguson, *Vernonia*, and *Earls* underscore the importance of the intent of the actor to assist (or not assist) law enforcement and whether any evidence is turned over to law enforcement in evaluating if there has been a Fourth Amendment violation.¹⁶⁶ *Ferguson*, however, extended

¹⁵⁹ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 666.

¹⁶⁰ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 666.

¹⁶¹ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 666.

¹⁶² See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 666.

¹⁶³ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 666.

¹⁶⁴ See *Ferguson*, 532 U.S. at 80.

¹⁶⁵ See *Earls*, 536 U.S. at 838; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658.

¹⁶⁶ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 82–84; *Vernonia*, 515 U.S. at 658.

But see *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). In *T.L.O.* the Court wrote, “[R]equiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.” See *id.* at 340. The Court went on to formulate a less stringent level of suspicion than probable cause when school officials conduct a school-based search. See *id.* at 341. The Court’s concern about impeding a school investigation even when there was a criminal law infraction is interesting, though, because it suggests that the Court, by referring to “disciplinary procedures,” expected even a school investigation into a criminal law matter to *only* result in school punishment, not criminal sanctions. See *id.* at 340. Even *T.L.O.*, while allowing school officials more flexibility than police in conducting school searches, still reflects the same concern as in *Vernonia*, *Earls*, and

this analysis beyond just the scope of the Fourth Amendment and the drug testing policy in that case.¹⁶⁷ *Ferguson* suggested that its analysis extended to Fifth Amendment rights as well, noting that “when [public hospital employees] 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.”¹⁶⁸ Because the *Ferguson* test is applicable in Fifth Amendment cases, and the Court considered and based its reasoning on similar factors in the Fourth Amendment school cases, the *Ferguson* test should also be applicable in school cases that involve the Fifth Amendment.¹⁶⁹

Because of the similar method of reasoning and consideration of factors in the analysis, it is likely that the student drug testing policies would have been unconstitutional if the test results had been turned over to law enforcement, putting the students, like the pregnant women in *Ferguson*, in the way of criminal sanctions.¹⁷⁰ This would likely be true even if the level of involvement between the schools and law enforcement was not as great as in *Ferguson*.¹⁷¹ The degree of collaboration between the hospital staff and law enforcement was not a defining characteristic; instead, it was important as a demonstration of the hospital staff’s intent to assist law enforcement.¹⁷² Similarly, if the motivation behind the school drug testing policies was to curb general crime control or catch suspected drugs users, as shown by more emphasis on criminal sanctions and school discipline than on counseling and treatment, the policies would likely have been found unconstitutional.¹⁷³ The reasoning in *Vernonia* and *Earls* support this conclusion because both decisions emphasized the nonpunitive uses of the drug tests.¹⁷⁴ Thus, by analogy to a Fifth Amendment school case, if a school official questions a student with a purpose of general crime control and intent to turn any evidence, such as written statements, over to law enforce-

Ferguson about what will be done with the results of the search (or drug test)—will they be revealed to law enforcement or not? See *Earls*, 536 U.S. at 833; *Ferguson*, 532 U.S. at 85; *Vernonia*, 515 U.S. at 658; *T.L.O.*, 469 U.S. at 340.

¹⁶⁷ See *Ferguson*, 532 U.S. at 85.

¹⁶⁸ See *id.*

¹⁶⁹ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658, 660.

¹⁷⁰ See *Ferguson*, 532 U.S. at 85.

¹⁷¹ See *id.*

¹⁷² See *id.* at 82–83, 85.

¹⁷³ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658.

¹⁷⁴ See *Earls*, 536 U.S. at 833, 834; *Vernonia*, 515 U.S. at 658.

ment, then the *Ferguson* test requires school officials to warn students of their constitutional rights, which in this case means *Miranda* warnings.¹⁷⁵

C. *The Ferguson Test in Action in Paradigmatic School Interrogation Cases*

Return to the scenario that opened this Note, taken from *State v. Tinkham*, a 1998 New Hampshire case.¹⁷⁶ A public high school student, the defendant, sold some marijuana to a fellow student, who was caught with the drugs and turned in the seller.¹⁷⁷ The principal then took the drugs to the local police department and told the police she planned to question the defendant as soon as she returned to school.¹⁷⁸ The principal called the defendant to her office, explained she believed he had drugs, and asked to search his book bag.¹⁷⁹ He acquiesced to the search.¹⁸⁰ The principal found more marijuana and told the defendant she would turn the drugs over to the police.¹⁸¹ The principal questioned the defendant regarding his sale of drugs to another student and he confessed, both orally and in writing, to selling drugs on a student-referral form.¹⁸² The principal then suspended the student for five days, told him further action would be taken, and then contacted the police, giving them the defendant's written statement and the drugs from his backpack.¹⁸³ The defendant was charged with selling marijuana to another student on school property and moved to suppress the written statement and the drugs.¹⁸⁴ The trial court denied both motions, the defendant was convicted, and the New Hampshire Supreme Court affirmed the denial of the motion to suppress and upheld the conviction on appeal.¹⁸⁵

The court ruled that the principal was not required to give *Miranda* warnings before questioning the defendant because the principal was neither a law enforcement officer nor functioning as an agent of law

¹⁷⁵ See *Earls*, 536 U.S. at 833, 834; *Ferguson*, 532 U.S. at 84–85; *Vernonia*, 515 U.S. at 658.

¹⁷⁶ See 719 A.2d 580, 581 (N.H. 1998). *Tinkham* was decided before the *Ferguson* decision; nevertheless, *Tinkham* is a typical school interrogation case that shows how *Ferguson* would apply in such cases. See *id.* *Tinkham* involves a Fourth Amendment search issue and a Fifth Amendment confession issue, as do many of the school interrogation cases. See *id.* at 583; see also cases cited *supra* note 21.

¹⁷⁷ See *Tinkham*, 719 A.2d at 581.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *Tinkham*, 719 A.2d at 581.

¹⁸³ See *id.* at 582.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 582, 584.

enforcement.¹⁸⁶ In determining that the principal was not a law enforcement officer, the court relied upon the fact that school officials are not trained to conduct police investigations and that school officials' mission is to create safe and healthy learning environments, not to enforce the law.¹⁸⁷ The court acknowledged that if the principal had been acting as an agent of law enforcement, *Miranda* warnings would have been required.¹⁸⁸ Yet, because the principal approached the police and they did not direct or advise the principal in her course of action, the principal had not been an agent of police.¹⁸⁹ Furthermore, the intentions of the principal were irrelevant to the analysis—the principal's clear intention to turn evidence over to law enforcement did not transform her into an agent.¹⁹⁰ Since the principal was neither a law enforcement officer, nor an agent of law enforcement, she was not required to give *Miranda* warnings.¹⁹¹

If the *Ferguson* test had been applied to *Tinkham*, the defendant still might have been convicted, but by requiring *Miranda* warnings, the *Ferguson* test would change the process and ensure that the defendant was aware of and given an opportunity to exercise his Fifth Amendment rights.¹⁹² The *Ferguson* test requires non-law enforcement actors to give constitutional warnings if they are seeking out and collecting evidence for incriminating purposes and with the intent to turn that evidence over to law enforcement.¹⁹³ In *Tinkham*, the principal's intention to turn evidence over to law enforcement was clear—she had contacted the local police and told them as much, as well as telling the defendant further action would be taken.¹⁹⁴ Moreover, she was intending to assist law enforcement before she questioned the defendant and obtained his written confession.¹⁹⁵ The principal did not inadvertently acquire the confession in the course of a school discipline situation and then turn it over to police.¹⁹⁶ Instead, she sought to obtain evidence from the defendant “for the specific purpose of incriminating [that student],”

¹⁸⁶ See *id.* at 583, 584.

