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THROWING AWAY THE KEY ON SOCIETY'S YOUNGEST SEX OFFENDERS

ALISON G. TUROFF*

I. INTRODUCTION

Although the academic community has hotly debated the merit and constitutionality of sexually violent person commitment laws,¹ no one has addressed the impact these laws have on juvenile sex offenders.² Regardless of their constitutionality as applied to adults,³ the appearance and administration of sexually violent predator laws with jurisdiction over juvenile delinquents violates several constitutional principles at both the state and federal level.⁴ Because minors do not receive the protection of the Sixth Amendment,⁵ sexually violent predator laws for juveniles violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁶

Illinois, as the founder of the juvenile justice system in the United States,⁷ gives a prime demonstration of how a state's criminal, juvenile and mental health laws interact to violate the rights of the nation's youngest offenders. Because of the Juvenile Court Act, minors may be charged with regular crimes but generally face trial in Juvenile Court, rather than criminal

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¹ See e.g., 725 ILL. COMP. STAT. 207/1 - 207/99 (West 2000).

² See, e.g., Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1217-20 (1998) for a discussion of objections to notification laws. See, e.g. Eli M. Rollman, "Mental Illness": A Sexually Violent Predator is Punished Twice for One Crime, 88 J. CRIM. L. & CRIMINOLOGY 985 (1998) for a discussion of arguments against involuntary commitment laws for sex offenders. Neither of these, however, fully discusses the problems associated with applying these laws to juveniles.

³ See *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding the validity of a sexually violent person commitment law).

⁴ See discussion *infra* part III.

⁵ See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

⁶ See discussion *infra* part III.

⁷ See *In re Gault*, 387 U.S. 1, 14 (1967).

court.⁸ For example, a minor accused of aggravated criminal sexual assault, a Class X felony under Illinois criminal law,⁹ would face this charge in Juvenile Court. Minors adjudicated guilty of sex crimes are subject to the Sex Offender Registration Act¹⁰ and the Sexually Violent Persons Commitment Act,¹¹ just like adults convicted of similar crimes.¹² Scholars and practitioners have debated the merit of these types of laws, questioning their efficacy and constitutionality.¹³ Under the Sexually Violent Persons Commitment Act, people found to be sexually violent may be involuntarily committed to a secure facility for an indefinite period of time—until deemed “cured,” or no longer sexually violent.¹⁴

Juveniles in Illinois normally do not receive jury trials when charged with offenses like aggravated criminal sexual assault.¹⁵ Because of two thirty year-old cases declaring that juveniles do not have state or federal constitutional rights to a jury trial,¹⁶ the Juvenile Court in Illinois will usually deny any motion for a trial by jury.¹⁷ If the State later petitions for a juvenile guilty of aggravated criminal sexual assault or other sex offenses to be clas-

⁸ See 705 ILL. COMP. STAT. 405/5-120 (West 2000).

⁹ See 720 ILL. COMP. STAT. 5/12-14 (West 2000).

¹⁰ See 730 ILL. COMP. STAT. 150/1 - 150/12 (West 2000) (This is an example of a statute commonly referred to as Megan's Law. It requires convicted sex offenders to register their names, pictures, addresses and DNA, for example, in various databases. Offenders must update the state every time any of their identifying information changes. This information then is available for public access and requires that the communities in which the offenders live be notified that a sex offender is living in their area).

¹¹ See 725 ILL. COMP. STAT. 207/1 - 207/99 (West 2000) (This statute allows the state to petition for the involuntary, indefinite confinement of individuals who have been convicted of sex offenses and who have a mental disorder that makes it probable that they will re-offend. These individuals remain in custody, receiving treatment until such time that the state believes they are sufficiently cured to be released back into society).

¹² See *id.*; 730 ILL. COMP. STAT. 150/1 - 150/12 (statutes cover both juvenile and adult offenders.)

¹³ See, e.g., Berliner, *supra* note 2, at 1217-20 for a discussion of objections to notification laws. See, e.g. Rollman, *supra* note 2, for a discussion of arguments against involuntary commitment laws for sex offenders. Though this comment argues that sexually violent predator commitment laws are unconstitutional as applied to juvenile offenders, the general constitutionality of these laws is beyond the scope of this article.

¹⁴ See 725 ILL. COMP. STAT. 207/40 (a), (b) (2).

¹⁵ See *In re Fucini*, 255 N.E.2d 380 (Ill. 1970). See discussion *infra* notes 29-33.

¹⁶ See *id.*; *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

¹⁷ See *In re G.O.*, 727 N.E.2d 1003, 1007 (Ill. 2000).

sified as a sexually violent person, its petition would include the fact that he had been adjudicated guilty of a sex offense or offenses as a juvenile.¹⁸ This constitutes one half of the State's burden of proof in order to commit this young person to a secured treatment facility for an indeterminate amount of time.¹⁹

Thus, any juvenile sex offender, regardless of age, could be incarcerated indefinitely because of just one offense, yet that minor had no jury trial for the original offense, the offense that led to his determination as a sexually violent person.²⁰ Without the right to a jury trial for the criminal offense, the use of a juvenile's past adjudication as a sex offender in a sexually violent persons commitment proceeding violates the minor's due process and equal protection rights by allowing the state to indefinitely commit him based on the bench trial adjudication of guilt.²¹ States like Illinois that intend to apply their sexually violent person laws to juvenile offenders must provide a juvenile defendant with a jury trial option for the alleged sex offense or forfeit the state's ability to commit later the juvenile as a sexually violent person.²²

Part II of this comment discusses the juvenile court and the state and federal cases that have denied juveniles a constitutional right to jury trials.²³ Part II also explains how the sex offender registration and sexually violent person laws operate. In Part III, the interplay of these systems and laws is analyzed. Finally, Part IV concludes that while involuntary commitment laws for sex offenders may be legal for adult offenders, they are unconstitutional when applied to juvenile offenders because the offenders lack the right to jury trials.

¹⁸ See 725 ILL. COMP. STAT. 207/5 (f).

¹⁹ See *id.*

²⁰ See discussion *infra* part II.

²¹ See discussion *infra* part III.

²² See *id.*

²³ Though this comment argues that the denial of jury trials for juveniles facing charges of sex offenses is unconstitutional pursuant to the Fourteenth Amendment, the general constitutionality of minors' right to trial by jury is beyond the scope of this article.

II. THE CURRENT STATE OF THE LAW

A. THE FUNDAMENTAL NATURE OF THE JURY TRIAL

The trial by jury is an integral component of the American and Anglo systems of justice. The jury trial is so important that it appears at least twice within the Constitution.²⁴ Article III of the Constitution declares, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"²⁵ This ideal was repeated in the Bill of Rights, underscoring its significance. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"²⁶

The United States Supreme Court has frequently recognized the necessity of the jury trial, most notably in *Duncan v. Louisiana*, where the court held that the denial of a jury trial for a crime punishable by two years imprisonment violated the constitutional rights of the defendant.²⁷ The *Duncan* Court detailed a short history of the trial by jury and cited several of its own opinions discussing the importance of the jury trial.²⁸ The Court then explained why the jury trial is so fundamental to the American system of justice:

The guarantees of a jury trial in the Federal and State Constitutions reflect a profound judgment about the way law should be enforced and justice administered. A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . .²⁹

Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of offi-

²⁴ See U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.

