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THE CENTRAL PARK FIVE AS "DISCRETE AND INSULAR" MINORITIES UNDER THE EQUAL PROTECTION CLAUSE: THE EVOLUTION OF THE RIGHT TO COUNSEL FOR WRONGFULLY CONVICTED MINORS

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I. INTRODUCTION

"[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[1] John Rawls, an American political and moral philosopher, theorized that justice, establishes a society of citizens holding equal rights and duties within a democratic system. According to Rawls, "[o]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."[2] Rawls' statement reflects on our nation's most firmly embedded and recognized principles: equal justice under the law.[3] This principle, written above the main entrance to the United States Supreme Court, expresses the responsibility of the court to ensure that there is equal justice under the law for all.[4] Yet, the United States criminal justice system has fallen short of this principle, contradicting former President Lincoln's proposition that,

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[1] JOHN RAWLS, A THEORY OF JUSTICE 63, (Harvard University Press, Rev. ed. 1999).

[2] JOHN RAWLS, POLITICAL LIBERALISM 137 (Columbia University Press, 2d ed. 2005).

[3] *Id.*

[4] *The Court and Constitutional Interpretation*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/constitutional.aspx

"all men are created equal."[5] Since 1989, courts have exonerated more than 1,800 defendants for crimes they did not commit due to officers systematically framing innocent suspects based on tainted evidence.[6] The vast majority of these defendants identified as African American and Latino.[7] The Central Park Jogger case demonstrates the ethical failures of the American criminal justice system and underscores the conscious disregard of ethical prosecutorial discretion and police interrogation.[8]

On April 19, 1989, a twenty-eight-year-old investment banker, Trisha Meili, was knocked down as she jogged in New York's Central Park.[9] She was dragged into a ravine, repeatedly raped, beaten severely, and left helpless and bleeding from her wounds.[10] Pedestrians discovered her body hours later, and medical assistance saved Meili, despite her having lost eighty percent of her blood.[11] She suffered a traumatic brain injury and was in a coma for twelve days.[12] Meili was never able to remember the events of the crime.[13]

At the time of the tragic incident in Central Park, the crime rate in New York City was at an all-time high due to inner-city poverty.[14] Deteriorating economic conditions, coupled with government budget cuts from welfare state initiatives, helped generate record levels of violent crime.[15] Police and the Manhattan District Attorney's Office launched an extensive investigation in efforts to find the attacker.[16] Detectives questioned about thirty Black and Latino male

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[5] *The Gettysburg Address*, HISTORY (Aug. 24, 2010), https://www.history.com/topics/american-civil-war/gettysburg-address.
[6] *About The Registry*, THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx
[7] Ron Stodghill, *True Confession of the Central Park Rapist*, TIME (Dec. 9, 2002), http://content.time.com/time/magazine/article/0,9171,397521,00.html
[8] The Central Park Jogger case is also referred to as the Central Park 5 case.
[9] Sandy Strickland, *Trisha Meili, 'The Central Park Jogger,' Finds Healing In Sharing Her Story*, THE WORKING WOMAN REPORT (May 16, 2014), https://workingwomanreport.com/trisha-meili-the-central-park-jogger-finds-healing-in-sharing-her-story/.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *The 1980's*, HISTORY (Aug. 23, 2018), https://www.history.com/topics/1980s/1980s.
[15] *Id.*
[16] Stodghill, *supra* note 7.

teenagers about their activities in Central Park during the time of the attack.[17] Within forty-eight hours of the attack on Meili, detectives apprehended five Black and Latino boys.[18] Police interrogated the five boys ranging from fourteen to sixteen years of age for prolonged periods of time.[19] The five boys: Raymond Santana, Korey Wise, Antron McCray, Kevin Richardson, and Yusef Salaam, later became known as the *Central Park Five*.[20] Officers interrogated each boy for at least seven hours. Officers questioned the boys, "What did you do to the lady?"[21] "Who were you with when you raped the lady?"[22] Officers yelled in their faces referring to them as "scumbag;" officers punched them in their chests, calling them liars; officers also grabbed their faces demanding "I want a story."[23] The five boys were promised that they would go home if they confessed to the crimes they did not commit, so each of them narrated a story that implicated themselves in written statements and on videotape in the presence of their parents or other adult relatives, after being offered and refusing immediate access to lawyers.[24] The media portrayed the five boys as rapists.[25] Even though each boy was a juvenile, citizens across the city called for the death penalty.[26]

In 1990, the prosecution arranged to try the five defendants in two separate trials to control the order in which certain evidence would be introduced to the court. Each trial rested on the five boys' confessions.[27] The DNA results did not inculpate any of the five boys,

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[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] Saul Kassin, *False Confessions and the Jogger Case*, N.Y. TIMES (Nov. 1, 2002), https://www.nytimes.com/2002/11/01/opinion/false-confessions-and-the-jogger-case.html.
[25] Linda S. Lichter et al., *The New York News Media and the Central Park Rape*, THE AMERICAN JEWISH COMMITTEE (1989), https://www.bjpa.org/content/upload/bjpa/the_/THE%20NEW%20YORK%20NEWS%20MEDIA%20AND%20THE%20CENTRAL%20PARK%20RAPE.pdf.
[26] Joanne Laurier, *The Central Park Five: A story of injustice*, WORLD SOCIALIST WEB SITE (Dec. 12, 2012), https://www.wsws.org/en/articles/2012/12/12/cent-d12.html.
[27] Stodghill, *supra* note 7.

but instead, indicated a single unknown rapist.[28] The leading evidence was each boys' incriminating statement, which the jury accepted, despite significant discrepancies in their accounts of the events.[29]

Prosecutors justified the inconsistencies, arguing that they were understandable in a situation where multiple individuals described the same event while seeking to minimize their individual role in the crime.[30] For over a decade, the convictions were largely accepted as correct.[31] However, this changed in 2002, when authorities were contacted by Matias Reyes, who was already serving concurrent sentences for multiple rapes, robbery and murder.[32] Reyes confessed that he alone committed the crimes against Meili, and a comparison of his DNA against DNA recovered from a sock found at the crime scene revealed a match.[33] Based on its investigation, the Manhattan District Attorney joined the defense's motion to vacate the convictions of the young black men.[34]

The Central Park Five case demands interrogation reform through constitutional amendment. There are lessons to be learned from this case that come from a legal and social discourse on minors as an underrepresented group in the criminal justice system. Part II of this note applies Antonio Gramsci's philosophical framework to address the economic disparities that diminished the rights of indigent citizens. Gramsci's framework theorizes that the criminal justice system, in light of cultural hegemony, plays a role in reproducing power relations between upper- and lower-class citizens in the justice system.[35] Part III discusses why minors are susceptible to false confessions when interrogated by law enforcement and the lack of equal protection and due process protections afforded to minors. It also explains why courts should continue to consider mounting bodies of

[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] People v. Wise, 752 N.Y.S.2d 837, 845–47 (2002)
[35] I use Antonio Gramsci's framework on *cultural hegemony* to show how the criminal justice system contributes to a class distinction between the rich and middle-class citizens.

scientific studies to highlight children's mental and emotional development in the context of police interaction. Part IV discusses the importance of prosecutorial function, the role of cultural hegemony in prosecutorial discretion, and a historical perspective on equal protection in Supreme Court jurisprudence regarding the right to counsel cases.[36] It also includes a theoretical application of Justice Stone's footnote four to the Central Park Five as a "discrete and insular" minority group.[37] Part V provides remedies to expand the protection of minors and considers how the equal protection clause can be used to expand the Fifth and Sixth Amendment right to counsel for minors.