¹⁸⁷ See *Tinkham*, 719 A.2d at 583.

¹⁸⁸ See *id.* at 583, 584.

¹⁸⁹ See *id.* at 584.

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001).

¹⁹³ See *id.*

¹⁹⁴ See *Tinkham*, 719 A.2d at 582.

¹⁹⁵ See *id.* at 581.

¹⁹⁶ See *id.*

much like how the hospital staff sought to obtain incriminating evidence against their pregnant patients in *Ferguson*.¹⁹⁷

Put another way, although the principal's ultimate goal may have been to prevent drug use and drug sales on her campus, the principal's immediate goal was to "generate evidence for law enforcement purposes" demonstrated by her immediate efforts to contact the police and turn evidence over to them.¹⁹⁸ As much as this distinction between ultimate and immediate goals mattered in the context of hospital drug tests, it also matters in school interrogation cases.¹⁹⁹ It is interesting that the New Hampshire court noted that a principal's primary mission was not to enforce the law, even though school officials are responsible for discipline within the school, which can include inquiries into violations of both school rules and criminal law.²⁰⁰ That is precisely the lesson of *Ferguson*—patients (or students) do not expect their doctors (or principals) to be law enforcement officers nor collect evidence as does law enforcement.²⁰¹ And if non-law enforcement actors are going to act like law enforcement and collect evidence with the intent to turn any collected evidence over to law enforcement, the subjects of the inquiries ought to receive fair warning.²⁰²

Under a *Ferguson* analysis, the principal should have given the defendant *Miranda* warnings, much as the Supreme Court said that the hospital personnel should have given constitutional warnings to their pregnant patients.²⁰³ If the principal failed to do so, the defendant's statement would likely be inadmissible because of the exclusionary

¹⁹⁷ See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

¹⁹⁸ See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

¹⁹⁹ See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

²⁰⁰ See *Tinkham*, 719 A.2d at 583.

²⁰¹ See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

²⁰² See *Ferguson*, 532 U.S. at 85; see also *State v. Heirtzler*, 789 A.2d 634, 640 (N.H. 2001). In the *Heirtzler* case, a typical school interrogation case with an atypical outcome, the court found an agency relationship between law enforcement and school officials. 789 A.2d at 641. The local police department had assigned an officer to the high school because the police believed that school officials had been handling matters that should have been investigated by the police. *Id.* at 636. The school police officer and the principal had a "silent understanding" that allowed the officer to pass information to the school officials about possible criminal activity on school grounds in order for the school officials to investigate and "gather evidence otherwise inaccessible [to the officer] due to constitutional restraints." *Id.* at 637. In finding an agency relationship, the court said that students "must be protected against school officials who inadvertently assume the role of law enforcement." See *id.* at 640. This is what the *Ferguson* test seeks to do. See *Ferguson*, 532 U.S. at 85.

²⁰³ See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581.

rule.²⁰⁴ In turn, without the confession, perhaps the defendant would have been found not guilty.²⁰⁵ Similarly, if the principal had given the defendant *Miranda* warnings, the defendant still may have confessed and subsequently still been found guilty.²⁰⁶ Whatever the outcome, application of the *Ferguson* test to this situation, or any school interrogation, would uphold the integrity of the confession and resulting criminal justice process and ensure that the student-defendant was fully informed of his “precious” right against self-incrimination.²⁰⁷

In a similar Massachusetts case, *Commonwealth v. Snyder*, a principal was not required to give *Miranda* warnings to a student because the principal was not acting as an agent of the police.²⁰⁸ In *Snyder*, a student told a teacher she had seen the defendant with marijuana, and in turn, the teacher reported the information to the principal.²⁰⁹ The principal located the defendant in the crowded student center during lunchtime but, because she did not want to arouse suspicion, she waited until the beginning of the next class period to search the defendant’s locker and to question the defendant.²¹⁰ After finding drugs in the defendant’s book bag, the principal and vice principal questioned the defendant in the principal’s office.²¹¹ The defendant then admitted he had offered to sell marijuana in school.²¹² After follow-up questions, the principal called the defendant’s mother while another school official called the police, in accordance with a school policy to turn any drugs found on school property over to law enforcement.²¹³ After an officer came to the school, the principal repeated what the defendant had admitted.²¹⁴

²⁰⁴ See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581. *Mapp v. Ohio* held that the admission of evidence obtained in violation of the Constitution was inadmissible in state court. 367 U.S. 643, 655 (1961). An earlier case had held unconstitutionally obtained evidence inadmissible in federal court. *Id.* at 654. The theory behind this concept, known as the exclusionary rule, is that suppression of evidence is the best (and really, only) deterrent for government officials to adhere to constitutional mandates in criminal investigations and prosecutions because civil actions for damages and criminal prosecutions against governmental officials are either ineffective or not pursued. *Id.* at 652 & n.7.

²⁰⁵ See *Tinkham*, 719 A.2d at 581.

²⁰⁶ See *id.*

²⁰⁷ See *Ferguson*, 532 U.S. at 85; *Tinkham*, 719 A.2d at 581; see also *Miranda v. Arizona*, 384 U.S. 436, 442 (1966) (“These precious rights were fixed in our Constitution only after centuries of persecution and struggle.”).

²⁰⁸ See 597 N.E.2d 1363, 1369 (Mass. 1992).

²⁰⁹ See *id.* at 1364.

²¹⁰ See *id.* at 1365.

²¹¹ See *id.*

²¹² See *id.*

²¹³ See *Snyder*, 597 N.E.2d at 1365.

²¹⁴ See *id.*

Then, the police officer read the defendant his *Miranda* rights, and the defendant confirmed his prior admission.²¹⁵ The defendant was eventually charged and found guilty of three drug-related offenses and sentenced to two years in jail.²¹⁶

Because the principal had not been acting as an agent of police, the principal was not required to give *Miranda* warnings (nor would any other private citizen) to the defendant before questioning him.²¹⁷ The fact that the principal had every intention of turning over any evidence she obtained to the police did not change the Massachusetts court's analysis.²¹⁸ As in *Tinkham*, the *Ferguson* test would have required the principal to give the defendant *Miranda* warnings before questioning him.²¹⁹ Given the school policy of turning any confiscated drugs over to police, after the principal had found drugs in the defendant's book bag, she knew that any statements the defendant made during her questioning would also be given to the police.²²⁰

Furthermore, the principal's conduct during the investigation seemed less like a school official inadvertently coming across evidence while ensuring the safety and order of her building and more like a law enforcement officer seeking to generate evidence for criminal sanctions.²²¹ The principal did not want to arouse suspicion, so she postponed searching and questioning the student even after the possible school and criminal drug violation was brought to her attention.²²² This behavior seems more designed to obtain the maximum amount of evidence, which the principal knew would be turned over to police, per school policy.²²³ Even after the police officer arrived, the principal assisted in the interrogation, repeating the incriminating statements the defendant had made to her in the presence of the police officer, which may have influenced the defendant's decision to confirm the confession even though he had now been given *Miranda* warnings.²²⁴ The

²¹⁵ See *id.*

²¹⁶ See *id.* at 1365–66.

