INTENTIONAL WRONGFUL CONVICTION OF CHILDREN

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INTRODUCTION

Wrongful convictions[1] of adult criminal defendants almost always stem from human error in the criminal justice system (CJS). Causes of wrongful convictions within the CJS include mistaken reliance upon confessions, informants, or eyewitnesses, misuse of evidence, overzealous police and prosecutors, and incompetent or overworked defense attorneys.[2] Very few adult cases appear to involve a judge who intentionally convicts the defendant when the judge doesn't believe the defendant is actually guilty. While we may understand and even be sympathetic to inadvertent mistakes in our criminal processes, intentional wrongful conviction of a criminal defendant is inexcusable. Further, proposed changes aimed at reducing inadvertent mistakes cannot be expected to reduce intentional acts.

Findings indicate that wrongful conviction of children may be a significant problem in criminal court and juvenile court.[3] Extrapolating beyond that research, it has been my experience that *intentional* wrongful convictions occur with greater frequency in cases involving child offend-

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1. The term "wrongful conviction" in this article uniformly means convicting a criminal defendant or adjudicating a juvenile respondent for the offense charged without proof beyond a reasonable doubt. The defendant or respondent may or may not have actually committed the offense, but in all cases the proof offered by the state failed to meet the required burden of proof beyond a reasonable doubt, thus making the conviction violate the Due Process Clause. *See In re* Winship, 397 U.S. 358, 364–65 (1970).

2. *See, e.g.*, AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, at xvi–xxviii (2006); DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 176–79 (2003); JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED, at xv (2000); JOHN A. HUMPHREY & SAUNDRA D. WESTERVELT, *Introduction* to WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 4–5 (Saundra D. Westervelt & John A. Humphrey eds., 3d prtg. 2005) (2001); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 17–18 (1992).

3. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 259–60 (2007).

ers, whether processed in the CJS or in the juvenile justice system (JJS). They may occur particularly in cases which the judge has insufficient evidence proving any crime by the child but feels a strong need for the court to intervene in the child's life and behavior.[4] This may be wrongfully convicting the child for the child's "own good," but it is nonetheless wrongful conviction. While such intentional wrongful conviction may seem bizarre and rare, it does happen. For example, two Pennsylvania judges convicted and sentenced juveniles to confinement in privately run youth detention centers in return for kickbacks from those centers.[5]

The causes of wrongful convictions of children appear to be different from those for adult offenders. Because this latter category has been so well documented during the past decade, the list of major causes in adult cases will be sketched first. The analysis then turns to the major causes of wrongful convictions in children's cases, comparing and contrasting them with those in adults' cases. The final section will begin to explore proposed changes to policies and procedures that might reduce these wrongful convictions.

I. EXAMPLES AND ILLUSTRATIONS

Readers may believe that the title of this article posits cases so unlikely to occur as to be unworthy of serious concern. However, they may be drawn away from that position of denial by a combination of basic intuition, several high-profile cases, and numerous reports in the literature.

Begin with your own memories as the long-suffering parent of a mischievous child. You caught your child with a guilty look on his face and with the expression of "the cat that ate the canary." However, you could find little if any other evidence of the child's misbehavior. You knew your child well and were quite versed in his past record of mischief, so you were perfectly willing to assume he was guilty until proven innocent. You may even have been willing to impose at least some form of punishment or discipline without any corroborating evidence of an offense, perhaps with the logic that if he didn't do this he probably did lots of other things you never discovered. Remember also that your child didn't have the "right to remain

4. *Id.* at 291 (some judges expect defense attorneys to act in the child's "best interest" rather than be zealous advocates for the child).

5. Wendy N. Davis, *Town Without Pity*, 95 A.B.A. J. 50 (Sept. 2009); Ian Urbina, *2 Ex-Judges May Be Tried in Sentencing of Juveniles*, N.Y. TIMES, Aug. 25, 2009, at A11, *available at* http://www.nytimes.com/2009/08/25/us/25judge.html; Ian Urbina & Sean D. Hamill, *Judges Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22, *available at* http://www.nytimes.com/2009/02/13/us/13judge.html.

silent" when you asked him what he did. Indeed, remaining silent in the face of stern parental questioning was an additional offense that aggravated the primary offense. No one would suggest that he had a right to an attorney present during your parental questioning.