II. A GRAMSCIAN APPROACH TO THE WAR ON CRIME AND DRUGS

Race and class play a significant role in the wrongful conviction of innocent Black and Latino teenagers. Through the historical context of socioeconomic disenfranchisement of race, class, and economics, it is evident that Blacks and Latinos are more likely to be arrested, charged, convicted, and sentenced to prison.[38] Blacks comprise thirteen percent of the U.S. population but are the majority of innocent defendants wrongfully convicted and later exonerated compared to any other racial class.[39]

During the 1970s and 1980s, trends took effect in the U.S. criminal justice system that eroded the equality of rights afford by the U.S. Constitution provided to indigent defendants.[40] Such changes are illuminated within cultural hegemony.[41] Italian philosopher Antonio Gramsci coined the term cultural hegemony as the ideological basis for

[36] Many historical cases pertaining to equal protection were known as "warren court" cases.
[37] United States v. Carolene Products, 304 U.S. 144 (1938).
[38] About The Registry, *supra* note 6.
[39] *Id.*
[40] KATHERINE BECKETT & THEODORE SASSON, THE WAR ON CRIME AS HEGEMONIC STRATEGY: A NEO-MARXIAN THEORY OF THE NEW PUNITIVENESS IN U.S. CRIMINAL JUSTICE POLICY 61-87 (SAGE Publications Inc. 2000).
[41] KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA (SAGE Publications Inc. 2004).

the domination of a ruling class.[42] He stated that cultural hegemony describes how the state and ruling capitalist class, the bourgeoisie, use cultural institutions to maintain power in capitalist societies.[43] He asserted that the ruling class capitalist maintains control, not just through violence and political and economic coercion, but also through ideology.[44] Gramsci's contribution underscores Marxism—a theory on power relations in capitalism where the ruling capitalist class, (the bourgeoisie), use cultural institutions to maintain power (control the process of production) in capitalist societies by exploiting the proletariats, working class citizens.[45] Gramsci's framework is essential in explaining a historical trend that created economic inequality leading up to the Central Park jogger case.

The trend, the war on crime and drugs, was a response to the social challenges existing between the 1930s and 1960's: The New Deal, Civil Rights Movement, the Women's Movement, the Anti-war Movement, the Youth Movement, and the Welfare Rights Movement.[46] Each movement aimed to ameliorate economic inequalities, which derived from the Great Depression.[47] The United States was considered a welfare state in an era called the "Warren Court."[48] The term "Warren Court" refers to the period in history of the Supreme Court during which President Eisenhower appointed Earl Warren as chief justice, who led the Supreme Court bench from October 5, 1953 to June 23, 1969.[49] During this era, the Warren Court effectively ended racial segregation in U.S. public schools in ruling on *Brown v. Board of Education* and *Copper v. Aaron*.[50] The rulings expanded constitutional rights of indigent defendants and introducing "one man, one vote" to ensure equal representation in state legislatures by applying the Bill of

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[42] WALTER L. ADAMSON, HEGEMONY AND REVOLUTION: ANTONIO GRAMSCI'S POLITICAL AND CULTURAL THEORY (Echo Point Books & Media 2014).
[43] *Id.*
[44] *Id.*
[45] KARL MARX ET AL., THE COMMUNIST MANIFESTO (Verso ed. 2010).
[46] BECKETT & SASSON, *supra* note 40.
[47] *Id.*
[48] Robert Longley, *The Warren Court: Its Impact and Importance*, THOUGHTCO., https://www.thoughtco.com/the-warren-court-4706521.
[49] *Id.*
[50] Copper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401 (1958); Brown v. Board of Educ., 347 U.S. 483 (1954).

Rights through the Due Process Clause of the Fourteenth Amendment.[51]

During the Warren Court, the U.S. Supreme Court also ruled on decisions that revolutionized the rights of indigent citizens, such as expanding the Sixth Amendment right to counsel for citizens who were unable to afford legal representation.[52] The Warren Court delivered additional landmark decisions that expanded the rights of citizens in criminal court.[53] The Court strengthened the Fourth Amendment protections by banning prosecutors from using evidence seized in illegal searches.[54] The Court also required all persons interrogated while in police custody to be clearly informed of their right—such as an attorney—and acknowledging their understanding of those rights.[55]

As previously mentioned, footnote 4 states the Warren Court's guiding principle on equal rights.[56] Three years later, the Supreme Court held in support of indigent citizens in *Harper v. Virginia State Bd. Of Elections*,[57] where it terminated a poll tax that ran afoul of the Equal Protection Clause of the Fourteenth Amendment because its stymied citizens from voting based on their economic status.[58] The Court declared that "lines drawn on the basis of wealth or poverty, like those of race, are traditionally disfavored."[59]

The expansion of rights for indigent citizens ended during the 1970's, when President Richard Nixon proposed the war on crime and drugs.[60] After Warren's retirement, President Nixon replaced liberal justices with more conservative justices, which led to rulings that clearly changed the Court's approach to indigent citizens.[61] For instance, the Court upheld Maryland's maximum grant rule that capped a family's monthly benefits and also rejected a claim that this rule denied families with a large number of children equal protection

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[51] BERNARD SCHWARTZ, THE WARREN COURT: A RETROSPECTIVE (Oxford University Press 1996).
[52] Fare v. Michael C., 441 U.S. 707, 725 (1979);
[53] SCHWARTZ, *supra* note 51.
[54] *Id.*
[55] *Id.*
[56] *See The Court and Constitutional Interpretation*, *supra* note 4.
[57] Harper v. Virginia Bd. of Elections, 383 U.S. 668 (1966).
[58] *Harper*, 383 U.S. at 668.
[59] *Id*.
[60] BECKETT & SASSON, *supra* note 40.
[61] *Id*.

under the law.[62] The Supreme Court rejected close judicial scrutiny and reasoned that the claimant failed to demonstrate the shortcomings in the political process that would justify closer judicial review in *San Antonio Independent School District v. Rodriguez*.[63] However, white flight of affluent families after *Brown* and *Rodriguez* resulted in greater neighborhood poverty and racial isolation.[64]

The Court refused to extend new rights to indigent citizens during the war on drugs and crime.[65] The war on drugs was not only reactionary, but a hegemonic strategy to promote the interest of conservative politicians.[66] Conservative politicians often united in opposition to social movements, which sought to expand reliance on welfare initiatives. By politicizing crime and demanding new policies that "get tough on crime," these conservative politicians discredited welfare initiatives designed to eliminate poverty, racial injustice, and economic instability.[67] The war on drugs policy in 1971 is an example of a ruling class' hegemonic strategy to divest the state's responsibility for social welfare and reinforce punitive crime prevention.[68] Cultural hegemony was further manifested through President Reagan's renewal of the 1980's War on Drugs policy, causing "an enormous increase in drug-related (often minor offenses) crimes and a rapid expansion in the prison population of African-Americans and Latinos, levels far beyond that in any industrial country."[69]

