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Symposium: Justice for the Child*

The Lee Arthur Hester Case and the Unfinished Business of the United States Supreme Court to Protect Juveniles During Police Interrogations

Steven A. Drizin**

ABSTRACT

In 1961, on the eve of the Warren Court's "due process revolution" in the area of constitutional criminal procedure and in the midst of the Civil Rights Movement, a fourteen-year-old black boy named Lee Arthur Hester was arrested and charged with raping and murdering a white teacher in Chicago. The unrepresented Hester confessed shortly after an interrogation by four police officers who accused him of the crime and told him that they had evidence linking him to the crime. He immediately recanted his confession when allowed to see his mother and an attorney. Hester's attorneys moved to suppress his confession but a judge admitted it, and although Hester's confession made little sense and Hester's teacher gave him an alibi, Hester was convicted. The Illinois Supreme Court affirmed his conviction and the United States Supreme Court granted certiorari in 1969. In their written briefs and at oral argument, Hester's attorneys boldly asked the Court for a per se rule excluding all confessions taken from juveniles who are unrepresented by counsel. The Court surprised the parties by dismissing the writ of certiorari as improvidently granted. This article tells the untold story of Lee Arthur Hester and his case, raises questions about Hester's guilt, and takes the Supreme Court to task for failing to use Hester's case to provide greater protections to juvenile suspects during police interrogations.

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** Clinical Professor & Legal Director, Center on Wrongful Convictions; Associate Director, Bluhm Legal Clinic, Northwestern University School of Law. I'd like to thank Bernardine Dohrn, who nearly twenty years ago invited me to join the first legal and policy advocacy "Center" at Northwestern—The Children and Family Justice Center (CFJC). Her vision, leadership, and passion for justice have inspired me and numerous other young clinical law professors and thousands of law students over the past two decades. I'd also like to acknowledge Thomas Geraghty, the Director of the Bluhm Legal Clinic for nearly forty years. Tom has been a mentor in the classroom and the courtroom and has been my co-counsel on numerous cases. It was Tom who first mentioned the *Hester* case to me more than fifteen years ago. Finally, I'd like to thank Joshua Tepfer and Laura Nirider, my two colleagues at the Center on Wrongful Convictions of Youth, who I hope will continue to carry on the legacy of zealous and ethical legal representation and policy advocacy on behalf of youth long after Tom, Bernardine, and I have left Northwestern.

I. INTRODUCTION

¶1 In 1994, shortly after I started working at Northwestern University School of Law's Bluhm Legal Clinic, Tom Geraghty, the Clinic's Director, and I began working on a series of high-profile juvenile murder cases with our students. The cases had a familiar script. Our clients were typically under the age of fifteen. They had confessed after being interrogated by Chicago detectives. No attorneys or parents were present with them when they confessed. Although a "youth officer"¹ was present, he did nothing to protect the juveniles' interests. Other than introducing himself, the youth officer sat silently while the juveniles waived their *Miranda* rights and gave their confessions.² It was during this time frame that Tom first started talking to me about the Illinois case of *People v. Hester*.³

¶2 According to Tom, the *Hester* case was the leading Illinois Supreme Court case regarding juvenile confessions when he had started practicing law in the late 1960s. Tom also had a vague recollection of reading about Hester's arrest in the Chicago newspapers in April of 1961. At the time, Tom was in high school (I was in utero), and he recalled that the case had involved a young black boy of low intelligence who had been convicted of raping and murdering a white teacher in a Chicago public school on the South Side of Chicago. He also told me that something about the case "just never felt right to him." Tom's gut feeling⁴ about the case stuck with me, but for years I did not have the time, the legal experience, or the perspective to do justice to the *Hester* case.

¹ The Illinois Juvenile Court Act requires that police officers who take a juvenile suspect into police custody must make immediate and reasonable attempts to notify the juvenile's parents or guardian and to take the suspect to a youth officer without unnecessary delay. 705 ILL. COMP. STAT. 405/5-405 (1999). The youth officer's role, however, is undefined when it comes to police interrogations. Typically, they are present to ensure that a defendant is given his *Miranda* rights and to protect the juvenile against police coercion. But youth officers have divided loyalties. They have a "protective role" when it comes to the juvenile suspects but they are police officers who are far lower on the pecking order than the detectives who conduct the interrogations. In my experience, youth officers typically do nothing to ensure that the juvenile understands his or her *Miranda* warnings or knowingly and intelligently waives them. I've never seen a youth officer challenge the aggressive or coercive tactics of the detectives. When called to testify, they invariably become State's witnesses against the juvenile, backing up the detectives' accounts of the interrogation in all respects.

² These cases included *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004) (affirming grant of writ of habeas corpus based on involuntariness of eleven-year-old's confession); *Hardaway v. Young*, 302 F.3d 757(7th Cir. 2002) (affirming denial of writ of habeas corpus in case of fourteen-year-old who confessed); and *In re M.W.*, 731 N.E.2d 314 (Ill. App. Ct. 2000) (affirming trial court decision that mentally retarded thirteen-year-old did not knowingly and intelligently waive his *Miranda* rights). In *Hardaway*, the Seventh Circuit recognized that the youth officer gave about "as much assistance as a potted plant." *Hardaway*, 302 F.3d at 765.

³ *People v. Hester*, 237 N.E. 2d 466 (Ill. 1968).

⁴ One thing I have learned since becoming Legal Director of the Center on Wrongful Convictions (CWC) is to trust the "gut feelings" of veteran criminal defense lawyers, especially when they start talking about that one case that "keeps them up at nights" or that "still bothers them." In fact, several of our exonerations at the CWC have come after investigations we initiated on the basis of such "war stories" from lawyers. Comments from Thomas Breen, a well-respected defense attorney in Chicago and a former Cook County State's Attorney, led CWC attorneys to launch an investigation into the rape and murder convictions of Michael Evans and Paul Terry. This investigation led Center attorneys to seek DNA testing which eventually exonerated both men after they served twenty-seven years in prison. See Steve Mills & Jeff Coen, *DNA Tests Gain Release of 2 in '76 Rape; Freedom Sweet for Men in Prison More Than 25 Years*,

¶3 By 2009, however, I was both ready and able to begin a case study of *Hester*. Between 1994 and 2009, my primary focus, both in my casework and my scholarship, had been on false and coerced confessions of juveniles. One case in particular, involving an eleven-year-old boy who falsely confessed to murdering his elderly white neighbor,⁵ sent me on an odyssey to understand everything I could about why juveniles are more likely than adults to falsely confess when pressured by adult authority figures. During that intellectual journey, I had studied the most important United States Supreme Court cases on juvenile interrogations and confessions and thought I knew about as much on these matters as I could know.

¶4 I was wrong. Little did I know when I began my research for this Article that the case of Lee Arthur Hester would enrich my knowledge of the law relating to juvenile interrogations and confessions. Little did I know that it would expand my understanding of race relations in Chicago, the civil rights movement, the Warren Court's due process revolution, and one of the saddest chapters in the Supreme Court's history—the resignation of Associate Justice Abe Fortas. Little did I know that I would come to believe in Hester's innocence and that I would meet Lee Arthur Hester. Little did I know that he would become my client.

¶5 At the start of this project, I was interested in Hester's case for a number of reasons. First, *Hester* has been a thorn in the side of juvenile defendants in Illinois for more than forty years. In 1968, in Hester's case, the Illinois Supreme Court had the opportunity to create special protections for juvenile and mentally limited defendants during interrogations. As a result of its failure to do so, juvenile defendants to this day are paying a heavy price. *Hester* still gets cited for the general proposition that “youth and subnormal intelligence do not *ipso facto*” render the defendant's confession involuntary,⁶ words which every defense lawyer knows usually signal that the reviewing court either plans on upholding the trial court's decision to admit a confession as voluntary or plans on reversing a court's decision to suppress one as involuntary.⁷ But what would the *Hester* case stand for if Hester's confession was false and this terrible precedent was based on the false premise that Hester was guilty of the crime?

¶6 Hester's case also interested me because the Illinois Supreme Court's decision was out of step with the path being forged by the United States Supreme Court and seemed

CHI. TRIB., May 24, 2003, at 1. Similarly, my decision to represent Thaddeus Jimenez was sparked, in part, by my conversation with Cynthia Leyh, a Cook County assistant public defender, who I came to know and respect during my years of practicing in juvenile court. When I called Leyh about Jimenez's case, she immediately recalled the case and urged me to take it because she was convinced that Jimenez was innocent. Jimenez was exonerated in 2009 and another man has since been charged with the murder. See Maurice Possley, *Arrested at 13, Inmate Freed*, CHI. SUN TIMES, May 4, 2009, at 5.

⁵ See *A.M.*, 360 F.3d 787.

⁶ See, e.g., *People v. Richardson*, 917 N.E.2d 501, 519 (Ill. 2009) (“A defendant's youth and subnormal intelligence do not *ipso facto* render the defendant's confession involuntary.”).

⁷ *Id.* at 260–64. In *Richardson*, the Illinois Supreme Court reversed the decision of the Illinois Appellate Court, holding the appellate court did not give sufficient deference to the trial court's credibility findings concerning the testimony of the police officers in finding that the officers had coerced Richardson's confession. *Id.* Richardson was a mentally retarded sixteen-and-a-half-year-old who was beaten while in police custody and given a black eye. *Id.* at 504. The beating took place before the interrogation and was the apparent work of a jailer or lockup keeper and not the interrogators who took the confession. *Id.*

destined to be reversed. Beginning in 1948, with *Haley v. Ohio*⁸ and continuing with *Gallegos v. Colorado*⁹ and *In re Gault*,¹⁰ the United States Supreme Court recognized that youthful suspects are not the equals of their adult interrogators. To put them on “less unequal footing” with their interrogators and to safeguard against involuntary confessions and unknowing and unintelligent waivers of their constitutional rights, the Court contemplated giving special protections to juvenile suspects.¹¹

¶7 The Court moved incrementally, repeatedly cautioning trial court judges to scrutinize juvenile confessions with “special care,” especially in cases where juveniles were left to fend for themselves without adult guidance. Although the Court stopped short of issuing *per se* rules requiring parents or even attorneys for children during interrogations, statements made by the Court in *Gault* in 1967 about the critical need for counsel by juveniles left little doubt that the Court was leaning in that direction. With a solid block of five votes—Chief Justice Earl Warren and Justices Fortas,¹² Douglas, Brennan, and Marshall—and perhaps a sixth vote in Justice Black—there was reason to be optimistic that greater protections were in the offing for juvenile suspects during interrogations in the post-*Gault* era. All the Court needed was the right case.

¶8 The *Hester* case had all the *bona fides* of a precedent-setting case—it was built largely on a confession, taken from a boy of low intelligence, during an interrogation conducted outside the presence of parents or counsel. Hester’s attorneys also raised serious questions about Hester’s guilt, arguing vehemently that the confession was false.¹³ Hester’s case had another thing going for it: a strong dissent from a highly

⁸ *Haley v. Ohio*, 332 U.S. 596 (1948).

⁹ *Gallegos v. Colorado*, 370 U.S. 49 (1962).

¹⁰ *In re Gault*, 387 U.S. 1 (1967).

¹¹ David T. Huang, *Less Unequal Footing: State Courts’ Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation*, 86 CORNELL L. REV. 437 (2001).

¹² Fortas was perhaps the greatest champion of the rights of juveniles, giving juveniles many of the same due process rights as adults in both *Kent v. United States*, 383 U.S. 541 (1966) and *In Re Gault*, 387 U.S. 1. Moreover, he was prepared to go even further, giving juveniles all of the same due process rights afforded adults, and perhaps some additional rights. See LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 456 n.20 (1990). For example, Fortas was poised to give juveniles the right to a trial by jury in all cases involving crimes which would be felonies if committed as adults. *Id.*

¹³ Brief of Petitioner at *53–*75, *Hester v. Illinois*, 90 S. Ct. 1408 (1969) (June 16, 1969), 1969 WL 119867. Innocence matters. Less than a year before *Miranda v. Arizona*, Yale Kamisar was on a panel of four speakers discussing the Supreme Court’s criminal procedure decisions at the annual conference for the United States Court of Appeals for the Third Circuit. Yale Kamisar, *A Look Back on a Half-Century of Teaching, Writing and Speaking About Criminal Law and Criminal Procedure*, 2 OHIO ST. J. CRIM. L. 69, 74–75 (2004). To his surprise and the surprise of the other panelists, Chief Justice Earl Warren and Associate Justice William Brennan, walked in to the auditorium and were escorted to the front row. *Id.* at 74. After Michael Murphy, the former Police Commissioner of New York City ranted about the Court’s coddling of criminals, Kamisar spoke and his spirited defense of the rulings received raves from the audience. *Id.* Justice Brennan was not as impressed; he took Kamisar aside and told him that the next time he defended the Court’s rulings, he should highlight the case of George Whitmore, a nineteen-year-old African-American man who had falsely confessed to and been wrongfully convicted of the murder of two young female Manhattan socialites on the Upper East Side. *Id.* at 75. Indeed, when the *Miranda* decision was issued in June 1966, the Court cited the *Whitmore* case in a footnote in its opinion. See *Miranda v. Arizona*, 384 U.S. 436, 455 n.4 (1966). See ROB WARDEN and STEVEN A. DRIZIN, TRUE STORIES OF FALSE CONFESSIONS 389–412 (2009), for more on the *Whitmore* case.

respected Illinois Supreme Court justice, Justice Walter V. Schaefer, who wanted his brethren to find the confession to be involuntary and to reverse Hester's conviction.¹⁴

¶9 The plot grew thicker when I learned, to my great surprise, that the United States Supreme Court had, in fact, granted certiorari in Hester's case. Not only had certiorari been granted, but the case was fully briefed and orally argued before the Court in November of 1969. The Court seemed poised to issue a momentous opinion, but on April 25, 1970, the *Hester* case came to an unceremonious end. The Court dismissed Hester's writ of certiorari as "improvidently granted,"¹⁵ a procedure that is usually only used by the Court when new information comes to light between the time of the grant of certiorari and the time of the Court's decision on the merits that makes the case no longer ripe for adjudication.¹⁶

¶10 So what happened? Why didn't the case of Lee Arthur Hester join the ranks of *Haley*, *Gallegos*, and *Gault* and continue the Court's legacy of giving children greater protections than adults in their stationhouse encounters with police? What changed circumstances had taken place between the grant of certiorari and the merits decision to lead the Court to dismiss Hester's case? To answer this question, this Article will revisit the time in which the Hester case was decided and place the Hester case into a historical context. I will discuss the change in the Court's personnel that eventually doomed Hester's chances and stopped the Court's protective legacy of juvenile suspects in its tracks. I will reveal—for the first time—why the United States Supreme Court chose to dismiss after oral argument not only Hester's case, but the case of a second juvenile suspect whose murder confession was obtained under even more coercive circumstances—the case of Willie Monks. Finally, I will argue that the Court, by failing to rule in these cases, missed a golden opportunity to protect child suspects and that in the years since *Hester*, the consequences of this missed opportunity have manifested again and again in the form of coerced and false confessions from youthful suspects, including, perhaps, the confession of Lee Arthur Hester.

II. CONFESSIONS IN THE COURTS IN THE 1960S

¶11 In the spring of 1961, the United States Supreme Court, led by Chief Justice Earl Warren, was about to embark on its "due process revolution" in the area of criminal procedure. *Mapp v. Ohio*, the landmark case that applied the Fourth Amendment's exclusionary rule for unlawful searches and seizures to the states by way of the due process clause of the Fourteenth Amendment, had been argued before the Court on March 29.¹⁷ The decision by the Supreme Court in *Mapp*, issued just a few months later on June 19, 1961, was the first in a series of decisions that would bestow a dizzying array of new constitutional protections upon criminal defendants in state and federal court cases.¹⁸

¹⁴ *People v. Hester*, 237 N.E.2d 466, 483 (1968) (Schaefer, J, dissenting).

¹⁵ *Hester v. Illinois*, 397 U.S. 660 (1970).

¹⁶ ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 328–32 (8th ed. 2002).

¹⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁸ Other landmark cases in criminal procedure to follow included *Robinson v. California*, 370 U.S. 661 (1962), applying the Eighth Amendment's right against cruel and unusual punishments to the states; *Gideon v. Wainwright*, 372 U.S. 335 (1963), applying the Sixth Amendment right to counsel to the states

¶12 In the area of police interrogations and confessions, the due process revolution arguably had begun as early as 1936, when the Supreme Court applied the Fourteenth Amendment’s “fundamental fairness” doctrine to prevent states from using confessions that were the products of physical or mental coercion against defendants.¹⁹ That movement reached its zenith in 1964 with *Escobedo v. Illinois*²⁰ and in 1966 with *Miranda v. Arizona*,²¹ perhaps the most controversial of the Warren Court’s criminal procedure decisions.

¶13 In *Miranda*, the Court launched its most pointed attack on the “interrogation atmosphere and the evils it can bring.”²² Relying on the leading police training manuals to describe the interrogation process, the Court characterized interrogations as inherently “compelling” and filled with pressures designed to “undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”²³ In order to dispel this coercion and combat these pressures, the Court held that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”²⁴ The procedural safeguards recommended by the court were the now-familiar *Miranda* warnings advising suspects of their right to silence, that anything the suspect says can be used against him or her in a court of law, that he or she has the right to consult with an attorney prior to answering questions, and that a suspect has the right to have an attorney appointed free of charge if he cannot afford one.²⁵ The Court further held that a suspect may waive his constitutional rights but that such a waiver must be made “voluntarily, knowingly, and intelligently.”²⁶

and requiring states to provide counsel for indigent defendants in felony cases; *Malloy v. Hogan*, 378 U.S. 1 (1964), applying the Fifth Amendment’s privilege against compelled self-incrimination to the states; and *In Re Gault*, 387 U.S. 1 (1967), giving juveniles many of the same constitutional rights as adults in their adjudicatory hearings.

