FOR THEY KNOW NOT WHAT THEY DO: REINTRODUCING INFANCY PROTECTIONS FOR CHILD SEX OFFENDERS IN LIGHT OF IN RE B.W.

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INTRODUCTION

The criminal culpability of young offenders has been an integral question in legal theories on criminal justice for centuries. At the heart of the debate are two competing state prerogatives: the interest in seeing the perpetrators of crimes punished for their actions, and the commitment to ensuring that punishment is only doled out to those with the intellectual capacity to understand the nature of their offenses.

In answer to these competing interests, the American and British common law systems incorporated a structure of infancy defenses into their proceedings against young respondents accused of criminal acts, which placed a burden on the state to prove that respondents between the ages of seven and fourteen were capable of forming criminal intent before they could be prosecuted.¹ This rule evolved out of the belief that, as a general rule, children under fourteen are incapable of fully understanding the ramifications of their actions. While this belief remains deeply engrained in American jurisprudence in a number of areas, with the advent of juvenile justice systems, infancy protections were stripped out of most proceedings against children under fourteen accused of criminal acts.² States primarily justified this change on the grounds that the capacity to form criminal intent is an irrelevant consideration within a civil system designated to rehabilitating wayward youth.³

With the trend towards more punitive juvenile justice policies in the 1980s and ‘90s, some state courts have begun to recognize the need for infancy defenses in juvenile courts to protect children from functionally punitive state action.⁴ However, the vast majority of states maintain decades-old precedents banning infancy defenses. As a result, while there has been significant advocacy on the issue, the reinstatement of such defenses has seen little progress in the courts as such action

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¹ See generally Frederick Woodbridge, Physical and Mental Infancy in the Criminal Law, 87 U. PA. L. REV. 426, 434 (1939) (explaining the development of common law infancy defenses).


³ See id.

⁴ See, e.g., In re Tyvonne, 558 A.2d 661, 666 (Conn. 1989).
requires a judiciary willing to make a serious departure from precedent on largely policy grounds. This Note suggests that the Texas Supreme Court case *In re B.W.* demonstrates an alternative means of pushing the law on juvenile sex offenses towards the recognition of infancy, without relying exclusively on nineteenth century common law and policy arguments.

In *In re B.W.*, the Texas Supreme Court held that because of their inability to consent to sex as a matter of law, minors under the age of fourteen may not be charged with the crime of prostitution. In doing so, the Texas Supreme Court found that as a threshold issue, minors under the age of fourteen were legally incapable of “knowingly” engaging in prostitution under section 43.02 of the Texas Penal Code because “the legal capacity to consent . . . is necessary to find that a person ‘knowingly agreed’ to engage in sexual conduct.” The court posited that statutory rape laws are an indication of a legislative determination that children under fourteen lack the capacity to grasp the moral ramifications of sexual activity. In so doing, the court appears to use statutory rape laws as a legislatively established infancy standard, which precludes children under fourteen from being adjudicated delinquent for crimes involving sexual acts.

Since the decision was handed down, however, Texas courts have continued to find preadolescent juveniles legally capable of “intentionally or knowingly” committing sexual assault. Texas courts have thus far succeeded in avoiding the question of whether or not the infancy defense accepted in *In re B.W.* extends to other sexual crimes committed by preadolescents on appeal. However, the dissent’s claim that the decision did preclude the continued prosecution of children under fourteen for all sexual crimes, the wording of the decision, and equal protection principles all seem to suggest that the extension of the infancy defense to cover sexual assault is legally mandated.

This Note seeks to place *In re B.W.* within the framework of the reemergence of infancy defenses in juvenile courts and to suggest that the case represents an alternative method for reincorporating aspects of infancy into juvenile adjudications. The first part of this Note discusses the history of infancy defenses, beginning with the defense’s inception in early common law and following the progression of precedent through the modern standard. The second part of this

5. *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010).
6. Id. at 824.
7. Id. at 822–23 (citing TEX. PENAL CODE ANN. § 22.011 (West 2013), which classifies sexual activity with children under fourteen as sexual assault).
10. See *In re B.W.*, 313 S.W.3d at 827 (Wainwright, J., dissenting) (arguing that the majority’s holding that minors under the age of consent are statutorily incapable of fulfilling the intent requirement of prostitution charges necessarily meant that children under the age of consent could not fulfill other sexual intent requirements).
Note discusses the In re B.W. decision and the implications of that decision on children under fourteen charged with sexual assault. The final section looks at the potential impact that the recognition of sexual infancy could have on juvenile offenders nationwide, and it maintains that sexual crime, in particular, is ripe for the reintroduction of the criminal culpability of youth as a consideration to be weighed within the juvenile justice system.