These punitive anti-crime policies, stemming from the Anti-Drug Abuse Act of 1986, transformed the meaning of poverty.[70] They legitimized the replacement of a "welfare state with a security state"

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[62] Adam Cohen, *The Enemy of Poor Americans*, THE ATLANTIC (Feb. 26, 2020), https://www.theatlantic.com/ideas/archive/2020/02/how-supreme-court-abandoned-poor/607060/
[63] *See infra* 204.
[64] In his concurrence, Justice Kennedy noted "avoiding racial isolation" and achieving a "diverse student population" in which race is one component are compelling interests. Parents involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 797-98 (2007) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.").
[65] Cohen, *supra* note 62.
[66] *Id.*
[67] *Id*.
[68] BECKETT & SASSON, *supra* note 40.
[69] German Lopez, *The War On Drugs, Explained*, VOX (May 8, 2016), https://www.vox.com/2016/5/8/18089368/war-on-drugs-marijuana-cocaine-heroin-meth.
[70] *Id*.

through the exchange of severe budget cuts in government spending for poverty relief and expansion of the nation's penal apparatus.[71] The act's purpose was to target "major" drug traffickers responsible for the manufacturing or distributing of drugs notwithstanding the preexisting low crime rate on drugs.[72] Sadly, their efforts were unsuccessful, instead it provided prosecutors broad authority to prosecute low-level users and dealers.[73] Moreover, instead of allocating funds to reform initiatives, the Justice Assistance Grant Program distributed funding to law enforcement and criminal justice agencies that perpetuated arrests and incarceration rates.[74] This also led to greater demands on the already overburdened and slow-to-adapt public defender system.[75] This was shown through preexisting economic inequalities among citizens and punitive anti-crime policies.[76] It also lead to more crime, which lead to indigent populations receiving lower quality of legal representation, and consequently, higher rates of conviction and longer sentences.[77] These punitive policies created a metaphorical *panopticon*, where minorities are objects of investigation, judgment, and manipulation of a ruling class based on their race, class, and relationship to poverty.[78] Given the increasing level of economic inequality and its reinforcement via the criminal justice system, the low quality of legal representation for indigent people implicate equal protection considerations.

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] JEFFREY REIMAN & PAUL LEIGHTON, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY CLASS AND CRIMINAL JUSTICE (Pearson, 10th ed. 2016).
[76] *Id.*
[77] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (New Press 2010).
[78] MICHAEL FOUCAULT, DISCIPLINE AND PUNISH 200-02 (Alan Sheridan trans. 1977). The term *panopticon* is coined by Jeremy Bentham to describe the prison structure, but Foucault expands on the term to illustrate how inmates are controlled by always feeling under "inspection." The term was introduced in Jeremy Bentham's *The Inspection- House*, published in 1791, the same year in which the Fourth Amendment was ratified.

III. THE SUSCEPTIBILITY OF MINORS TO FALSE CONFESSIONS AND LACK OF EQUAL PROTECTION UNDER THE LAW

The war on crime and drugs as a hegemonic strategy led to the abusive policing of residents in black and brown communities. Studies show that while youth incarceration has declined over the last decade, there has been an increase of racial and ethnic disparities in arrests.[79] There is no doubt that White teenagers are not excluded from police detention; however, Black and Latino teenagers are still arrested at higher rates and thus, are particularly at a higher risk of facing coercive police interrogations.[80] The false confessions produced within forty-eight-hours led to the wrongful conviction of the innocent young suspects in the Central Park jogger case. Additionally, juveniles over-represent false confession cases, typically accounting for about one-third of the samples of adults and children. [81] The structure and function of a minor's brain may affect the way that she or he processes and reacts to information and various stimuli.[82] It is difficult for minors to regulate mood, impulse, and behavior because their brain is in a constant period of maturation.[83] Minors are susceptible to the pressures of interrogation and demands from authoritative figures because the presentation of fabricated evidence would be risky for young suspects with low "social maturity."[84]

One problem with modern interrogative techniques used during police questioning is that juveniles often exhibit behaviors that investigators are trained to associate with deception.[85] Modern police

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[79] Joshua Rovner, *Racial Disparities in Youth Communities and Arrests,* THE SENTENCING PROJECT (April 1, 2016), https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders,* CLINICAL PSYCHOLOGY REVIEW 33, 449-456 (2013)
[84] Steven A. Drizin & Beth A. Colgan, *Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects,* 20 PERSPECTIVE IN LAW AND PSYCHOLOGY 127-62 (2004).
[85] Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1473 (2002).

interrogation methods are accusatory, confrontational, isolative, and psychologically manipulative.[86] Psychologist Deborah Davis observed that one of the primary goals of investigators is to "sell a confession" by leading suspects to believe confessing is the best choice under the circumstances.[87] She stated that investigators tailor an attractive confession in four ways.[88] First, the interrogation is a negotiation between officers and suspects where suspects still have control of their legal outcomes.[89] Second, interrogators purport to have a suspect's best interests in mind.[90] Third, interrogators establish criminal responsibility through other means, such as non-existent physical evidence or witness testimonies.[91] And fourth, interrogators present a confession as the best alternative for suspects to mitigate their chances of incarceration.[92]

Moreover, interrogations are believed to be most effective when conducted in accordance with the *Reid Technique*.[93] The *Reid Technique* has two interrogative phases. [94] The first phase, called "behavioral analysis interview," is non-accusatory and designed for investigators to gather information about suspects, build trust and rapport, and determine whether the suspect is dishonest.[95] Once investigators believe a suspect is guilty based on his verbal and nonverbal cues, they engage in the second phase.[96] The second phase consists of additional steps that counteracts a suspect's denial of criminal involvement, breaks their resistance, and tailors a confession as an appealing alternative.[97] Law and Psychology Professor,

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[86] *Id*.
[87] Deborah Davis & William T. O' Donohue, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, HANDBOOK OF FORENSIC PSYCHOLOGY (2004).
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J AM ACAD PSYCHIATRY LAW [No. 3] 322, 335 (2009).
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] Saul M. Kassin, *False Confessions: From Colonial Salem through Central Park, and into the Twenty-First Century*, THE WITNESS STAND AND LAWRENCE S. WRIGHTSMAN JR. 53-74 (2016).