Now assume that you are an officer of the CJS or JJS—law enforcement, prosecution, defense, judicial, corrections, etc. The child offenders who parade through your professional life seem to cry out for help, often living in impossible situations by no fault of their own. You may see some who have committed serious offenses. These children need and deserve strong intervention by the CJS or the JJS. Yes, you could be wrong about their guilt, but the evidence in their cases certainly meets the burden of beyond a reasonable doubt.

But then there are the other cases, perhaps the younger siblings of the primary offenders. The evidence of their involvements in the offenses is much less convincing, to the point that you have substantial doubts about their involvement at all. However, you convince yourself that those younger siblings (a) live in the same impossible situation as their older siblings and (b) will end up in the same serious situations unless things change drastically for them.

Finally, you may see yourself as a surrogate parent or a big brother or big sister as much as an officer of the CJS or JJS. Your overriding professional mission is to help children before it is too late, and these younger children certainly need help. Sticking to legal formalities may hinder your mission to help these children. You are convinced beyond a reasonable doubt that the child needs intervention in his life, even if you are far from certain beyond a reasonable doubt that the child committed the offense as charged.

What should you do in this child's case? Are you tempted to first pick out the disposition that the child most needs and then backtrack to seek the best path to get to that predetermined disposition?[6] If so, you may be troubled by the parallel to juries that seek to know what sentences are attached to which crime alternatives so that they can tailor their guilty verdicts to give the defendants before them the sentences such juries think would be best. We may admonish these juries to focus only on the proof of the elements of the crime and not to jump ahead to sentencing alternatives. This jumping ahead may be a particularly strong temptation in juvenile courts in which singularly appropriate sanctions are available only to juvenile re-

6. *See, e.g.*, Davis, *supra* note 5, at 53 (judge accused of learning about a child's alleged "disrectful" acts prior to the fact-finding portion of the child's case and then using that information to determine a disposition for the child).

spondents who are adjudicated delinquent for a narrow range of juvenile offenses. The option of finding the child not guilty apparently is almost never chosen—virtually every child charged becomes a child adjudicated in juvenile court.[7] Indeed, acquitting the child of the offenses charged and thereby sending the child back to his home environment may be inconsistent with the mission of helping children in need.

The JJS trial court scenario is far from typical, since the overwhelming percentage of children's cases are plea bargained and thereby avoid adjudicatory hearings or trials. Of course, their guilty pleas must still be accepted by the judge, so that may be the point at which the judge is tempted to enter an intentionally wrongful conviction of the child because it is the only means to the desired dispositional alternative.[8] Earlier in the process, the prosecutor and defense attorney faced the same issue when they worked out an agreement in which the child pleads guilty to offenses he did not commit. Consider the parent who advises her child to enter such an agreement, and to lie about the facts in order to get into a preferred program.

The other, odder example of wrongful convictions of juveniles is when they are imposed not for the children's own good but for the judges' own good.[9] The conduct of the Pennsylvania judges, who took kickbacks for convicting juveniles and sending them to private correctional institutions, may be unprecedented.[10] Although denied by the judges in question, many of these convictions may have been knowingly wrongful and at least the sentences of incarceration were often unjustified.[11] At a minimum, the judges had clear and irreconcilable conflicts of interest when imposing such sentences.

Nonetheless, finding real world examples of intentional wrongful convictions is difficult. Even those JJS and CJS officials who do engage in these actions appear to be reluctant to admit to them. Children's cases are seldom reviewed thoroughly on appeal, so even egregious intentional

7. *See* BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 829 (2d ed. 2004) (2000) ("Because the juvenile court adjudicates virtually all juveniles against whom the state files delinquency petitions delinquent, the dispositional decision becomes the crucial one in the process.").

8. At least one judge stopped giving probation to juveniles arrested at school, preferring to place them in various types of reform schools. *See* Davis, *supra* note 5, at 53.