²⁵ U.S. CONST. art. III, § 2.

²⁶ U.S. CONST. amend. VI.

²⁷ See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

²⁸ See *id.* at 152-57.

²⁹ *Id.* at 155.

cial power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.³⁰

The jury trial not only helps ensure accurate fact-finding but also protects citizens from abuses of power by prosecutors and judges and places another system of checks and balances on the government.³¹ Therefore, the jury trial is a fundamental component of American jurisprudence.³²

B. THE JUVENILE COURT AND DENIAL OF A JURY TRIAL

The juvenile delinquency side of the Juvenile Court of Illinois is similar to those of the other states.³³ It implements the process afforded by the Juvenile Court Act of 1987 for treatment of juveniles charged with crimes.³⁴ The Juvenile Court Act and both the Illinois and federal constitutions provide minor defendants with many of the same protections that adult defendants have. For example, juveniles have the right to counsel, the right to be free from self-incrimination, and the right to face their accusers and question witnesses.³⁵

However, minor defendants do not have all of the same rights as their adult counterparts.³⁶ Most importantly, juveniles do not have the right to a jury trial.³⁷ Thirty years ago, both the Illinois and the United States Supreme Courts declared that there is neither state nor federal constitutional protection for jury trials for juvenile defendants.³⁸ In *In re Fucini*, an Illinois minor was accused of grand theft of an automobile with a value greater than \$150.³⁹ He challenged his lack of a jury trial pursuant to the Sixth Amendment and the procedural due process grounds of the Fourteenth Amendment.⁴⁰ However, the Illinois Supreme Court found that “trial by jury is not crucial to a system

³⁰ *Id.* at 156.

³¹ *See id.*

³² *See id.*

³³ *See In re Gault*, 387 U.S. 1, 14 (1967).

³⁴ *See* 705 ILL. COMP. STAT. 405/5-101 - 405/5-170 (West 2000)

³⁵ *See* *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971) (“Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state juvenile proceeding that is adjudicative in nature.”).

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.* at 545; *In re Fucini*, 255 N.E.2d 380, 382 (Ill. 1970).

³⁹ *See In re Fucini*, 255 N.E.2d at 380.

⁴⁰ *See id.* at 381-82.

of juvenile justice."⁴¹ The *Fucini* Court did not want to add more formality than was already present in juvenile court proceedings.⁴²

One year after *Fucini*, the United States Supreme Court decided a similar case comprised of cases consolidated from Pennsylvania and North Carolina⁴³ and came to the same conclusion as the *Fucini* Court, namely that jury trials are not fundamental to the juvenile court process.⁴⁴ In *McKeiver v. Pennsylvania*, minors from Pennsylvania and North Carolina appealed their bench trial adjudications as delinquents for various criminal offenses, such as robbery, non-aggravated assault, and willfully impeding traffic.⁴⁵ The Court conceded that the Sixth and Fourteenth Amendments require states to provide impartial juries in all criminal prosecutions because the Court believed that jury trials for criminal defendants are "fundamental to the American scheme of justice."⁴⁶ Nevertheless, the Court decided that jury trials are not fundamental for criminal defendants under the age of eighteen, despite its decision in *Duncan*.⁴⁷

The Court recognized that the due process standard was "fundamental fairness"⁴⁸ but found that jury trials for juveniles did not violate this standard for several reasons.⁴⁹ First, jury trials for juveniles would transform juvenile court proceedings into fully adversarial ones.⁵⁰ Second, a federal government task force report did not recommend such a right.⁵¹ Finally, prior Court dictum stated that jury trials are not required in every

⁴¹ *Id.* at 382 (citation omitted).

⁴² *See id.*

⁴³ *See* *McKeiver v. Pennsylvania*, 403 U.S. 528, 535 (1971).

⁴⁴ *See id.* at 550.

⁴⁵ *See id.* at 534-36.

⁴⁶ *Id.* at 540.

⁴⁷ *See id.* at 547.

⁴⁸ *See id.* at 543.

⁴⁹ *See id.* at 545.

⁵⁰ *See id.*

⁵¹ *See id.* at 546. The Court appears to have relied rather heavily on the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), treating it similar to a medical expert in a medical malpractice case. This report did not directly make a recommendation on the issue of jury trials for juvenile delinquents. The task force did urge that lawmakers, attorneys and judges revise the philosophy of the juvenile court system while preserving separate treatment of juvenile offenders. The Court understood the lack of a recommendation for jury trials as evidence that they were not necessary. *See id.*; *see also* 725 ILL. COMP. STAT. 207/40 (a), (b) (2) (West 2000).

criminal process.⁵² Therefore, the Court concluded that while states may mandate jury trials for juvenile defendants by statute, minors do not have the same constitutional rights as their adult counterparts.⁵³ Thus, "fundamental fairness" does not require that juveniles' interests be protected through jury trials.⁵⁴

These cases, however, are not dispositive of the issue of jury trials for juveniles. The Supreme Court in *McKeiver* explicitly stated that states may allow a statutory right to a jury trial if they so choose.⁵⁵ The Illinois Juvenile Court Act, for example, has three exceptions to the general rule of bench trials for minor defendants.⁵⁶ Juveniles have the right to a jury trial when they fall under the provisions for (1) extended jurisdiction juvenile prosecutions,⁵⁷ (2) habitual juvenile offenders,⁵⁸ or (3) violent juvenile offenders.⁵⁹

The extended jurisdiction provision gives jurisdiction over the accused to both the juvenile and criminal courts.⁶⁰ The extended jurisdiction juvenile prosecution provides two sentences—one juvenile and one adult criminal—upon pleas, findings or verdicts of guilt.⁶¹ The adult criminal sentence will be stayed if the defendant successfully completes the juvenile sentence.⁶² The delinquent receives an individualized juvenile sentence but then may serve an adult criminal sentence if he violates the provisions of the juvenile punishment.⁶³ This acts as a compromise between the ideals of the juvenile court system and the principles of the adult criminal system.⁶⁴

The state can petition for juveniles to be named habitual juvenile offenders if they have been adjudicated delinquents three separate times and the third offense was one of several severe

⁵² See *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971).

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See 705 ILL. COMP. STAT. 405/5-810 (West 2000); 705 ILL. COMP. STAT. 405/5-815 (West 2000); 705 ILL. COMP. STAT. 405/5-820 (West 2000).

⁵⁷ See 705 ILL. COMP. STAT. 405/5-810.

⁵⁸ See 705 ILL. COMP. STAT. 405/5-815.

⁵⁹ See 705 ILL. COMP. STAT. 405/5-820.

⁶⁰ See 705 ILL. COMP. STAT. 405/5-810(4).