Dr. Richard Leo asserts that the primary goal of police interrogations is to obtain confessions from suspects, not necessarily to "find the truth".[98] He also states the *Reid Technique* focuses on breaking down denial and resistance, without necessarily focusing on whether the interrogator intentionally elicits false confessions. [99]

Moreover, distinguished Professor and Psychologist, Dr. Saul Kassin addressed three aspects of interrogations that are common to false statements: 1) physical custody and isolation: interrogations conducted in the absence of social support for protracted periods; 2) presentation of false evidence: lying to suspects about non-existent evidence against them, and 3) minimization: police-originated scenarios that serve to minimize the severity of the crime and the suspect's culpability, making it easier to confess.[100] Dr. Kassin further describes the interrogation as a trained interrogator overcoming the suspect's objections as he protests his innocence.[101] However, when police use these techniques on juveniles, they are at a greater risk of providing false confessions due to juveniles' varying stages of maturity, psychological and socio-cognitive processes, and emotional functions.[102]

[98] Richard A. Leo et al, *Using the Innocent to Scapegoat Miranda*: *Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 564-571 (1998).
[99] *Id*.
[100] *Fare*, 441 U.S. at 725.
[101] *Id*.
[102] Stodghill, *supra* note 7.

a. Laws and Science

Federal Constitutional law, as applied to the states, regulates police interrogations in the United States.[103] Two legal doctrines govern the admissibility of pre-trial confessions: the Fourteenth Amendment Due Process Clause voluntariness standard and the Fifth Amendment Miranda doctrine.[104] The harsh reality is that police interrogation practices often produce false confessions from minors irrespective of federal laws that attempt to regulate it.[105] Under the Fourteenth Amendment Due Process Clause, a statement obtained from a suspect must have been made freely and voluntarily, without compulsion or inducement. The Supreme Court held in *Brown v. Mississippi* that the use of confessions at trial obtained through physical coercion violates the suspects' fundamental rights of due process under the Fourteenth Amendment.[106] Minors are most susceptible to pressure from authoritative figures.[107] This is shown through research, which found that minors are more compliant, open to suggestion, predisposed to social peer pressure, and more likely that an adult to agree to a false or inaccurate statement.[108]

Sadly, the United States Supreme Court only first acknowledged the dangers of a minor providing a false confession in the 1948 case of *Haley v. Ohio.*[109] In *Haley*, a 15-year-old African American defendant falsely confessed to a murder he did not commit.[110] The defendant, John Harvey Haley, was questioned by law enforcement for five hours and was not allowed to see his mother or the lawyer she retained for him.[111] However, a newspaper photographer was allowed to take his picture immediately after the confession.[112] The lower court convicted Haley of first-degree murder in

[103] Miranda v. Arizona, 384 U.S. 436 (1966).
[104] *Id.* at 436.
[105] Anthony J. Domanico, Michael D. Cicchini & Lawrence T. White, *Overcoming Miranda: A Content Analysis Of The Miranda Portion Of Police Interrogations*, 49 IDAHO L. REV. 1 (2012).
[106] Brown v. Mississippi, 297 U.S. 278 (1936).
[107] Duncan, *supra* note 85.
[108] *Id.*
[109] Haley v. Ohio, 332 U.S. 596, 599 (1947).
[110] *Id.* at 599.
[111] *Id.* at 599-601.
[112] *Id.*

state court.[113] The Supreme Court reversed, holding that the police obtained Haley's confession in violation of his Fourteenth Amendment due process rights because evidence showed that force and coercion were used to extract Haley's confession.[114] The *Haley* Court acknowledged that minors cannot be judged by the more exacting standards of maturity held to adults.[115] They also encouraged reliance on child psychology in the criminal prosecution of minors.[116] In his concurring opinion, Justice Frankfurter expressed his view on child prosecution, arguing that, "[o]ur Constitutional system makes it the Court's duty to interpret teenagers' confession based on an evaluation of psychological factors[.]"[117]

The ability of minors to provide trustworthy statements must be considered in light of a child's psychological developmental as well as the circumstances precipitating the confession.[118] However, because of their mental developmental state, police interrogation tactics pose a specific threat to the accuracy of a minor's confession. Courts will continue to hear cases like the Central Park jogger case unless law enforcement cease practices and procedures intended to extract confessions from minors.

The Due Process voluntariness standard continued to evolve during the 1960's, with *Miranda v. Arizona* breathing new life into the Fifth Amendment—right against self-incrimination.[119] In *Miranda*, the Supreme Court recognized that coercive police tactics, although falling short of violating the Fourteenth Amendment, may nevertheless cause a suspect to incriminate himself in violation of the Fifth Amendment.[120] Under the *Miranda* Doctrine, a person in custody must, prior to interrogation, be clearly informed by police of his four core *Miranda* rights: the right to remain silent, the right to counsel, the right of indigent arrestees to have an attorney appointed for them, and the acknowledgement that any incriminating statement made can

[113] *Id.*
[114] *Id.* at 599.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 606.
[118] Domanico, Cicchini & White, *supra* note 105.
[119] *Miranda*, 384 U.S. at 436.
[120] *Id.* at 444

be used against him at trial.[121] A statement obtained from a suspect during custodial interrogation following provision of *Miranda* rights may be admitted at trial only if the prosecution demonstrates that the suspect "knowingly, intelligently and voluntarily" waived his rights.[122]

The Supreme Court decided its first *Miranda* case involving a juvenile defendant in *Fare v. Michael*, where a sixteen-year-old suspect's request for his probation officer, at the onset of questioning, was held not to be an invocation of his Fifth Amendment right to remain silent and request for an attorney.[123] The *Fare* Court addressed whether a totality-of-the-circumstances approach surrounding interrogations is appropriate to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his *Miranda* rights. The Court held the totality-of-the-circumstances approach was appropriate since it mandates inquiry into all the circumstances surrounding the interrogation.[124] This includes evaluation of the juvenile's age, experience, education, background, and intelligence.[125] It also includes whether a juvenile has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.[126] However, in practice, courts rarely, if ever, consider whether a minor's waiver was knowingly, intelligently, and voluntarily made.[127] This was the situation in the Central Park jogger case, when law enforcement interrogated each of the five teen boys twice: first on April 19th, 1989 by police and detectives then second time two days later on April 21st, 1989 when ADA Lederer recorded their confessions.[128] Each of the five suspects waived their right to counsel, and the court held that each waiver was valid despite the boys not knowing the consequences of their waiver.[129] Indeed, after the interrogation, the court acknowledged

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[121] *Id.*
[122] *Id.*
[123] *See Fare*, 441 U.S. at 727–28 (holding that a sixteen-year-old juvenile's request for his probation officer during police questioning is not the same as a request for counsel and should not be treated as a per se assertion of his Fifth Amendment rights and adopting the use of the "totality of the circumstances" approach).
[124] *Id.* at 725.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Stodghill, *supra* note 7.
[129] *Id.*

that one of the suspects, Korey Wise, had a learning and intellectual disability that further impeded his ability to appreciate the consequences of a *Miranda* waiver.[130] Despite Korey's confession in the absence of counsel and his limited intelligence to voluntarily waive his *Miranda* rights, the Appellate Court concluded that his learning disability did not render him incapable of voluntary consent.[131] The erroneous ruling on the trial and appellate level demonstrates the level of illegitimate differential treatment based on conscious racism and class bias.[132]

Even if a suspect is informed his *Miranda* rights, the Supreme Court in *Berghuis v. Thompkins* held that waivers to *Miranda* can be implied in the absence of an explicit statement if the suspect's words and actions implicitly constitute a decision to forego his or her rights.[133] This allows police interrogators to merely read the Miranda warnings, and initiate an interrogation, reducing the formal requirement of a knowing, intelligent, and voluntary waiver in practice.[134] How do courts measure intelligent? How can an individual intelligently waive *Miranda* if he or she cannot appreciate the consequences of their waiver? Voluntary confessions are necessary to the integrity of a criminal investigation if the suspect had the autonomy.[135] It is almost never in a suspect's rational self-interest to make incriminating statements, admissions or confessions to police, especially in the absence of DNA evidence.[136] Police officers and detectives pushed and punched each of the Central Park Five boys. For example, one of the officers repeatedly called Raymond Santana a scumbag while another jabbed Antron McCray in the chest.[137] Even if the boys waived their *Miranda* rights, the act of punching and name calling during hours of interrogation should *shock the conscience* of a judge, jury or any reasonable person because Due Process requires