9. Urbina, *supra* note 5, at A11.

10. Urbina & Hamill, *supra* note 5, at A22 (Referring to the over 5000 juvenile cases that may have been wrongfully decided, Special Master Senior Judge Arthur E. Grim stated "In my entire career, I've never heard of anything remotely approaching this."); *See generally In re* Expungement of Juvenile Records, No. 81 MM 2008, 2009 Pa. LEXIS 1695 (Pa. Aug. 7, 2009).

11. Urbina & Hamill, *supra* note 5, at A22; *Expungement*, 2009 Pa. LEXIS 1695, at *26.

wrongful convictions of children are unlikely to be documented in appellate or post-conviction processes.[12]

II. PRIMARY CAUSES OF WRONGFUL CONVICTIONS IN ADULT CASES

The past decade or so has seen an explosion of research on the various reasons why wrongful convictions occur. Some of these reasons are counter-intuitive, such as defendants confessing to crimes they didn't commit.[13] Others seem to stem from basic human nature, such as believing sworn testimony from witnesses who "saw it with their own eyes."[14] Still more result from overzealousness or negligence on the part of prosecutors or defense attorneys.[15] Such errors obviously could occur in children's cases as well as in adult's cases. However, intentional wrongful conviction of children seems more likely than intentional wrongful conviction of adults, at least if the primary motivator is doing what is best for the defendant. The *parens patriae* approach of the JJS[16] is not nearly as common in the CJS.

Before we identify the causes of wrongful convictions of children and juxtapose them with those for adults, we need to identify the latter. The research literature on wrongful convictions in adult cases is voluminous, and this is but a brief sketch of such a rich topic. If we look carefully enough, however, we may find that some of these adult factors also apply to children's cases. Our approach to them will be to tease out causal factors of intentional wrongful convictions and to separate them from those that are unintentional.

The misleading impact of false confessions can be enormous.[17] Why would the defendant have confessed if he wasn't guilty? It is easy to imag-

12. BARRY C. FELD, JUVENILE JUSTICE ADMINISTRATION IN A NUTSHELL 316–17 (2d ed. 2009) (2003) ("Even with expedited review, appeals by many delinquents may fail because their cases become moot when dispositional orders expire or they are released from custody."); Davis, *supra* note 5, at 53–54 ("While juveniles could have appealed [the juvenile court judge's] orders, the sentences were so short that a successful appeal would prove meaningless.").

13. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983 (1997).

14. Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1489 (2008) (courts and laypersons tend to believe the testimony of eyewitnesses).

15. *See, e.g.*, HUMPHREY & WESTERVELT, *supra* note 2, at 5.

16. *In re* Gault, 387 U.S. 1, 16 (1967) (stating that historically, the government acting as *parens patriae*, could deny due process rights to a child because children did not have a recognized right to liberty).

17. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 960 (2004)("[C]onfessions may be 'uniquely potent' relative to other forms of (falsely) incriminating evidence in their ability to cause wrongful convictions.").

ine this question resonating in the jury room during final deliberations. Indeed, research has concluded that "placing a confession before a jury is tantamount to an instruction to convict . . . ."[18] However, this powerful evidence can be false, leading to wrongful convictions. False confession may be a leading cause in as many as one-fourth of all wrongful conviction cases.[19]

It also appears that coercive police interrogation is a primary source of false confessions.[20] Of particular significance to our topic is that juvenile suspects are particularly likely to provide false confessions during police interrogation.[21] If the child sees the police officer as an authority figure, the pressure from parents to "tell the truth" may be translated by the child as telling the police what they want to hear—namely a confession.[22] In a major study of exonerations, nearly half of the juvenile cases involved false confessions, and the younger the defendant, the greater likelihood of a false confession.[23]

Apparently the single most important factor in wrongful convictions is eyewitness misidentification.[24] Such cases include those in which there is a close resemblance between the actual offender and the innocent defendant, and other where the accused person bears little if any resemblance to the actual offender. The greatest margin of error appears to be with eyewitness identification of a suspect previously unknown to the victim or witness.[25] However, juries still tend to attach special importance to such identification and see the testimony of eyewitnesses as quite convincing.[26] These eyewitness identifications can be at the scene of the crime, at a pretrial lineup or photo display, or in open court. Research indicates that the chance of error is particularly high for cross-racial identifications.[27] One might posit that a

18. Ofshe & Leo, *supra* note 13, at 1118.

19. Drizin & Leo, *supra* note 17, at 902.

20. *See, e.g.*, Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 440 (1998) ("Interrogators sometimes become so committed to closing a case that they improperly use psychological interrogation techniques to coerce or persuade a suspect into giving a statement that allows the interrogator to make an arrest.").