⁶¹ See *id.*

⁶² See *id.*

⁶³ See 705 ILL. COMP. STAT. 405/5-810(6), (7).

⁶⁴ See 705 ILL. COMP. STAT. 405/5-801 (West 2000).

offenses.⁶⁵ If the state is successful, the minor will be incarcerated with the Juvenile Division of the Department of Corrections until his or her twenty-first birthday "without the possibility of parole, furlough, or non-emergency unauthorized absence."⁶⁶ However, these delinquents may earn credit for good conduct that can be used to lower the time of incarceration.⁶⁷

Finally, juveniles can be adjudicated violent juvenile offenders if, on two separate occasions, they have been adjudicated delinquent for felonies "involving the use or threat of physical force or violence against an individual or . . . for which an element of the offense is possession or use of a firearm. . . ." ⁶⁸ Violent juvenile offenders, like habitual juvenile offenders, face the same period of confinement and have the opportunity to gain good conduct credit to reduce their actual time of incarceration.⁶⁹

These three provisions of the Juvenile Court Act demonstrate that sometimes even juvenile defendants need jury trials in order to protect their interests.⁷⁰ However, juveniles receive this protection because the purpose of the state's prosecution in these three instances changes from rehabilitating young people to protecting society from criminals.⁷¹ However, these provisions give rise to a statutory right to a jury trial, not a constitutional one,⁷² and the legislature can change or remove the right at any time.

⁶⁵ See 705 ILL. COMP. STAT. 405/5-815 (a) (West 2000) (The third offense must be the "commission of or attempted commission of the following offenses: first degree murder, second degree murder or involuntary manslaughter; criminal sexual assault or aggravated criminal sexual assault; aggravated or heinous battery involving permanent disability or disfigurement or great bodily harm to the victim; burglary of a home or other residence intended for use as a temporary or permanent dwelling place for human beings; home invasion; robbery or armed robbery; or aggravated arson.").

⁶⁶ 705 ILL. COMP. STAT. 405/5-815 (f).

⁶⁷ See *id.*

⁶⁸ 705 ILL. COMP. STAT. 405/5-820 (a) (West 2000).

⁶⁹ See 705 ILL. COMP. STAT. 405/5-820 (f).

⁷⁰ See 705 ILL. COMP. STAT. 405/5-801 (West 2000).

⁷¹ Compare 705 ILL. COMP. STAT. 405/5-801 ("[I]n all proceedings under Sections 5-805, 5-810 and 5-815, the community's right to be protected shall be the most important purpose of the proceedings."), with 705 ILL. COMP. STAT. 405/5-101 (West 2000) (purpose includes provisions allowing for the individual treatment and rehabilitation of each minor).

⁷² See *id.*

C. INVOLUNTARY COMMITMENT FOR SEXUALLY VIOLENT PERSONS

The Juvenile Court Act of 1987 provides that a minor guilty of a sex offense may be subject to indeterminate incarceration with the Department of Corrections until he or she turns twenty-one years of age, at which point the sentence automatically terminates.⁷³ Thus, a child guilty of a sex offense may be incarcerated for several years.⁷⁴ However, such a child's punishment would not end there because, as a convicted sex offender, even though a juvenile offender, a minor is subject to the Sex Offender Registration Act.⁷⁵ Under the Act, an offender faces the same constraints as an adult offender.⁷⁶ For example, the child is required to register as a sex offender,⁷⁷ remain registered for ten years,⁷⁸ and verify his or her whereabouts four times per year for the rest of his or her life.⁷⁹

Not only are these minors subject to juvenile criminal prosecution and the Sex Offender Registration Act but they also fall under the jurisdiction of the Illinois Sexually Violent Persons Commitment Act.⁸⁰ The Act allows either the State's Attorney or the Attorney General to petition for them to be civilly committed to a secure treatment facility as sexually violent people.⁸¹ Under the Act, the State's Attorney or Attorney General simply must allege that an offender "has been found delinquent for a sexually violent offense" and that he or she "suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence."⁸² The Act defines "mental disorder" as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a per-

⁷³ See 705 ILL. COMP. STAT. 405/5-750 (West 2000).

⁷⁴ See *id.* Because the Juvenile Court Act covers only minors, defendants will be incarcerated for a minimum of three years, from age 18 to age 21. See *id.*; 705 ILL. COMP. STAT. 405/5-120 (West 2000).

⁷⁵ See 730 ILL. COMP. STAT. 150/1 - 150/12 (West 2000).

⁷⁶ See 730 ILL. COMP. STAT. 150/2 (A-5).

⁷⁷ See 730 ILL. COMP. STAT. 150/3.

⁷⁸ See 730 ILL. COMP. STAT. 150/7.

⁷⁹ See 730 ILL. COMP. STAT. 150/5-10.

⁸⁰ See 725 ILL. COMP. STAT. 207/1 - 207/99 (West 2000).

⁸¹ See 725 ILL. COMP. STAT. 207/15 (a).

⁸² 725 ILL. COMP. STAT. 207/5 (f). The other two categories of people subject to this Act are those who have been convicted of a sexually violent offense and those who have been found not guilty of a sexually violent offense by reason of insanity. See *id.*

son to engage in acts of sexual violence."⁸³ The petition must be filed no more than ninety days before a delinquent's release from the Juvenile Division of the Department of Corrections.⁸⁴

An offender subject to such a petition retains all of the rights of criminal defendants.⁸⁵ For example, he or she has the right to counsel, to remain silent, and to present and cross-examine witnesses.⁸⁶ However, unlike in the Juvenile Court, he or she also has the right to request a jury trial to determine the State's petition.⁸⁷

During the bench or jury trial for the petition, the State must prove its allegations beyond a reasonable doubt.⁸⁸ If the trier of fact finds that the juvenile is a sexually violent person, he or she will be committed to a secure treatment facility until such time that the State believes that the juvenile or adult former juvenile offender is no longer a threat to society.⁸⁹ Thus, if a judge or jury grants the State's petition, a child could be incarcerated for ten, twenty, even fifty years or more.⁹⁰

The Illinois Supreme Court recently upheld the Sexually Violent Persons Commitment Act generally in *In re Detention of Samuelson*.⁹¹ The *Samuelson* Court followed the United States Supreme Court's plurality opinion in *Kansas v. Hendricks*, which sustained the constitutionality of a similar Kansas law.⁹² The Illinois Supreme Court followed the United States Supreme Court when it declared that the Sexually Violent Persons Commitment Act is civil, not criminal, in nature, despite the elements it shares with criminal laws and proceedings.⁹³ Both Courts found that these types of laws do not violate the principles prohibiting double jeopardy and ex post facto actions.⁹⁴

⁸³ 725 ILL. COMP. STAT. 207/5 (b).

⁸⁴ See 725 ILL. COMP. STAT. 207/15 (b-5)(2)(A) (West 2000).

⁸⁵ See 725 ILL. COMP. STAT. 207/25 (c) (West 2000).