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[130] *Wise*, 752 N.Y.S.2d at 845–47.
[131] *See*, e.g., *Id.* (reassessing the juveniles' confessions of raping a Central Park jogger in light of new exculpatory evidence). In the Central Park jogger case, five teenagers ages fourteen to sixteen were convicted in 1990 of beating and raping a woman in Central Park, but their convictions were overturned when Matias Reyes, an adult, confessed to the crime in 2002. *Id.* at 840, 842.
[132] *Id*.
[133] Berghuis v. Thompkins, 560 U.S. 370 (2010).
[134] *Id*. at 560.
[135] JAN PEIL & IRENE VAN STAVEREN, HANDBOOK OF ECONOMICS AND ETHICS (Edward Elgar Pub 2009).
[136] Longley, *supra* note 35.
[137] Stodghill, *supra* note 7.

criminal prosecutions be conducted in a manner in accordance with due process.[138] The Supreme Court in 1952 established what it meant to shock the conscience in *Rochin v. California* based on law enforcement methods (forcing an emetic into defendant's stomach) to retrieve evidence for narcotics.[139] The Court established the shock-the conscience test based on the Fourteenth Amendment to prohibit any conduct by government agents that falls outside the standards of civilized decency.[140] Today, courts still apply this test to determine voluntariness, but they also consider the totality of circumstances, including the suspect's education, mental and physical condition, along with the setting, duration, and manner of police interrogation.[141] Thus, evidence obtained in a manner is inadmissible, even if it does not run afoul of the Fourteenth Amendment protections.[142]

Miranda warnings continue to be of little or no avail for juvenile suspects.[143] Due to their precarious mental states, they are less likely to provide a knowing, intelligent, and voluntary waiver of their rights. Decades later, *Miranda* warnings have not reduced the possibility of false confessions. Dr. Kassin observed the difference between *Miranda* rights and how law enforcement conveys *Miranda* warnings.[144] In a laboratory experiment, seventy-two apprehended participants who were guilty or innocent participated in a mock theft. Participants were motivated to avoid prosecution at trial and were confronted by a neutral, sympathetic, or hostile male "detective" who sought a waiver of their *Miranda* rights.[145] Later in the experiment, seventy-two other participants watched videotapes of these sessions and answered questions about the detective and suspect.[146] The results showed that, although the detective's demeanor had no effect, participants who were truly innocent were significantly more likely to sign a waiver than those who were guilty.[147] Believing in the power of their innocence to set them free, most waived their rights

[138] Rochin v. California, 342 U.S. 165 (1952).
[139] *Id.* at 175.
[140] *Id.*
[141] *But see* Spano v. New York, 360 U.S. 315 (1959).
[142] *Id.*
[143] Leo, *supra* note 93.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*

even in the hostile detective condition, where the risk of interrogation was apparent.[148]

Adding to the problem, although the Supreme Court specifically stated that police must communicate *Miranda* rights to detained suspects, it did not specifically state *how* police officers must convey the warnings.[149] This results in high inconsistency on how *Miranda* warnings are communicated across the nation.[150] Studies demonstrate that the content of *Miranda* rights on written forms are too complex for many suspects to fully comprehend.[151] Therefore, the ambiguity of *Miranda* rights severely limits a juvenile suspect's rights to remain silent and obtain counsel.[152] In 2007, psychologists Rogers, Harrison, Shuman, Sewell, and Hazelwood conducted a study to assess the content, format, and complexity reading level of 560 Miranda warning forms used by different police departments across the country.[153] They discovered that the analysis of the wording used in the forms required a reading level that varied between third grade and postgraduate education.[154] A separate study of twenty-nine custodial interrogations conducted by Milwaukee, Wisconsin police officers revealed that the Flesch-Kincaid readability level for the entire warning was 10, indicating that individuals with a tenth-grade education should be able to understand most of its content.[155] The last clause, which contains two parts of the warning, is critical in protecting a suspect's right against self-incrimination, as it states the suspect's right to end questioning at any time, remain silent, and request an attorney.[156] Yet, the last two parts of the warning were rated 13 and 18.7 out of 0.0 (with 10.0-0.0 as the highest), indicating that suspects would need a college and postgraduate reading

[148] Stodghill, *supra* note 7.
[149] Leo, *supra* note 93.
[150] *Id.*
[151] Michael Gianaris, *Police Routinely Read Juveniles Their Miranda Rights, But Do Kids Really Understand Them?*, THE NEW YORK STATE SENATE (June 1, 2016), https://www.nysenate.gov/newsroom/in-the-news/michael-gianaris/police-routinely-read-juveniles-their-miranda-rights-do-kids.
[152] *Id.*
[153] Richard Rogers, et. al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, PSYCHOLOGY PUBLIC POLICY, AND LAW, 14(1), 63-87 (2008).
[154] Domanico, Cicchini & White, *supra* note 105.
[155] *Id.*
[156] *Id.*

comprehension level to understand the last two parts of the warning.[157]

The accused, for a number of reasons, may be less prepared to understand a Miranda warning. Furthermore, factors such as race, class, and socioeconomic status influence the outcomes between minority children and law enforcement.[158] Research has consistently shown that racial and ethnic minorities, particularly Blacks and Latinos, compared to White suspects, are overrepresented and experience harsher outcomes at every stage of the law enforcement process.[159] The number of Americans living in poverty are disproportionately Blacks and Latino.[160] Because African Americans and Latinos are disproportionately poor, their vulnerabilities are associated with lack of education, negative expectations of police interaction, limited English proficiency, and conflicting cultural expectations about law enforcement's role and authority.[161] All vulnerabilities contribute to an intensified sense of powerlessness.[162] Lack of education may also cause development of intellectual disabilities.[163] While the Central Park jogger case occurred when courts had yet to consider how neuroscience guides policy, *intelligence* is a significant factor in producing false confessions that add innocent children to the vast majority of wrongful convictions.[164]

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[157] *Id.*
[158] Rogers, *supra* note 153.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).
[163] *Id.* at 44.
[164] MICHAEL PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES (Rowman & Littlefield Publishers 2013).

IV. THE POWER OF PROSECUTORIAL DISCRETION AND EQUAL PROTECTION JURISPRUDENCE

a. The Abuse of Prosecutorial Discretion and Danger of Confirmation Bias

Some scholars have suggested that one of the reasons why ethnic minorities, particularly Blacks and Latinos, have the highest rates of wrongful convictions might be due to the heightened risk of confessing falsely, or otherwise, during criminal investigations.[165] Prosecutorial discretion produces racial inequality in the criminal justice system when prosecutors abuse their discretion. The Central Park Jogger case is a clear example of racial inequality that warrants a demand to expand equal protection.