²¹⁷ See *id.* at 1369.

²¹⁸ See *Snyder*, 597 N.E.2d at 1369.

²¹⁹ See *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001).

²²⁰ See *Snyder*, 597 N.E.2d at 1365 n.1.

²²¹ See *id.* at 1365.

²²² See *id.*

²²³ See *Ferguson*, 532 U.S. at 85; *Snyder*, 597 N.E. 2d at 1363. The record is unclear as to whether the defendant knew of the school policy in question. See *Snyder*, 597 N.E.2d at 1365.

²²⁴ See *Snyder*, 597 N.E.2d at 1363. Assuming the *Ferguson* test were law and required the principal to give the defendant *Miranda* warnings, the defendant may have had some success in suppressing his later statement to the police officer had the principal failed to pro-

principal's very deliberate actions throughout the incident indicate that her immediate goal was to generate evidence, even if her ultimate goal was to maintain the safety of her school building.²²⁵ If her immediate goal was the safety of the school building, she should have searched and questioned the student right away, rather than wait so as not to arouse suspicion.²²⁶ Either way, the principal's actions met the *Ferguson* test—she sought to generate evidence with the intent to turn the evidence over to law enforcement—and thus she should have given the student *Miranda* warnings.²²⁷

As in the analysis of *Tinkham* under a *Ferguson* test standard, whether or not the defendant is convicted in a case like *Snyder* may not change.²²⁸ Perhaps, if given *Miranda* warnings, the defendant would have confessed anyway, leading to a conviction.²²⁹ Perhaps he would not have confessed, but there still would have been enough other evidence to convict him.²³⁰ Perhaps, if the principal had not given the defendant *Miranda* warnings, even if she were required to, the statements may have been suppressed—which could have led to a not guilty verdict.²³¹ In choosing a jurisprudence to evaluate school interrogation cases, the emphasis should not be on the eventual outcome, but on a process that protects student-defendants and informs them of their Fifth Amendment rights in situations where their school officials are seeking out evidence to be used not just in school disciplinary proceedings, but in criminal proceedings.²³²

vide those warnings. See *Missouri v. Seibert*, 542 U.S. 600, 603 (2004). In *Seibert*, a prior non-warned statement tainted a later statement made after the provision of *Miranda* warnings. See *id.* at 603. The two confessions were separated by a brief twenty-minute break and were both made in the same police station; the second round of questioning did not involve a specific acknowledgement that the prior confession could not be used against the suspect. *Id.* at 602. The Supreme Court suppressed the later statement, not wanting to legitimize the police practice of purposefully obtaining an illegal confession, then giving *Miranda* warnings, and confusing or tricking suspects into simply repeating themselves. See *id.* at 601, 602. In *Snyder*, the defendant was allowed to meet with his girlfriend between the two confessions, but the close proximity in time (less than forty-minutes) and the lack of a specific warning and any pressure from already having confessed to the principal would favor suppression. See *Snyder*, 597 N.E.2d at 1363.

²²⁵ See *Ferguson*, 532 U.S. at 85; *Snyder*, 597 N.E. 2d at 1363.

²²⁶ See *Ferguson*, 532 U.S. at 85; *Snyder*, 597 N.E. 2d at 1363.

²²⁷ See *Ferguson*, 532 U.S. at 85; *Snyder*, 597 N.E. 2d at 1363.

²²⁸ See *Ferguson*, 532 U.S. at 85; *Snyder*, 597 N.E. 2d at 1369.

²²⁹ See *Snyder*, 597 N.E.2d at 1363.

²³⁰ See *id.*

²³¹ See *id.*

²³² See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Snyder*, 597 N.E.2d at 1365. Both *Tinkham* and *Snyder* involved students accused of possessing and selling drugs on school property. *Snyder*, 597 N.E.2d at 1363; *State v. Tinkham*, 719 A.2d 580 (N.H. 1998). Although

III. EXTERNAL SUPPORT FOR APPLYING THE *FERGUSON* TEST IN SCHOOL INTERROGATION CASES

When school officials act with the intent to assist law enforcement, as demonstrated by collecting evidence and turning that evidence over to police and by analyzing the school officials' immediate and ultimate goals (general crime control, assisting law enforcement, or separate school-related ends), the *Ferguson* test would require that school officials give constitutional warnings.²³³ Although the *Ferguson* test is a fact-specific inquiry based on each case and their attendant circumstances, a general trend exists towards a close collaboration among school officials and law enforcement, which bolsters the inference that school officials' immediate goals are often to assist law enforcement, even if the ultimate goal is enforcement of school rules.²³⁴ Furthermore, a close connection between school officials and law enforcement is frequently mandated by school district policies requiring school officials to turn evidence over to law enforcement, and statistics reflect a growing increase of schools reporting crime to law enforcement.²³⁵

this is a common situation in which school interrogation cases arise, it is not the only type of situation. See *In re Navajo County Juvenile Action No. JV91000058*, 901 P.2d 1247, 1248 (Ariz. Ct. App. 1995). In *In re Navajo County*, a student confessed to his principal of setting a fire in a school locker. *Id.* The student-defendant moved to suppress the confession because the principal had not given him *Miranda* warnings before the questioning. See *id.* The court denied the motion and the student was later convicted. See *id.* In upholding the trial court, the appellate court cited extensively from the *Snyder* decision. See *id.* at 1249. The court wrote that the school principal was not a law enforcement agent and was not acting as an agent of law enforcement, and thus was not required to give the student-defendant *Miranda* warnings. See *id.*

²³³ See *Ferguson*, 532 U.S. at 85.

²³⁴ See JILL F. DEVOE ET AL., NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2005, at 26, 27, 28, (Nov. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iscs05.pdf>.