I. INFANCY DEFENSES IN HISTORY AND AMERICAN JURISPRUDENCE

Although infancy defenses, in one form or another, have existed in Western legal systems throughout most of its history, these defenses are currently not available in most family courts within the United States. Understanding the trend away from the presumption of infancy requires an understanding of the history of common law infancy defenses and the movement away from common law practices, which occurred with the advent of separate juvenile courts. At the time of their creation, it was assumed that within these new rehabilitation-based systems, criminal culpability, which was central to the notion of just punishment at common law, was no longer a vital component in determining whether the state should intervene in the life of a wayward child. Put into this context, the recent reconsideration of infancy defenses by some jurisdictions can be seen as part of a broader trend in American jurisprudence towards reconceptualizing juvenile justice and recognizing the ways in which delinquency adjudications and sanctions have begun to become less and less distinguishable from adult criminal proceedings.

A. The History of Infancy Defenses

Laws identifying children as less criminally responsible for their actions because of their diminished mental capacity have appeared in penal codes dating back to the Code of Hammurabi. Although the articulations and specifications of the infancy defense have varied over time, they all sought to draw a distinction between those who were doli incapax, or lacked the capacity to form criminal intent, and those who could be held accountable for their crimes.

Under Roman law, this line was drawn at seven, with children under that age deemed categorically incapable of forming criminal intent. In Medieval Britain, youth could, and occasionally did, provide a basis for pardoning an offender, but these grants of mercy lacked the consistency and conceptual underpinnings present in Roman law. The availability of automatic defenses for children built on the

12. See In re Devon T., 584 A.2d at 1289; Kaban & Orlando, supra note 11, at 36.
13. See Kaban & Orlando, supra note 11, at 36.
14. The laws of Aethelstan specified that robbers above the age of twelve should not be pardoned for robbery where the stolen property exceeded a certain value. Scholars seem to think that pardons for robbers under the age
The premise of *doli incapax* only emerged officially in the British Common Law system after findings of mens rea became a required component of criminal conviction in the thirteenth century.15 Mens rea required not only that the actor intended to commit the offense in question, but also that the actor committed the offense as a “responsible moral agent for wicked purposes.”16 With the recognition of mens rea as a prerequisite for criminal liability, a number of defenses emerged to preclude those who acted without malicious intent from prosecution.17 The infancy defense, which can be seen in cases dating back to 1302,18 developed in this vein.

Though not formalized until the end of the sixteenth century,19 the infancy defense posits that, “infancy renders the child incapable of conviction for a criminal act as a threshold issue.”20 In Britain, at common law, children were placed into three categories21 based on their potential for criminal culpability. Children younger than seven were recognized as incapable of forming criminal intent and, as such, could not be charged.22 Children fourteen or older, on the other hand, were seen as fully accountable for their actions, and, until the development of juvenile courts in the late nineteenth century, faced the same punitive sentences as adults.23 Children between the ages of eight and thirteen were viewed as having
presumptive but rebuttable incapacity.24 Under this framework, children aged eight to thirteen could not be convicted for criminal conduct unless the state could prove beyond a reasonable doubt that they acted out of malice.25 Malice was a somewhat amorphous concept in British common law, with some legal scholars asserting that malicious intent behind the act in question needed to be demonstrated, and others declaring that malice could be established if the child was sufficiently mature to comprehend the consequences of their actions in general.26

As with most American common law principles, the infancy defense was imported from Great Britain during colonization and remained in effect after the United States was formed.27 Under American common law, the same rebuttable presumption of incapacity was extended to minors between the ages of eight and fourteen28 with malice hinging solely on children’s capacity to understand the wrongfulness of their actions, not maliciousness behind specific acts.29 Though many children were held fully accountable and subjected to serious, often physical, punishments in the United States,30 cases such as State v. Adams exemplified the serious effect infancy defenses could have when children between the ages of seven and thirteen faced criminal charges.31 In that case, the conviction of a twelve-year-old boy accused of stabbing a seventeen-year-old was reversed on the grounds that the jury was not properly instructed that they needed to find “evidence strong and clear beyond all doubt and contradiction” to overcome the common law presumption that a twelve-year-old lacks the malice required for a