⁸⁶ See *id.*

⁸⁷ See 725 ILL. COMP. STAT. 207/35 (c) (West 2000).

⁸⁸ See 725 ILL. COMP. STAT. 207/35 (d)(1).

⁸⁹ See 725 ILL. COMP. STAT. 207/40 (a), (b)(2) (West 2000).

⁹⁰ See *id.* (no limit on the duration of commitment except the determination that the offender is no longer a sexually violent person)

⁹¹ 727 N.E.2d 228 (Ill. 2000).

⁹² See *id.* at 234; *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁹³ See *Samuelson*, 727 N.E.2d at 235.

⁹⁴ See *Hendricks*, 521 U.S. at 369-71; *Samuelson*, 727 N.E.2d at 234-35 ("The points raised by the United States Supreme Court apply with equal force to Illinois' version of the law.").

The Illinois Supreme Court also stated that, "as with the Kansas statute, the law has no retroactive effect. A defendant cannot be involuntarily committed based on past conduct."⁹⁵

Although no record exists of any Illinois appellate cases involving a juvenile protesting the propriety of involuntary commitment as a sex offender, Wisconsin and Minnesota have applied similar laws to young offenders.⁹⁶ For example, in *In re Commitment of Matthew A.B.*, the State petitioned to commit a sixteen year-old under Wisconsin's sexually violent persons law.⁹⁷ Matthew previously had a few non-sexual delinquency determinations and one adjudication for second-degree sexual assault of a child.⁹⁸ However, the acts leading to the sexual assault determination apparently were consensual between Matthew and another boy.⁹⁹ At this point, the staff of Matthew's residential care facility considered petitioning for his commitment as a sexually violent person but decided against it.¹⁰⁰ After conviction for a non-sexual crime and engaging in two acts of consensual sexual contact with another boy that did not lead to adjudication or conviction, Matthew faced involuntary, commitment for an indefinite period of time.¹⁰¹ Matthew appealed the finding that he was sexually violent on both procedural and substantive grounds.¹⁰² Matthew contended that Wisconsin's sexually violent persons act was unconstitutional, but he did so on the grounds that the mental disorder he was found to have was too vague and that prediction of juvenile dangerousness was too uncertain.¹⁰³ The Wisconsin court found that Matthew suffered from a "conduct disorder," which was sufficient to satisfy due process and to allow courts to predict future dangerousness of juveniles.¹⁰⁴

⁹⁵ *Samuelson*, 727 N.E.2d at 235.

⁹⁶ See *In re Commitment of Matthew A.B.*, 605 N.W.2d 598 (Wis. Ct. App. 1999); *In re Commitment of Mervel L.E.*, Nos. 98-0837, 97-2508, 1998 WL 665852 (Wis. Ct. App. Sept. 29, 1998); *In re Kubec*, No. C9-97-1673, 1998 WL 27295 (Minn. Ct. App. Jan. 27, 1998).

⁹⁷ See *Matthew A.B.*, 605 N.W.2d at 602.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.* at 603.

¹⁰³ See *id.* at 608-11.

¹⁰⁴ See *id.*

Wisconsin applied its commitment law to another juvenile offender as well in *In re Commitment of Mervel L.E.*¹⁰⁵ [juvenile cases are private – not supposed to use last names] The state petitioned for Mervel to be named sexually violent shortly before his release from a residential facility and after he turned eighteen.¹⁰⁶ Mervel had twice been adjudicated delinquent for sexual assault.¹⁰⁷ He appealed the decision that he was sexually violent based on ineffective assistance of counsel, claiming his attorney did not raise several objections to the applicability of the law to the defendant.¹⁰⁸ Despite evidence describing the lack of ability to predict a juvenile's likelihood to recidivate based on studies of adults, the court denied Mervel's petition because his claims were grounded in the ineffective assistance argument, which carries a high burden of proof.¹⁰⁹ The problem of proving ineffective assistance also served to defeat Mervel's other arguments because he confused procedural issues with constitutional questions.¹¹⁰ Relevant to the mental disorder prong, the court explained that the psychologists based their diagnoses on Mervel's history of sex offenses as well as his "impulsiveness, minimization and continued rationalizing of his offenses."¹¹¹ The state's psychologists believed that these few signs indicated that Mervel had an antisocial personality disorder which predisposed him to further commit sexually violent acts.¹¹²

The one known Minnesota case applying its sexual psychopathic personality law and its sexually dangerous person law to a juvenile offender also largely dealt with the mental health is-

¹⁰⁵ See *In re Commitment of Mervel L.E.*, Nos. 98-0837, 97-2508, 1998 WL 665852 (Wis. Ct. App. Sept. 29, 1998). This opinion is unreported and has no precedential value.

¹⁰⁶ See *id.* at *1.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* Mervel claimed his attorney was ineffective because he did not (1) argue that the statute was unconstitutional when based on adjudications as delinquents; (2) fully explore and develop an expert witness's evidence; (3) argue that antisocial personality disorder is not sufficiently precise to satisfy the statute; (4) challenge the term "substantially probable" as impermissibly vague; (5) argue that the Act violates the ex post facto clauses of the Wisconsin and federal Constitutions; and (6) challenge the Act as unconstitutional for violating equal protection. See *id.*

¹⁰⁹ See *id.* at *4.

¹¹⁰ See *id.* at *3-7.

¹¹¹ *Id.* at *4.

¹¹² See *id.*

sue.¹¹³ In *In re Kubec*, [See BB R.10.2.1(b) requiring the abbreviation of phrases like “in the matter of” to “in re”] a probation/parole officer filed a petition against a sex offender less than two months before his nineteenth birthday alleging that he was a sexual psychopath and a sexually dangerous person.¹¹⁴ The court upheld the involuntary commitment of this individual despite its reserves about the testimony of one of the expert examiners.¹¹⁵ Though the examiner was unsure if the defendant lacked control over his impulses, Minnesota’s mental health requirement for a sexual psychopathic personality, the court found that the other expert provided clear and convincing evidence.¹¹⁶ Thus, even when there is conflicting expert testimony, juveniles may be committed indefinitely.¹¹⁷

An Illinois appellate court recently discussed the mental health prong of the State’s allegations that a defendant was a sexually violent person.¹¹⁸ In *In re Detention of Walker*, the court explained that the Sexually Violent Persons Commitment Act “does not define the term ‘substantially probable’” when it states that the second allegation must be that the defendant “is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.”¹¹⁹ To determine this “substantial probability,” the court refused to base its judgment on statistical predictions of recidivism.¹²⁰ Instead, the court relied on the testimony of two psychologists associated with the Department of Corrections who identified various risk factors applicable to the defendant.¹²¹ Though the court recognized that the more risk factors that apply, the greater the likelihood of recidivism, the court did not state if a certain number or type of risk factors are needed to be “substantially probable.”¹²² Since the defendant

¹¹³ See *In re Kubec*, No. C9-97-1673, 1998 WL 27295 (Minn. Ct. App. Jan. 27, 1998). This case is unreported and has no precedential value.

¹¹⁴ See *id.* at *1.