²³⁵ See, e.g., Hayward (Wis.) Community School District, Student Interrogation/Interview Policy (2002), <http://www.hayward.k12.wi.us/BOE/Web%20policies/400%20Policies/445.htm> [hereinafter Hayward Policy]; Jefferson County (Colo.) Public Schools, Student Interrogations, Searches, and Arrests (2004), <http://www.jeffcodir.jeffco.k12.co.us/board/policies/regs/jih-r.html> [hereinafter Jefferson County Policy]; Jonesport (Me.) Public Schools, Student Interrogations, Searches, and Arrests (2003), <http://www.union103.org/InsptPolicies/JIH.htm> [hereinafter Jonesport Policy]; Knox County Board of Education, Interrogations and Searches (2004), <http://www.kcs.k12tn.net/policy/j/jcab.pdf> [hereinafter Knox County Policy]; Las Cruces (N.M.) Public Schools, Regulation, Student Interrogations, Searches, and Arrests (2005), http://www.lcps.k12.nm.us/Committees/Policies/Series_J/JIH_Interrogation_Searches_Arrests.doc [hereinafter Las Cruces Policy] & http://www.lcps.k12.nm.us/Committees/Policies/Series_J/JIH_RA_Student_Interrog_Search.doc [hereinafter Las Cruces Regulation]; York (Me.) School Department, Student Interrogations and Searches Procedures (2003), <http://www.yorkschoools.org/policies/J%20-%20Students/S008B91F5-008B91F5?DF0=0>. Many of the policies are identical and seem to be based on

A. School Policies Concerning Student Interrogations

Many school districts have policies that both allow principals to interrogate students without giving constitutional warnings and require that principals turn over any evidence of a crime to law enforcement.²³⁶ A typical policy is that of the Las Cruces (New Mexico) Public Schools which provides that when a student is a suspect or accused of a crime, “a principal may interview the student, without the presence of parents, and without giving the student constitutional warnings, if breach of school discipline, health or safety of the student or the student body, or presence in the school building or grounds or illegal matter is involved.”²³⁷ These broad areas in which a student may be interrogated without warnings will cover almost any infraction, from a minor violation of school rules to a serious felony.²³⁸ Importantly, this broad application covers the set of circumstances with which the *Ferguson* test is concerned—situations in which the school official is acting to assist law enforcement and turn evidence over to law enforcement.²³⁹ The policy goes on to require school officials to report evidence of “any felony, or distribution or possession of any amount of drugs” to law enforcement.²⁴⁰ Additionally, school officials are instructed to “cooperate with [any] law enforcement agency and not withhold information which the agency deems relevant to its investigation.”²⁴¹ This sounds remarkably similar to the unconstitutional policy in *Ferguson* which was “designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and could be admissible in subsequent criminal prosecutions.”²⁴²

Thus, in Las Cruces public schools, a student could be interrogated by a school official, with that school official having every intention to assist law enforcement without giving the student *Miranda* warnings.²⁴³ Notably, if a school official calls a law enforcement officer to the school to conduct the very same interrogation about the same incident, the law enforcement officer would be constitutionally required to give

the National School Board Association model policies. See generally National School Board Association, homepage, <http://www.nsba.org> (last visited Mar 20, 2007).

²³⁶ See Las Cruces Regulation, *supra* note 235, at 5.

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ See *Ferguson*, 532 U.S. at 85.

²⁴⁰ See Las Cruces Policy, *supra* note 235, at 1, 3.

²⁴¹ See *id.*

²⁴² See *Ferguson*, 532 U.S. at 86.

²⁴³ See Las Cruces Policy, *supra* note 235, at 5.

the student *Miranda* warnings.²⁴⁴ Applying the *Ferguson* test, the principal would be required to give *Miranda* (or similar) constitutional warnings because the school official is acting for the purpose of and with the intent to assist law enforcement, by collecting incriminating evidence against the student while knowing she would turn that evidence over to law enforcement as required by district policy.²⁴⁵

Many school policies have similar requirements that school officials turn evidence of certain crimes (often specifying drug-related incidents) over to law enforcement and allow school officials to question students for any reason without notifying the students' parents or guardian or giving any constitutional warnings regarding the right to silence and an attorney.²⁴⁶ Interestingly, many school policies require the exact opposite when law enforcement officials conduct investigations on school premises.²⁴⁷ When law enforcement agents (as opposed to school officials) conduct an interrogation, many policies require school officials to notify a student's parents or guardian, require that the parents be present during the interrogation, or require a parent to give consent before an interrogation is conducted on school grounds.²⁴⁸ The differing stance of treatment of interrogations by school officials and law enforcement suggests that school officials recognize the gravity of a law enforcement interrogation.²⁴⁹ Some school districts even require their school administrators to apprise law enforcement of any disabilities or limitations of an interviewed student.²⁵⁰

School districts take differing views on whose responsibility it is to assure compliance with constitutional mandates during law enforcement interrogations.²⁵¹ Some districts expect the law enforcement offi-

²⁴⁴ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

²⁴⁵ See *Ferguson*, 532 U.S. at 85; Las Cruces Policy, *supra* note 235, at 1, 5; see also *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1369 n.9 (Mass. 1992) (noting that, though it seemed unlikely that the court would require school officials to give students *Miranda* rights in all situations, it might make good policy sense to give students a warning that any statements could be used as evidence against them when "incriminating evidence has already been seized and where, pursuant to established practice, the evidence is to be turned over to the police").

²⁴⁶ See sources cited *supra* note 235.

²⁴⁷ See Hayward Policy, *supra* note 235; Jefferson County Policy, *supra* note 235.

²⁴⁸ See Hayward Policy, *supra* note 235; Jefferson County Policy, *supra* note 235.

²⁴⁹ See Hayward Policy, *supra* note 235; Jefferson County Policy, *supra* note 235. Interrogations by school officials, like those performed by law enforcement agents, can be an entry into the criminal justice system, and thus, perhaps, they require similarly stringent standards. See *Ferguson*, 532 U.S. at 85; *Snyder*, 597 N.E.2d at 1369; *State v. Tinkham*, 719 A.2d 580, 581 (N.H. 1998).

²⁵⁰ See Hayward Policy, *supra* note 235.

²⁵¹ See sources cited *supra* note 235.

cers to self-govern, while others instruct their respective school officials to ensure that the law enforcement officers apprise the student of her *Miranda* rights.²⁵² The Jonesport (Maine) School District policy is atypical in that it mandates its school officials to take an active role in protecting students' constitutional rights.²⁵³ The policy states, "[I]t is the responsibility of the school administration to assure that the legal rights of students are not violated" during the school day or during school-sponsored activities, and further directs school officials to protect students from coercion or illegal restraint during law enforcement interrogations.²⁵⁴ School districts' imposition of additional safeguards during law enforcement interrogations, given the serious consequences of such questioning, is incongruous with the policies' specific exemption of school personnel from giving constitutional warnings during interrogations with school officials even though a confession to a school official can just as easily lead to serious consequences in the criminal justice system.²⁵⁵

B. School Crime and Reporting Statistics

Even as the occurrence of crimes at schools has been declining, schools are reporting more crimes to law enforcement, which reflects an increasingly close collaboration between school officials and law enforcement.²⁵⁶ More urban schools and schools with higher minority enrollments report more crimes to law enforcement.²⁵⁷ This suggests a disparate impact upon urban and minority students of student confes-

²⁵² Compare Jefferson County Policy, *supra* note 235 (placing no obligation on principals to ensure law enforcement officers comply with constitutional safeguards), with Knox County Policy, *supra* note 235 (instructing principal to confirm that the law enforcement officer provided constitutional warnings), and Jonesport Policy, *supra* note 235 (requiring principals to ensure that the law enforcement officer gives constitutional warnings).

²⁵³ See Jonesport Policy, *supra* note 235.

²⁵⁴ See *id.*

²⁵⁵ See *State v. Tinkham*, 719 A.2d 580, 581 (N.H. 1998); DEVOE ET AL., *supra* note 234, at 28; Knox County Policy, *supra* note 235.