21. Drizin & Leo, *supra* note 17, at 920.

22. *See* Drizin & Luloff, *supra* note 3, at 275 (under questioning from adult authority figures, innocent children may feel pressured to falsely admit guilt).

23. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005).

24. Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 765 (1995).

25. *See* Gross, et al., *supra* note 23, at 530 ("Eyewitness misidentification is almost entirely restricted to crimes committed by strangers. . . .").

26. Thompson, *supra* note 14, at 1489.

27. Gross et al., *supra* note 23, at 551.

case involving an older white suburban victim identifying a teenage black inner-city suspect may particularly lead us astray.

In cases relying upon eyewitness identification, a jury or a judge should consider all information related to the issue and should decide the adequacy, validity, and reliability of the eyewitness identification in each case. Police should make a special effort to conduct interviews of all eyewitnesses and victims as soon as possible in order to minimize memory distortion. No identification procedure (pre- or post-indictment) should be conducted in the absence of the defendant's attorney. Moreover, courts should permit the use of expert testimony on the reliability of witnesses, and should instruct juries of the problem with inaccurate eyewitness testimony.[28]

With the popularity of crime scene investigation (CSI) television shows, current television fans and potential jurors may come to believe that at least forensic science will not mislead us. However, research has found that one-third of exonerations studied in a leading innocence project involved "tainted or fraudulent science."[29] Surprisingly, many cases of misconduct, negligence and fraud in forensic laboratories have been documented and exposed.[30] Still, no significant factor relating to children's cases is readily apparent. Indeed, the typical minor offenses peculiar to juveniles would seldom provide evidence lending itself to analysis by forensic science.

The widespread and often unprincipled use of informants, or "snitches," by police, prosecutors and jail officers is particularly problematic. These are situations in which less than reliable witnesses provide incriminating information against a suspect in return for some payoff, either in cash or in some desirable break in their own case. Such cases of paying for information may well lead to fabricating that information. For example, in the 1980s, defense lawyers identified 225 convictions based on potentially improper use of jailhouse informants and "snitches" at the Los Angeles County Jail.[31] Also, almost half of the thirteen wrongfully convicted Illinois death row inmates were prosecuted using evidence from jailhouse

28. *See* C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 CRIM. JUST., Spring 2003, at 19; Bethany Shelton, Comment, *Turning a Blind Eye to Justice: Kansas Courts Must Integrate Scientific Research Regarding Eyewitness Testimony into the Courtroom*, 56 U. KAN. L. REV. 949, 958–59 (2008).

29. DWYER ET AL., *supra* note 2, at 246.

30. AM. BAR ASS'N, *supra* note 2, at xxi.

31. Huff, *supra* note 28, at 18; *See also* Robert Reinhold, *California Shaken Over an Informer*, N.Y. TIMES, Feb. 17, 1989, at A1, *available at* http://www.nytimes.com/1989/02/17/us/california-shaken-over-an-informer.html.

informants.[32] Whether or not children's cases are overrepresented here is not readily apparent.

Following the Supreme Court's lead, many CJS and JJS analysts have come to stress the need for competent and effective counsel.[33] *Powell v. Alabama*, a 1932 case about black teenagers accused of raping two white girls, was the beginning of the now ubiquitous claims of inadequate defense attorneys at trial.[34] The inadequacy of some defense counsel in criminal cases seems hard to deny.[35] Some of this inadequacy stems simply from having incompetent lawyers defending criminal cases.[36] But even if able criminal lawyers are appointed as public defenders, the back-breaking work load of key public defender offices often leaves them unable to provide adequate legal counsel.[37] Additionally, some unscrupulous defense attorneys convince their clients to plead guilty without adequately investigating these clients' cases.[38]