¹¹⁵ See *id.* at *2.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *In re Detention of Walker*, 731 N.E.2d 994 (Ill. App. Ct. 2000).

¹¹⁹ *Id.* at 1001.

¹²⁰ See *id.* at 1002.

¹²¹ See *id.*

¹²² See *id.*

appealed based on a manifest weight of the evidence argument, the court had no need to explicitly define the term.¹²³

Current law denies juveniles a constitutional right to a jury trial although some states, such as Illinois, afford jury trial protection in very limited circumstances.¹²⁴ However, juvenile sex offenders do not fall within these exceptions despite their vulnerability to petitions as sexually violent people.¹²⁵ Commitment as a sexually violent person involves involuntary commitment for an indefinite period of time in a locked treatment facility.¹²⁶ The State bases this commitment on a defendant's prior history of a sex offense as well as a mental disorder imprecisely defined as making the defendant "substantially probable" to recidivate.¹²⁷ Because of the interplay of these two shaky systems, juvenile sex offenders have a constitutional right to a jury trial.

III. ANALYSIS

Denying juvenile sex offenders a jury at the trial for their initial alleged crimes violates these minors' constitutional rights,¹²⁸ despite the protections provided in the Sexually Violent Persons Commitment Act and other similar laws.¹²⁹ Undoubtedly, sex offenders are often violent, dangerous people. Commitment laws may serve to protect the community and rehabilitate the offenders when they are adults.¹³⁰ The system breaks down, however, when these commitment laws are applied to juvenile delinquents because they do not receive jury trials for the crimes themselves to protect their interests, despite the potential for long periods of confinement.¹³¹ State petitions for these juveniles to be adjudicated sexually violent individuals violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹³²

¹²³ See *id.* at 1001-02.

¹²⁴ See discussion *infra* part II(B).

¹²⁵ See 705 ILL. COMP. STAT. 405/5-810 (West 2000); 705 ILL. COMP. STAT. 405/5-815 (West 2000); 705 ILL. COMP. STAT. 405/5-820 (West 2000); 725 ILL. COMP. STAT. 207/15 (a) (West 2000).

¹²⁶ See 725 ILL. COMP. STAT. 207/15 (a), (b)(2).

¹²⁷ See discussion *infra* part II(C).

¹²⁸ See U.S. CONST. amend. XIV, § 1.

¹²⁹ See, e.g. 725 ILL. COMP. STAT. 207/25 (c) (West 2000); 725 ILL. COMP. STAT. 207/35 (c) (West 2000); 725 ILL. COMP. STAT. 207/35 (d)(1) (West 2000).

¹³⁰ See 725 ILL. COMP. STAT. 207/40 – 207/50 (West 2000).

¹³¹ See discussion *infra* part II(B).

¹³² See U.S. CONST. amend. XIV, § 1.

A. VIOLATION OF DUE PROCESS RIGHTS

The Fourteenth Amendment states that, "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law. . . ." ¹³³ The United States Supreme Court discussed the importance of this clause in one of the preeminent juvenile court cases, *In re Gault*. ¹³⁴ In this case, the state incarcerated a fifteen year-old boy in a residential facility after a proceeding pursuant to Arizona's Juvenile Code. ¹³⁵ However, the state gave no formal notice to the boy or his family of the proceeding, did not swear any witnesses, and made no formal record or transcript of the proceeding. ¹³⁶

First, the Court acknowledged that the Due Process Clause of the Fourteenth Amendment definitely applied to juvenile court proceedings. ¹³⁷ The Court then addressed Arizona's contention that the lack of formality was constitutional because of the goals of the juvenile court system. ¹³⁸ "Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." ¹³⁹ Furthermore, "the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." ¹⁴⁰ The Court went on to find that the State had wholly violated the defendant's due process rights by according him such little protection from incarceration. ¹⁴¹

Several years later, the United States Supreme Court in *McKeiver* stated that the appropriate due process standard is one of "fundamental fairness." ¹⁴² The Court found that juvenile adjudications without a jury trial were fundamentally fair, partly out of the desire to maintain juvenile adjudications as separate

¹³³ *Id.*

¹³⁴ 387 U.S. 1 (1967).

¹³⁵ *See id.* at 4.

¹³⁶ *See id.* at 5.

¹³⁷ *See id.* at 13.

¹³⁸ *See id.* at 18-19.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 21.

¹⁴¹ *See id.* at 30-31.

¹⁴² *See McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

proceedings from criminal trials.¹⁴³ Despite this idealistic hope, a juvenile conviction satisfies the first of two necessary elements for the State to commit indefinitely a defendant as a sexually violent person.¹⁴⁴ Thus, the Sexually Violent Persons Commitment Act treats juvenile adjudications for sex offenses as criminal convictions.

Two dissenting opinions have found substantial problems with the current case law's logic. First, Justice Douglas' dissent in *McKeiver* recognized that the incarceration sentences the appellants faced were at least as severe as those adults would face in the same circumstances.¹⁴⁵ Justice Douglas also attacked the majority's emphasis on the practical problems of implementing jury trials in juvenile proceedings without recognizing the practical effects the lack of jury trials have on the juvenile defendants.¹⁴⁶ He explained that rehabilitation may be less successful when youthful offenders believe that they have been denied their constitutional rights.¹⁴⁷ Finally, Justice Douglas noted that jury trials would help protect child defendants from prejudgments made by the judges presiding over their cases and reviewing the pretrial reports provided by the police and caseworkers.¹⁴⁸

While Justice Douglas argued against the general denial of jury trials for juveniles, Justice Heiple on the Illinois Supreme Court attacked not only the civil status of the Sexually Violent Persons Commitment Act, but also the validity of the mental health prong of the Act.¹⁴⁹ Justice Heiple argued that "a finding of a mental disorder flows almost inexorably from a conviction for a violent sex offense."¹⁵⁰ He noted that "the State's expert. . .

¹⁴³ See *id.* at 550.

¹⁴⁴ See *id.* at 543-44 ("We must recognize. . .that the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized."); 725 ILL. COMP. STAT. 207/5 (f) (West 2000).

¹⁴⁵ See *McKeiver*, 403 U.S. at 560 (Douglas, J., dissenting).

¹⁴⁶ See *id.* at 561-62. ("Traumatic experiences of denial of basic rights only accentuate the past deprivation and contribute to the problem. Thus, a general societal attitude of acceptance of the juvenile as a person entitled to the same protection as an adult may be the true beginning of the rehabilitative process.") *Id.* at 562 (citation omitted).

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* at 563 (citation omitted).

¹⁴⁹ See *In re Detention of Samuelson*, 727 N.E.2d 228, 238-39 (Ill. 2000) (Heiple, J. dissenting).