²⁵⁶ See DEVOE ET AL., *supra* note 234, at 28, 71, 81. The two most suggested theories to explain why there has been increase in crimes reported to police (even though crime is actually declining) are the proliferation of zero-tolerance policies and the increasing use of the criminal justice system to handle school-based offenses that were formerly handled within schools with detention, suspension, and counseling. See generally Annette Fuentes, *Zero Tolerance Policies Have Created a 'Lockdown Environment' in Schools*, NATION, Dec. 15, 2003, at 17; Richard Luscombe, *Student Arrests Test Rules of a Post-Columbine World*, CHRISTIAN SCI. MONITOR, Feb. 3, 2005, available at <http://www.csmonitor.com/2005/0203/p01s01-ussc.html>; Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES, Jan. 4, 2004, at A1.

²⁵⁷ See DEVOE ET AL., *supra* note 234, at 29, 84.

sions as an entry into the criminal justice system.²⁵⁸ Both the close connection between schools and law enforcement and the unequal reporting rates demonstrate the need for the *Ferguson* test to establish uniform standards since school officials often knowingly intend to share evidence with law enforcement, a situation of which students should be fully informed.²⁵⁹

Between 1992 and 2003, overall youth crime declined by approximately half, both at school and away from school, while during the same time period, schools reporting at least one crime to law enforcement rose from 57% to 63%.²⁶⁰ Breaking this figure down by type of crime, 36% of schools reported a violent crime (including 15% of a serious violent crime), 28% reported a theft, and 52% reported other crimes.²⁶¹ The incidence of crimes and of crimes reported to police is not uniform across different urbanicities, however.²⁶² In all three reporting categories, city schools had a higher incidence of crime and higher reporting levels to police.²⁶³ For example, the overall violent crime report rate was 36%, although 44% of city schools reported a violent crime to police, while only 35% of urban fringe, 40% of town, and 29% of rural schools reported a violent crime to police.²⁶⁴ The pattern is similar in the other categories—city schools report rates higher than the overall figure, followed in decreasing order by town, urban fringe, and rural.²⁶⁵ The higher reporting rates for city schools suggests that

²⁵⁸ See *id.*

²⁵⁹ See *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001); DEVOE ET AL., *supra* note 234, at 28.

²⁶⁰ DEVOE ET AL., *supra* note 234, at iv. “At school” includes crimes that took place in school buildings, on school grounds, or on school buses during normal school hours or during school-sponsored events or activities. See *id.* at 29. Regarding “at school” incidents, in 1992, there were 144 total crimes per 1000 students and only 73 per 1000 students in 2003. *Id.* at 71. “Away from school” crimes were committed by 138 per 1000 students in 1992 and declined to 60 per 1000 students by 2003. *Id.*

²⁶¹ DEVOE ET AL., *supra* note 234, at 27. Serious violent crime includes rape, sexual battery, physical attack or fight with a weapon, threat of physical attack with a weapon, and robbery with or without a weapon. *Id.* Other incidents include possession of a firearm or explosive device, possession of a knife or sharp object, distribution of illegal drugs, possession or use of alcohol or illegal drugs, sexual harassment, or vandalism. *Id.*

²⁶² See *id.* at 29. As might be expected, incidents and reports of crimes in all four categories are lowest at the primary school level, increasing at the middle school level, and significantly increasing at the high school level. *Id.* at 28.

²⁶³ DEVOE ET AL., *supra* note 234, at 28.

²⁶⁴ *Id.* at 29.

²⁶⁵ *Id.* The overall report rate for theft was 29%: 34% for city schools, 28% for urban fringe schools, 30% for town schools, and 24% for rural schools. *Id.* For “other crimes” the overall rate was 52%: 61% for urban schools, 49% for urban fringe, 55% for town schools, and 47% for rural schools. *Id.*

more students in those schools are likely to find themselves in a situation where the *Ferguson* test would be applicable.²⁶⁶

Schools' reports of crimes to police also vary depending on the percentage of minority enrollment.²⁶⁷ Schools with the highest minority enrollments have the highest rates of reporting crime to police.²⁶⁸ The overall report rate for violent incidents was 36%, but for schools with a minority enrollment of 75% or more, the report rate for violent crime was 45%.²⁶⁹ For schools with minority enrollment of less than 10%, the report rate was 31%; for schools with minority enrollment of 10 to 24%, the report rate was 36%; for schools with minority enrollment of 25 to 50%, the report rate was 37%; and for schools with a minority enrollment of 50 to 74%, the report rate was 39%.²⁷⁰ Again, the same trend exists in the subset of serious violent crime and in the "other incidents" categories.²⁷¹ The trend was less significant in the theft category, where the schools with the lowest minority enrollment had a report rate of 27% and schools with the highest minority enrollment had a report rate of 31%.²⁷²

These statistics suggest a frequent sharing of information and evidence of crimes between many schools and law enforcement, indicating a need for the *Ferguson* test.²⁷³ Furthermore, the statistics demon-

²⁶⁶ See *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001); DEVOE ET AL., *supra* note 234, at 29.

²⁶⁷ See DEVOE ET AL., *supra* note 234, at 84.

²⁶⁸ See *id.*

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See *id.* In the subset of serious violent crimes reported to police, schools with the lowest minority enrollment of less than 10% had a report rate of 10%; schools with 10 to 24% minority enrollment had a report rate of 14%; schools with 25 to 50% minority enrollment had a report rate of 18%; schools with 50 to 74% minority enrollment had a report rate of 17%; and schools with 75% or more minority enrollment had a report rate of 23%. *Id.* In the category of other incidents, for schools with minority enrollment of less than 10%, the report rate was 47%; for schools with minority enrollment of 10 to 24%, the report rate was 55%; for schools with minority enrollment of 25 to 50%, the report rate was 56%; for schools with a minority enrollment of 50 to 74%, the report rate was 52%; and for schools with a minority enrollment of 75% or more, the report rate was 58%. *Id.*

²⁷² See DEVOE ET AL., *supra* note 234, at 84.

²⁷³ See *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001); DEVOE ET AL., *supra* note 234, at 29. Some people are resisting the school-police connection. See Luscombe, *supra* note 256. In response to an incident in which a thirteen-year-old first generation immigrant was removed as president of the student council and had her membership in the honor society revoked for bringing a traditional Korean pencil sharpener to school (which includes a folding two-inch blade), one Texas state senator introduced legislation that would require school administrators to take a "student's intent" into account before administering any disciplinary procedures. See *id.* In New York City, several public school teachers have clashed with school police over police actions the teachers thought crossed

strate that urban and minority students are more likely to be questioned about an incident the principal knows she is going to relate to the police as evidence than their urban fringe, town, rural, and non-minority counterparts.²⁷⁴ This disparity also highlights the need for the *Ferguson* test because a uniform, predictable standard would help ensure that students are equally apprised of their constitutional rights, which is particularly necessary given that not all student confessions are equally likely to result in referral to the criminal justice system.²⁷⁵ Thus, in situations in which it is applicable, the *Ferguson* test would protect and inform rural and urban as well as minority and non-minority students alike.²⁷⁶