Police investigations may initially focus on a prime suspect. From that point on, human nature may lead the investigators to ignore contradicting evidence and instead to pursue evidence that validates their premise.[39] Similarly, once prosecutors have formally charged a defendant with specific crimes, it would be professionally embarrassing to admit error and dismiss those charges.[40] Moving from these understandable and perhaps benign behaviors, we also see instances in which the police or the prosecutor engage in overzealous and unethical behaviors such as coaching witnesses, fabricating or concealing evidence, and committing perjury in order to convict the defendant.[41] The community seldom can be expected to pun-

32. Huff, *supra* note 28, at 18.

33. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 684–86 (1984); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1883 (1994); Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 177–78 (2001).

34. 287 U.S. 45, 49, 51–52 (1932).

35. *See, e.g.*, Stephen B. Bright, *Gideon's Reality: After Four Decades, Where Are We?*, CRIM. JUST., Summer 2003, at 5, 8.

36. *Id.* at 4–5.

37. Donna Leinwand, *Public Defenders Refusing Cases; Offices Argue Cuts, Caseloads Threaten Rights of Defendants*, USA TODAY, Sept. 11, 2008, at 1A.

38. Huff, *supra* note 28, at 17.

39. *See* HUMPHREY & WESTERVELT, *supra* note 2, at 10; DWYER, ET AL., *supra* note 2, at xvi.

40. For example, in the recent, high-profile ethics case against former Alaskan Senator Ted Stevens, prosecutors apparently withheld vital information from defense counsel. Leading Justice Department prosecutors were admonished by the judge, cited for contempt of court, and some resigned from their Justice Department positions. *See Signs of Prosecutorial Misconduct Appear in Ted Stevens Legal Saga*, WALL ST. J., Feb. 20, 2009, at A16, *available at* http://online.wsj.com/article/SB123509358392428915.html.

41. *See* Leo & Ofshe, *supra* note 20, at 441.

ish such "tough on crime" behavior, certainly where it errs on the side of aggressive crime detection and prosecution.

Plea agreements produce a growing number of convictions in the JJS.[42] Given the sheer volume of these bargained convictions, at least some of these convictions are likely to be erroneous. Nonetheless, these are defendants who are wrongfully convicted after knowingly and intelligently pleading guilty.[43] Why would someone plead guilty to a crime he or she did not commit? Some answers may come from the same sources as the false confessions discussed earlier. However, many other defendants may decide to plead guilty, even though they are innocent, in order to avoid the possibility of even more severe consequences if they go to trial.[44]

Even just one sensational crime may generate a community atmosphere of fear and paranoia, resulting in tremendous pressure on the police, the prosecutor, and the courts to catch the "bad guy" and to remove him from the community.[45] Working under intense pressure and heightened public scrutiny can increase the incidence of error, and that of course can be true for officers of the CJS and JJS as well. If we arrest, prosecute and convict the wrong person, however, the community is even less safe that it was before. The real offender is still at large, and, since we already have "solved" the case, no one is still out looking for that real offender. This further motivates avoiding wrongful convictions and would seem to render intentional wrongful convictions unforgivable.

When a crime with somewhat unusual characteristics occurs, the police may tend to "round up the usual suspects," at least figuratively.[46] That is, they search for past suspects or offenders with possible involvement in similar crimes, building on a premise that this may just be repeat behavior.[47] The problem is, of course, that this may lead the police to a likely but innocent suspect and cause them to ignore evidence leading them in another direction.[48] The prosecutor may similarly be lead to file charges against this likely suspect, based in part upon the logic that he has done this sort of thing before. When the case comes before the court, it would not be

42. Robert E. Shepherd, Jr., *Plea Bargaining in Juvenile Court*, CRIM. JUST., Fall 2008, at 61.

43. Drizin & Luloff, *supra* note 3, at 292.

44. *Id.*

45. *See* Drizin & Leo, *supra* note 17, at 946 ("[F]alse confessions tend to be concentrated in the most serious and high profile cases, lending credence to the argument that false confessions . . . are more likely to occur in the most serious cases because there is more pressure on the police to solve such cases.").

46. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1125–26 (2008) ("[P]olice are prone to arrest recidivists on less concrete evidence. . . .").

47. *Id.*

48. *See, e.g.*, HUMPHREY & WESTERVELT, *supra* note 2, at 5.

unusual for the judge to know of the defendant's criminal record as well.[49] In fact, the only people directly involved in the case who usually don't know of the defendant's past record are the members of the jury.

There is a good reason why we don't admit evidence of the defendant's prior convictions before a jury at the guilt trial. We fear that the jurors may just assume that if the defendant has done this kind of thing before, then he is more likely to have done it again this time and thus should be convicted. However, if the judge is the sole adjudicator of guilt, as in almost all juvenile court cases, then the judge seldom will be able to avoid encountering these pressures.[50]

III. PRIMARY CAUSES OF WRONGFUL CONVICTIONS IN CHILDREN'S CASES

Almost all of the causes listed above for adult's cases are leading toward unintentional wrongful convictions, and almost all would apply equally to children's cases. The issue of false confessions is particularly problematic for children, and any child's confession to criminal offenses should be verified carefully.[51] Eyewitness error may be more prominent in children's cases, in that adults may see most children as dressing alike with similar haircuts and demeanor, making distinguishing between them more difficult. One fairly obvious point addresses the tendency of police departments to use high school yearbook photographs as mug shots for photo displays for witnesses and victims.[52] Most of us can remember that our high school pictures were not particularly accurate portrayals of how we looked on a day-to-day basis.

Adequacy of defense counsel may be a particular problem in children's cases.[53] One thematic problem is that juvenile court may be seen as a training ground for beginning assistant public defenders.[54] If they do well in this training period and after they gain experience, they will be "promoted" to adult criminal court.[55] They then will be replaced by a new wave

49. Drizin & Luloff, *supra* note 3, at 306.

50. *Id.*

51. FELD, *supra* note 12, at 108–111.

52. *See, e.g.*, Dean v. Duckworth, 748 F.2d 367, 368 (7th Cir. 1984) (raped woman shown high school yearbook photos in an attempt to identify her attackers).

53. *See, e.g.*, Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 580 (2002); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 309 (2003).

54. *See* Marrus, *supra* note 53, at 348.

55. *Id.*

of beginning assistant public defenders, insuring that children will continually receive the services of the least experience defense counsel. In addition, the huge caseloads for public defenders do not diminish when it comes to juvenile cases.[56]

But the role of juvenile defense attorney presents another unique twist not found in adult cases. Many well-meaning observers would urge this attorney to seek the "best interests of the child" rather than being a zealous advocate for the child's rights.[57] Winning an acquittal, and thereby preventing the court from ordering the child to enter a much needed treatment program, may be seen as undesirable for the child.[58]

Plea agreements in adult criminal court generate almost all convictions, perhaps as much as 90% or more.[59] Given the pressure toward settling a child's case "in the best interests of the child," a plea bargain may offer the most efficient path to a desired treatment and corrections program for the child. Serious questions as to whether the child is guilty as charged may be seen simply as roadblocks to doing the right thing for the child. Instead, we ask the child to lie in court when he pleads guilty. Do we forget to ask what long term effect this perjury may have on that child's perception of fairness and justice in society?

The impact on children's cases that occurs when police react to community fear and paranoia about a high profile crime may be illustrated by considering the Central Park Jogger case.[60] There the police aggressively investigated the shocking 1989 case of the woman jogger who was brutally beaten, raped, and left for dead in New York City's Central Park.[61] Five children ages fourteen to sixteen had confessed to being at least accomplices to the rape and assault.[62] All five children were subsequently convicted and sentenced to prison.[63] Thirteen years later, the actual offender confessed that he and he alone had raped and beaten the victim.[64] Analysis of DNA found at the crime scene confirmed his statement.[65]

56. *See, e.g.*, Drizin & Luloff, *supra* note 3, at 290–91 (in some jurisdictions, juvenile defenders have over 1000 cases per year).

57. *Id.* at 291–92.