¹⁵⁰ *Id.* at 239.

was able to diagnose defendant as having a 'mental disorder' within the meaning of the Act *solely by virtue of defendant's having committed the acts which led to his criminal conviction and punishment.*¹⁵¹ A mental health specialist such as a psychologist or psychiatrist can use the defendant's sex crimes as direct evidence that he has a mental disorder.¹⁵² Thus, the State could prove beyond a reasonable doubt both of its burdens under the Sexually Violent Persons Act merely by proving that the defendant had been convicted of committing a sex offense.¹⁵³ A defendant has a mental disorder because he has committed a sex offense and because he has committed a sex offense and therefore has a mental disorder, the defendant must be committed indefinitely.¹⁵⁴

The arguments of Justices Douglas and Heiple are even more persuasive when considered in the specific context of juvenile sex offenders. It is fundamentally *unfair* to adjudicate a juvenile guilty of a sex offense with the knowledge that the conviction can be the predicate for an indeterminate period of confinement *after* serving several years of incarceration in a juvenile, or possibly adult, prison.¹⁵⁵

Essentially, the determination of one judge could lead to the indefinite incarceration of a child or adult who was a former juvenile offender.¹⁵⁶ A juvenile first faces trial for a sex offense without the protections of a jury, allowing possibly biased, or at least unsympathetic, judges to determine the juvenile's guilt.¹⁵⁷ Once the State decides to petition for indefinite commitment as a sexually violent predator, it proves the first element of its petition, the fact that the juvenile was guilty of a sex offense, with no contest because that original adjudication would act as the trigger to the incarceration procedure.¹⁵⁸ The only thing a State's expert needs in order to prove a mental disorder is to show that

¹⁵¹ *Id.*

¹⁵² *See id.* (State's expert explained that she diagnosed defendant as a pedophile because he engaged in sexual activities with children despite the consequences and continued to do so even though he knew of these consequences.).

¹⁵³ *See id.*

¹⁵⁴ *See id.*

¹⁵⁵ *See* 725 ILL. COMP. STAT. 207/1 - 207/99 (West 2000).

¹⁵⁶ *See id.*; discussion of denial of a jury trial *infra* part II(B).

¹⁵⁷ *See* discussion of the importance of jury trials *infra* Part II.

¹⁵⁸ *See* 725 ILL. COMP. STAT. 207/5 (f).

the juvenile committed the triggering sex offenses.¹⁵⁹ Furthermore, an expert and the State can prove this without a concrete definition of what is needed to show that it is a “substantial probability” that the child will re-offend.¹⁶⁰ As a result, what at first blush appears to be a burden of the very highest standard of proof in an adversarial hearing becomes a virtual guarantee of commitment.¹⁶¹ Thus, the initial finding of guilt and the later proof of a mental disorder essentially rests on the judgment of one person, the potentially very fallible juvenile court judge.¹⁶² Taken together, this violates the “fundamental fairness” standard of due process and deprives juveniles of the right to a jury trial.

B. VIOLATION OF EQUAL PROTECTION OF THE LAWS

The Fourteenth Amendment of the Constitution also mandates that a State may not “deny to any person within its jurisdiction the equal protection of the laws.”¹⁶³ The denial of a jury trial to juvenile sex offenders violates equal protection with respect to both other juvenile delinquents and to adult sex offenders.

As the *Samuelson* Court described, courts use the legislative classification of the two relevant groups of people to determine which level of scrutiny is applicable in equal protection analysis.¹⁶⁴ Racial, national origin or fundamental rights classifications trigger strict scrutiny.¹⁶⁵ Courts use intermediate scrutiny for classifications based on sex or illegitimacy.¹⁶⁶ For all other cases, the court uses the rational basis test.¹⁶⁷ Because no court has determined that the right to a jury trial is a fundamental right for children, the appropriate standard is the rational basis test.¹⁶⁸ Even with this low level of scrutiny, the State lacks the

¹⁵⁹ See discussion of Justice Heiple’s dissent in *Samuelson infra* Part II(C).

¹⁶⁰ See discussion of *Walker infra* Part II(C).

¹⁶¹ See discussion of invalidity of mental health prong *infra* Part II(C).

¹⁶² See discussion of denial of a jury trial *infra* Part II(B).

¹⁶³ U.S. CONST. amend. XIV, §1.

¹⁶⁴ See *In re Detention of Samuelson*, 727 N.E.2d 228, 236 (Ill. 2000).

¹⁶⁵ See *id.* (citing *McLean v. Department of Revenue*, 704 N.E.2d 352 (Ill. 1998)).

¹⁶⁶ See *id.* at 236.

¹⁶⁷ See *id.* (citing *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996)).

¹⁶⁸ See *In re G.O.*, 710 N.E.2d 140, 145-46 (Ill. App. Ct. 1999).

requisite rational basis for denying juvenile sex offenders their right to jury trials.

1. Juvenile sex offenders versus certain other juvenile delinquents

The Illinois Juvenile Court Act provides for three exceptions to the general rule that juveniles are not entitled to jury trials.¹⁶⁹ The three classes of juveniles are those who are subject to (1) extended jurisdiction juvenile prosecution, (2) habitual juvenile offender provisions, and (3) violent juvenile offender provisions.¹⁷⁰ These juveniles receive the right to a jury trial because the court is no longer interested in the best solution for an individual juvenile defendant, but rather for the protection of the community at large.¹⁷¹ This is the same goal of the sexual offender commitment laws.¹⁷² The potential for consequences such as long prison terms or treatment as an adult for these juvenile defendants is very high, thus demonstrating the need for a jury trial to better protect their liberty and other interests.¹⁷³ Therefore, the State grants jury trials to those juveniles who face prosecutions in which convictions would result in lengthy incarceration and when the State's prosecutorial goal is to protect the community rather than reform the juvenile.

Juvenile sex offenders do not differ from these three special classifications of juvenile defendants. Petitions for commitment under the Sexually Violent Persons Act have the primary intent of protecting the community from dangerous people. This is evident from the definition of a sexually violent person; the defendant must be "dangerous because he or she suffers from a

¹⁶⁹ See 705 ILL. COMP. STAT. 405/5-810 (West 2000); 705 ILL. COMP. STAT. 405/5-815 (West 2000); 705 ILL. COMP. STAT. 405/5-820 (West 2000). See discussion of exceptions *infra* Part II(B).

¹⁷⁰ See 705 ILL. COMP. STAT. 405/5-810; 705 ILL. COMP. STAT. 405/5-815; 705 ILL. COMP. STAT. 405/5-820. See discussion of exceptions *infra* Part II(B).

¹⁷¹ See 705 ILL. COMP. STAT. 405/5-815 (a). The third offense must be the "commission of or attempted commission of the following offenses: first degree murder, second degree murder or involuntary manslaughter; criminal sexual assault or aggravated criminal sexual assault; aggravated or heinous battery involving permanent disability or disfigurement or great bodily harm to the victim; burglary of a home or other residence intended for use as a temporary or permanent dwelling place for human beings; home invasion; robbery or armed robbery; or aggravated arson." *Id.*

¹⁷² Compare 705 ILL. COMP. STAT. 405/5-101 (West 2000), with 725 ILL. COMP. STAT. 207/40(a), (b) (5) (West 2000)..