¹⁹ *Brown v. Mississippi*, 297 U.S. 278 (1936).

²⁰ 378 U.S. 478 (1964). *Miranda* was preceded by *Escobedo*, a confusing decision which, if broadly construed, held that suspects had the right to counsel under the Sixth Amendment during the pre-indictment stage “when the process shifts from investigatory to accusatory—when the focus is on the accused and its purpose is to elicit a confession.” *Id.* at 492. As Yale Kamisar notes, Justice Goldberg’s opinion, at times, so strongly rejected the idea that police have an opportunity to interrogate suspects that it “promised or threatened to extinguish all police interrogations.” Yale Kamisar, *Miranda, The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1076 (1984). A more limited reading, however, confining *Escobedo* to its facts, limited the right to counsel to cases in which the suspect, like *Escobedo*, had specifically requested to see his attorney and his attorney was in the stationhouse seeking to speak to his client. *Id.*

²¹ 384 U.S. 436. *Miranda* actually “displaced” *Escobedo*, grounding a suspect’s pre-indictment protections in the Fifth Amendment privilege against self-incrimination and clarifying that the suspect’s right to be informed of his right to counsel and to silence began at the point when the suspect was “in custody” and being “interrogated.” Kamisar, *supra* note 20, at 1076–77.

²² *Miranda*, 384 U.S. at 456.

²³ *Id.* at 467.

²⁴ *Id.* at 444.

²⁵ *Id.*

²⁶ *Id.*

¶14

The *Miranda* decision left many questions unanswered, including whether *Miranda* applied to juvenile court proceedings²⁷ and whether special protections were needed to ensure juvenile suspects understood their rights and “voluntarily, knowingly, and intelligently” waived them. Some of these questions were answered a year later in *Gault*, a case not primarily about interrogations, but about the constitutional infirmities of the juvenile court system.²⁸ In giving defendants in juvenile court many of the same rights afforded adult defendants, including the right to counsel and the privilege against self-incrimination, Justice Fortas, writing for the majority, echoed the concerns raised earlier by Justice Douglas in *Haley* and *Gallegos* that youthful suspects would fail to understand and appreciate these rights and would be easily manipulated into giving them up.²⁹ He singled out the importance of counsel in ensuring that juveniles understood their rights before speaking to the police, seeing the participation of counsel not as an impediment but as an “assist” to “the police, Juvenile Courts, and appellate tribunals” in administering the privilege against self-incrimination.³⁰ Justice Fortas warned judges to be especially wary of confessions obtained in the absence of counsel:

If counsel was not present for some permissible reason when an admission was obtained . . . the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.³¹

¶15

Justice Fortas went even further, expressing concern not only with the voluntariness of juvenile confessions but also with their reliability. In dicta, he wrote that “common observation” and “expert opinion” suggested that a “distrust” of confessions was particularly necessary in the cases of children and that “authoritative opinion has cast formidable doubt on the reliability and trustworthiness of ‘confessions’ by children.”³² In several instances, Fortas put the word “confession” in scare quotes to signal his skepticism about the worth of such evidence.³³ In his discussion of two recent cases from the highest courts in New York and New Jersey, he raised serious questions about the

²⁷ Indeed, the United States Supreme Court has never held that *Miranda*'s exclusionary rule applies to juvenile proceedings. In *Fare v. Michael C.*, 442 U.S. 707, 734 n.4 (1979), the Court assumed, without deciding, that the *Miranda* warnings applied to the case at hand.

²⁸ See *In re Gault*, 387 US 1, 55 (1967).

²⁹ *Id.* at 45, 54–55.

³⁰ *Id.* at 55. Both Justices Fortas and Douglas, had serious reservations about the ability of juvenile suspects to knowingly, intelligently and voluntarily waive their constitutional rights. They also thought the mere fact that a juvenile suspect was read his rights and had waived them was entitled to little weight. In *Haley*, Justice Douglas perhaps best expressed this skepticism of juvenile competency, writing that “we cannot give any weight to recitals which merely formalize constitutional requirements” and refusing to indulge the assumption that “a boy of fifteen, without aid of counsel, would have a full appreciation of that advice.” *Haley v. Ohio*, 332 U.S. 596, 601 (1948).

³¹ *In re Gault*, 387 U.S. at 55.

³² *Id.* at 56.

³³ See, e.g., *id.*

reliability of these confessions, noting that the boys' statements in both cases were inconsistent with the facts of the crime.³⁴

¶16 To the law enforcement community, many of whose members were still reeling from *Miranda*, *Gault* must have felt like having additional salt poured on its wounds. What was the Court saying about juvenile confessions? If giving *Miranda* rights to juveniles did not protect against involuntary confessions, how were police officers supposed to interrogate juvenile suspects? Was the court suggesting that all juvenile confessions would be inadmissible? The fact that Justice Fortas's decision commanded eight of the Court's votes in *Gault*³⁵ also must also have concerned law enforcement. These concerns no doubt only escalated when shortly after *Gault*, President Johnson appointed Justice Thurgood Marshall—the first African-American on the Court and a man whose long record of civil rights victories suggested he would firm up the Court's liberal wing—to replace retiring Justice Tom Clark.³⁶

¶17 It was in this volatile legal atmosphere that the case of Lee Arthur Hester made its way to the United States Supreme Court. But Hester's case actually began nearly eight years earlier in the midst of the national struggle of blacks for basic civil rights and equality and in a city—Chicago, Illinois—that was and still is one of the most racially segregated major cities in the United States.³⁷

III. THE CIVIL RIGHTS MOVEMENT AND RACIAL SEGREGATION IN THE SOUTH SIDE OF CHICAGO IN THE 1960S

¶18 The United States Supreme Court under Chief Justice Earl Warren was not the only place where change was afoot in the 1960s. Early in the decade, civil unrest on the

³⁴ *Id.* at 47. The two cases were *In re Gregory W.*, 224 N.E.2d 102 (N.Y. App. Ct. 1966) and *In re Carlo and Stasilowicz*, 225 A.2d 110 (N.J. 1966). At least one of the confessions at issue in the New York case of *In the Matter of Gregory W.* was, in all probability, a false confession. As Justice Fortas noted, one of the two “Negro” boys in that case who had admitted to breaking into an elderly white woman's home in the Bronx was a schizophrenic who had been locked up in a psychiatric hospital at the time of the murder. *In re Gault*, 387 U.S. at 52.

³⁵ Although the vote to reverse *Gault*'s conviction was 8 to 1, with Justice Harlan the only dissenting justice, there was less support on the Court for Justice Fortas's views about the voluntariness and reliability of juvenile confessions. Just how much support for these positions existed is hard to tell. First, these statements were only dictum and a vote with Justice Fortas did not necessarily mean support for dictum. Moreover, Justice White wrote a special concurrence in which he opted out of the part of the majority opinion dealing with the privilege against self-incrimination. *In re Gault*, 387 U.S. at 64–65.

³⁶ Predicting how Justice Marshall would vote on some of the remaining post-*Miranda* questions also was not as simple as it seemed. Prior to joining the Court, Justice Marshall was the Solicitor General of the United States and had argued for the Government in one of *Miranda*'s companion cases, *Westover v. United States*. He took the position that requiring federal law enforcement agents to notify suspects of their right to counsel and silence would unduly burden the agents and prevent them from obtaining confessions. The *Miranda* decision was Marshall's greatest defeat as Solicitor General. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 323 (1998). During his confirmation hearings, North Carolina Senator Sam Ervin tried to convince Marshall to disavow the *Miranda* ruling and to agree that courts should accept voluntary statements even if the suspect had not been read his rights. Marshall, like most nominees to the Court, refused to address specifics but did remark: “Well Senator, the word *voluntary* gets me in trouble. I tried a case in Oklahoma where the man ‘voluntarily confessed’ after he was beaten up for six days.” *Id.* at 335.

³⁷ Azam Ahmed & Darnell Little, *Segregation City: Racial Lines Were Drawn over the City's History and Remain Entrenched by People's Choice, Economics*, CHI. TRIB., Dec. 26, 2008, at 1.

streets was brewing, especially in the South, as whites defiantly resisted the Supreme Court's efforts to dismantle segregation, especially the Warren Court's landmark 1954 decision in *Brown v. Board of Education* pronouncing "separate but equal" schools to be unconstitutional.³⁸ The first sit-ins began in February 1960 in Greensboro, North Carolina, when four well-dressed black college students sat down at a luncheon counter at a F.W. Woolworth's and asked to be served.³⁹ By September 1961, more than 70,000 people had participated in sit-ins throughout the South, leading to the arrest of some 3,600 persons and sporadic violence in response to the protesters.⁴⁰ The summer of 1961 was also the summer of the Freedom Riders, as whites and blacks from the North invaded the South to fight segregation in Southern public transportation systems, provoking even greater violence from Southern whites.⁴¹

¶19 Chicago, in the 1960s, was not immune from the problems of the racially segregated South. By 1960, Chicago was home to one of the largest populations of blacks in the United States, fueled by two "Great Migrations" of Southern blacks. The first "Great Migration" occurred in the period from 1890 to 1930, swelling the population of blacks from only 14,271 in 1890 to 233,903 in 1930.⁴² The second wave of the "Great Migration" of Southern blacks from the 1940s to 1960s was even more dramatic.⁴³ Between 1940 and 1950, Chicago's black population rose by 214,534, and in the next decade the population mushroomed by another 320,372.⁴⁴

¶20 During the first Great Migration, blacks arriving in Chicago were confined to a small cluster of undesirable neighborhoods in the South Side known as the "Black Belt," unable to move freely to other neighborhoods as a result of restrictive covenants which prevented the sale of homes to blacks.⁴⁵ During the Second Great Migration, as blacks flooded the city after World War II, most were also steered to the Black Belt.⁴⁶ The entire city of Chicago was in the midst of a terrible housing shortage as returning veterans also vied for housing in the city with the growing black population.⁴⁷

¶21 Several factors combined to lead to more and better housing for Chicago's blacks in the post-World War II era. Courts began to find restrictive covenants illegal, opening up housing in the predominantly white areas that bordered the Black Belt.⁴⁸ To meet a housing shortage, developers in the 1950s built single-family homes for middle and upper middle class families in the suburbs that ringed the city.⁴⁹ These new homes were filled

³⁸ See, e.g., TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–1963*, 413 (1988).

³⁹ *Id.* at 271.

⁴⁰ Anthony Lewis, *Sit-ins Pose a Basic Legal Question: Does the Constitution Apply when Discrimination is Private*, N.Y. TIMES, Dec. 17, 1961, at E10; see also Marilyn Marshall, *Forty Who Made a Difference*, EBONY, Nov. 1985, at 62.

⁴¹ BRANCH, *supra* note 38, at 451–91.

⁴² ARNOLD HIRSCH, *MAKING OF THE SECOND GHETTO* 16–17 (1998).

⁴³ *Id.* at 16.

⁴⁴ *Id.*

⁴⁵ By 1920, the Black Belt was approximately three miles long but only seven blocks wide, ranging from 22nd Street to the North and 55th Street to the South and bounded by Wentworth to the West and Cottage Grove to the East. *Id.* at 3.

⁴⁶ *Id.* at 16.

⁴⁷ *Id.*

⁴⁸ *Id.* at 29–31

⁴⁹ *Id.* at 27.

almost exclusively by white families who fled their enclaves in the city for the suburbs.⁵⁰ The departure of white families opened up new neighborhoods for blacks to occupy and those with the money to do so began to flood into the better neighborhoods that bordered the Black Belt.⁵¹

¶22 One such South Side neighborhood that opened up to blacks in the 1950s was Englewood. Originally settled by Germans and Irish in the 1850s and 1860s, by the turn of the century Englewood was home to a mix of Germans, Irish, Scots, Swedes, and Polish and other Eastern European immigrants.⁵² In 1930, Englewood's population was made up of 98.7 percent whites and 1.3 percent blacks.⁵³ As blacks sought to move out of the Black Belt, they were attracted by Englewood's large housing stock, good schools, excellent public transportation, and thriving shopping district, anchored by a huge, block-long Sears store at 63rd and Halsted.⁵⁴

¶23 Black migration to Englewood, however, was slow in coming. By 1940, blacks still made up only two percent of Englewood and only four percent of West Englewood.⁵⁵ White resistance in Englewood to aspiring black homeowners is perhaps best exemplified by an infamous incident that occurred in 1949. When blacks attended a union rally at the home of a Jewish resident at 5643 South Peoria, a rumor circulated that the home was being sold to a black family.⁵⁶ For three days, up to 10,000 people rioted, attacking blacks, Jews, Communists, and "meddlers from the University of Chicago."⁵⁷ By 1950, the influx of blacks from the Great Migration brought the city's black population up to fourteen percent, the population of blacks in Englewood to ten percent, and West Englewood to six percent.⁵⁸

¶24 The 1950s saw many of Englewood's whites depart. Many Irish residents who lived in the northern sections of Englewood moved to the southwest, while the Germans and Swedes fled to the Beverly and Morgan Park neighborhoods.⁵⁹ In the late 1950s, many more blacks moved to Englewood, displaced by the construction of what would later come to be known as the Dan Ryan expressway.⁶⁰ By the dawn of 1960, blacks

⁵⁰ *Id.*

⁵¹ *Id.* at 16, 27–28.

⁵² Chanel Polk & Mick Dumke, *A Brief History of Englewood*, CHI. REPORTER, http://www.chicagoreporter.com/index.php/c/Sidebars/d/A_Brief_History_of_Englewood.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ West Englewood is a separate neighborhood to the west of Englewood that shared much of the same history and culture. It was slower to integrate than Englewood, due in part to the fact that it was further away from the Black Belt, as well as the fact that jobs from the stockyards, the Chicago Transit Authority's bus barn, and the railroads kept white West Englewood residents put. When these jobs left the community in the 1970s, so did West Englewood's whites. The greatest demographic shift in West Englewood occurred between 1970 and 1980, when the African-American population doubled from 48 percent to 98 percent. See *West Englewood*, in *ENCYCLOPEDIA OF CHI.*, available at <http://www.encyclopedia.chicagohistory.org/pages/1337.html>.

⁵⁶ Polk & Dumke, *supra* note 52.

⁵⁷ *Id.*; see also Hirsch, *supra* note 42, at 89.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* (citing DOMINIC A. PACYGA & ELLEN SKERRETT, CHICAGO: CITY OF NEIGHBORHOODS). The Dan Ryan Expressway exacerbated the problem of racial segregation in housing in Chicago. The path of the expressway created a racial divide, with the resource-rich white ethnic neighborhood of Bridgeport (and the home of Mayor Daley) to the west and the traditional Black Belt impoverished areas to the East. Those

made up the majority of Englewood's population for the first time in its history. There were more than 67,216 blacks living in Englewood, nearly sixty-nine percent of the neighborhood's population.⁶¹

¶25 In April 1961, fourteen-year-old Lee Arthur Hester lived at 6213 Princeton Avenue in Englewood, directly across the street from a campus that included three public schools: the Englewood High School; the Princeton Annex, a school for dropouts; and the Lewis-Champlin grammar school, which housed grades K-8.⁶² Hester lived in a small house with his father Emmett, a city garbage truck worker, his mother Helen, and seven brothers and sisters.⁶³

IV. A TEACHER IS MURDERED, A SUSPECT IS ARRESTED

¶26 On April 20, 1961, at Lewis-Champlin Elementary School, Josephine Keane, a beloved teacher, went missing.⁶⁴ A master teacher whose duties included mentoring younger teachers and giving special tutoring to kids with learning and behavioral disabilities, Mrs. Keane had last been seen at 9:30 a.m. outside of a book room on the first floor where she often worked one-on-one with students.⁶⁵ Because she did not have an assigned classroom, her absence during the day did not arouse suspicion; but when she failed to appear at the lunchroom and then did not meet her carpool colleagues for their drive home at the end of the day, her colleagues began to worry.⁶⁶

¶27 The principal organized a search party, and a posse of teachers and staff searched the school for Mrs. Keane before arriving at the door of the book room.⁶⁷ The door to the room was locked.⁶⁸ Because Mrs. Keane had been given the office key earlier in the day, the principal summoned the chief engineer to assist in unlocking the door with his master key.⁶⁹ The door was opened and to everyone's horror, there lay Mrs. Keane in a pool of her own blood, the apparent victim of a brutal stabbing and sexual assault.⁷⁰

¶28 Chicago police officers soon swarmed the school, processing the crime scene and looking for any evidence to help find the killer. Mrs. Keane was found on her back with her overcoat thrown over her head.⁷¹ She had been stabbed seven times, four times in her right side and three times in her upper left chest.⁷² Her undergarments had been torn off and police suspected she had been sexually assaulted.⁷³ The police collected Mrs. Keane's blood spattered clothing and recovered some fingerprints and a palmprint from

blacks who were unable to leave the Black Belt were confined in new public housing buildings that stretched alongside the Dan Ryan, including the twenty-eight buildings of the Robert Taylor Homes, which later became a national symbol of the failure of the high-rise public housing experiment.