At every step of the criminal process, public stigmatization morphed the perception of all five suspects and created a presumption of guilt before any discovery of sufficient evidence.[166] This is because cultural hegemony influences the perception of minority suspects, which in turn, effects important prosecutorial decisions. Likewise, the race and class of a victim, as compared to her alleged perpetrator, tends to impact how prosecutors exercise discretion at indictment hearings, plea bargaining, and sentencing stages.[167] Also, prosecutorial discretion stems from the fact that prosecutors do not have a client.[168] Instead, the prosecutor represents the state, which entails every individual who lives in the state they serve.[169]

A prosecutor's relationship with the state involves a balance of conflicting goals.[170] That is, confirmation bias influences prosecutorial decisions.[171] For example, in the Central Park Jogger case, three sets of semen samples picked up from Trisha and the crime scene were all linked to a single person, and that person was not any of the

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[165] Davis, *supra* note 162, at 15.
[166] Lichter, *supra* note 25.
[167] *Id.*
[168] *Id.*
[169] ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 3-42 (Oxford University Press 1997).
[170] *Id.*
[171] *Id.*

five boys who were wrongfully convicted.[172] The prosecutors knew that at the time, despite the DNA evidence, they created an alternate theory where the real perpetrator got away and that each of the five boys was protecting the unknown, unnamed sixth individual.[173] Mike Sheenan, one of the lead investigators in the case, also knew that the DNA did not match the five juvenile suspects.[174] Despite having access to DNA samples from other suspects, such as Matias Reyes, the actual perpetrator, Sheenan, failed to test preexisting DNA evidence from his case file.[175] Sheenan and the Assistant District Attorneys made decisions that confirmed their own biases, depriving all five suspects of a fair and equal trial.[176]

b. Equal Protection Considerations

In order to reduce inequalities reinforced via the criminal justice system and prevent the outcomes similar to the Central Park Jogger case, the right to counsel must be expanded for minors. The right to counsel has roots in several Constitutional sources: The Sixth Amendment, the Fourteenth Amendment Due Process Clause, Fifth Amendment Miranda Doctrine, and the Equal Protection Clause.[177]

The Sixth Amendment provides the most direct statement of the right, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[178] In addition, the right to counsel is an essential element of due process. In *Gideon v. Wainwright*, the Supreme Court expanded the Sixth Amendment right to counsel, by holding the right to counsel as a fundamental right that applies to the states via the Fourteenth Amendment Due Process Clause.[179] Indigent clients would be guaranteed competent counsel for not just in capital and felony cases, but also for low-level crimes.[180]

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[172] Strickland, *supra* note 9.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] U. S. CONST. Amend. IV,V, VI.
[178] U. S. CONST. Amend. VI.
[179] Gideon v. Wainwright, 372 U.S. 335 (1963).
[180] *Id.*

In *Messiah v. United States,* the Supreme Court held that a suspect was entitled to the right to counsel upon indictment. Thereafter, the Supreme Court held a suspect's right to counsel attaches and a suspect is entitled to counsel as soon as judicial proceedings have been commenced against him or her; whether by formal charge, preliminary hearing, indictment, information or arrangement.[181] At that point, police cannot interrogate a suspect about matters relating to those proceedings absent to an explicit waiver of the suspect's Sixth Amendment right to legal representation. In 1967, a few years after *Gideon* and *Messiah*, in *In Re Gault*, the Supreme Court held the Due Process Clause of the Fourteenth Amendment applied to juvenile defendants and adults.[182] It was the first time that the Supreme Court held that juveniles facing prosecution have many of the same legal rights as adults including the right to an attorney, the right to remain silent, the right to notice of the charges, and the right to a full hearing on the merits of the case.[183]

The Fourteenth Amendment is an important source of individual rights and liberties.[184] The Due Process Clause and the Equal Protection Clause both guarantee the fairness of laws.[185] Substantive due process guarantees that laws will be reasonable, not arbitrary, and equal protection guarantees fair treatment of similarly situated persons alike.[186] Courts have struggled in deciding whether the due process clause or equal protection framework applies to addressing the constitutionality of the right to counsel. Several Supreme Court cases explicitly rely on equal protection considerations.

In *Griffin v. Illinois*, the Supreme Court held that while the trial court was not required by the federal constitution to provide a right to appellate review, the Due Process and Equal Protection Clause protected the prisoners from invidious discriminations.[187] To emphasize the volume of economic inequality that hinders a defendant's legal representation in the court room, the Court stated, "There can be no equal justice where the kind of trial a man gets

[181] Messiah v. United States, 377 U.S. 201 (1964).
[182] In re Gault, 387 U.S. 1 (1967).
[183] *Id.* at 387.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Griffin*, 351 U.S. at 12.

depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[188] The Supreme Court in *Gideon* also distinctively stated, "Any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[189] These cases are clear examples of equal protection being used to foster protections of the Sixth Amendment right to counsel.

Furthermore, the Supreme Court has simultaneously applied equal protection and due process without a clear distinction from one another.[190] In *Ross v. Moffitt*, the Court held "neither the due process clause nor the equal protection clause of the Fourteenth Amendment requires that a state, after appointing counsel for indigent defendants on their first appeal as of right from a conviction, must also appoint counsel for further discretionary state court appeals."[191] The Supreme Court in *Ross* also acknowledged that the Fourteenth Amendment does not require absolute equality or precisely equal advantages, but conceded:

> That the equal protection clause of the Fourteenth Amendment requires that a state's criminal appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system; the state cannot adopt procedures which leave an indigent entirely cut off from any appeal at all by virtue of his indigency, or extend to such indigent merely a meaningless ritual while others in better economic circumstances have a meaningful appeal--the question being one of degrees, not of absolutes.[192]

A court's approach to address equal protection and due process considerations regarding the right to counsel can demonstrate judicial

[188] *Id.* at 19.
[189] *Gideon*, 372 U.S. at 344.
[190] Ross v. Moffitt, 417 U.S. 600 (1974).
[191] *Id.*
[192] *Id.*at 612.

activism or judicial restraint.[193] Notwithstanding its holding to refuse a defendant's constitutional right to counsel for discretionary appeals, the Supreme Court in *Ross* still, but vaguely, considers equal protection and due process considerations.[194] It is important to address the Court's ambiguity for two reasons. First, Raymond, Korey, Antron, Kevin, and Yusef, as minority suspects in a high-profile case and susceptible to false confessions, are considered a "discrete and insular" group.[195] Second, they possessed an immutable or highly visible trait. Third, they are powerless to protect themselves in a political process; the group's distinguishing characteristic does not inhibit it from contributing meaningfully to society. Raymond, Korey, Antron, Kevin, and Yusef had no prior criminal record.[196] Each were born and raised in low-income communities in New York City during the 1970s, when concentrated poverty deepened economic disparity and fragmented race relations between upper class, middle, and lower-class residents.[197] Concentrated poverty caused more crime, and reinforced hostility towards poor people.[198] These socioeconomic circumstances, taken as a whole, painted the image of crime as the work of poor people. The court, notwithstanding the lack of DNA evidence sufficient for a conviction, warranted these teenagers as discrete and insular.