IV. THE REALITIES AND PRACTICALITIES OF THE *FERGUSON* TEST IN THE SCHOOL INTERROGATION SETTING

A. *Custodial Interrogation*

Assuming a situation in which the *Ferguson* test triggers constitutional warnings, traditionally, *Miranda* warnings are only required when the recipient of the warnings is both (1) interrogated and (2) in custody.²⁷⁷ Interrogation is questioning initiated by law enforcement of a suspect, meaning that someone the police are focusing on as a potential defendant, not just as a witness.²⁷⁸ When a school official questions a student in a *Ferguson*-triggering situation, the “interrogation” compo-

the line. See BETH FERTIG, *School Safety Agents Cause Tensions* (WNYC Radio Broadcast, May 3, 2005) (transcript on file with author), <http://www.wnyc.org/news/articles/46748>. In one incident, a teacher was arrested for trying to stop a school officer from arresting a student for swearing (apparently on a disorderly conduct charge). *Id.* In another New York City school, two teachers were arrested for obstruction of justice after school police broke up a fight and the teachers asked the officers not to handcuff the students inside the classroom. *Id.* The charges against the teachers were dropped the same day. *Id.*

²⁷⁴ See *Ferguson*, 532 U.S. at 85; DEVOE ET AL., *supra* note 234, at 29.

²⁷⁵ See *Ferguson*, 532 U.S. at 85; DEVOE ET AL., *supra* note 234, at 85.

²⁷⁶ See *Ferguson*, 532 U.S. at 85; DEVOE ET AL., *supra* note 234, at 85.

²⁷⁷ See *Thompson v. Keohane*, 516 U.S. 99, 107 (1995); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). This Note does not take the position that when the *Ferguson* test requires warnings in a school interrogation case that the student must also be subject to custodial interrogation to mandate warnings. See *Miranda*, 384 U.S. at 444. Instead, the *Ferguson* test is applicable when school officials “undertake to obtain such evidence [of criminal conduct] . . . for the specific purpose of incriminating those [students]” whether or not custodial interrogation is present. See *Ferguson*, 532 U.S. at 85. However, because the custodial interrogation element is so important to *Miranda*, it bears addressing in the school interrogation setting. See *Miranda*, 384 U.S. at 444.

²⁷⁸ See *Beckwith v. United States*, 425 U.S. 341, 347 (1976); *Miranda*, 384 U.S. at 444.

ment is met.²⁷⁹ By requiring that the school official seek out evidence with the intent to turn that evidence to law enforcement, the *Ferguson* test ensures that the questioning is initiated by a school official and that the school official is focused on gathering evidence against a particular student.²⁸⁰ Furthermore, interrogation for *Miranda* purposes also covers conduct or questioning that law enforcement knows is reasonably likely to elicit an incriminating response from the suspect.²⁸¹ This so-called “functional equivalent” of interrogation also includes consideration of any suspect’s particular susceptibilities or vulnerabilities that law enforcement is aware of to use in eliciting a statement from the suspect.²⁸² In a *Ferguson* situation, the functional equivalent of interrogation is often easily met because of the special relationship between a school official and a student. A school official is not only likely to personally know the student she is interrogating and the student’s background (including any particular susceptibilities), but a school official also has access to the student’s entire educational file, which contains much more than just grades.²⁸³

²⁷⁹ See *Ferguson*, 532 U.S. at 84–85; *Tinkham v. State*, 719 A.2d 580, 581 (N.H. 1998).

²⁸⁰ See *Tinkham*, 719 A.2d at 581, 583–84. The principal in *Tinkham* told the police she intended to question the defendant. *Id.* at 581. Furthermore, it was never disputed that there was an “interrogation,” only that *Miranda* was not required because the principal was neither a law enforcement officer nor acting as an agent of law enforcement. *Id.* at 583–84; see also *In re Navajo County Juvenile Action No. JV91000058*, 901 P.2d 1247 (Ariz. Ct. App. 1995) (noting that the only dispute was whether the principal “was required to give appellant such a [*Miranda*] warning before questioning him”); *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1369 (Mass. 1992) (not questioning whether an interrogation had occurred, only that *Miranda* was not required); *In re Brendan H.*, 372 N.Y.S.2d 473, 477 (Fam. Ct. 1975) (referring to a school questioning as an “interrogation,” but again found that *Miranda* was not required because school officials were not acting as agents of or in concert with police).

²⁸¹ See *Rhode Island v. Innis*, 446 U.S. 291, 301–02 (1980).

²⁸² See *id.*

²⁸³ See *id.* Educational records are important enough to be protected by federal law. See 20 U.S.C. § 1232g (1974). The Federal Educational Records Protection Act defines educational records as information directly related to a student, specifically, any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche and maintained by education agencies or institutions, or by parties acting for agencies or institutions, including special education schools and health or social service institutions. See *id.* The National Center for Education Statistics, which provides guidelines to many academic institutions about the Federal Educational Records Privacy Act lists educational records as including: family information, such as the name and address of the student and her parents or guardians, date and place of birth, and number of siblings; personal information such as identification and social security number, picture, and information to readily identify the student; grades, test scores, courses taken, academic specializations and activities, and official letters about a student’s status in school; test records, answer sheets, and individualized educational plans; special education records; disciplinary records established and maintained by school officials; medical and health records that the school collects and maintains; docu-

What constitutes custody is a more tricky analysis.²⁸⁴ A formal arrest can meet the custody requirement, but this would not be the case in a school-based *Ferguson* situation.²⁸⁵ However, “restraint on freedom of movement of the degree associated with a formal arrest” also meets the custody requirement.²⁸⁶ The latter definition of custody is evaluated with a reasonable person test: would a reasonable person in the suspect’s position, given the totality of the circumstances, have felt free to end the questioning and leave?²⁸⁷ The location of the interrogation is not determinative because even some interrogations that have taken place in police stations have been found to be non-custodial since the suspects went to the station voluntarily and were not prevented from leaving.²⁸⁸ On the other hand, the Supreme Court held that an interrogation in a suspect’s home was custodial because it took place in the middle of the night, with the suspect surrounded by police officers with guns drawn.²⁸⁹

A student, of course, does not go to the principal’s office voluntarily, in any true meaning of the word.²⁹⁰ The student must go see the principal and, once in the office, is not free to “end the questioning and leave.”²⁹¹ Although a student might be insolent and difficult by refusing to answer questions, this is not the same as feeling free to leave the principal’s office.²⁹² In a *Ferguson* situation, a student would not be surrounded by police who can use force or the threat of force to prevent her from leaving the principal’s office, but the power dynamic between a student and her principal, who has the ability to threaten and impose school punishments, effectively functions as restraint on a student’s freedom of movement.²⁹³ After all, being summoned to the principal’s office certainly carries with it “inherently compelling pres-

mentation of schools attended, courses taken, attendance, awards conferred and degrees earned; and video tape recordings of individual or groups of students. See Nat’l Ctr. for Educ. Statistics, Section 2: Summary of Key Federal Laws, http://nces.ed.gov/pubs97/p97527/Sec2_txt.asp# (last visited Mar. 20, 2007). This is far more information than law enforcement officers have about most of the suspects they are interrogating. See *Innis*, 446 U.S. at 301.