⁶¹ *Id.*

⁶² *Pupil, 14, Admits Killing*, CHI. TRIB., Apr. 22, 1961, at 1–2.

⁶³ *School Killer to Get Tests*, CHI. TRIB., Apr. 23, 1961, at 1.

⁶⁴ *Woman Teacher Slain*, CHI. SUN TIMES, Apr. 21, 1961, at 1, 3.

⁶⁵ *Id.*

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* at 3.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

inside the bookroom.⁷⁴ A grease smudge found on Mrs. Keane's undergarments also intrigued the police, leading them to think that the killer might have come out of a machine shop or a garage or that he might be a mechanic.⁷⁵ Detectives who processed the crime scene also found microscopic bits of wood and fiber and metal in the victim's underwear.⁷⁶ At the time, Captain Daniel Dragel of the crime laboratory, downplayed the importance of the particles and fibers, stating "[t]he particles of wood fiber could have come from a clothespin and the metal particles from a washing machine during laundering. Who knows? But all this will be checked out."⁷⁷ A note that Mrs. Keane was apparently writing when she was interrupted by her attacker was also found under her body with the heel-print of a man's shoe on the paper.⁷⁸

¶29 None of the faculty or students could think of anyone who would want to kill Mrs. Keane.⁷⁹ She was beloved not only by the all-black student body but by the mixed black and white faculty at the school.⁸⁰

¶30 The Chicago police were interested particularly in finding the murder weapon—a small knife—and the keys used to open and lock the book room door.⁸¹ However, by the next morning, after an extensive search of the school grounds, neither piece of evidence had been found.⁸² The police had few leads on the identity of the killer.⁸³

¶31 The news that a white teacher had been murdered and raped in a Chicago public school during a school day spread like wildfire. The next morning, stories of the gruesome murder made the front pages of Chicago's many daily newspapers, including the *Tribune*, the *Sun-Times*, *Chicago's Daily American*, and the *Daily News*.⁸⁴ Reporters were omnipresent at the school on the day Mrs. Keane was murdered and throughout the next day, and were given extensive access to the crime scene and to the investigating officers and school staff.⁸⁵

¶32 Early on the morning after Mrs. Keane's murder, the police were given their first lead. Two white Chicago detectives, Anton Prunkle and Sheldon Teller,⁸⁶ went into the

⁷⁴ *Knife, 2 Keys Sought in Slaying*, CHI.'S DAILY AM., Apr. 21, 1961, at 1, 5.

⁷⁵ *Grease Smudge a Clue: Lab Experts Analyze It*, CHI. SUN TIMES, Apr. 22, 1961, at 3.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Phillip J. O'Connor, *Pupils Rated Slain Teacher as the Best*, CHI.'S DAILY AM., Apr. 21, 1961.

⁸⁰ *Id.*

⁸¹ *Pupil, 14, Admits Killing*, *supra* note 62, at 2.

⁸² *Id.*

⁸³ *Id.*; *see also Knife, 2 Keys Sought in Slaying*, *supra* note 74.

⁸⁴ *See, e.g., Woman Teacher Slain*, *supra* note 64 (Chicago Sun Times); *Teacher Murdered in School*, CHI. TRIB. Apr. 21, 1961, at 1; *Knife, 2 Keys Sought in Slaying*, *Knife*, *supra* note 74 (Chicago's Daily American).

⁸⁵ That reporters were given access to the crime scene is evidenced by the fact that many of the newspaper articles cited previously featured pictures of the crime scene, including the pool of blood on the floor of the bookroom, the covered body of Mrs. Keane, and the refrigerator which was dusted for prints.

⁸⁶ Sheldon Teller, the son of a well-known rabbi, had been on administrative leave from the Chicago Police Department just prior to his work on the Hester case. In September of 1959, Teller and his partner were indicted in federal court for conspiring to deal drugs. He was acquitted when the trial court judge ordered a directed verdict in his favor. Only a few days after the Hester arrest, one of Teller's co-defendants was sentenced to twelve years in prison. *See, e.g., Dope Ring Leader Given 12 Years*, DEFENDER, Apr. 26, 1961, at 1. Restored to active duty only a month before the Keane murder, Hester was Teller's first big case since his return to the force and both he and the Chicago police department were likely eager for him

front office and inquired of the secretaries whether any of the students in the school had ever been in trouble for sexually inappropriate behavior. A white gym teacher told the officers that one “Negro” boy in particular had been accused of sexual misconduct with another boy off-campus, although nothing came of the accusation.⁸⁷ That boy, she told the police, had been tutored by Mrs. Keane.⁸⁸ His name was Lee Arthur Hester.⁸⁹ Hester was in the fifth grade.⁹⁰ He was fourteen years old, three grades behind academically, and was described by some teachers (and later by the press) as a “problem child” who frequently disrupted class.⁹¹

¶33

Following this conversation, the detectives went straight to the classroom of Jean Webster, a young black teacher at the school, and asked to speak with Hester. Without contacting Hester’s parents, Prunkle and Teller took him out of the classroom and began to interrogate him. According to Hester, Prunkle kicked him in the shins. Seeing what looked like blood spots on his trousers and a long strand of hair on his sweater, Teller decided to take Hester into police custody.⁹² Hester was allowed to go back to the classroom to retrieve his jacket. When he told the class, “They think I killed Mrs.

to redeem his image. In the days after Hester’s arrest, Teller was lionized on the pages of the newspapers and given great play for his role in effectuating Hester’s arrest. *Pupil, 14, Admits Killing, supra* note 62.

⁸⁷ *Pupil, 14, Admits Killing, supra* note 62, at 2.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*; see also Sheri Giles & Mort Edelstein, *Good and Bad Opinions, Boy Held in Slaying—A Confused Picture*, CHI.’S DAILY AM., 1961, at 6. With the exception of the Chicago Defender, the coverage of the other Chicago dailies described Hester, who was only five feet tall and weighed less than 100 pounds, in animalistic terms, using words like “remorseless,” “unusually powerful,” “muscular as an ox,” “tough,” a “bully,” and a “chronic troublemaker” who conducted a “reign of terror among other children” and allegedly “molested” both girls and “small boys.” See, e.g., Mort Edelstein, *Police Reveal Terror by Youth at School*, CHI.’S DAILY AM., Apr. 26, 1961, at 6. Nearly thirty years later, New York’s dailies would use similar terms to describe the boys who were arrested, convicted, and later exonerated of the sexual assault and beating of the woman who became known as the “Central Park Jogger,” and thirty-four years later, with the coinage of the word “superpredator” to describe black youth criminals, the use of such language reached a new level. See LynNell Hancock, *Wolfpack: The Press and the Central Park Jogger Case*, COLUM. JOURNALISM REV. 38 (2003).

⁹² See *Pupil, 14, Admits Killing, supra* note 62; see also *Det. Teller’s Role in Case Hailed*, CHI. SUN TIMES, Apr. 22, 1963, at 3. One writer for the *Daily News*, who later would go on to become a Chicago icon, was particularly gushing about Teller’s redemption. See Michael Royko, *Detective’s Story Reads Like a Movie Script*, CHI. DAILY NEWS, Apr. 22, 1961 (describing the “handsome, curly haired” Teller as an “ace-detective” and quoting Maurice Begner, Chief of Detectives, as saying: “A month ago, I congratulated him for coming back to work [and now] I wonder how often I’ve got to keep congratulating him”). In a few years, Royko and Begner would eat their words. The federal government finally caught up with Teller, arresting both Teller and his wife for their drug dealing operations in 1966 after a raid of their home uncovered \$45,000 in cash and drugs in Teller’s wife’s purse. *Jury Indicts Teller, Wife in Dope Case*, CHI. TRIB., July 27, 1966, at 1. This time, Teller was convicted and sentenced to eighteen years in federal prison. At his trial, he was represented by another Chicago attorney who would later gain prominence as the Cook County State’s Attorney. See *2 Detectives Convicted in Dope Trial*, CHI. TRIB., Nov. 11, 1966, at 1. His name was Richard Devine. *Id.* In September of 1998, Devine would take heat after his office charged two boys, ages seven and eight, with the murder of an eleven-year-old girl named Ryan Harris based on little more than a confession of one of the boys. Steve Mills & Maurice Possley, *Cops Ignored Clues that Case was Weak*, CHI. TRIB., Sept. 6, 1998, at 1. The confession was soon proven false by DNA evidence. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891 (2004).

Keane,” the entire class broke out laughing, finding ludicrous the idea that Hester would have hurt Mrs. Keane.⁹³

¶34

Back at the police station, detectives grew even more suspicious of Hester when they noticed what looked like a lipstick smudge on his jacket. They took Hester to the Cook County Juvenile Detention Center, where they took his clothing and sent it to the crime lab, gave him a white gown to wear, and placed him alone in a locked room for four or five hours.⁹⁴ At 4 p.m., four officers, two white sergeants in the homicide unit and two black youth officers, began to interrogate Hester. According to these sergeants, after some initial denials, Hester quickly confessed to the rape and murder after he was told that evidence analyzed by the crime lab linked him to the crime.⁹⁵ At around 5:30 p.m., a court reporter and a Cook County State’s Attorney came in to memorialize Hester’s confession. The confession was eight pages in length and was typed up on carbon paper and signed by Cook County Assistant State’s Attorney Louis Garippo,⁹⁶ Hester, Sergeant William Keating, and the court reporter, Donald Flannery.

V. THE CONFESSION NARRATIVE

¶35

Hester told Garippo that he saw Mrs. Keane in the book room at precisely “two minutes after ten”⁹⁷ when he and a friend named Sherman Baker were on their way back from returning milk cartons to the cafeteria.⁹⁸ Hester told Sherman to wait by the stairs while he went in to see Mrs. Keane.⁹⁹ Mrs. Keane was tearing a hole in a package of

⁹³ Brief and Argument of Plaintiff in Error at 28–29, *People of the State of Illinois v. Hester*, No. 39588 (Ill. 1967) [hereinafter Hester’s State Supreme Court Brief] (on file with author).

⁹⁴ *Id.* at 30; see also *How Science, Police Solved School Killing*, CHI. DAILY NEWS, Apr. 22, 1961, at 1.

⁹⁵ Brief and Argument of Defendant in Error at 11, *People of the State of Illinois v. Hester*, No. 39588 (Ill. Dec. 29, 1967) [hereinafter State’s Illinois Supreme Court Brief] (on file with author). Sergeant Killackey testified at the motion to suppress and at trial that the interrogation of Hester was a “conversation,” that no one raised their voices, and that the officers merely took turns revealing to Hester that the crime lab had found blood on his clothes, a white female’s hair, some metal particles and some lipstick. Bill of Exceptions, Vol. II at 2896–2900, *People of the State of Illinois v. Hester*, No. 39588 (Ill. Jan. 27, 1966 [hereinafter Bill of Exceptions, Vol. II]) (on file with author). Killackey and the other officers denied telling Hester that the blood, hair, or lipstick matched Mrs. Keane’s. He denied calling Hester a liar or even accusing Hester of committing the crime. *Id.* at 2893, 2900. There is reason to believe that Killackey did tell Hester that there was a match and did accuse Hester of the murder. In an interview with the *Tribune* two days after Hester’s arrest, Killackey described how Hester insisted on his innocence, saying “God knows I am innocent.” *School Killer to Get Tests*, CHI. TRIB., Apr. 23, 1961, at 1–2. In response to Hester, Killackey is quoted as saying that he told Hester: “God also knows what the results of the crime laboratory tests are and you know they show you are the murderer.” *Id.* The article also reported that Hester started to confess immediately after Killackey’s response. See *id.* At trial, however, Killackey and the other officers testified that Killackey was not even in the room when Hester first confessed and that Hester first confessed to the two black officers after Killackey and Keating had left the room. Bill of Exceptions, Vol. II at 330–331, 336–340, 374–380, *People of the State of Illinois v. Hester*, No. 39588 (Ill. Jan. 27, 1966 [hereinafter Bill of Exceptions, Vol. I]) (on file with author); Bill of Exceptions, Vol. II, *supra*, at 2908, B.

⁹⁶ Louis Garippo was the son of the Clerk of the Circuit Court of Cook County. He went on to have a distinguished career as a prosecutor, a Circuit Court judge, and as a highly regarded criminal defense attorney.

⁹⁷ Statement of Lee Arthur Hester to Louis Garippo, Assistant State’s Attorney, and William Keating, Sergeant, Detective Div., Area 4, in Room 203, Family Court Bldg., 2246 W. Roosevelt, Chi., Ill. at 6:45 p.m. (Apr. 21, 1961) (on file with author).

⁹⁸ *Id.* at 2–3.

⁹⁹ *Id.* at 3.

books.¹⁰⁰ As he approached Mrs. Keane from behind, Hester had a knife up his sleeve.¹⁰¹ The knife was secured by a rubber band on his wrist and had been given to him earlier in the day by a friend named Allen Randolph.¹⁰² As he walked into the book room, Hester accidentally tripped on some books and the knife came out of his sleeve and somehow ended up in his fist.¹⁰³ As he was stumbling toward Mrs. Keane, he stuck Mrs. Keane in her back.¹⁰⁴ While trying to get up off of the floor, Hester slipped again on some books and somehow stuck her again in the back.¹⁰⁵ When Keane turned on her back, Hester, now in an excited state, stuck her again twice, this time in the “breast.”¹⁰⁶ He pulled up her dress, cut her “garter belt” with the knife, unzipped his pants, and then cut her shorts.¹⁰⁷ With his “penis” out, he lay on top of her and “squirted a little bit.” Hester insisted that his penis was not inside of her. Next, Hester leaned over Mrs. Keane to see if he could hear her heartbeat and in the process got some of Mrs. Keane’s lipstick on his coat.¹⁰⁸ He left the room, locked the door with the key, which he found on the floor, and “dropped the key somewhere” as he was running.¹⁰⁹ He went back to class with Sherman. He stayed in class until about “five minutes before 12,” when he left for the day.¹¹⁰

¶36 On its face, Lee Arthur Hester’s confession made little sense. His description of how the knife ended up in his fist is almost impossible to imagine as is his description of how he accidentally came to stab Mrs. Keane; the confession contained language that a fourteen-year-old mentally limited child would never have used (for example “garter belt” “breast”); the highly specific time frames in the confession (for example, “two minutes after ten”, “five minutes to twelve”) seem scripted to fit a police theory of when the crime happened; and the explanation for how “lipstick” got on his coat seems scripted to conform to what police knew about the forensic evidence.¹¹¹ It is also hard to fathom how Hester could have committed the crime in the narrow window of time allotted to students tasked with returning milk cartons to the cafeteria, and even harder to believe that he would have committed this crime while a friend and fellow student stood watch outside the bookroom. To believe Hester’s confession, one must also accept the far-fetched idea that Hester could have committed this horrific crime and returned to class as if nothing unusual had happened.

¶37 Lee Arthur Hester’s confession to murdering Josephine Keane must have felt like a bombshell had dropped at Lewis-Champlin and in the Englewood neighborhood where the school was located. In 1961, there were few, if any, white students left at Lewis-Champlin. The student body was all black, and the school was grossly overcrowded, housing approximately 2,600 students in two shifts: a morning shift that ran from 8:00

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.* at 4.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 6.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *How Science, Police Solved School Killing*, CHI. DAILY NEWS, Apr. 22, 1961, at 1.

a.m. to noon and an afternoon shift that ran from noon to 4 p.m.¹¹² The school's principal and most of its administrative and engineering staff¹¹³ were white, its faculty was slightly more black than white, and its janitorial staff was all black.

¶38 Mrs. Keane's death led school administrators to tighten security at Lewis-Champlin and other schools in the Chicago public school system. A permanent police guard was assigned to the school, and School Superintendent Benjamin C. Willis announced a policy of periodic searches of students for weapons.¹¹⁴ By the year's end, many of the remaining white teachers, afraid that the school was no longer safe for them, had put in for transfers.¹¹⁵

VI. HESTER'S LAWYERS

¶39 Despite his family's meager resources, Hester was able to secure private attorneys to represent him in his criminal case. His attorneys were three young lawyers: Jerome Feldman, Marshall Kaplan, and Edward Kaplan, Marshall's twin brother. Of the three, Feldman had the most criminal law experience, having defended soldiers in court martial proceedings while serving in the armed forces, but all were relative novices to the rough and tumble world of the criminal court building at 26th and California.¹¹⁶

¶40 Feldman joined the law firm of Kaufman, Feldman, Berg, and Cohen upon leaving the service.¹¹⁷ Several nights a week, Feldman went to his Uncle Dave's real estate office at 63rd Street in Englewood to interview potential new clients.¹¹⁸ It was during one of those trips in the late 1950s that he met Hester, who waited outside of Feldman's office and offered to shine Feldman's shoes.¹¹⁹ Feldman took a liking to the boy, invited him inside, and a bond developed between the two.¹²⁰ Feldman served as a mentor to Hester, helping him with his homework.¹²¹ In this capacity, Feldman had corresponded with Mrs. Keane and knew both of her desire to help Hester and of the respect that Hester had for her.¹²² When Hester's mother called Feldman and told him that her son had been charged with Josephine Keane's rape and murder, he knew that a mistake had been

¹¹² Bill of Exceptions, Vol. II, *supra* note 95, at 2312; *see also* Ben Holman, *Violence is No Stranger at Englewood Death Scene*, CHI. AM., Apr. 21, 1961.