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[193] *Id.*
[194] *Id.*
[195] Lincoln Caplan, *Ruth Bader Ginsburg and Footnote Four*, THE NEW YORKER (Sept. 13, 2013), https://www.newyorker.com/news/news-desk/ruth-bader-ginsburg-and-footnote-four. I apply the term "discrete and insular" to the Central Park Five.
[196] Susan Welsh, Keren Schiffman & Enjoli Francis, *Looking Back at the 1989 Central Park Jogger Rape Case That Led to 5 Teens' Conviction, Later Vacated*, ABC NEWS (May 24, 2019), https://abcnews.go.com/US/back-1989-central-park-jogger-rape-case-led/story?id=63084663.
[197] *Id.*
[198] Lichter, *supra* note 25.

c. Footnote Four's Focus on Individual Rights.

The term "discrete and insular", emerged in 1938, is described as the "most famous footnote in the U.S. Supreme Court's history — footnote four of Justice Stone's opinion in *United States v. Carolene Products Co*.[199] *Carolene Products* ended a practice of unwarranted judicial activism and restriction of a political process to address the unequal distribution of wealth and power.[200] The case resulted in the discontinued application of heightened scrutiny to economic legislation and began consciously protecting discrete and insular minorities.[201] Justice Stone faded footnote 4, famously stating that "legislation aimed at 'discrete and insular' minorities without the normal protections of the political process would be one exception to the presumption of constitutionality and justify heightened standard of judicial review."[202]

Footnote four of *Carolene Products* implies that a court should apply stricter scrutiny than rational basis to a law that reflects "prejudice against discrete and insular minorities" who may be inadequately protected by equal protections of the law and restricted from the majoritarian political process.[203] The Central Park Jogger case demonstrates the socioeconomic disenfranchisement of minorities in the criminal justice system, irrespective of the incorporation of the Sixth Amendment right to counsel.[204] Therefore, it is plausible for equal protection to apply to produce fair and impartial results in a case involving legal representation for minors in criminal trials and monitor a court's degree of judicial discretion.

Carolene Products influenced equal protection considerations by implying that there may be an opportunity to examine more carefully any statutes that restrict political processes or violate the Fourteenth Amendment.[205] However, the Court failed to apply heightened scrutiny in a situation that warranted the application of footnote four in *San*

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[199] United States v. Carolene Products Co., 304 U.S. 144 (1938).
[200] *Id*.
[201] *Id.*
[202] *Id.* at 153.
[203] Caplan, *supra* note 195. More searching judicial review under Equal Protection should also be applied to laws that appears to be unconstitutional and laws that restricts political processes.
[204] *Wise*, 752 N.Y.S.2d at 845–47.
[205] Lichter, *supra* note 25.

Antonio Independent School District v. Rodriguez.[206] Notably, in 1972, the Supreme Court in *Rodriguez* rejected a claim for heightened scrutiny of unequal financing of Texas public schools.[207] The Court limited judicial review of equal protection challenges to three categories that were necessary to justify extraordinary protection from the majoritarian political process.[208] A group must be "saddled" by "disabilities," have been subject to "a history of purposeful unequal treatment," or "relegated to a position of political powerlessness.[209]

V. REMEDIES

The U.S. Constitution guarantees all citizens individual fundamental freedoms and civil rights.[210] The Constitution and Supreme Court's interpretation of the Constitution provide the floor for individual rights.[211] Although states have the power to pass their state's constitutions and may even afford citizens more rights than thoughts guaranteed by the constitution, they may not curtail those rights guaranteed by the U.S. Constitution.[212] The supremacy clause prevents the state and the federal government from interfering with each other's exercise of power.[213] However, the Central Park Jogger case overlooked early Supreme Court decisions that protected minors' rights and acknowledged the status of minors. The Central Park Jogger case is the epitome of a miscarriage of justice, but the criminal justice system can learn lessons from it by expanding equal protection to minors.

The poor, as neither a quasi-suspect nor a suspect class under the Equal Protection Clause, places a glass ceiling on minors uniquely impacted by socioeconomic circumstances. Since *Rodriguez*, the

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[206] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).
[207] *Id*. at 28.
[208] *Id.*
[209] *Id*.
[210] Caleb Nelson & Kermit Roosevelt, *The Supremacy Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/article-vi/clauses/31.
[211] *Id*.
[212] *Article IV, Section 1: Full Faith and Credit Clause*, THE NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive constitution/interpretation/article-iv/clauses/44.
[213] Nelson, *supra* note 210.

Supreme Court stated that the poor is not a suspect class.[214] But on several occasions the Court provided dicta that supports the notion under factual pleadings and evidence, that poverty might constitute a suspect class.[215] To properly decide this issue, the Court would need to carefully assess several factors in determining whether a particular group should be treated as a quasi-suspect or suspect class under Equal Protection Clause.[216] The Court must examine poverty through discourse on race, ethnicity, and gender to address the structural nature of poverty that disproportionately harms minorities more than other ethnic groups.[217] This approach permits the Court to determine whether there are legitimate reasons for the government to treat members of a group differently than other individuals, whether members of the group have immutable characteristics; whether federal and state legislation reflects a continuing antipathy or prejudice against the group; whether the group is politically powerless in its ability to attract the attention of lawmakers; and whether there are principled ways to distinguish the group from other similar groups who might seek heightened scrutiny under Equal Protection Clause.[218] Minorities unfairly impacted by the criminal justice system can demonstrate a complete deprivation of education and other indicia of income discrimination. But because there is a demand for extending protection for minorities, considering poverty factors can reinforce factual pleadings and evidence of a minority group's effect from poverty.

The present system of allocating assigned counsel from a public defender does not constitutionally guarantee equal protection under the law.[219] That is, those who can privately retain their own counsel are more likely to be acquitted than those who cannot, creating unequal access to counsel.[220] A feasible approach to transforming the

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[214] Davis, *supra* note 162.
[215] McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807. The Supreme Court indicated that it considers wealth and race when dealing with an alleged infringed of a fundamental right.
[216] *Id.*
[217] *Id.*
[218] Davis, *supra* note 162.
[219] REIMAN & LEIGHTON, *supra* note 75.
[220] *Id.*

equal right to counsel into the right to equal counsel, courts should emulate 18 U.S.C. 3005, where a "learned" counsel must provide legal representation. Congress enacted 18 U.S.C. 3005 for death penalty cases, where a defendant is assigned to counsel under the Sixth Amendment along with a learned counsel representation in capital cases.[221] To be considered "learned," an attorney must have experience "in the trial, appeal, or post-conviction review" of federal or state death penalty cases.[222] A lawyer's responsibility in death penalty cases may be comparable to her or his responsibility in representing minors.[223] For instance, the attorney must develop a meaningful relationship with a child who, like the boys in the Central Park Jogger case, is likely the target of public and media animosity whose unpopularity may taint the quality of that relationship.[224] But one common issue in death penalty cases and the Central Park Jogger case is the quality of representation afforded to defendants. U.S. Supreme Court Justice Ruth Bader Ginsburg supported a moratorium on the death penalty and criticized the insufficient funding available for defendants.[225] She stated, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial."[226] Similarly, to the inadequate representation of trial attorneys on capital cases, the Central Park Jogger case demonstrates inadequate counsel where none of the three defense attorneys cross-examined Meili in the first trial involving Antron McCray, Yusef Salaam and Raymond Santana.[227]

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[221] 18 U.S.C.S. § 3005 (LexisNexis, Lexis Advance through Public Law 116-135, approved March 26, 2020, with a gap of P.L. 116-113).
[222] *See* Rosie Gorn, *Adequate Representation: The Difference Between Life and Death*, GEORGETOWN AMERICAN CRIM. L. REV. (2018).
[223] *Individual Justices and the Death Penalty*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/facts-and-research/united-states-supreme-court/individual-justices.
[224] PERLIN, *supra* note 164.
[225] *Individual Justices and the Death Penalty*, *supra* note 223.
[226] *Id*.
[227] Nancy E. Ryan, *Affirmation in response to motion to vacate judgment of conviction* (Dec. 5, 2002), https://wps.prenhall.com/wps/media/objects/13023/13335893/downloadables/NYDA%20motion%20in%20Jogger%20case.pdf.