²⁸⁴ See *New York v. Quarles*, 467 U.S. 649, 655 (1984); *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 494–95 (1977).

²⁸⁵ See *Quarles*, 467 U.S. at 655; *Beheler*, 463 U.S. at 1125; *Mathiason*, 429 U.S. at 494–95.

²⁸⁶ See *Quarles*, 467 U.S. at 655; *Beheler*, 463 U.S. at 1125; *Mathiason*, 429 U.S. at 494–95.

²⁸⁷ See *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

²⁸⁸ See *Beheler*, 463 U.S. at 1122, 1123; *Mathiason*, 429 U.S. at 494.

²⁸⁹ See *Orozco v. Texas*, 394 U.S. 324 (1969).

²⁹⁰ See *Beheler*, 463 U.S. at 1122, 1123; *Mathiason*, 429 U.S. at 494.

²⁹¹ See *Thompson*, 516 U.S. at 112.

²⁹² See *id.*

²⁹³ See *Orozco*, 394 U.S. at 325.

tures which . . . compel [the student] to speak where he would not otherwise do so freely.”²⁹⁴ Additionally, in some schools, a school security guard, who may or may not be a law enforcement officer, may retrieve a student from class and accompany that student to the principal’s office, further demonstrating that the student is not voluntarily going nor free to end the questioning, but rather is made to go by a show of authority and a potential use of force.²⁹⁵

In at least one case, a court found a custodial setting in a principal’s office.²⁹⁶ In *In re Killitz*, the student-defendant was summoned to the principal’s office, waited outside for a few minutes, and then was brought into the office.²⁹⁷ In the principal’s office, a police officer questioned the student while the principal watched.²⁹⁸ The court found that the student was in custody during the questioning because the student was “obliged” to respond to a school administrator’s request to go to the principal’s office, and had not gone voluntarily.²⁹⁹ Further, the court found that the student was in school during regular school hours, such that school officials controlled this student’s (and all other students’) freedom of movement “a great deal.”³⁰⁰ Additionally, neither the police officer nor the principal did anything “to dispel the clear impression communicated to defendant that he was not free to leave.”³⁰¹ The court concluded that the student was in custody, under a state standard very similar to the federal *Miranda* custody test.³⁰²

In re Killitz is distinguishable from most school interrogation cases (and from the school interrogation cases addressed in this Note) because a law enforcement officer conducted the interrogation.³⁰³ However, the Colorado court’s analysis on the issue of custody is instructive and applicable to more routine school interrogation situations that do

²⁹⁴ See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

²⁹⁵ See *Orozco*, 394 U.S. at 327–28; DEVOE ET AL., *supra* note 234, at 63.

²⁹⁶ See *In re Killitz*, 651 P.2d 1382, 1383 (Or. Ct. App. 1982).

²⁹⁷ See *id.*

²⁹⁸ See *id.* The student-defendant was summoned to the office because another student had implicated him in a burglary. *Id.* Note that this type of focused interrogation also meets the implicit focus as a suspect, not merely questioning as a witness, aspect of *Miranda* rights applicability. *Beckwith v. United States*, 425 U.S. 341, 347 (1976); *Miranda*, 384 U.S. at 444.

²⁹⁹ See *Killitz*, 651 P.2d at 1383–84.

³⁰⁰ See *id.* at 1384.

³⁰¹ See *id.*

³⁰² See *id.* at 1383–84. Oregon weighs the following in establishing custody: (1) whether the defendant could have left the scene of the interrogation voluntarily, (2) whether defendant was being questioned as a suspect or merely as a witness, and (3) whether defendant freely and voluntarily accompanied the officer to the place of questioning. *Id.*

³⁰³ See *id.* at 1383.

not involve law enforcement.³⁰⁴ The court affirmed that a student does not go to the principal's office voluntarily and, once in the office, is not free to leave, two important factors in the custody analysis.³⁰⁵ Therefore, the custody element is often met when a student is questioned by school officials.³⁰⁶

B. *The Substance of the Ferguson Rule Warnings*

Because the traditional *Miranda* requirements of custodial interrogation are met in a school interrogation by a school official, and because school officials often have an intent (frequently dictated by school policy or custom) to turn the results of an interrogation over to police, *Miranda* warnings should be given to students in these types of interrogation settings.³⁰⁷ *Ferguson* stated that the hospital employees should have warned patients of "their constitutional rights, as standards of knowing waiver require," and similarly, school officials should warn their students in comparable situations.³⁰⁸ For ease of application, school officials can follow their respective state laws concerning minors and *Miranda* warnings.³⁰⁹

Some states have special requirements when administering *Miranda* rights to minors, and in such a jurisdiction, school officials should also follow these rules.³¹⁰ For example, some states require the presence of or an opportunity for the minor to discuss the *Miranda* warnings with an "interested adult," while others require a simplified version of *Miranda* for minors.³¹¹ The *Miranda* court stated that an "accused must be adequately and effectively apprised of his rights" in order to permit a full opportunity for the accused to exercise his or her right against self in-

³⁰⁴ See *Killitz*, 651 P.2d at 1383.

³⁰⁵ *New York v. Quarles*, 467 U.S. 649, 655 (1984); *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977); *Killitz*, 651 P.2d at 1383-84.

³⁰⁶ See *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *Killitz*, 651 P.2d at 1383.

³⁰⁷ See *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); sources cited *supra* note 235.

³⁰⁸ See *Ferguson*, 532 U.S. at 85; *Miranda*, 384 U.S. at 436, 444. The *Miranda* warnings include: the right to remain silent; the right to an attorney, either retained or appointed; and that any statement a suspect does make may be used as evidence against her. See *Miranda*, 384 U.S. at 444.

³⁰⁹ See *Miranda*, 384 U.S. at 444.

³¹⁰ See *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1371 (Mass. 1988); *Commonwealth v. Philip S.*, 594 N.E.2d 880, 885 (Mass. App. Ct. 1992); see also *In re J.A.N.*, 346 N.W.2d 495, 500 (Iowa 1984).

³¹¹ See *Philip S.*, 594 N.E. 2d at 885; *State v. Benoit*, 490 A.2d 295, 304 (N.H. 1984) (requiring that warnings be in "language understandable to a child"); *A Juvenile*, 521 N.E.2d at 1371.

crimination.³¹² Therefore, in a school interrogation, an adequate warning of a student's rights should require the school official to make it clear that any information obtained will be shared with law enforcement for potential criminal punishments, not just for in-school punishments, since this is the crux of why a school official would even be giving such warnings.³¹³ Such specific warnings are not unheard of—New Hampshire specifically requires informing a minor that she may be sent into the adult system in its *Miranda* warnings for minors.³¹⁴

C. Feasibility

The *Ferguson* test will not require constitutional warnings in every school discipline situation because the factors of the test will not be met in every situation.³¹⁵ The *Ferguson* test and its factors limit the applicability to situations in which school officials are seeking out evidence against a student with the intent to turn that evidence over to law enforcement.³¹⁶ School functioning will not be impaired because of the *Ferguson* test or by requiring school officials to sometimes give *Miranda* warnings, as concerned the Superior Court of Pennsylvania in *Commonwealth v. Dingfelt*, which wrote:

School officials do stand in the position of loco parentis and as such are entitled to retain a degree of control over the school's students and its environment. For these reasons they should not be limited to the degree that would result in making it necessary to warn students of their constitutional rights everytime [sic] a problem of discipline arose and especially when the problem of discipline occasions the knowledge of the commission of the crime. It would be utterly ridiculous for a teacher who confronted a student for throwing a rubber

³¹² See *Miranda*, 384 U.S. at 467.