¹¹³ The engineer staff was an exclusive, almost all-white club filled with many veterans who had returned from fighting in World Wars I and II. Interview with Joyce Clark, former eighth grade teacher, Lewis-Champlin School, (Mar. 8, 2010) (on file with author). The job was highly coveted and was often passed down from father to son. *Id.* The Chief Engineer was paid more than the principal and, in some respects, had more power than the principal, able to override the principal when it came to decisions concerning whether to open or close the school. *Id.*

¹¹⁴ *Teacher Slaying Brings Full Time Guard*, CHI. AM., May 1, 1961; *see also School Board Defends Right to Search Pupils*, CHI. DEFENDER, May 4, 1961.

¹¹⁵ Interview with Joyce Clark, *supra* note 113.

¹¹⁶ Affidavit of Jerome Feldman, Attorney at Law, Mar. 28, 2011 (on file with author).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

made.¹²³ Without hesitation, he agreed to take the case and enlisted the assistance of the Kaplans, whom he knew from high school.¹²⁴

¶41 What Feldman and the Kaplans lacked in experience they made up for with their passion in defending a client they believed to be innocent. Feldman and Marshall Kaplan fanned out into the community shortly after the murders and attempted to interview every teacher and every student who may have possessed information about the case.¹²⁵ In the summer of 1961, the legal team interviewed dozens of potential witnesses, usually after hours or on the weekends, as the men had law practices they were trying to sustain during regular working hours.¹²⁶ It was grueling work and the men had many doors slammed in their faces, particularly when they tried to interview white teachers and administrators.¹²⁷

¶42 The trio filed many pre-trial motions in the Hester case throughout the summer months, but by far the most important one was Hester's motion to suppress his confession. Given the power of confession evidence to a jury—even a confession as ridiculous as Hester's—Hester would have little chance of being acquitted if his confession was admitted into evidence.¹²⁸

VII. HESTER'S MOTION TO SUPPRESS HIS CONFESSION

¶43 The hearing on Hester's motion to suppress his confession commenced in September of 1961.¹²⁹ The evidence established that Lee Arthur Hester was fourteen years and five days of age at the time of his arrest.¹³⁰ He was in the fifth grade.¹³¹ The most recent psychological testing—two years old—of Hester by the Chicago Public Schools placed Hester's I.Q. at eighty-two. He was at least four grade levels behind in math and five in reading and spelling.¹³² He was taken into police custody at around 8:00 a.m. on April 21, 1961, and remained in police custody until approximately 8:30 p.m.—twelve and a half hours later—when he finished signing a confession that had been typed up by a court reporter and reviewed with him by a Cook County State's Attorney.¹³³ He

¹²³ *Id.*

¹²⁴ *Id.* The lead prosecutor in the case of *People of the State of Illinois v. Hester* was John J. Stamos, one of the most experienced and talented attorneys in the Cook County State's Attorney's Office. See Adolph J. Slaughter, *Why Hester 'Blew Up'*, CHI. DEFENDER, Oct. 7, 1961, at 1. Stamos later became the Chief Justice of the Illinois Supreme Court. *John J. Stamos*, THE THIRD BRANCH: A CHRONICLE OF THE ILLINOIS SUPREME COURT, http://www.state.il.us/court/SupremeCourt/JusticeArchive/Bio_Stamos.asp.

¹²⁵ Affidavit of Jerome Feldman, *supra* note 116.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ United States Supreme Court Justice William J. Brennan, Jr., perhaps more than any other Justice, recognized the unique power of confession evidence to tilt “the balance against the defendant in the adversarial process” of a trial, writing that “the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.” *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (quoting E. CLEARY, MCCORMICK ON EVIDENCE 316 (2d. ed. 1972)).

¹²⁹ Bill of Exceptions, Vol. I, *supra* note 95, at 283.

¹³⁰ *Id.* at 21–22.

¹³¹ *Id.*

¹³² *Id.* at 24.

¹³³ *Id.* at 25–37.

had no attorney or parent with him during the time he was in custody and was not advised of his right to an attorney or to counsel.¹³⁴

¶44 Many other facts were in sharp dispute. According to Hester, he was the victim of a classic good cop, bad cop routine. The white officers, Sergeants John Killackey and William Keating, played the bad cops, accusing him of lying, screaming at him, pointing a pen in his face, and getting so close to him that their spit flew into his face.¹³⁵ Meanwhile, the black officers, Robert Perkins and Harold Thomas, played the role of good cops, telling Hester that the white cops were ready to throw his head through the wall and that they would make sure the white cops would not bother him anymore.¹³⁶ The black officers told him that he could go home if he said he did it.¹³⁷ They also told Hester, who was still in a white hospital-like gown and slippers, that they would go to his house, get his clothes, and bring his mother to take him home.¹³⁸

¶45 In addition to threats and promises, the officers used evidence ploys. The two black officers told him that his blood was found on Mrs. Keane's clothes and that they found her hair on his sweater, and one of the white officers told him that they found his fingerprints on the icebox.¹³⁹ Hester said that before he confessed, the officers showed him numerous crime scene photos, including pictures of Mrs. Keane lying in a pool of her own blood.¹⁴⁰ When he finally broke, he made up a story from details he had seen in the pictures and by agreeing to leading questions from the officers.¹⁴¹ Before the Assistant State's Attorney came in to take his confession, the black officers rehearsed the details with him five or six times.¹⁴² Hester also testified that he asked to see his "mama" at least three times while in police custody and that his requests were denied.¹⁴³

¶46 Of course, the detectives and youth officers recalled the interrogation very differently. Their account was that although Hester at first denied killing Mrs. Keane during the interrogation at 4 p.m., when confronted with the Crime Lab's findings, he confessed, suggesting that he stabbed her by accident.¹⁴⁴ He then provided a detailed statement to Officers Perkins and Thomas.¹⁴⁵ Only after Hester provided the details did the officers show him crime scene photos to "clear up a few points."¹⁴⁶ The whole interrogation lasted no more than fifteen minutes and contained no threats or promises.¹⁴⁷

¶47 On September 19, 1961, Judge Alexander J. Napoli heard oral arguments on Hester's motion to suppress, allotting each side no more than thirty minutes. Hester's attorney, Marshall Kaplan, took well over an hour.¹⁴⁸ Kaplan brought an unusual perspective to his argument. He had previously defended accused American prisoners of

¹³⁴ *Id.* at 48.

¹³⁵ Bill of Exceptions, Vol. I, *supra* note 95, at 486–88, 609–10.

¹³⁶ *Id.* at 486; Bill of Exceptions, Vol. II, *supra* note 95, at 2377.

¹³⁷ Bill of Exceptions, Vol. I, *supra* note 95, at 487.

¹³⁸ *Id.* at 524–25, Bill of Exceptions, Vol. II, *supra* note 95, at 2377.

¹³⁹ Bill of Exceptions, Vol. II, *supra* note 95, at 2377–2388.

¹⁴⁰ *Id.* at 2378.

¹⁴¹ *Id.*

¹⁴² Bill of Exceptions, Vol. I, *supra* note 95, at 607.

¹⁴³ *Id.* at 521.

¹⁴⁴ *Id.*, at 782–83.

¹⁴⁵ *Id.*, at 779–93.

¹⁴⁶ *Id.* at 788–90.

¹⁴⁷ *Id.* at 331–32.

¹⁴⁸ Bill of Exceptions, Vol. II, *supra* note 95, at 1053.

war who were tried for collaborating with the Chinese communists in a North Korean prison camp. These prisoners confessed only after holding out for as long as three years.¹⁴⁹

¶48 Kaplan's argument was fascinating on many levels. He did his best to argue the facts and the applicable law, but he also asked Judge Napoli to think about what the law should be and what the law likely would be in the near future. Such aspirational arguments were not likely to persuade Judge Napoli, a career prosecutor¹⁵⁰ before becoming a judge, to rule in Hester's favor, but Kaplan was not deterred:

I submit that you reach a point in the law that the age of the defendant, his educational abilities, his mental capacity, his attainment in school, his family background . . . when those facts are looked at, that it then becomes not only factual but a rule of law requiring the State to furnish him, if at least not his parents, a lawyer, someone to look after his rights and his obligations, whatever has gone before, whatever will go after, there must be somebody to protect his rights.¹⁵¹

¶49 Interpreting the United States Supreme Court's decisions on confessions, Kaplan predicted that it was only a matter of time before the Court would hold that the absence of counsel during police interrogations would be the decisive factor in admitting or suppressing confessions, and urged Judge Napoli to get ahead of the curve:

They [the Supreme Court] have never, I will admit, determined a confession case on the supplying or not supplying of counsel, but they have mentioned it so often that I venture to say that in the not too distant future it will be one of the prime bases for striking a confession, if not already the prime basis.¹⁵²

¶50 Although the truth or falsity of the confession was an issue for the jury to decide, Kaplan asked the court to look at the unreliability of Hester's confession and to create a rule requiring that where a confession is, on its face, obviously untrue, law enforcement must continue to investigate the crime at hand:

I ask you to lay down a rule [of law] . . . that where facts in a statement, be it oral or written, are indicated to investigating officials, be they policeman, juvenile officers or State's attorneys, where those facts are so abominably ridiculous and so absolutely inconceivable that it cannot term the document, although it is signed, a confession, and that they have a duty to go further.¹⁵³

¹⁴⁹ *Id.* at 1033.

¹⁵⁰ Judge Alexander J. Napoli was an Assistant State's Attorney from 1933 to 1950. *Biographical Directory of Federal Judges*, FED. JUD. CENTER, <http://www.fjc.gov/public/home.nsf/hisj> (enter "Napoli, Alexander" in search box; follow "Napoli, Alexander J." hyperlink).

¹⁵¹ Bill of Exceptions, Vol. I, *supra* note 95, at 1030.

¹⁵² *Id.* at 1050.

¹⁵³ *Id.* at 1051. Richard Leo, Peter Neufeld, Bradley Hall, Amy Shavell, and I made a similar argument forty-five years later when we called for courts to hold pre-trial reliability hearings in cases involving

¶51 Kaplan ended his argument by telling the court, in no uncertain terms, that Hester was innocent, that the State knew it, and that he would fight to prove Hester's innocence, no matter how long it took: "They know he didn't kill that teacher . . . [a]nd if I have to spend the rest of my life doing it and giving up my law practice I'll prove it."¹⁵⁴

¶52 Despite Marshall Kaplan's best efforts, Judge Napoli denied Hester's motion to suppress. Siding with the officers, Judge Napoli found Hester's claims of being kicked, spit on, and threatened, to be unbelievable.¹⁵⁵ He held that "there was no prolonged questioning" or coercion of any kind during the interrogation.¹⁵⁶ Further, Judge Napoli held that the interrogation lasted only five or ten minutes and that Hester started making admissions shortly after the officers informed him of the crime lab's findings.¹⁵⁷

¶53 Despite the best efforts of Feldman and the Kaplans,¹⁵⁸ in October 1961, a Cook County jury convicted Hester of the murder and sexual assault of Mrs. Keane.¹⁵⁹ Although it is unlikely that Hester would have prevailed anyway, in light of the weight given to confession evidence by jurors, Hester's defense was hamstrung by several rulings of the trial court, particularly the court's refusal to allow a defense psychiatric expert to testify concerning Lee Arthur's personality and why his character traits made him especially vulnerable to authority figures and susceptible to psychological coercion.¹⁶⁰ The same jury that convicted Hester sentenced him to fifty-five years in prison. Before the year would end, the boy, still only fourteen years of age, was sent to Pontiac Correctional facility, a maximum-security facility for adult criminal offenders, to serve out his sentence.¹⁶¹

confessions in addition to hearings on the voluntariness of confessions. See Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479 (2006).

¹⁵⁴ Bill of Exceptions, Vol. I, *supra* note 95, at 1061.

¹⁵⁵ *Id.* at 1067–71

¹⁵⁶ *Id.* at 1067–68

¹⁵⁷ *Id.* at 1069.

¹⁵⁸ Hester's trial was a highly contested affair which involved a battle of the experts with regard to the physical and scientific evidence in the case and a swearing contest between Hester and the interrogating officers with regard to the confession. It makes for fascinating reading, but a full discussion of the trial is beyond the scope of this Article, which is focused on the interrogation and confession-related issues and the import of Hester's case on the law relating to interrogations and confessions of children.

¹⁵⁹ Bill of Exceptions, Vol. II, *supra* note 95, at 3136–38.

¹⁶⁰ See Hester's State Supreme Court Brief, *supra* note 93, at 99–105.

¹⁶¹ Hester's trial was also a cauldron of racial tension which boiled over at times. On one occasion, Hester exploded, breaking away from his guards, and high-jumping over a bench so that he could talk with his sister who was sitting in the gallery. He was eventually restrained by prosecutors and detectives, but he managed to get in his licks first, kicking one prosecutor, punching Sergeant William Keating in the face, and kicking Detective Sheldon Teller, before being held under control. In the midst of this fury, Hester threatened to kill everyone and blow up the building unless he was allowed to see his sister. Adolph Slaughter, a reporter for the *Chicago Defender*, described the pressure in the courtroom as follows:

Although whites and Negroes sit side by side in the courtroom which is nearly always filled with spectators, it is impossible to ignore the rank overtones of racism and the sometimes audible expressions of Negroes who feel the boy is being "railroaded". . . . Whites, on the other hand, have openly expressed hatred for the boy whose courtroom conduct, even before Wednesday, has lent fuel to this hatred Who is responsible for these set of circumstances which have made this case much more than a trial of a 14-year-old boy accused of stabbing his school teacher? It is really difficult to say or even to place the blame on a single individual. There can be little doubt, however, that the

¶54 Hester’s attorneys were stunned by the verdict. Feldman was quoted as saying that “[t]he verdict isn’t as important as the feeling you have when you know your client is innocent and 12 persons still have found him guilty.”¹⁶² “Lee Arthur Hester did not kill Jo Keane,” said Edward Kaplan, “and I believe this now as strongly as I did during the trial.”¹⁶³ Kaplan went on to explain how the jury could have convicted an innocent boy and how Hester could have confessed to a crime he did not commit:

The indicia of guilt that a confession gives many times magnifies all the other evidence all out of proportion. . . . That which you might not otherwise believe becomes believable when you have a confession. . . . [T]he fact that those people [the jurors] could not be induced to admit things they were not guilty of would prevent them from understanding that a boy of the low mentality of Lee Arthur Hester could very well admit to things he did not do. . . . Hester has no concept of the social stigma that would attach to his admitting guilt to a crime he was not guilty of. The fact that all he had to do was admit guilt and he could go home was paramount in his mind. . . . In Hester’s mind, his reasoning is, “if I didn’t do it and admit that I did, certainly they will discover I didn’t do it and let me go home.”¹⁶⁴

¶55 Hester’s lawyers expected that the appeal would take at least a year, but they vowed to take the case to the United States Supreme Court, if necessary.¹⁶⁵

VIII. THE APPEALS

¶56 Hester’s attorneys were overly optimistic to think that the appeal would take only a year. It would take nearly seven years for the Illinois Supreme Court to rule on Hester’s appeal. Part of the delay can be attributed to the size of the record. The record in the Hester case was massive. Comprising 3,228 transcript pages, it took court reporters, in the days before word processors, approximately four years to complete.¹⁶⁶ Once the record was complete, additional time was granted for Hester’s attorneys to prepare and file Hester’s brief. The attorneys raised eighteen issues in their mammoth brief, which

attitude of the State, as expressed by Stamos who is also Chief of the Criminal Division, is one contributing factor. Said Stamos: ‘Trial is war. If I don’t annihilate them, they’ll annihilate me.’

Slaughter, *supra* note 124, at 1.

¹⁶² *Teacher Killer Convicted*, CHI. DAILY TRIB., Oct. 21, 1961, at 1.

¹⁶³ Adolph J. Slaughter, *Lawyers Stand by Hester; Map Appeal*, CHI. DEFENDER (Nat’l ed.), Oct. 14, 1961.

¹⁶⁴ *Id.* Kaplan’s theories about why confession evidence is so powerful, why juries are so easily swayed by it, and why juveniles are more likely to falsely confess, were right on target and well ahead of his time. Numerous psychological studies have since verified Kaplan’s opinions. *See, e.g.*, Saul Kassin et al, *Police Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 9, 19–20, 23 (2010).

¹⁶⁵ Slaughter, *supra* note 163.

¹⁶⁶ *See* The Complete Oral Arguments of the Supreme Court of the United States: A Retrospective 1969 through 1979 Term, *Lee Arthur Hester v. State of Illinois*, No. 82, Nov. 18, 1969, at 1 [hereinafter Transcript of Oral Argument] (on file with author).

totaled a whopping 238 pages.¹⁶⁷ The State received extra time to file its brief and submitted its 64-page reply on December 29, 1967.¹⁶⁸

¶57 At the dawn of 1968, Hester's attorneys had to like their chances at prevailing on appeal. Between 1961 and 1968, the United States Supreme Court issued both *Escobedo* (a case that originated in Chicago) and *Miranda*, two decisions that underscored the importance of the role of counsel for suspects at the pre-trial stages of proceedings. Furthermore, the ink was still drying on *Gault*, which raised questions about the ability of juveniles to waive their rights to counsel and silence and to be adequately protected against self-incrimination in the absence of counsel.¹⁶⁹ Given these powerful new precedents, the delays in the filing of the briefs seemed only to increase Hester's chances of success, if not in the Illinois Supreme Court, then certainly in the United States Supreme Court.