58. *Id.*

59. Malvina Halberstam, *Criminal Law: Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1,1 (1982).

60. *See generally* Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. OF L. & SOC. CHANGE 209 (2006).

61. *Id.*

62. *Id.* at 211.

63. *Id.* at 212.

64. *Id.* at 220.

65. *Id.*

It seems generally accepted that the adjudicators of guilt or innocence of an alleged offense do not know of any past offenses by the defendant. If these adjudicators are members of the jury, we fear that they may just assume that if the defendant has done this kind of thing before, then he is more likely to have done it again this time and thus should be convicted. However, many children's cases are processed in juvenile courts, where juries are not required to sit.[66] Thus, the case may be tried solely by the juvenile court judge.[67] Even if the trying judge doesn't have formal evidence of the child's past offense record, certainly much less effort is made to keep the judge from knowing that information.[68] In a small town, for example, it would be likely that the juvenile court judge will know of the child's past record or at least of his "reputation in the community." Indeed, this judge may have had this child in court before.

The primary cause of the sentencing kickback scheme in Pennsylvania was apparently one of the oldest temptations in public life, the lure of easy money. Indeed, the two judges involved have pled guilty to federal charges that they received more than $2.6 million.[69] Political office-holders taking kickbacks for favors while in office is sadly nothing new, and judges have been known to take bribes for not convicting or sentencing clearly guilty and deserving defendants.[70] In the Pennsylvania cases, however, the kickbacks came from the corrections agents seeking more clients.[71] Such a setting is likely only when the corrections agency is private and receives additional state payments for each additional client—a warden of a public prison would not be motivated to bribe a judge to send more prisoners to the already overcrowded public facility.

This list could go on and on, with different unique twists for each jurisdiction. The rules and procedures of juvenile court are less rigid than those of adult criminal court,[72] and taming juvenile courts to function under the firm hand of *In re Gault* and its progeny continues to be a work in progress. However, there do seem to be some possible prescriptions that may moderate the symptoms of wrongful juvenile conviction, even if they do not cure the underlying disease.

66. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[T]rial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.") (plurality opinion).

67. *See, e.g.*, Drizin & Luloff, *supra* note 3, at 302.

68. *Id.* at 305.

69. Urbina & Hamill, *supra* note 5, at A22.

70. Stratos Pahis, *Corruption In Our Courts: What It Looks Like And Where It Is Hidden*, 118 Yale L.J. 1900, 1926–27 (2009).

71. Davis, *supra* note 5, at 50.

72. *See* Irene Merker Rosenberg, *The Rights of Delinquents in Juvenile Court: Why Not Equal Protection?*, 45 CRIM. L. BULL. (forthcoming Fall 2009).

IV. REDUCING INTENTIONAL WRONGFUL CONVICTIONS OF CHILDREN

The above discussion has to some degree lumped together wrongful convictions both of adults and of children, only occasionally specifying which wrongful convictions may be unintentional and which may be intentional. Parsing through this discussion, however, gives the impression that intentional wrongful convictions are more common for children than for adults. Building from that premise, this section more clearly identifies those odd actions and searches for means to reduce their occurrence and impact. The following suggestions are presented and analyzed in order of importance to this question.

Arguably the most significant cause of intentional wrongful convictions of children is that their defense attorneys are not zealously advocating for dismissal, acquittal or minimally intrusive sentencing.[73] In contrast, these attorneys may adopt the posture of seeking the best interests of their child clients and have convinced themselves that adjudications or convictions, commonly through plea agreements, are the most efficient means of achieving those goals.[74] Far from zealously advocating for their clients and against the state's prosecution, they cooperate with the state in shunting the child off to the desired program.[75]

The cure for this problem may be challenging. It seems likely that these defense attorneys are perfectly capable advocates and have been trained in the law of criminal procedure, evidence, and trial advocacy. Their "ineffectiveness" is probably not in preparation or skill but in their goal. In some cases, they may seek an end result for their clients that others might reject, that end result being adjudication as a delinquent or conviction as a criminal. They probably believe that the negative factors attached to such a status are worth suffering if the child gains can benefit from corrective custody of the state. This orientation must be changed.