³¹³ See *Ferguson*, 532 U.S. at 85.

³¹⁴ See *Benoit*, 490 A.2d at 304.

New Hampshire's recommended *Miranda* warning for minors is: "There is a possibility that you may not be brought to juvenile court but instead will be treated as an adult in criminal court. There you could go to county jail or the State prison. If you are treated as an adult you will have to go through the adult criminal system, just as if you were 18 years old. If that happens, you will not receive the protections of the juvenile justice system."

Id. app. at 306–07.

³¹⁵ See *Ferguson*, 532 U.S. at 85.

³¹⁶ See *id.*

band across the classroom to be under a duty to give *Miranda* warnings before telling the student to empty his pockets.³¹⁷

The Supreme Court enunciated a similar concern when considering if school officials were required to get a warrant before searching a student in *New Jersey v. T.L.O.*³¹⁸ The Court wrote that a warrant requirement was “unsuited” to the school environment because it would interfere with school officials’ ability to swiftly implement disciplinary procedures needed in the school setting.³¹⁹ The *Ferguson* test and its factors, however, distinguish routine classroom discipline situations from interrogations by administrators who are intending to turn incriminating evidence over to law enforcement based on official or de facto school policies.³²⁰ The *Ferguson* test would not require constitutional warnings in the former, only in the latter.³²¹

As the Pennsylvania court worried, if every teacher in every disciplinary situation, had to give *Miranda* warnings, classroom discipline would halt, chaos would reign, and learning would cease.³²² But the line is much clearer than the Pennsylvania court admits; school officials would be required to give warnings when they intend to turn evidence over to police, based upon the nature of the incident and school policies.³²³ A classroom teacher instructing her student to hand over the student’s cache of rubber bands, or even questioning the student about his rubber band “possession,” is a disciplinary situation that is very unlikely to reach law enforcement, and thus would not meet the *Ferguson* test.³²⁴

Similarly, most in-classroom discipline situations will not meet the *Ferguson* test.³²⁵ Even those situations that begin in the classroom but eventually include sending a student to the administration for further action will usually not meet the *Ferguson* test because so many of these incidents are not of the sort that could or would be turned over to law enforcement.³²⁶ For example, thirty percent of middle schools and twenty-nine percent of high schools report at least weekly incidents of

³¹⁷ See 323 A.2d 145, 147 (Pa. Super. Ct. 1974).

³¹⁸ See 469 U.S. 325, 340 (1985).

³¹⁹ See *id.*

³²⁰ See *Ferguson*, 532 U.S. at 85.

³²¹ See *id.*

³²² See *Dingfelt*, 323 A.2d at 147.

³²³ See *Ferguson*, 532 U.S. at 85, *Dingfelt*, 323 A.2d at 147.

³²⁴ See *Ferguson*, 532 U.S. at 85; *Dingfelt*, 323 A.2d at 147.

³²⁵ See *Ferguson*, 532 U.S. at 85; *Dingfelt*, 323 A.2d at 147.

³²⁶ See *Ferguson*, 532 U.S. at 85.

“student acts of disrespect for teachers,” and these are likely handled and punished within the classroom by the classroom teacher.³²⁷ When students causing an act of disrespect are referred to a school administrator, such incidents are not the kind where a principal would interrogate a student with the intent to turn any information gathered over to police, even if the student “confessed” to disrespecting her teacher in a written student-referral form.³²⁸

On the other hand, a situation in which a principal is investigating a student suspected of having drugs on school property and questions that student with every intention of turning any evidence (such as a written confession) over to the police would meet the *Ferguson* test.³²⁹ Already existing school policies also provide guidance as to when there is a *Ferguson* situation, and thus school officials should give *Miranda* warnings.³³⁰ For example, the Las Cruces policy mandates that school officials report and turn any evidence of a felony or drug-related crimes to local law enforcement.³³¹ Likewise, the Hayward policy encourages school officials to report and share evidence of tobacco use and requires school officials to report and share evidence of alcohol use or possession with local law enforcement.³³² Thus, in these districts, teachers and (most likely) principals know that if they are questioning a student about an alcohol or drug incident, they need to give warnings because they intend (and indeed, are required) to turn any evidence over to law enforcement.³³³ Thus, even though the number of incidents where school officials call, inform, or assist law enforcement is rising, the *Ferguson* test will not have any impact on most individual, routine discipline situations.³³⁴

CONCLUSION

In *Miranda*, the Supreme Court wrote, “[This decision] was necessary . . . to insure that what was proclaimed in the Constitution had not become but a ‘form of words’ in the hands of government officials.”³³⁵

³²⁷ See DEVOE ET AL., *supra* note 234, at 31.

³²⁸ See *Ferguson*, 532 U.S. at 85; *State v. Tinkham*, 719 A.2d 580, 581 (N.H. 1998).

³²⁹ See *Ferguson*, 532 U.S. at 85.

³³⁰ See *id.*; Hayward Policy, *supra* note 235; Las Cruces Policy, *supra* note 235.

³³¹ See Las Cruces Policy, *supra* note 235.

³³² See Hayward Policy, *supra* note 235.

³³³ See *Ferguson*, 532 U.S. at 85; *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); Hayward Policy, *supra* note 235; Las Cruces Policy, *supra* note 235.

³³⁴ See *Ferguson*, 532 U.S. at 85; DEVOE ET AL., *supra* note 234, at 26.

³³⁵ See *Miranda*, 384 U.S. at 444.

The *Ferguson* test would ensure that a student is informed of her constitutional rights before an interrogation if her principal is seeking out evidence with the intent to turn that evidence over to law enforcement. Applying the *Ferguson* test to school interrogations would ensure a process more appropriately protective of students' Fifth Amendment rights than agency law, which is how school interrogation cases have usually been analyzed. The *Ferguson* test is the more appropriate analysis because, although *Ferguson* and other school search cases rely on similar analyses, *Ferguson* extends to other constitutional rights.

The *Ferguson* test, which would provide a uniform guideline for school officials conducting student interrogations, is particularly necessary for several reasons. First, there is an increasingly close connection between many school officials and law enforcement due to policies that require school officials to share evidence of certain potential criminal activity with law enforcement. Next, statistics show that students in urban schools and schools with high numbers of minority students report more crimes to police, suggesting that some students may be more vulnerable in school interrogation situations. Finally, because students do not expect their principals to seek out evidence the same way they would expect of law enforcement, they may give a statement that they believe will be used solely for school disciplinary purposes, though it turns out to be used for matters of criminal justice—a situation that, if known by the student, may have changed their decision to speak. Thus the *Ferguson* test is necessary because it would ensure that students' Fifth Amendment rights do not become “but a form of words” in the hands of school officials.