¶58 Hester's arguments with respect to the admissibility of his confession took up a full thirty pages of the brief. The entire argument in the brief was summarized in the lengthy heading to this section:

It was violative of both the United States and Illinois constitutions to admit into evidence the purported oral and written confessions of the defendant over timely defense objections thereto because these purported confessions were coerced from the defendant by psychological coercion and by threats of physical brutality, the defendant being a fourteen year old boy of limited mentality who was kept incommunicado for over twelve hours before signing a written confession, who was not furnished legal counsel, who was not advised of any of his constitutional rights (nor capable of understanding same), including the right to silence and to counsel, and who, in addition, after repeatedly requesting to see his mother, was refused the right to see her or any other friend before and during his interrogations.¹⁷⁰

¶59 Beginning with *Haley* and *Gallegos*, Hester's counsel argued that Hester's claim that his confession was involuntary was as strong as, if not stronger than, those of the defendants in those cases. At times, Hester's counsel sought greater relief than a fact-specific determination that his confession was involuntary, arguing for a *per se* rule that every confession taken from a youthful suspect in the absence of counsel or another adult friend, must be suppressed: "There is therefore no doubt that where a defendant is as young as Hester is, the rule of law to be applied (without regard to the requirements of *Miranda v. Arizona*) is that irrespective of the pressure applied to bend the will, failure to provide counsel (or some other friend) will render a confession taken during secret

¹⁶⁷ Hester's State Supreme Court Brief, *supra* note 93.

¹⁶⁸ State's Illinois Supreme Court Brief, *supra* note 95.

¹⁶⁹ Although the United States Supreme Court, in *Johnson v. New Jersey*, 384 U.S. 719 (1966), held that neither *Escobedo* nor *Miranda* could be applied retroactively, the fact that Hester was interrogated by police without counsel and was never warned of his constitutional rights, coupled with the fact that he also did not have a parent with him during the interrogation preceding his confession, were facts that would have been considered important evidence by the Warren Court in assessing the voluntariness of Hester's confession.

¹⁷⁰ Hester's State Supreme Court Brief, *supra* note 93, at 62.

detention of one so young inadmissible.”¹⁷¹ This section of Hester’s brief closed with a rhetorical flourish, arguing that “[w]ithout counsel, without friend, and without safeguarding his constitutional rights,” Hester was no match for his interrogators: “[H]e was like clay in the hands of a sculptor.”¹⁷² Such interrogation practices, argued Hester’s attorneys, had “no place in this age of enlightenment.”¹⁷³

¶60 Given the size of Hester’s brief and the many issues it raised, the Illinois Supreme Court ruled relatively quickly. On March 28, 1968, the Court affirmed Hester’s conviction, siding with the police on every fact that Hester disputed, including whether Officer Prunckle kicked Hester, whether the officers threatened Hester, whether Officer Perkins showed Hester crime scene photographs before his confession, and whether he asked to see his mother. On this last point, the Court found it “highly relevant” that Officers Perkins and Thomas went to Mrs. Hester’s home at 2:45 p.m. on the day Hester was taken into custody. The officers told Mrs. Hester that her son was being held by the police, and Mrs. Hester did not try to find her son until 6:00 p.m., after he had already confessed.¹⁷⁴ Although the Court acknowledged Hester’s youth and mental limitations, it held that these factors, in the absence of a showing of coercion, did not render Hester’s confession involuntary.¹⁷⁵

¶61 One justice filed a dissenting opinion.¹⁷⁶ That justice, however, Walter V. Schaefer, was one of the most highly respected state supreme court justices in the United States.¹⁷⁷

¶62 Justice Schaefer was appointed to the Illinois Supreme Court by Governor Adlai E. Stevenson in 1951 to fill a vacancy.¹⁷⁸ He was elected in 1951, again in 1960, and was retained in 1970.¹⁷⁹ During his tenure on the Court, Justice Schaefer served as Chief Justice on two occasions.¹⁸⁰ Schaefer was widely recognized as one of the most outstanding state supreme court judges ever to take the bench.¹⁸¹ Indeed, in the United States Supreme Court’s landmark *Miranda* decision, Chief Justice Earl Warren cited Schaefer’s scholarship in his majority opinion and called Schaefer “one of our country’s distinguished jurists.”¹⁸²

¶63 In April 1966, on the eve of *Miranda*, Justice Schaefer delivered the Julius Rosenthal Foundation lecture at the Northwestern University School of Law in Chicago, where he served for many years as a professor.¹⁸³ His lectures were later published as a

¹⁷¹ *Id.* at 82.

¹⁷² *Id.*

¹⁷³ *Id.* at 91.

¹⁷⁴ *People v. Hester*, 237 N.E.2d 466, 499 (Ill. 1968).

¹⁷⁵ *Id.* at 598.

¹⁷⁶ *Hester*, 237 N.E.2d at 518.

¹⁷⁷ In 1965, when President Lyndon Johnson sought to appoint his close friend and advisor Abe Fortas to the United States Supreme Court, Fortas, who did not want to leave his lucrative law practice, initially rebuffed the President. In his place, Fortas suggested that Johnson nominate Walter Schaefer to the Court. BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 177 (1988).

¹⁷⁸ Walter Vincent Schaefer, *Jurist, Lawyer, Scholar, Teacher 1904-1986*, 80 NW. U. L. REV. 1141, 1151 (1986).

¹⁷⁹ *See id.* at 1152.

¹⁸⁰ *Id.* at 1143.

¹⁸¹ *Id.* at 1144.

¹⁸² *Miranda v. Arizona*, 384 U.S. 436, 480 n.50 (1966).

¹⁸³ Schaefer, *supra* note 178, at 1143.

book in 1967 entitled *The Suspect and Society: Criminal Procedure and Converging Constitutional Doctrines*.¹⁸⁴ In *The Suspect and Society*, Justice Schaefer voiced his concern that “the doctrines converging upon the institution of police interrogation are threatening to push on to their logical conclusion—to the point where no questioning of suspects will be permitted.”¹⁸⁵ He was particularly concerned that *Escobedo*, which appeared to forbid interrogation in the absence of counsel, would be the end of interrogation.¹⁸⁶

¶64

Justice Schaefer favored a more balanced, legislative approach, one that he and his colleagues at the American Law Institute (ALI) devised. According to the ALI Model Code of Pre-Arrest Procedure, suspects did not have a right to counsel during the first four hours of detention, but the suspect’s attorney could be present if the suspect had an attorney.¹⁸⁷ However, once the four-hour detention period ended, continued interrogation of suspects was prohibited except with the permission of counsel.¹⁸⁸ To ensure that an adequate record of the initial four-hour period was made, and that the question of what happened during the interrogation did not devolve into a swearing contest between suspect and police officer, the Code required that the questioning be tape-recorded.¹⁸⁹ The fact that Justice Schaefer did not fully embrace the leanings of the Warren Court to grant suspects the right to counsel in the stationhouse meant that his dissent would carry even greater weight with the Court when Hester sought certiorari review. Schaefer’s dissent was a straightforward application of the “totality of circumstances” voluntariness test, but he came to a different result from that of his colleagues.¹⁹⁰ The fact that the police held Hester, a fourteen-year-old with the mind of an eleven-year-old, in police custody for over twelve hours without ever telling him that he was under arrest or advising him of his rights, led Justice Schaefer to conclude that the State failed to prove that Hester’s confession was voluntary.¹⁹¹ Schaefer also quarreled with the majority’s insinuation that Mrs. Hester was less than diligent in trying to locate Lee Arthur.¹⁹² He found no support for the majority’s finding that she waited until 6 p.m. to try to find her son but did find that the State used repeated and frivolous objections to prevent Mrs. Hester from telling her side of the story.¹⁹³ These facts led Justice Schaefer to conclude that the prosecution failed to meet its burden of proving that Hester’s confession was voluntary by a preponderance of the evidence.¹⁹⁴

¹⁸⁴ WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY: CRIMINAL PROCEDURE AND CONVERGING CONSTITUTIONAL DOCTRINES* (1967).

¹⁸⁵ *Id.* at 9.

¹⁸⁶ *Id.* at 23.

¹⁸⁷ *Id.* at 50.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 52.

¹⁹⁰ *See* *People v. Hester*, 237 N.E.2d 466 (Ill. 1968).

¹⁹¹ *Id.* at 484.

¹⁹² *Id.* at 483.

¹⁹³ *Id.* at 518–20.

¹⁹⁴ *Id.* at 520. There is reason to believe that had Ellen Hester, Lee Arthur’s mother, been allowed to answer these questions she would have described being given the runaround by the police when she tried to locate Lee Arthur. In an article in the *Chicago Daily News* shortly after Hester’s arrest, Mrs. Hester in words “tinged with bewilderment—and anger,” stated: “I just don’t like the way they took my boy without letting me know about it . . . and not letting me see him.” *Slain Woman His Favorite Teacher: Mother Refuses to Believe Her Son Committed Crime*, CHI. DAILY NEWS, Apr. 22, 1961, at 3.

IX. HESTER'S PETITION FOR A WRIT OF CERTIORARI

¶65 Hester's attorneys filed a motion to reconsider before the Illinois Supreme Court that was quickly denied. This paved the way for the attorneys to seek certiorari review in the United States Supreme Court. On August 14, 1968,¹⁹⁵ Hester filed his petition for a writ of certiorari with the Court. Although Hester raised several issues in his cert petition, the lead issue was framed as follows:

Can the petitioner's conviction stand where the petitioner's conviction is based in whole or in part on the secret incommunicado taking, during a period of unlawful detention, of the oral and written confessions of a 14 year old Negro boy in the fifth grade of grammar school, with severely limited intelligence, without counsel, parent or anyone else standing in loco parentis to him, without adherence to any of his constitutional rights or knowledge of the same and under conditions more fully described herein in the statement of facts material to this case?¹⁹⁶

¶66 Clearly relying on the fact that the Court would give great deference to the dissent of Justice Schaefer, Hester's attorneys cited Justice Schaefer in the opening and closing paragraphs of the argument section, and several times in between.¹⁹⁷ The State filed its response on January 20, 1969.¹⁹⁸ On April 7, 1969, John Clark, Clerk of the United States Supreme Court, sent Western Union telegrams to counsel for both parties, notifying them that the Court had granted Hester's writ of certiorari.¹⁹⁹

X. EVENTS BEYOND HESTER'S CONTROL DAMAGE HESTER'S CHANCES OF SUCCESS

¶67 The period between the time that Hester's appeal was denied by the Illinois Supreme Court (March 28, 1968) and the time the Court granted Hester's cert petition (April 7, 1969) was one of the most turbulent times in the history of the United States.

¹⁹⁵ See Petition for Writ of Certiorari, *Hester v. Illinois*, 397 U.S. 660 (1969) (No. 82) (on file with author).

¹⁹⁶ *Id.* at 2. The petition for certiorari raised other weighty issues that merited the United States Supreme Court's attention, including whether the police had probable cause to arrest Hester at the school and whether Hester's right to a present a defense was compromised when he was precluded from calling an expert to testify about his personality characteristics which rendered him particularly susceptible to coercion. *Id.* at 14–16, 18–22. These issues, however, were not taken up by Justice Schaefer and were, appropriately, given less primacy in the petition.

¹⁹⁷ *Id.* at 9–11, 22. In an opinion which predated both *Miranda* and *Hester*, Justice Schaefer, again in dissent, held that a fifteen-year-old was entitled to be notified of his right to counsel as soon as the State brought an attorney in to take his confession:

Whatever may have been the situation during his interrogation by police officers, this defendant's right to counsel certainly attached when the prosecution found it necessary to use an attorney in questioning him. At least at that point he was entitled to be told that he need not answer questions, and to be advised of his right to counsel.

People v. Richardson, 207 N.E.2d 478, 481 (Ill. 1965). The *Richardson* opinion is an example of Justice Schaefer's effort, in the immediate aftermath of *Escobedo*, to find a compromise that would both respect the need of the police to interrogate suspects to solve cases (a view that he shared), and the need to provide greater protections to suspects from police overreaching during interrogations.

¹⁹⁸ Response in Opposition, Jan. 20, 1969 (on file with author).

¹⁹⁹ See Western Union Telegram from Clerk of the United States Supreme Court to Marshall Kaplan (Apr. 7, 1969) (on file with author).

On March 31, 1968, President Lyndon Johnson stunned the world when he announced that he would not seek the nomination of the Democratic Party for President of the United States.²⁰⁰ Johnson's announcement came at the end of a speech concerning the war in Vietnam, a war in which American casualties were mounting and an American victory seemed uncertain after the North Vietnamese's successful Tet Offensive in January 1968.²⁰¹ That same week, on April 4, 1968, Martin Luther King was assassinated, causing blacks in cities across the country to take to the streets and riot.²⁰² On June 5, 1968, Robert Kennedy, brother of assassinated former President John F. Kennedy, and the leading Democratic candidate for President, was assassinated at a rally after his victory in the California primary.²⁰³ And in August of 1968, students and anti-war protestors clashed violently with Chicago police on the streets as the Democrats gathered for their convention to elect a nominee for President.²⁰⁴

¶68 In the midst of this chaos, the Republican Party, led by their leading candidate, Richard M. Nixon, made "law and order" the centerpiece of their platform.²⁰⁵ Opposition to the Warren Court was one of Nixon's central campaign themes.²⁰⁶ The United States Supreme Court was not oblivious to the chaos in the streets and the public's shifting sensibilities against criminal defendants and in favor of law enforcement. The *Miranda* decision in particular was a lightning rod, prompting predictions from law enforcement officers that the decision would embolden criminals and compromise public safety.²⁰⁷ In the midst of such instability, it is hard to predict with certainty how the Warren Court acting at full strength would have ruled in Hester's case. But Hester would never get the chance to see the full Warren Court decide his case. By the time his case was argued in front of the Court, seismic events transpired that changed the makeup of the court and almost certainly assured that Hester would not win his case.

XI. A JUSTICE IS FORCED TO RESIGN IN DISGRACE AND A NEW CHIEF JUSTICE IS APPOINTED TO REPLACE THE RETIRING EARL WARREN

¶69 In June of 1968, President Johnson was a lame-duck President with diminishing political capital on the Hill. But he didn't see it that way. When Chief Justice Earl Warren told the President that he wanted to resign, Johnson, against the advice of Clark

²⁰⁰ Lyndon B. Johnson, President, United States, Address to the Nation (Mar. 31, 1968), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/680331.asp> (announcing steps to limit the war in Vietnam and reporting his decision not to seek reelection).

²⁰¹ Tom Wicker, *Johnson Says He Won't Run*, N.Y. TIMES, Apr. 1, 1968.

²⁰² Ben A. Franklin, *Army Troops in Capital as Negroes Riot; Guard Sent Into Chicago, Detroit, Boston*, N.Y. TIMES, APR. 6, 1968.

²⁰³ Gladwin Hill, *Kennedy is Dead, Victim of Assassin*, N.Y. TIMES, June 6, 1968.

²⁰⁴ J. Anthony Lukass, *Police Battle Demonstrators in Streets*, N.Y. TIMES, Aug. 29, 1968.

²⁰⁵ Erwin Chemerinsky, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* 16 (2010).

²⁰⁶ In his acceptance speech at the 1968 Republican National Convention, Richard M. Nixon made no attempt to hide his disdain for the Warren Court's criminal procedure decisions: "let us also recognize that some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country." *Transcripts of Acceptance Speeches by Nixon and Agnew to the G.O.P. Convention*, N.Y. TIMES, Aug. 9, 1968, at 20; see also *The Campaign: Crime Control*, N.Y. TIMES, Sept. 26, 1968, at 46.

²⁰⁷ Fred P. Graham, *How to Make Sure a Confession Stands Up*, N.Y. TIMES, Feb. 26, 1967, at E12; Donald Jansen, *New Group Fights Curbs on Police*, N.Y. TIMES, July 16, 1967, at 68; Irving R. Kaufman, *Miranda and the Police: The Confession Debate Continues*, N.Y. TIMES, Oct. 2, 1966.

Clifford, one of his closest advisors, decided to exercise his remaining capital to honor two old friends with nominations to the United States Supreme Court. He nominated Associate Justice Abe Fortas, one of his closest confidantes, to replace Warren as Chief Justice, and nominated federal judge and Johnson's former congressional colleague, Homer Thornberry, to replace Fortas as Associate Justice.²⁰⁸ Johnson's decision set in motion a course of events that he could not possibly have anticipated. What started as a way to honor his loyal friend ended up in Fortas's resignation from the Court in disgrace.