A second cause of intentional wrongful conviction of children is the strong tradition of denying jury trials in juvenile court and leaving both the question of guilt and sentence solely to the judge.[76] While juvenile court judges may rise up in condescending protest at any assertion of their intentional error, they might sometimes "guide" the case to a particular outcome.[77] They may take great pride in their parental approach to judging,

73. *See* Drizin & Luloff, *supra* note 3, at 290.
74. *Id.* at 291–92.
75. Marrus, *supra* note 53, at 290–91.
76. *See, e.g.*, Drizin & Luloff, *supra* note 3, at 302.
77. *Id.* at 291.

and they might resist turning over even a part of their essentially unchecked power to a jury. Juvenile court judges might argue that their intimate knowledge of the child's background and previous record is of great assistance to them in finding the best result for the child. At the same time, they would agree that a jury would never be given that information during a trial.

The solution here is one arrived at by a growing number of jurisdictions—provide for jury trials in juvenile court.[78] In some situations, there may be no practical way to keep the judge from knowing of the child's past record.[79] The only way to address this fundamental injustice is to turn the adjudication over to a lay jury as we do in criminal cases. We could expect a jury to take seriously their charge to decide solely whether or not the child committed the alleged offense and not to bother themselves with the resulting sentence options. If nothing else, wrongful convictions from a jury presumably would not be intentional.

A closely associated factor to the judge-or-jury issue is taking seriously the requirement that children's offenses be proven beyond a reasonable doubt.[80] This is the highest burden of proof known to American law, and satisfying this burden should be a considerable undertaking. It seems at least plausible that a jury solemnly instructed by their judge concerning this lofty burden of proof might take it quite seriously. They might be expected to return a verdict of not guilty even in cases in which they thought the defendant was probably guilty but they had at least a reasonable doubt. That result is what the United States Supreme Court anticipated when it decided *Winship*,[81] and we should seek means to better insure that it is maintained.

Reducing the instances in which judges and other officers of the CJS and JJS take bribes and kickbacks is a laudable goal but it is neither new nor particularly a problem for children as defendants and respondents. In contrast, one can more easily imagine the wealthy adult criminal defendant who tempts with tainted funds than the street delinquent who almost never would have access to funds, tainted or otherwise. However, the Pennsylvania scandal serves to remind us that judges may be uniquely vulnerable to bribes and kickbacks from private correctional facilities.

78. *See, e.g.*, *In re* L.M., 186 P.3d 164, 172 (Kan. 2008) (finding that the Kansas Constitution provides juveniles with the right to a jury trial).

79. *See, e.g.*, Drizin & Luloff, *supra* note 3, at 306 (for example, the judge may have presided over the child in court previously).

80. *In re* Winship, 397 U.S. 358, 368 (1970).

81. *Id.* at 363–64.

The final two factors are also related to each other. One is that some jurisdictions may limit access to the most desirable programs for children to those adjudicated delinquent in juvenile court or convicted in criminal court.[82] Simply being found to be a status offender or a child in need of services might not be sufficient for admission.[83] This might tempt a judge to intentionally wrongly convict a child as a justifiable means to that desirable end. It would seem that we could find ways to revise the appropriate statutes to assure appropriate dispositions are available even if not convicted or adjudicated.

The related issue is that we have too many negative collateral effects from juvenile adjudication and conviction. Perhaps wrongful convictions, even intentional wrongful convictions, wouldn't be so objectionable if there were no serious consequences from those convictions. An overarching inquiry should be what societal interests those negative consequences serve, and if they outweigh the best interests of the child.

Finally, imagine the impact on children who are the subject of intentional wrongful convictions. Presumably major goals of both the criminal and juvenile justice systems are to impress upon children the majesty of the law and the key roles that truth and justice play in those processes. Might these children leave the courts even less respectful of the law than they were when they entered?

82. *See generally*, FELD, *supra* note 12, at 378–382.

83. *Id.* at 380 ("Deinstitutionalization restricted juvenile courts' options to place status offenders and reduced their authority to enforce dispositional orders. If states could not confine status offenders in secure facilities, then it became more difficult to prevent them from running away from nonsecure placements.").