¹⁷³ See 725 ILL. COMP. STAT. 207/40 (a), (b) (2) (no limit on length of incarceration except the dangerousness of the offender).

mental disorder that makes it substantially probable that the person will engage in acts of sexual violence."¹⁷⁴ If the State simply wanted to help rehabilitate all of its citizens who have committed sex offenses, it would implement treatment into punishment for the offense. Rather, the State has the legitimate interest in protecting its citizens by removing dangerous people from society. Nevertheless, like the State's interest in the three classifications of juvenile offenders, the State's interest in juvenile sex offender cases lies in protecting society rather than rehabilitating the defendant as in regular juvenile delinquency proceedings.¹⁷⁵ The State's classification of these two groups of people, sex offenders and serious juvenile offenders subject to the other three classifications, is purely arbitrary and violates the equal protection afforded by the Fourteenth Amendment.¹⁷⁶ The State must provide jury trials for these juveniles if it wants to continue applying the involuntary commitment law to young people, just as it does for the other three types of juvenile offenders.¹⁷⁷

An Illinois appellate court found that a juvenile charged with first degree murder was similarly situated to juveniles subject to the habitual and violent offender provisions of the Juvenile Court Act for purposes of equal protection analysis.¹⁷⁸ The court recognized that the appropriate standard was the rational relationship test.¹⁷⁹ The court rejected the state's argument that the repeat offenders were substantially different from the juvenile accused of murder and noted that the juvenile accused of murder faced more dire circumstances because he had no ability to earn good time credit, unlike the repeat offenders.¹⁸⁰ The court further grounded its holding in the idea that when the state's prosecutorial goal is the protection of society as well as rehabilitation, the defendant requires a jury trial.¹⁸¹ Thus, the court determined that the state's denial of a jury trial violated

¹⁷⁴ 725 ILL. COMP. STAT. 207/5 (f) (West 2000).

¹⁷⁵ Compare 705 ILL. COMP. STAT. 405/5-101 (West 2000), with 725 ILL. COMP. STAT. 207/40(a),(b)(5) (West 2000).

¹⁷⁶ See *In re G.O.*, 710 N.E.2d 140, 146 (Ill. App. Ct. 1999) (discussing the improper treatment of juvenile murder defendants versus juvenile repeat offenders).

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* at 145-46.

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

equal protection, even though it used the low standard of rational relationship.¹⁸² There was no rational relationship or legitimate state goal in treating one member (juvenile murder defendants) of a class differently from other members (habitual and violent juvenile offenders).¹⁸³

The Illinois Supreme Court later overturned *In re G.O.* because the court invalidated the law mandating the juvenile murder defendant's incarceration because the statute in which it was passed violated the single subject rule.¹⁸⁴ The appellate court's reasoning still stands, however. The Illinois Supreme Court refused to rule on the merits of the reasoning because it would equate to an advisory opinion.¹⁸⁵ However, the appellate court's reasoning is sound and the Supreme Court made no attempt to discredit it.¹⁸⁶

Juvenile sex offenders, like the murder defendants, are the same as the other three categories of delinquents in terms of the degree of punishment and loss of liberty. Delinquents prosecuted under extended jurisdiction face two sentences, one juvenile and one criminal.¹⁸⁷ If the child violates the provisions of his or her juvenile sentence in any way, he or she will have to serve the adult criminal sentence as well.¹⁸⁸ This is akin to the child sex offender who not only faces his or her juvenile sentence for the offense but also the possible future commitment as a sexually violent person at the end of the juvenile sentence. The juvenile sex offender's fate is at least as severe as the second sentence an extended jurisdiction juvenile faces since the involuntary commitment as a sex offender is indeterminate.¹⁸⁹ Moreover, the sex offending juvenile could lose his or her liberty for a much longer period of time than the juvenile facing an adult criminal sentence.¹⁹⁰

Juvenile sex offenders are likewise similarly situated to habitual and violent juvenile offenders. Habitual and violent juvenile offenders could be sentenced to juvenile prison until

¹⁸² See *id.* at 146-47.

¹⁸³ See *id.* at 146.

¹⁸⁴ See *In re G.O.*, 727 N.E.2d 1003, 1007 (Ill. 2000).

¹⁸⁵ See *id.* at 1008.

¹⁸⁶ See *id.* at 1007-08 (no ruling on the merits of the appellate court's arguments.)

¹⁸⁷ See 705 ILL. COMP. STAT. 405/5-810(4) (West 2000).

¹⁸⁸ See *id.*

¹⁸⁹ See 725 ILL. COMP. STAT. 207/40 (a) (West 2000).

¹⁹⁰ Compare, e.g., *id.*, with 705 ILL. COMP. STAT. 405/5-820 (f) (West 2000).

their twenty-first birthdays because of their likelihood to re-offend and put society in danger.¹⁹¹ This is the same principle used in Sexually Violent Persons Commitment Act hearings.¹⁹² To protect society from people likely to commit more sex offenses, the State can petition to incarcerate further dangerous sex offenders.¹⁹³ This petition is triggered by the conviction for an original offense, just as the State's ability to petition to proceed under Habitual or Violent Juvenile Offender provision stems from an original offense and the likelihood that the delinquent will recidivate.¹⁹⁴

The consequences juvenile sex offenders face are at least as serious as, if not more so than, those faced by habitual or violent juvenile offenders. Juvenile sex offenders do not receive good conduct credit when they are incarcerated until their twenty-first birthdays, unlike the habitual or violent offenders.¹⁹⁵ In addition, habitual and violent juvenile offenders do not face commitment proceedings after their juvenile detentions, unlike juvenile sex offenders.¹⁹⁶ Thus, the consequences are more dire for juvenile sex offenders than for habitual or violent offenders, yet they do not receive jury trials to protect their liberty interests.¹⁹⁷

There is no rational relationship for giving juvenile sex offenders less protection than their delinquent counterparts who have not committed sex offenses.¹⁹⁸ If anything, juvenile sex offenders should receive more procedural protection because they have the potential to spend many more years incarcerated than the other delinquents.¹⁹⁹ The juvenile offenders possessing the right to a jury trial have this safeguard in order to ensure that they do not suffer serious consequences without the appro-

¹⁹¹ See 705 ILL. COMP. STAT. 405/5-815 (f) (West 2000); 705 ILL. COMP. STAT. 405/5-820 (f) (West 2000).

¹⁹² See 725 ILL. COMP. STAT. 207/15(b)(5) (West 2000) (offender alleged dangerous because he is likely to re-offend).

¹⁹³ See *id.*

¹⁹⁴ See 705 ILL. COMP. STAT. 405/5-815 (a); 705 ILL. COMP. STAT. 405/5-820 (a).

¹⁹⁵ See 705 ILL. COMP. STAT. 405/5-750, 5-755 (West 2000) (no provision for good conduct credit for minors incarcerated until they reach the age of 21).