¶70 Throughout the summer of 1968, Fortas's nomination was debated before the Senate Judiciary Committee. Fortas was grilled relentlessly about his close relationship with President Johnson, especially his continued service to the President as a trusted advisor after he was appointed an Associate Justice of the Court.²⁰⁹ The Senators on the Committee were stunned to learn, for example, that Fortas helped draft Johnson's State of the Union address and consulted with him on the most pressing issues of the day, including the Vietnam War, while he was sitting on the Court.²¹⁰ They also questioned Fortas about his judicial philosophy and the decisions of the Warren Court, particularly Fortas's decisions to expand the rights of criminal defendants. As the summer turned to fall, it became apparent that Fortas would not be confirmed in time to sit as Chief Justice when the Court began its October term. With his supporters unable to break a Senate filibuster over his nomination, Fortas asked Johnson to withdraw his name for the nomination as Chief Justice.²¹¹

¶71 More bad news came for Fortas just seven months later. During his confirmation hearings for the position of Chief Justice, the Senate Judiciary Committee had received an anonymous letter suggesting that the Committee look into the relationship between Fortas and a suspected stock manipulator named Louis Wolfson.²¹² Although the Committee did not pursue the tip, a reporter for *Life* magazine did, and on May 5, 1969, William Lambert's exposé hit newsstands.²¹³ Lambert's story raised concerns about Fortas's ethics, specifically his decision to accept a \$20,000 payment from Wolfson's family foundation. Fortas received a check for \$20,000 from the foundation in January 1966, ostensibly to serve as an advisor to the foundation on charitable, educational, and civil rights projects. Although Fortas returned the check without cashing it, he waited until December 1966, after Wolfson was indicted, to do so. By the time the *Life* article was published, Wolfson was in prison.²¹⁴

¶72 The Nixon administration met with Lambert nearly a month prior to the release of his article. After Lambert's article hit the stands, the Justice Department opened its own investigation into Fortas's dealings with Wolfson and subpoenaed all correspondence

²⁰⁸ Fred. P. Graham, *Johnson and the Court: Two Appointments that Don't Please Everybody*, N.Y. TIMES, June 30, 1968, at E1. Clark Clifford was shocked when consulted about the decision, telling the President that had the President nominated the two men before March, he could have succeeded, but "you're never going to get it through" now when the Republicans are planning to take over the White House. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 326–27 (1990).

²⁰⁹ Linda Greenhouse, *Ex-Justice Abe Fortas Dies at 71: Shaped Historic Rulings on Rights*, N.Y. TIMES, Apr. 7, 1982, at A1.

²¹⁰ Marjorie Hunter, *Griffin Rebukes Nixon for Stand Opposing a Filibuster on Fortas*, N.Y. TIMES, Sept. 15, 1968.

²¹¹ *Id.*; see also Fred P. Graham, *The Votes Are Not There for Fortas*, N.Y. TIMES, Sept. 29, 1968, at E7.

²¹² KALMAN, *supra* note 208, at 360.

²¹³ William Lambert, *Fortas of the Supreme Court: A Question of Ethics*, LIFE, May 9, 1969, at 32.

²¹⁴ KALMAN, *supra* note 208, at 366–70.

between Fortas and Wolfson from the Foundation.²¹⁵ Among the documents, was a contract that specified not only that Fortas was to receive a one-time payment of \$20,000, but also that the Foundation agreed to pay Fortas \$20,000 a year for life and to his wife if she survived him. With talk that Congress might institute impeachment proceedings, and Fortas losing support from many of his brethren on the Court, including Chief Justice Warren, Fortas resigned from the bench on May 15, 1969.²¹⁶

¶73 Hester's chances were dealt another blow when President Nixon nominated federal appeals court Judge Warren E. Burger to replace retiring Chief Justice Earl Warren. Burger, who was known to be less than enamored with the Warren Court's expansion of procedural rights for defendants, was quickly confirmed in June 1969.²¹⁷ When the Court opened its fall term on the first Monday of October 1969, Fortas's seat had not yet been filled, leaving a court of only eight members. More importantly, Hester had lost two likely allies in Warren and Fortas.

XII. HESTER'S BRIEF AND ORAL ARGUMENT BEFORE THE UNITED STATES SUPREME COURT

¶74 Hester's attorneys were knee-deep in preparing their brief for the Court when the events involving Justices Fortas, Warren, and Burger were playing out in the national arena. In many ways, the brief was written with an eye to Justice Fortas. Although the lead argument in the brief was a traditional application of the due process voluntariness test, relying heavily upon *Haley*, *Gallegos*, *Gault*, and Justice Schaefer's dissent, Hester's attorneys went much further, perhaps too far in retrospect. Building upon Justice Fortas's language in *Gault* that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children," Hester's attorneys boldly asked the Court that "the talking [sic] of confessions from children . . . be abolished," at least to the extent that such confessions can be used against them in criminal court proceedings.²¹⁸ Such sweeping arguments might have appealed to a majority of the Warren Court, but were unlikely to capture a majority of the Burger Court.

¶75 In their brief, Hester's attorneys undertook the burden of showing not only that Hester's confession was unreliable, but also that he was actually innocent of the crime.²¹⁹ They asked the Court to undertake a *de novo* review of the entire record and systematically deconstructed Hester's confession by showing that it was not corroborated by the physical evidence in the case and that it was inconsistent with the actual facts of the murder.²²⁰

²¹⁵ Fred P. Graham, *Aim is to Avert Leaks*, N.Y. TIMES, May 18, 1969, at 1.

²¹⁶ KALMAN, *supra* note 208, at 366–70.

²¹⁷ Fred P. Graham, *Warren Court Era Ending Today After 16 Years of Reform*, N.Y. TIMES, June 23, 1969, at 1, 24 (noting that President Nixon "made a point of selecting a Chief Justice who rejects much of what the Warren Court has done on the subject of defendant's rights.").

²¹⁸ Brief of Petitioner, *Hester v. Illinois*, 90 S. Ct. 1408 (No. 82) (1969), 1969 WL 119867, at *42–*48.

²¹⁹ *Id.* at *53.

²²⁰ *Id.* at *53–*74. In hindsight, the case against Hester was very weak and bore many of the indicia of false confessions. Hester's confession did not lead the police to such critical pieces of corroborative evidence as the knife used to kill Mrs. Keane or the keys used to lock her door. *Id.* at *71. Hester's confession also contained numerous errors, including the number of times that Mrs. Keane was stabbed, that he was wearing his jacket during the time of the murder, and that he did not ejaculate inside the victim. *Id.* at *64–*75; see Richard A. Leo et al, *Bringing Reliability Back In*, *supra* note 153, at 521–35

¶76

Oral argument in the case took place on November 18, 1969.²²¹ Marshall Kaplan argued the case for Hester.²²² Joel M. Flaum of the Illinois Attorney General's Office represented the State of Illinois.²²³ Kaplan argued that the confession must fail in three ways: First, a traditional application of the voluntariness test must result in suppression of Hester's confession. Kaplan started out his argument with a highly detailed recitation of the facts, focusing on the circumstances of the arrest, interrogation, and confession of Hester. Kaplan listed each of the factors that should lead the Court to find the confession involuntary, focusing on the length of time Hester was in custody, his age, lack of experience, illiteracy, and low I.Q.; that no fewer than seven Chicago police officers participated in his arrest and interrogation; that the two Negro officers told him that the white detectives were going to throw his head through the wall unless he told them what they wanted to hear; that the officers showed him numerous pictures that enabled him to concoct a story of what happened; and that the statement was rehearsed multiple times before a written confession was commenced.²²⁴ Summing up the first argument, Kaplan said: "Under conventional principles of due process, forgetting the retroactivity of *Miranda* or *Escobedo* or the lack thereof . . . you cannot take a confession from a fourteen year old of the type I have described, after incommunicado holding of him, failing to give him even the barest rudiments of representation, and/or having anybody stand *in loco parentis* to him."²²⁵

(discussing ways to distinguish true confessions from false ones). Moreover, two key witnesses gave Hester an alibi. Sherman Baker, the boy who supposedly waited for Hester at the stairwell while he went into the bookroom, corroborated Hester's account that another boy, Lorenzo Walker, had returned the milk cartons on the day of the murder with Baker. *Id.* at *64. So did Hester's teacher, Mrs. Webster, who swore that Hester never left her room to return the cartons. *Id.* To the extent that Hester did get some of the facts right, these could have come from leading questions of his interrogators or the crime scene photos showed to him by the police. See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010) (finding evidence of police fact-feeding in virtually every DNA exoneration involving false confessions). Although the State's expert testified at trial that a spot of blood found on Hester's clothing was the same type as Mrs. Keane's, Hester's trial expert, the eminent Dr. Alexander Weiner, of the Office of the Chief Medical Examiner of New York City, questioned the methods of the Chicago Crime Lab in ascertaining the blood type found on Hester's clothes. *Blood Tests Hit in Murder Trial of Boy*, CHI. DAILY TRIB., Oct. 6, 1961, at C10. In any event, approximately forty percent of the general population shared Mrs. Keane's blood type. The other so-called evidence would never stand up in court today. Microscopic hair analysis, like that of the hair allegedly found on Hester's clothing, is notoriously unreliable and has led to numerous wrongful convictions. Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL'Y REV. 381, 395-96 (2004). Similarly, the lab expert's testimony that lipstick found on Hester's jacket was similar to lipstick found in her purse and that metal filings found in Hester's pockets were similar to those found in the victim's underwear would probably not even be admissible in court today and suffers from the same problems of subjectivity as the hair analysis. Today, if the evidence still exists, DNA testing might determine with certainty whether the blood or the hairs found on Hester's clothing belonged to Mrs. Keane.

²²¹ Transcript of Oral Argument, *supra* note 166, at 1.

²²² *Id.*

²²³ Flaum would later have a distinguished career as a federal prosecutor under United States Attorney James R. Thompson (who later became Governor of Illinois), and as a judge on the United States Court of Appeals for the Seventh Circuit, where he still sits today. See Joel Martin Flaum, *Federal Judicial Center, Biographical Directory of Federal Judges*,

<http://www.fjc.gov/servlet/nGetInfo?jid=767&cid=999&ctype=na&instat=na> .

²²⁴ Transcript of Oral Argument, *supra* note 166, at 3-7; see also Oral Argument, *Hester v. Illinois*, 397 U.S. 660 (No. 82) (1969), available at http://www.oyez.org/cases/1960-1969/1969/1969_82/argument.

²²⁵ Transcript of Oral Argument, *supra* note 166, at 7.

¶77 Second, Kaplan argued that, forgetting conventional principles of due process, “[i]t is violation of due process” to treat juveniles as if they were adults when taking their statements.²²⁶ To underscore this point, Kaplan, building to a crescendo, stated:

And may I point it out: In a golf game we give a handicap, in a bowling tournament we give pins to a less capable bowler . . . in a horse race we add weight to the faster horse. I say that even if you were to anoint Lee Arthur Hester with the finest of oils and place him in a room with a swimming pool and velvet walls, you cannot take a confession from Lee Arthur Hester without providing him with some rudiments of due process and fairness.²²⁷

¶78 Up until this point, over twelve minutes of argument, not a single justice had interrupted Kaplan. But Kaplan’s third argument brought some of the justices to life. Kaplan asked the Court to “abolish the taking of juvenile confessions because there is no possible way [that] someone like Lee Arthur Hester can adequately be advised of his rights. Advising Lee Arthur Hester of his rights, is like, is like advising a deaf man of his rights.”²²⁸ Justice Harlan interrupted Kaplan and asked him pointedly: “Is the rule you are asking for there you say is an absolute constitutional prohibition against taking confessions from a juvenile no matter what the circumstances.”²²⁹ Kaplan responded that he had asked for such a rule because he thought it was “the only workable rule with a juvenile.”²³⁰ However, he stated that the case could be decided under the “narrowest of principles.”²³¹

¶79 This exchange signaled that at least Justice Harlan was not likely to support any broad rules of exclusion. This was no surprise. Justice Harlan had dissented in *Miranda*, arguing that the due process voluntariness test was an adequate tool for dealing with confessions.²³² But when the next Justice to speak, Thurgood Marshall, began to question the wisdom of a *per se* exclusionary rule, the chances of a groundbreaking juvenile confession decision seemed to go out the window:

Marshall: What about the 18 year old who is a genius and is a senior, is in college? Same rule?

Kaplan: We have a problem and may I be frank to admit Your Honor, I don’t know how to resolve it.

Marshall: Well you do have problems with all general rules like that don’t you?

Kaplan: Your Honor, we have a problem every day of our . . .

²²⁶ *Id.* at 8.

²²⁷ *Id.* at 8–9.

²²⁸ *Id.* at 9.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Miranda v. Arizona*, 384 U.S. 436 (1966).

Marshall: Why don't you stick to the case you have which is a 14 year old with 9 years of mentality, why don't you stick with that?"²³³

¶80 Following Justice Marshall's lead, Kaplan returned to the basic facts of the case and placed Hester's case squarely within the Court's precedents from *Brown v. Mississippi*²³⁴ up to and including *Miranda v. Arizona*,²³⁵ paying particular attention to *Haley*²³⁶ and *Gallegos*.²³⁷ According to Kaplan, Hester was younger than both boys in *Haley* and *Gallegos*; in fact, he was probably the youngest defendant in the history of the United States Supreme Court.²³⁸ Starting with the fact that Hester was not permitted to see his mother, Kaplan listed all of the reasons why the confession was involuntary: "the mentality of the defendant, . . . his ability to withstand pressure, the fact that he was held incommunicado, the fact that he was never taken before a magistrate,²³⁹ the fact that he could not cope with his captives [sic]."²⁴⁰ When you take a confession from a boy like Hester, Kaplan argued, "it's like the proverbial taking candy from a baby."²⁴¹

¶81 Illinois Assistant Attorney General Joel Flaum began his argument with a statement that the proof of guilt in Hester's case was overwhelming, even if the confession was set aside. Justice Harlan immediately interrupted Flaum, noting that Justice Schaefer had reached the opposite conclusion.²⁴² Flaum began to explain why Justice Schaefer's decision was wrong when he was immediately interrupted by Justice Marshall:

Marshall: When did he first see his mother?

Flaum: He saw his mother, Your Honor, at 10 a.m. the following morning.

The statement made by counsel . . .

Marshall: When did he first have a lawyer?

Flaum: He had it on Monday morning, Your Honor, 48 hours later. And he was not informed of his right to have counsel.

Marshall: When did you give this boy his mother?

Flaum: At 10 a.m. the next morning.

Marshall: That was after the interrogation.

Flaum: After the confession.

Marshall: And prior to the time the confession was written down, he saw nobody who was friendly to him.

²³³ Transcript of Oral Argument, *supra* note 166, at 9–10.

²³⁴ *Brown v. Mississippi*, 297 U.S. 278 (1936).

²³⁵ *Miranda*, 384 U.S. 436.

²³⁶ *Haley v. Ohio*, 332 U.S. 596 (1948).

²³⁷ *Gallegos v. Colorado*, 370 U.S. 49 (1962).

²³⁸ Transcript of Oral Argument, *supra* note 166, at 14.

²³⁹ *Id.* at 13–16. Justice Schaefer, in *The Suspect and Society*, revived the idea that suspects be taken in front of magistrates, advised of their rights, and be interrogated by police officers in court, as a way to protect suspects. See SCHAEFER, *supra* note 184. This idea was popular among scholars and reformers in the 1930s—the age of the use of the so-called “third degree” by police officers to obtain confessions. See, e.g., Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1228–31 (1932).

²⁴⁰ Transcript of Oral Argument, *supra* note 166, at 13.

²⁴¹ *Id.*

²⁴² *Id.* at 16.

Flaum: Correct, Your Honor.

Marshall: And obviously there was no reason for depriving him of that, was there?

Flaum: Well, Your Honor, this is the situation. 1961, what did the prosecutors in Cook County have by way of case law to rely upon.

Marshall: They had mothers.

Flaum: I understand.

Marshall: And they knew this was a juvenile. They knew he was a 14 year old stuttering. . . .

Marshall: Well, what grade was he in?

Flaum: He was in the fifth grade, Your Honor.

Marshall: At the age of 14. Something was wrong.²⁴³

¶82 When Flaum tried to quarrel with Justice Marshall's suggestion of Hester as a disabled youth, characterizing Hester as aggressive and not the shy, retiring, incompetent youth portrayed by the defense, Justice Marshall continued to raise questions about the police's actions in "depriv[ing] the boy of his family" and using four officers to interrogate Hester.²⁴⁴ Flaum eventually claimed that Hester was manipulative in the way in which he made corrections to his statement to minimize his culpability, first stating the killing was an accident, then later changing his story from "kicking books that were on the floor of the book room, to tripping over the books."²⁴⁵

¶83 Flaum began to distinguish *Haley*, the only precedent to guide the Chicago law enforcement authorities at the time of the interrogation, focusing on the length of the interrogations, the time of day of the interrogations, the fact that there were no relay interrogations, and the location of the interrogations.²⁴⁶ In the middle of his discourse, Flaum was interrupted by a question from Justice Harlan, which appeared to come out of the blue and took Flaum by surprise:

Harlan: Was there any effort made to take this case to federal habeas?

Flaum: No, Your Honor, this case is . . .

Harlan: I know this case is on direct appeal. I realize that.

Flaum: Yes, it is, Your Honor. . . .

Harlan: As I listen to the argument on both sides, it is the kind of argument where we are being asked to reassess the facts. I have not heard yet, from anybody, the assertion of any principle of law that we've laid down so far that was misapplied in the judgment that the state court made on this confession.

Flaum: Well, your Honor we suggest there has been no misapplication of the law.²⁴⁷

¶84 Flaum spent the remainder of his argument trying to persuade the Court not to create a *per se* rule. He admitted that such a rule "may be supported by some of the

²⁴³ *Id.* at 18.

²⁴⁴ *Id.* at 21–22.