Courts can also look to incorporating *guardian ad litum* into cases like the Central Park Jogger. *Guardian ad litem* is appointed to represent the legal interests of a person appointed by a court to represent the interest of a child in family court proceedings.[228] One is often appointed to represent a child's interest when a parent would not be able to represent the interests of the child without a conflict of interest, or the interests of an orphaned child in the probate of the estate of the child's last surviving parent.[229] Judges also appoint *guardian ad litem* for a minor lacking mental capacity in court.[230] Because minors are distinguishable from adults and lack political power due to their developmental, mental capacities, they make up a portion of innocent defendants wrongfully convicted by the criminal justice system.[231] Thus, minors wrongfully accused of crimes would benefit from a learned counsel and an appointed counsel to represent their best interest.

Some lawmakers have passed laws that require mandatory video recording for all confessions.[232] Interrogation reform requires police officers, prosecutors, and judges to exercise discretion. Examining the basis of a prosecution delays the criminal proceeding since it "threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry," and potentially undermines prosecutorial effectiveness.[233] Although prosecutors play a dominant and commanding role in the criminal justice system through the exercise of broad unchecked discretion, they can use their power and discretion to reform the system.[234] Prosecutors can exercise discretion to construct effective solutions, and while they

[228] JOHN BOUVLER, BOUVIER'S LAW DICTIONARY VOL. 1: ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF HE SEVERAL STATES OF THE AMERICAN UNION (6th ed. 1856).
[229] *Id.*
[230] *Id.*
[231] Domanico, Cicchini & White, *supra* note 105.
[232] *New York State Law Requiring Video Recording if Interrogations Takes Effect*, INNOCENCE PROJECT, https://innocenceproject.org/new-york-state-law-video-recording-interrogations-takes-effect/.
[233] Davis, *supra* note 162.
[234] *Id.*

are granted broad discretion to enforce criminal laws, discretion cannot violate equal protection principles.[235]

Equal protection considerations currently do and should continue to hold prosecutors accountable.[236] Courts have upheld and sanctioned the misuse of prosecutorial discretion, but made it challenging for defendants to establish a prima facie finding to discretionary decisions that have a discriminatory effect on African-American criminal defendants and crime victims.[237] These challenges are usually brought as selective prosecution claims under the Equal Protection Clause, requiring a nearly impossible showing that the prosecutor intentionally discriminated against the defendant or the victim.[238] A challenge in meeting this standard is that much of the discriminatory treatment of defendants and victims may be based on unconscious racism and institutional bias rather than on discriminatory intent.[239] The culture of over criminalizing poverty, along with the mass media coverage of Meili and the prosecution of the five boys, produces and socially constructs race, class, and gender bias in criminal court.[240] Media is a form of social institution in which Gramsci argued is an avenue for the dominant group to spread ideologies—beliefs, assumptions, and values—to socialize people into the norms, values and beliefs of the dominant group.[241] A clear example of hegemony is that the mass media's portrayal of all five teen suspects in the era of the overcriminalization of poverty reflected confirmation bias. The public perceived information on the five teens as low-income minority youths roaming the streets looking for trouble; it affirmed the public's existing racial stereotypes, while overlooking data that contradicts those beliefs, and reinforced the unequal treatment of law enforcement and the prosecutors over non-white residents. [242]

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[235] United States v. Armstrong, 517 U.S. 456 (1996).
[236] Davis, *supra* note 162.
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] Lichter, *supra* note 25.
[241] Strickland, *supra* note 9.
[242] Lichter, *supra* note 25.

Courts, legislators, and scholars have acknowledged that there are many factors that account for the wrongful convictions of indigent citizens, such as the lack of competent counsel, police misconduct, and prosecutorial discretion, that stem from economic inequality.[243] It is important to note that our nation's shift from a welfare state to a security state, coupled with the law enforcement's surveillance on minorities, has led to higher rates of crime and poverty.[244] Our nation's transition demonstrates that the criminal justice system benefits the rich, not the poor:

> Both police officers and lawyers are essential to the individual's legal protections. It is a hypocrisy to acknowledge everyone's right to equal protection under the law by the police and then to allocate protection under the law by lawyers on the basis of what individuals can pay. As long as this continues, we cannot claim that there is anything like equal treatment before the laws in the criminal justice system.[245]

The connection between poverty and minority status traces back to Gramsci's framework on cultural hegemony, where the criminal justice system subjugates citizens based on a class distinction between upper-class and lower-class citizens.[246] Minority children lack the political process since they have no control over the historical and socioeconomic circumstances that limit their autonomy in the criminal justice system.[247] Likewise, the Central Park Five were minors who became products of cultural hegemony that occurred in the 1970s that led to the erosion of equality of rights for minorities. The Central Park Five, and minors alike, continue to have no control over the cultural hegemony that changed the cultural norms and ideology on society's view on economic equality during the 1970s and 80s.

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[243] *Id.*
[244] *See* Michael Foucault's philosophical framework on discipline and punishment.
[245] REIMAN & LEIGHTON, *supra* note 75
[246] BECKETT & SASSON, *supra* note 40.
[247] *Id.*

To many, the overrepresentation of minorities in false confession and wrongful convictions cases in the criminal justice system is a problem found only in history books. However, the truth is that children are still prone to contact with the criminal justice system due to their socioeconomic status beyond their control. The welfare of children must always be the court's paramount consideration. The Central Park Jogger case serves as a demand to break the glass ceiling for minority children currently impacted by the nation's cultural hegemony that fostered disenfranchisement of minority men and women in the 1980s and 1990's.[248] The theory and application of equal protection to expand the right of counsel for minors would mitigate the residual effects of our nation's shift from a welfare state to a security state.[249] Perhaps one place to start is by looking back at the Warren Court's jurisprudence. According to historian Bernard Schwartz, Chief Justice Earl Warren's jurisprudence worked best when the political institutions defaulted on their responsibility to address and remedy problems such as segregation, reapportionment, and cases where the constitutional rights of defendants were abused.[250] Justice Warren's belief, along with John Rawl's philosophy echoes our nation's recognized principle: equal justice under the law.[251] Our nation must take broader views on equal protection. Therefore, children who patently have no control over the socioeconomic circumstances require judicial intervention as a basis under equal protection of rights to prevent further miscarriages of justice.

[248] Lopez, *supra* note 69.
[249] BECKETT & SASSON, *supra* note 40.
[250] SCHWARTZ, *supra* note 51.
[251] RAWLS, s*upra* note 1.