¹⁹⁶ See 705 ILL. COMP. STAT. 405/5-805 (West 2000); 705 ILL. COMP. STAT. 405/5-810 (West 2000); 705 ILL. COMP. STAT. 405/5-815 (no provision for further commitment once a delinquent serves a full sentence).

¹⁹⁷ See *id.* (no provision for juvenile sex offenders).

¹⁹⁸ See *In re G.O.*, 710 N.E.2d 140, 146 (Ill. App. Ct. 1999).

¹⁹⁹ See *id.*

priate due process.²⁰⁰ Nevertheless, juvenile sex offenders do not have this protection, despite their potential punishments. Juvenile sex offenders are similarly situated to their juvenile offender cohorts, but the State does not provide them with equal protection. There is no rational relationship between lower procedural protection for sex offenders and higher protection for non-sexual, violent and habitual offenders.

2. *Juvenile sex offenders versus adult sex offenders*

Juvenile sex offenders are denied the equal protection of the laws in another way as well. Juvenile sex offenders face the same potential for confinement as do adult sex offenders, but juvenile sex offenders do not receive the same right to a jury trial as their adult counterparts.²⁰¹ Once again, there is no rational relationship between the State's denial of a jury trial to juveniles and a legitimate state interest since the State's goal is the same in both juvenile and adult sex offender cases.²⁰²

Once a juvenile has been adjudicated guilty of a sex offense, he or she faces the same consequences as an adult sex offender.²⁰³ First, juvenile sex offenders must register as such through the Sex Offender Registration Act.²⁰⁴ As stated earlier, there are no special provisions for juveniles registered through the act.²⁰⁵ They must follow all of the same rules as adult sex offenders, such as remaining registered for ten years²⁰⁶ and giving notice of their whereabouts four times annually.²⁰⁷

Juvenile sex offenders also face the exact consequences as adult sex offenders when petitioned to be named sexually violent people.²⁰⁸ Juvenile delinquency is a basis for commencing such a petition, but there are no provisions separating juvenile offenders from adults in terms of rights and consequences.²⁰⁹ However, of the three classifications of people subject to the

²⁰⁰ See 705 ILL. COMP. STAT. 405/5-801 (West 2000).

²⁰¹ See 725 ILL. COMP. STAT. 207/5 (f) (West 2000).

²⁰² See 725 ILL. COMP. STAT. 207/1.

²⁰³ See 725 ILL. COMP. STAT. 207/5 (f).

²⁰⁴ See 730 ILL. COMP. STAT. 150/1 -150/12 (West 2000).

²⁰⁵ See 730 ILL. COMP. STAT. 150/2 (A-5).

²⁰⁶ See 730 ILL. COMP. STAT. 150/7.

²⁰⁷ See 730 ILL. COMP. STAT. 150/5-10.

²⁰⁸ See 725 ILL. COMP. STAT. 207/5 (f).

²⁰⁹ See *id.*

commitment act,²¹⁰ only one of the three, the juvenile delinquent, does not have the right to have his or her case decided by a jury at the trial for the original offense.²¹¹ In all other respects, the juvenile delinquent is treated the same as his or her adult counterparts.²¹²

There can be no rational relationship for holding juveniles to the same consequences as adults without providing the same fundamental protections as adults. Justice Douglas argued, "[t]he Fourteenth Amendment, which makes trial by jury provided in the Sixth Amendment applicable to the States, speaks of denial of rights to 'any person,' not denial of rights to 'any adult person . . .'"²¹³ For juvenile sex offenders, the protection of the Fourteenth Amendment is just that, protection against the denial of rights to "any adult person."²¹⁴ Yet, there is no rational relationship for treating the two types of offenders differently in the specific context of sex offenders.

A Wisconsin Supreme Court justice argued this very point when three juveniles appealed for the right to a jury in their trials for various offenses:²¹⁵

The majority fails to identify a rational basis on which to rest its distinction between adults who become subject to [Wisconsin's sex offender commitment law's] confinement proceedings after a jury trial and juveniles who become subject to [the commitment law] without the protections of a jury trial, because there is no such basis. . . . The majority's response, that in order for a child adjudged delinquent to be committed under [the commitment law] that child must also be dangerous due to a mental disorder, serves only as a smoke and mirrors attempt to avoid the real issue. Adult convicts, those committed [because they were not guilty by reason of insanity], and juveniles adjudged delinquent all must be dangerous due to a mental disorder and likely to commit sexual violence. Yet, of these three classes of individuals, it is only the juvenile adjudged delinquent that becomes subject to a [commitment] petition without the benefit of a jury trial.²¹⁶

²¹⁰ Convicted sex offenders, adjudicated juvenile sex offenders and offenders not criminally liable of a sex offense because of insanity. *See id.*

²¹¹ *See* discussion of denial of jury trial *infra* Part II(B).

²¹² *See* 725 ILL. COMP. STAT. 207/5 (f) (West 2000).

²¹³ *McKeiver v. Pennsylvania*, 403 U.S. 528, 560 (1971) (Douglas, J. dissenting).

²¹⁴ *See id.*

²¹⁵ *See In re Hezzie R.*, 580 N.W.2d 660, 687 (Wis. 1998) (Bradley, J. dissenting).

²¹⁶ *Id.*

Both juvenile and adult sex offenders are subject to commitment laws like the Sexually Violent Persons Commitment Act yet only juveniles become exposed to commitment without jury trials.²¹⁷ The State's distinction is completely arbitrary for the State can have no legitimate interest in providing protection to adults while leaving children vulnerable.²¹⁸

Juveniles generally are treated differently than their adult counterparts.²¹⁹ However, in the context of sex offending juveniles, there is no difference between the two groups other than the protections provided to them.²²⁰ There is no rational basis, therefore, for providing juveniles with less protection against injustice than that which adults receive in sex offender cases.²²¹ Denial of jury trials to juvenile sex offenders violates their constitutional rights to due process and equal protection of the laws and must be remedied by allowing them the right to a jury in the trial for the original sex offense. Otherwise, the State must forfeit its ability to petition for the involuntary commitment of juvenile offenders as sexually violent people.

IV. CONCLUSION

Sex offenders can be dangerous and it is understandable that society wants to protect the public. The goal of rehabilitation is an admirable one, but the means, indeterminate incarceration, are beyond the limits of the Constitution when applied to juvenile sex offenders. Juvenile offenders need the protection of a jury trial when charged with violent sexual offenses because of the severe consequences they face.²²² Denying these young people the right to a jury trial when they could potentially be committed indefinitely²²³ violates both their rights to due process and equal protection of the laws. Rather than forcing children to act older than their age by treating them as adults when they commit sex offenses, the courts and society at large need to re-embrace the original purpose and goals of the

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ *See, e.g., In re Gault*, 387 U.S. 1, 15 (1967).

²²⁰ *See In re Hezzie R.*, 580 N.W.2d at 687.

²²¹ *See id.*

²²² *See* 725 ILL. COMP. STAT. 207/40 (a), (b)(2) (West 2000).

²²³ *See id.*

Juvenile Court and help rehabilitate juveniles instead of locking them up and throwing away the key.