²⁴⁵ *Id.* at 23.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 24.

dictum in *Gallegos*,” but argued that it would do “great harm to the administration of justice.”²⁴⁸ Flaum argued that the coupling of *Miranda* warnings with the totality test was ample protection for juvenile suspects. In his argument against a *per se* rule, he made several concessions that many prosecutors and courts would quarrel with today, including that prosecutors have a “heavier burden” in proving that a confession is voluntary in juvenile cases.²⁴⁹

¶85 Flaum concluded by quoting Justice Harlan’s dissent in *Miranda*: “Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments in the law. . . . We feel that the application and the calling for of a *per se* rule is totally unwarranted by the Petitioner.”²⁵⁰

¶86 Early in his rebuttal argument, Kaplan was interrupted by Chief Justice Burger: “Counsel, are you going to tell us at some point whether there is any legal question other than the voluntariness of the confession?” Kaplan moved on to some of the other arguments in his brief but soon returned to the voluntariness of the confession. In his final pitch to the Court, Kaplan, in a move that sounded of desperation, told the court that the boy was innocent and reminded the Court that he had denied killing Mrs. Keane under truth serum:

[W]hen you take this case, and the total absolute inability to cope with his captors plus the fact that this is an innocent boy sitting in the penitentiary, that an offer of proof as to a truth serum test was made, and that he passed the truth serum test, that he denied unequivocally any knowledge of how the woman had met her demise, I say that when a judge in chambers is presented with testimony like that, although I can’t find any basis in the law to admit a truth serum test into evidence, that once he knows that a boy has passed a truth serum test, some inquiry has to be made as to whether or not the right guy is on trial. You can’t just bury your head in the sand and say the law doesn’t allow the truth serum test to be admissible in evidence.²⁵¹

¶87 When asked by Justice Burger whether contrary results of a truth serum test would have been admissible if offered by the prosecution, Kaplan responded by saying:

No, Your Honor, it would not have been admissible. All I am saying is you had to live with this case. My associates and I, under the law of 1961, couldn’t get a dime to hire competent people to come to the state or people from our own state to testify as experts. We spent \$12,000 trying and

²⁴⁸ *Id.* at 25.

²⁴⁹ *Id.* at 26.

²⁵⁰ *Id.* at 27.

²⁵¹ *Id.* at 30–31. In July 1961, a psychiatrist hired by the defense, Dr. Marvin Ziporyn, illegally administered sodium amytal, the claimed truth serum, to Hester during an examination at the Audy Home. *Drug, Quiz Boy in Slaying*, CHI. TRIB. July 7, 1961, at 1. Hearing screams from inside the room, a guard entered the room and noticed that Hester was very drowsy. He summoned the chief nurse at the detention center. *Drug, Quiz Boy in Slaying*, CHI. TRIB. July 7, 1961, at 1. The nurse checked the garbage can and found the vial of sodium amytal. *Id.* Hester’s attorneys were sharply reprimanded for Dr. Ziporyn’s actions by Judge Napoli. *Id.*

appealing this case so we could bring in a blood expert, a pathologist, a handwriting expert.²⁵²

And on that note, Kaplan's time was up.

XIII. THE SUPREME COURT'S SURPRISING DECISION

¶88 On April 27, 1970, the United States Supreme Court Clerk sent a telegram to the attorneys of record in the case.²⁵³ The telegram notified the parties that the Court, in a per curiam opinion, with dissents by Justices Brennan, Marshall, and Douglas, had dismissed the writ of certiorari as improvidently granted.²⁵⁴ No reasons for the dismissal were given, not even the standard language that often accompanies such dismissals: “After having reviewed the record, and considered the briefs and oral arguments submitted by both sides, we are satisfied that petitioner’s claim does not merit the plenary review that we thought it might deserve at the time petitioner’s petition for certiorari was granted.”²⁵⁵

¶89 Generally, a writ of certiorari to a state court should be dismissed as improvidently granted only on the basis of considerations that were not apparent at the time the writ was granted.²⁵⁶ But no new facts emerged in the briefing or at oral argument. Nothing had changed in the circumstances of the case from the time that certiorari was granted. The case was still “certworthy.”²⁵⁷ Why then, did the Supreme Court dismiss the writ?

¶90 It’s a question that has bothered Jerome Feldman, Hester’s lawyer, for more than forty years. Recently, Feldman told me that he and the Kaplans were stunned that the Court had dismissed the writ.²⁵⁸ Feldman believed that the Court would not have taken the case unless it was prepared to reverse the conviction.²⁵⁹ At the time of the grant of certiorari, Feldman and the Kaplans were confident that they had at least six votes on Hester’s side—Fortas, Marshall, Brennan, Warren, Douglas, and Black.²⁶⁰ Although Justice Black was a question mark, he had often voted with the liberal wing of the Court in criminal procedure cases and had voted with Douglas in *Haley* and *Gallegos*, Fortas in *Gault*, and Warren in *Miranda*. When Feldman and the Kaplans received the telegram, they were left to speculate about what had happened. The only explanation they could come up with was that the Court must have been deadlocked in a four to four vote on the merits.²⁶¹ This interpretation enabled them to rationalize the decision by attributing the loss to the changes in the Court’s personnel. If only Fortas had not resigned and Warren

²⁵² *Id.* at 31.

²⁵³ See Western Union Telegram from Clerk of the United States Supreme Court, *supra* note 199.

²⁵⁴ *Id.*

²⁵⁵ Stephen L. Walsby et al, *The Per Curiam Opinion: Its Nature and Function*, JUDICATURE (1992).

²⁵⁶ STERN ET AL., *supra* note 16, at 328.

²⁵⁷ *Id.* Stern cites numerous examples of cases in which the Supreme Court has dismissed previously granted petitions over the years, breaking down these cases into sixteen different reasons for the dismissals. None of them seem applicable to Hester’s case. *Id.* at 328–31.

²⁵⁸ Interview with Jerome Feldman, Attorney for Lee Arthur Hester (Jan. 19, 2011).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

had not retired, they told themselves, Lee Arthur Hester's conviction would have been reversed.²⁶²

¶91 As a novice in the intricacies of Supreme Court practice, I found Feldman's narrative compelling and I clung to it in earlier drafts of this Article. Even though avoiding a tie vote is not recognized as a legitimate basis for dismissing a writ, there were practical reasons for the Court not to issue a four-to-four opinion. During *Hester*, the Court was short a justice and still reeling from the resignation of Justice Fortas. Two attempts by President Nixon to appoint Justices to replace Fortas had been rejected by the Senate.²⁶³ Perhaps the Court did not want to issue an opinion of such importance with only eight members sitting. A four-to-four decision would have let Hester's conviction stand and would have been of no precedential value.

¶92 The first chink in this theory, however, came when I received from the Library of Congress the files of Justice Douglas on the *Hester* case. Three documents in Justice Douglas's files proved that Hester's attorneys' take on the reasons why the case was dismissed was wrong. The first document was perhaps the biggest surprise. Dated March 10, 1969, the document listed the voting on Hester's petition for certiorari.²⁶⁴ Hester did not get six votes in favor of granting the writ. He did not even get five. Justice Fortas, who would seem to have been the justice most likely to vote with Hester after *Gault*, had voted to deny certiorari.²⁶⁵ So had Justice Black.²⁶⁶ Fortas and Black were joined by Justices White, Stewart, and Harlan in voting to deny certiorari.²⁶⁷ The four who voted to grant Hester's petition were Justices Marshall, Brennan, Douglas, and Chief Justice Warren.²⁶⁸

²⁶² *Id.*

²⁶³ President Nixon sought to replace Justice Fortas first with Clement Haynsworth, a United States Court of Appeals Judge for the Fourth Circuit Court of Appeals, in August 1969. After Haynsworth's nomination was defeated in the Senate in November 1969, Nixon nominated G. Harold Carswell, a recent appointee to the United States Court of Appeals for the Fifth Circuit, in January 1970. The United States Senate failed to confirm Carswell's nomination in April 1970. Justice Fortas's seat was finally filled on May 14, 1970 by Justice Harry Blackmun whose nomination was quickly approved. The Court had been shorthanded for one year. See Bob Woodward & Scott Armstrong, *THE BROTHERS: INSIDE THE SUPREME COURT* 63–64, 86–88, 100–03 (1979). The Justices had been hesitant to rule on some cases while shorthanded, including those questioning the constitutionality of the death penalty and cert petitions where only three of the four votes needed to accept certiorari were available. When Justice Blackmun joined the Court, he was assigned nearly 200 pending petitions for certiorari to dispose of. *Id.* at 103.

²⁶⁴ William O. Douglas Papers, Library of Congress, *Hester v. Illinois*, Box 1456, Case 76-1459, 68 Terms No. 691 Misc., No. 82.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* Precisely why Justice Fortas voted to deny certiorari will have to remain a mystery until another scholar decides to write on the *Hester* case. Justice Fortas's files are kept at the Yale Law School Library. At the time this Article was due, I had hired a researcher to view Justice Fortas' files but she had not yet finished her review. The fact that Justice Fortas voted to deny Hester's certiorari petition, however, does not mean that he would have voted against Hester on the merits. Supreme Court decisions to grant certiorari generally fall into four categories: (1) the decision below conflicts with the decision of a federal court of appeals or a state court of last resort on an important federal question; (2) the lower court decision on an important question of federal law conflicts with a Supreme Court decision; (3) the court below decided an important question of federal law that has not been, but should be, settled by the Supreme Court; and (4) the lower court's decision is such a departure from the accepted and usual course of proceedings as to require the Court to exercise its rarely used supervisory powers. Timothy Bishop et al,

¶93 Justice Douglas's file also provided insight into why the Court decided to dismiss the writ. A one-page sheet of handwritten notes from the Court's conference on the case indicates that the Court met to discuss the case on November 24, 1969, less than a week after the argument.²⁶⁹ According to the notes, presumably written by Douglas, four justices had voted to affirm the Illinois Supreme Court's decision and three had voted to reverse.²⁷⁰ The notes suggest that Chief Justice Burger seemed skeptical of Hester's position but did not record his vote. Next to each Justice's initials was a summary of their position. Next to an entry labeled "HLB" for Justice Hugo Black, were the words "confession not coerced—affirms."²⁷¹ Justice William O. Douglas ("WOD") voted to reverse "on totality of evidence as to coercion."²⁷² Justice John Marshall Harlan ("JMH") saw "nothing in the case" and voted to affirm.²⁷³ Justice William Brennan ("WJB") said that it "doesn't take much when dealing with a child to find coercion" and voted to reverse. Justice Marshall voted to reverse based on "*Haley v. Ohio, et al.*"²⁷⁴ By Justice Byron White's initials ("BW"), the only notation is "affirms."²⁷⁵ Only the notation next to "PS" for Justice Potter Stewart hints at the ultimate decision in the case. It reads: "affirms—prefers to dismiss as improvidently granted."²⁷⁶

¶94 Justice Stewart's reasons for dismissing the writ as improvidently granted were revealed in a "Memorandum to the Conference" dated April 15, 1970.²⁷⁷ In the memo, Justice Stewart began by recounting the history of the *Hester* case before the Court. He noted that the case was first presented in conference on November 21, 1969 (contrary to the November 24th notes of Justice Douglas), and that the Court had tentatively voted to affirm Hester's conviction by a vote of five to three. He announced to the Court that he was now voting to dismiss the writ as improvidently granted and sought to persuade his brethren to follow his lead.²⁷⁸

¶95 Surprisingly, Justice Stewart's reasons for dismissing the writ had nothing to do with Hester's confession. Upon reviewing the State's brief on the merits, he noticed that the State had delved more deeply into three of Hester's arguments than in its response to the petition for certiorari. None of these three arguments related to Hester's confession. The arguments concerned whether Hester was denied due process when a psychiatrist

Tips for Petitioning and Opposing Certiorari in the United States Supreme Court, 34 LITIGATION 27 (2008). Justice Fortas, upon reviewing the Illinois Supreme Court's affirmance of Hester's conviction, could have disagreed with Illinois court's determination that Hester's confession was voluntary, but believed that it was not so out of line with prior Supreme Court decisions as to merit review. Moreover, the Court almost never publishes the reasons for a denial of certiorari or even the vote count of the justices on the cert question. At the merits stage, however, Justice Fortas would have had to put his reputation as the champion of juvenile rights on the line; he would have had to take a stand on the voluntariness of Hester's confession and a vote to affirm Hester's conviction would have raised questions.

²⁶⁹ William O. Douglas Papers, Library of Congress, *Hester v. Illinois*, No. 82, Box 1456, Case 76-1459, Conference Notes, Nov. 24, 1969.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Memorandum to the Conference from Justice Potter Stewart 1 (April 25, 1970); William O. Douglas Papers, Library of Congress, *Hester v. Illinois*, No. 82, Box 1456, Case 76-1459 [hereinafter WODP].

²⁷⁸ Memorandum to the Conference from Justice Potter Stewart, *supra* note 277.

who had examined Hester was precluded from testifying for him; whether Hester should have been permitted to inspect police reports and test data that was made available to the prosecution; and whether there was an unlawful search and seizure of Hester's clothing. Although Justice Stewart did not think any of these claims had merit, he wrote that "there remain factual difficulties with respect to each of them which "should be left to the processes of federal habeas corpus."²⁷⁹ Accordingly, wrote Justice Stewart. "I would favor dismissing the writ as improvidently granted, *though I do not find any new factors in the case that were not known when we granted certiorari.*"²⁸⁰

¶96 Justice Stewart made clear in his memorandum that he did not think that any factual difficulties existed with respect to the state courts' findings that Hester's confession was voluntary, writing that the "question of voluntariness and of whether a *per se* rule should be imposed are presented as well here as they are likely to be presented on habeas."²⁸¹ With regard to these issues, Justice Stewart's position was crystal clear: "I think in view of the state court's supportable findings of fact, the confession was voluntary and that a *per se* rule to the effect that nobody of 14 can make a voluntary confession should not be adopted."²⁸²

¶97 Within days, Justice Stewart's memorandum had netted a majority of the Court's votes. On April 15, the same day it was disseminated, Justice Harlan wrote a letter to Stewart agreeing with his memorandum.²⁸³ On April 16, Justices Burger²⁸⁴ and Black²⁸⁵ wrote letters of support. On April 16, Justice Douglas, recognizing that he did not have enough support to oppose Justice Stewart's memorandum, wrote the following letter:

Dear Potter:

Re: No. 82 – Hester v. Illinois

I have thought all along that there should be a reversal because the confession was involuntary.

But I am in a very small minority and the thing turns upon a tangle of facts and the Court apparently will follow your recommendation and dismiss as improvidently granted.

Therefore, I wonder if you would kindly

²⁷⁹ *Id.* at 2.

²⁸⁰ *Id.* (emphasis added).

²⁸¹ WODP, *supra* note 277; Letter from Justice Harlan to Justice Stewart (Apr. 15, 1970) (on file with the Library of Congress).

²⁸² Memorandum to the Conference from Justice Potter Stewart, *supra* note 277, at 2 (emphasis added).

²⁸³ WODP, *supra* note 277; Letter from Justice Burger to Justice Stewart (April 16, 1970) (on file with the Library of Congress).

²⁸⁴ WODP, *supra* note 277; Letter from Justice Black to Justice Stewart (Apr. 16, 1970) (on file with the Library of Congress).

²⁸⁵ WODP, *supra* note 277; Letter from Justice Douglas to Justice Stewart (Apr. 16, 1970) (on file with the Library of Congress).

note at the end of that sentence:

Mr. Justice Douglas dissents.

W. O. D.²⁸⁶

Justice Douglas was later joined in dissent by Justices Brennan and Marshall.²⁸⁷

¶98 In retrospect, the fact that the Court dismissed the case as improvidently granted is perhaps not so surprising. Questions asked by justices during oral argument can sometimes shed light on their reasons for dismissing a writ of certiorari. For example, briefing and oral argument can change a justice's view of the case by clarifying issues of fact and law that the justice may have misunderstood at the time of the grant of certiorari. It may help him or her narrow an issue, see that the case at hand is not the best case to resolve an issue, or decide that the case should be remanded back to the lower courts for further factual findings.²⁸⁸ The comments of Justices Harlan at oral argument seem most pertinent here. In particular, Justice Harlan's question to Flaum concerning whether the petitioner's claims were vetted through federal habeas and whether either side is asserting "any principle of law that we've laid down so far that was misapplied in the judgment that the state court made on this confession"²⁸⁹ are the kinds of clarifying questions that might indicate some hesitancy to decide the case. These comments, coupled with Justice Burger's question to Kaplan on rebuttal about "whether there is any legal question other than the voluntariness of the confession,"²⁹⁰ suggest an unwillingness on the part of these two justices to review state court voluntariness determinations unless those decisions were based on unreasonable applications of law. Although these two justices originally voted to affirm Hester's convictions, their questions at oral argument suggest that Justice Stewart's pitch to them to dismiss the case was not a tough sell.

¶99 The Court's decision later in the term in the case of another juvenile confession—the case of Willie Monks—seems to confirm a hesitancy of the Burger Court to review voluntariness issues on direct appeal from state supreme courts. Willie Monks was a fifteen-year-old juvenile who had been convicted of first-degree murder and sentenced to life in prison in New Jersey in 1957. The order granting certiorari in Monks's case was issued on May 19, 1969, five days after Justice Fortas tendered his resignation to the Court.²⁹¹

¶100 Monks's case, in some respects, was an even more compelling case to strengthen the protections for juveniles during interrogations because his interrogation was far longer and far more coercive than Hester's. These circumstances were described by Justice Marshall in his dissent from the Court's decision to dismiss the writ as improvidently granted:

²⁸⁶ *Id.*

²⁸⁷ *Hester v. Illinois*, 397 U.S. 660 (1970).

²⁸⁸ See Stephen L. Walsby, *The Supreme Court's Use of Per Curiam Dispositions, The Connection to Oral Argument*, 13 N. ILL. U. L. REV. 1, 6 (1992).

²⁸⁹ Transcript of Oral Argument, *supra* note 166, at 24.

²⁹⁰ *Id.* at 29.

²⁹¹ *Monks v. New Jersey*, 398 U.S. 71 (1970).

Petitioner, a 15-year-old boy, was arrested at 1 o'clock in the morning of February 16, 1957, removed to the police station, and questioned by detectives for several hours about two purse-snatching incidents. He was then held in confinement in the Children's Shelter for 10 days during which time he was questioned at least three times by two detectives in the presence of a juvenile probation officer. Further questioning began on other crimes including two murders in the same area as the purse snatchings.

During the entire 10-day period this 15-year-old boy was without advice of his parents, lawyer, or friends. Indeed, his mother first learned he was in custody after he confessed to the two murders. During the entire 10-day period petitioner was never told he had a right to remain silent, or to refuse to answer the questions by the two detectives.

The end came on February 26, 1957. Petitioner arose at 7 o'clock in the morning, questioning began at 10 o'clock and continued off and on for 15 hours before the confession was typed. During this period he was moved from the Children's Shelter to the courthouse, the grand jury room, and an adjacent room. He was given several lie-detector tests and confronted with alleged witnesses. He had no sleep. He was given sandwiches for his lunch and dinner.²⁹²

¶101 Analyzing these facts in light of the Court's precedents in *Haley* and other cases, Justice Marshall, joined by Justice Douglas, wrote: "Certainly, such treatment so clearly violates [the Court's precedents in the voluntariness cases] as to require reversal in this case."²⁹³

¶102 In dismissing Monks's writ as improvidently granted, however, the Court held:

Having scrutinized the record and considered the briefs and oral arguments submitted on both sides, we are satisfied that petitioner's claim of coercion respecting his confession, given by him over 12 years ago upon his apprehension as an alleged juvenile delinquent, does not merit the plenary review that we thought it might deserve at the time petitioner's pro se petition for certiorari was granted.²⁹⁴

¶103 Although the result was the same as in *Hester*—a per curiam decision to dismiss the writ as improvidently granted—the *Monks* Court added several words to its dismissal order that did not appear in the *Hester* order: "without prejudice to any further appropriate proceedings below."²⁹⁵

¶104 The words "without prejudice to any further appropriate proceedings below" essentially provided a roadmap to Monks's attorney to seek federal habeas relief. Monks's attorney needed no such roadmap. Monks had been represented by Anthony

²⁹² *Id.* at 71–72 (Marshall, J., dissenting).

²⁹³ *Id.* at 72.

²⁹⁴ *Id.* at 71.

²⁹⁵ *Id.*

Amsterdam, a seasoned United States Supreme Court litigator, and a Stanford law professor who had clerked for Justice Felix Frankfurter from 1960 to 1961.²⁹⁶ Taking his cue from the Court’s “without prejudice” language, Amsterdam, along with co-counsel Richard Newman, filed a petition for a writ of habeas corpus in the United States District Court in New Jersey. On March 6, 1972, the court granted Monks’s petition, holding that under the totality of the circumstances, Monks’s confession was involuntary.²⁹⁷

¶105 There is no way to reconcile the Court’s decision to leave out the words “without prejudice” in Hester’s case while adding them in Monks’s. Hester’s lawyers, who were novices to United States Supreme Court practice, could have benefitted from the roadmap given to Monks. Left to divine what the Court meant in its order, Hester’s lawyers failed to seek habeas review. The United States Supreme Court’s decision to dismiss Hester’s writ of certiorari ended Hester’s lawyers’ long crusade to exonerate their client. In the end, their failure to pursue habeas relief did not extend Hester’s stay in prison. Hester was paroled on August 24, 1972, after serving approximately ten years and nine months in the Illinois Department of Corrections.²⁹⁸

¶106 The Court’s decisions to dismiss the *Hester* and *Monks* cases as improvidently granted do not hold up well under scrutiny. The truth is that there was no need for federal habeas review in either case. The United States Supreme Court was accustomed to reviewing voluntariness cases on direct appeal. Both cases had fully developed factual records on the issues of voluntariness of the confessions in the state courts and clearly articulated rulings by the trial court judges.²⁹⁹ No new facts emerged in the briefing or at oral argument. Nothing had changed in the circumstances of the case from the time that certiorari was granted. Both cases were ripe for plenary review and the Court’s use of its power to dismiss the writs as improvidently granted seems groundless.

XIV. JUVENILE CONFESSION CASES IN THE SUPREME COURT AFTER *HESTER* AND *MONKS*

¶107 The case of Lee Arthur Hester proved to be the last and best chance for the United States Supreme Court to create a different set of rules for juvenile suspects, rules that would have put them on “less unequal” footing with their interrogators and rules that would have ensured that they both understood their *Miranda* rights and did not waive them without understanding the consequences of doing so. After the *Hester* and *Monks* cases were decided, Justices Marshall and Brennan tried, for a decade or so, to keep issues relating to the voluntariness of juvenile *Miranda* waivers and confessions alive, but never could command a majority of the justices.

²⁹⁶ During briefing and oral argument, Professor Amsterdam, perhaps recognizing that the Burger Court was highly unlikely to establish any broad, per se rules protecting children during interrogations, focused exclusively on persuading the Justices that the confession was involuntary under the traditional totality of the circumstances test. Brief of Petitioner, *Monks v. New Jersey*, 398 U.S. 71 (No. 127) (1970), 1969 WL 119893, at *9–*25.

²⁹⁷ U.S. *ex rel.* *Monks v. Warden, N.J. State Prison of Rahway*, 339 F. Supp. 30, 33–34 (D.N.J. 1972), *aff’d*, 474 F.2d 1337 (3d Cir. 1972).

²⁹⁸ Recommendation for Final Discharge, Jan. 29, 1976 (submitted by Alonzo Whitlock, approved by G. Gist) (on file with author).

²⁹⁹ In fact, the record in Monks’s case was so well developed that the federal district court granted Monk’s habeas petition without an evidentiary hearing. *Monks*, 339 F. Supp. at 31.

¶108 Both justices dissented from the denial of certiorari in *Little v. Arkansas*,³⁰⁰ a case involving a thirteen-year-old “dull” girl who had confessed to killing her father after police arranged for the girl’s mother, who was also a suspect, to meet with her and persuade her to confess.³⁰¹ Justice Marshall authored the dissent, suggesting that the Court take up the question of “whether, before a juvenile waives her constitutional rights to remain silent and consult with an attorney, she is entitled to competent advice from an adult who does not have significant conflicts of interest.”³⁰²

¶109 In 1979, a sharply divided Supreme Court in *Fare v. Michael C.*³⁰³ ruled that a sixteen-year-old juvenile’s request to see his probation officer did not constitute an invocation of his right to counsel or to silence under *Miranda*. Expecting the boy to invoke his legal rights with adult-like precision,³⁰⁴ the Court held that the same totality of the circumstances test that governs adult waivers of rights should govern juvenile waivers. Four justices dissented. Justice Marshall, whose dissent was joined by Justices Brennan and Justice Stevens, called for a broad rule holding that *Miranda* requires that interrogation cease whenever a juvenile requests an adult who is obligated to represent his or her interests.³⁰⁵ Even Justice Powell, in a separate dissent, wrote that the interrogators, who outnumbered the boy two to one and who were persistent in pressing the boy to confess despite his numerous denials, failed to exercise the “greatest care” in ensuring that the confession was voluntary.³⁰⁶

¶110 Justice Marshall again dissented from the denial of certiorari in *Riley v. Franzen*,³⁰⁷ a case involving a sixteen-year-old boy whose repeated requests to see his father (who was at the station) before confessing were denied.³⁰⁸ The issue presented in *Riley* was whether a child’s request to see his parents was “the functional equivalent of an adult’s request for an attorney” and whether such a request must be honored by police before continuing to interrogate.³⁰⁹ This time Justice Marshall stood alone in his dissent—not even Justice Brennan joined him.

¶111 The “totality of the circumstances test,” while theoretically giving judges flexibility to take into account the unique vulnerability of children on a case-by-case basis, has, in practice, offered little protection to juveniles. Without bright lines to follow, courts have near-unfettered and unreviewable discretion to admit juvenile confessions into evidence. As Professor Barry Feld’s research has shown, when judges

³⁰⁰ *Little v. Arkansas*, 435 U.S. 957 (1978).

³⁰¹ *Id.*

³⁰² *Id.* at 957–58.

³⁰³ *Fare v. Michael C.*, 442 U.S. 707 (1979).

³⁰⁴ Barry Feld, *Juvenile’s Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 105, 112 (Thomas Grisso & Robert G. Schwartz eds., 2000).

³⁰⁵ *Fare*, 442 U.S. at 729–30 (Marshall, J., dissenting).

³⁰⁶ *Id.* at 734 (Powell, J., dissenting).

³⁰⁷ *Riley v. Franzen*, 454 U.S. 1067 (1981).

³⁰⁸ *Id.*

³⁰⁹ *Id.* Justice Marshall dissented twice in the *Riley* case, first when the Court denied certiorari on direct appeal from the Illinois Supreme Court, and again after *Riley* sought certiorari review of the denial of his habeas petition.

apply the test, “they exclude only the most egregiously obtained confessions and then only haphazardly.”³¹⁰

¶112 Moreover, in the post-*Fare* world, courts have only paid lip service to the unique difficulties that children have in understanding their *Miranda* rights and knowingly and intelligently waiving them. By and large, courts have not required police officers to employ special procedures in administering the rights to child suspects.³¹¹ Justice Douglas’s recognition in *Haley* that the boy’s waiver of his constitutional rights was not entitled to much weight in assessing the voluntariness of his confession has also largely been ignored.³¹² Once a suspect waives his rights, few courts in the post-*Fare* world are willing to suppress juvenile confessions. The *Miranda* jurisprudence on knowing, voluntary, and intelligent waivers, has, to a great extent, displaced the voluntariness test.

XV. CONCLUSION

¶113 Of Hester’s three lawyers, only Jerome Feldman is still alive. I recently met with Tom Geraghty, Laura Nirider, and some of our law students. Feldman, who still practices some criminal law, is one of those veteran criminal defense attorneys whose “gut feelings” are worth trusting. When he speaks about Hester’s case, his passion about his former client’s innocence is much more than a gut feeling; he is absolutely convinced of it.

¶114 Feldman also arranged for us to meet Lee Arthur Hester. Seeing Hester and Feldman together was a moving experience. Although they had not seen each other for several years, they embraced as if they were old friends. Today, Hester is sixty-four-years-old. He still maintains his innocence and has authorized the Bluhm Legal Clinic to investigate his case to try to prove his innocence.

¶115 Our investigation into Hester’s innocence is in full swing. We have collected numerous newspaper articles from the time of Hester’s arrest and trial, obtained a copy of the entire trial transcript on microfiche, and reviewed what remains of both the Feldmans’ file and the court file. Although many key witnesses have died, we have located dozens of witnesses to date, including several teachers from the Lewis-Champlin school. Not surprisingly, the opinions of these witnesses divide largely along racial lines. Most of the black teachers still believe that Hester was innocent, and most of the white teachers remain convinced he is guilty.

¶116 Jerome Feldman has also given us a strong lead on the identity of the actual killer. According to Feldman, shortly after Hester was arrested, Feldman received a call from a psychologist at the Psychiatric Institute of the Municipal Court of Chicago, the forensic court clinic charged with conducting mental health evaluations of criminal defendants.³¹³ This psychologist told Feldman, in confidence, that a white man who was a janitor at

³¹⁰ Feld, *supra* note 304, at 113; see also Tamar Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 437–42 (2008).

³¹¹ Birckhead, *supra* note 310, at 445–46. One notable exception to this trend is *In re Jerrell, C.J.*, 699 N.W.2d 110 (Wis. 2005), a case involving a fourteen-year-old convicted of armed robbery based on a confession, in which the Wisconsin Supreme Court held that all interrogations of juvenile suspects must be electronically recorded.

³¹² Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Juveniles from Unknowing, Unintelligent and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 450 (2006).

³¹³ Affidavit of Jerome Feldman, *supra* note 116.

Lewis Champlin at the time of the attack, had tried to commit suicide shortly after Mrs. Keane's murder.³¹⁴ The psychologist told Feldman that when the janitor was brought to the Institute to be evaluated, he had confessed to raping and killing Mrs. Keane and said that someone else had been charged with the crime.³¹⁵ Feldman's investigation led him to believe that the man in question was not a janitor, but an engineer at the school, a veteran of World War II who had a history of mental health problems and had been the subject of several complaints by female teachers at the school.³¹⁶ We have made some progress in verifying Feldman's information but our investigation is continuing.³¹⁷

¶117 So far our search for the semen swabs that were taken from Mrs. Keane or for other evidence that could be subjected to DNA testing has been unsuccessful. We have located some of the trial exhibits related to the case but have not located any clothing or other evidence that could be subjected to testing. Unless we are able to find the evidence and do DNA testing, proving Hester's innocence will be an uphill battle.

¶118 Regardless of whether we are able to exonerate Hester, my discovery of his case has only fueled my passion to pursue greater protections for youthful suspects. Together with my colleagues Bernardine Dohrn, Laura Nirider, and Joshua Tepfer, we have created an organization—the Center on Wrongful Convictions of Youth—whose mission is to “identify, investigate, and litigate credible claims of wrongful convictions, provide resources to actors in the juvenile and criminal justice systems, and advocate for policy reforms that will decrease the chance that any juvenile will be wrongfully convicted.”³¹⁸ We are advocating for a number of reforms to prevent false and coerced confessions, including mandatory electronic recording of all interviews and interrogations of juvenile suspects, witnesses, and victims. As Hester's lawyers did more than forty years ago, we are calling for the exclusion of confessions in criminal court that are the product of interrogations of juveniles without counsel. We also hope to create developmentally appropriate interview and interrogation practices, practices that improve the likelihood that juveniles understand their *Miranda* rights and can intelligently waive them and reduce the risks of juvenile false confessions.

¶119 In the years since Hester's case was dismissed, the case for these protections for juvenile suspects has only gotten stronger. Numerous studies have supported Justice Douglas's belief articulated in *Haley* that many juveniles, especially those under the age of fifteen, are not capable of knowingly and intelligently waiving their *Miranda* rights without the advice of counsel.³¹⁹ New scientific discoveries about juvenile immaturity and lack of judgment, including new understandings about juvenile brain development, have helped to explain why juveniles may be more willing than adults to confess falsely

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See *About Center on Wrongful Convictions of Youth*, NW. U. SCH. L., <http://www.cwcy.org/AboutUs.aspx>.

³¹⁹ See Saul Kassin et al., *supra* note 164, at 7–9; see also Barry C. Feld, *Juvenile's Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 100 (2006) (finding in study of recorded police interrogations that juveniles over the age of fifteen are as capable as adults in their understanding of *Miranda* but that those under sixteen, especially those under age fourteen, may require special protections such as the presence of an attorney or interested adult to assure that their waivers are knowing and intelligent).

when pressured by police.³²⁰ There have been dozens of documented cases of wrongful arrests and convictions of juveniles, many of which have been the result of false confessions by juvenile suspects or false statements by juvenile witnesses.³²¹ These cases and others involving adults are contributing to a newfound concern—one increasingly shared by law enforcement³²²—about the reliability of confession evidence and leading to some of the most significant reforms in the criminal justice process since the due process revolution of the Warren Court.³²³

¶120

Perhaps the most promising development, however, is that the United States Supreme Court, for the first time in decades, has recognized that juveniles are developmentally different from adults, and therefore less deserving of the same punishments.³²⁴ If the Court can be persuaded that these same differences—immaturity, vulnerability to outside pressure, diminished capacity to weigh risks and long-term consequences, and greater compliance with authority figures—make juveniles more vulnerable to police pressure during police interrogations, perhaps the legacy of *Haley*, *Gallegos*, and *Gault* can be revived, and the United States Supreme Court will finish its unfinished business.

³²⁰ See, e.g., Laurence Steinberg, *Risk Taking in Adolescence*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 55 (2007).

³²¹ Joshua A. Tepfer, Laura H. Nirider & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 941 (2010); see also Drizin & Leo, *supra* note 92, at 944–45.

³²² Even John E. Reid & Associates, the legendary interrogation training firm, whose tactics are taught to more police officers than any other firm in the United States, has recognized in material on its website that juvenile suspects may be more vulnerable to giving false confessions. *Investigator Tips: False Confession Cases n [sic] The Issues*, JOHN E. REID & ASSOCIATES INC., http://www.reid.com/educational_info/r_tips.html?serial=1080839438473936 (“[W]hen a juvenile . . . confesses, the investigator should exercise extreme diligence in establishing the accuracy of such a statement through subsequent corroboration.”).

³²³ Solomon Moore, *Exoneration Using DNA Brings Change in Legal System*, N.Y. TIMES, Oct. 1, 2007, available at <http://www.nytimes.com/2007/10/01/us/01exonerate.html>.

³²⁴ *Graham v. Florida*, 130 S. Ct. 2011 (2010) (abolishing life without parole sentences for juvenile non-homicidal offenders); *Roper v. Graham*, 543 U.S. 551 (2005) (abolishing the death penalty for juvenile offenders).