24. See id.
25. See id. at 709. In order to overcome the presumption of incapacity, the state must show that the accused child is capable of forming criminal intent beyond a reasonable doubt. In Commonwealth v. Durham, the State’s failure to produce evidence to refute the presumption of a nine-year-old defendant’s incapacity to form criminal intent resulted in the case being overturned on appeal. 389 A.2d 108, 109–10 (Pa. Super. Ct. 1978).
27. See Carter, supra note 2, at 711 (describing the 1786 case of Hannah Ocuish, a twelve-year-old girl charged with murdering a six-year-old child, which demonstrates the application of the same common law principles shortly after Independence).
28. It is important to note that while infancy standards in the United States maintained the same “rebuttable presumption” that existed at common law in Britain, the application within American courts came to mirror specific American social realities. This is illustrated most notably in the disparate rates of findings of malice between white and black children. See generally Robin Walker Sterling, “Children Are Different”: Implicit Bias, Rehabilitation, and the “New” Juvenile Jurisprudence, 46 LOY. L. A. L. REV. 1019, 1044–45 (2013) (discussing eight murder cases that considered infancy, where all four white children were ultimately found incapable of forming malice, while two of the four black children were found to have malicious intent and were executed).
29. See, e.g., State v. Guild, 10 N.J.L. 163, 167–70 (N.J. 1828) (finding the fact that a defendant was identified as a “cunning smart boy” who was known to be “smarter than common black boys of his age” sufficient to find malice, even though there was significant testimony that his “bad actions proceed[ed] more from passion than from malice”).
30. See, e.g., id. at 163 (where the twelve-year-old defendant was executed); Godfrey v. State, 31 Ala. 323 (Ala. 1858) (where an eleven-year-old defendant was convicted and executed for killing a four-year-old).
31. State v. Adams, 76 Mo. 355 (Mo. 1882).
murder conviction.\textsuperscript{32}

Although the protection extended to children between the ages of seven and fourteen is consistently identified as the infancy defense, it is important to note that in the United States at common law the application of infancy protections did not rely on the matter being raised by defense counsel, but instead acted to modify the responsibility of the prosecution and judge.\textsuperscript{33} As such, many of the nineteenth century infancy appeals are more procedural than anything else, overturning lower court decisions for failure to properly instruct juries on the presumption of incapacity or for applying the wrong standard of proof rather than delving deeply into the concept of malice.\textsuperscript{34} Although some states, including Texas, began to statutorily alter the common law age of presumptive criminal capacity,\textsuperscript{35} significant changes to the infancy structure did not occur until the advent of the juvenile justice system.

\textit{B. The Decline of Infancy Defenses with the Rise of Juvenile Justice}

The concept of separate juvenile justice proceedings grew out of late nineteenth century paternalistic reform concerns. Wanting to save children from the evil influences that surrounded them, reformers saw juvenile proceedings as methods of setting redeemable youths on the right path before delinquent tendencies solidified into an unshakable lifelong criminal path.\textsuperscript{36} These new courts were centered on the principle of \textit{parens patriae}, which conferred onto the state guardianship of all children within its jurisdiction deemed to be in need of intervention.\textsuperscript{37} The revised systems purported to view juvenile offenders as simply another class of youth in need of state services. Under this theoretical framework, youth charged with crimes were indistinct conceptually from orphaned wards of the state, and, as such, court proceedings against them were classified as civil proceedings, and criminal convictions were replaced by delinquency findings.\textsuperscript{38} Many scholars have challenged the notion that juvenile sanctions were ever

\begin{itemize}
\item \textsuperscript{32} Id. at 355, 357–58.
\item \textsuperscript{33} See, \textit{e.g.}, id. at 357–58 (reversing the defendant’s conviction for murder in part because of the judge’s failure to properly instruct the jury on infancy).
\item \textsuperscript{34} See, \textit{e.g.}, Martin v. State, 8 So. 858, 861–62 (Ala. 1891) (reversing a child’s manslaughter conviction in part because the lower court failed to properly include questions of infancy when instructing the jury); Wusnig v. State, 33 Tex. 651, 652 (Tex. 1870) (reversing a minor’s conviction due, in part, to the judge’s “with[drawal] from the jury any consideration of the question of infancy and responsibility”).
\item \textsuperscript{35} Carter, \textit{supra} note 2, at 714–15; Gardiner v. State, 33 Tex. 692, 696 (Tex. 1870) (citing a statute of the time that stated, “[n]o person shall in any case be convicted of any offense committed before he was of the age of nine years; nor of any offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense”); Woodbridge, \textit{supra} note 1, at 436 n.64 (citing state codes from Minnesota, New York, and Washington that fixed the presumptive age of incapacity at twelve, rather than fourteen).
\item \textsuperscript{36} See Kaban & Orlando, \textit{supra} note 11, at 41–42 & n.48.
\item \textsuperscript{37} See \textit{id}. at 41; Walkover, \textit{supra} note 22, at 515–16.
\item \textsuperscript{38} See Kaban & Orlando, \textit{supra} note 11, at 41–42; Carter, \textit{supra} note 2, at 720–22.
\end{itemize}
non-punitive in nature. In discussing early juvenile proceedings, Zimring insists that, from the beginning, juvenile treatment programs were “punitive in intent as well as in effect” and that juvenile courts have always considered retribution in addition to the purported best interest of the child when adjudicating cases.39

However, despite the demonstrably punitive nature of juvenile detention and sanctions, the majority of American lawmakers and judges accepted the notions that juvenile proceedings were rehabilitative and conducted with the best interest of the child in mind. This led to the disintegration within the juvenile justice system of a number of previously available avenues of relief for young offenders, including the infancy defense.40 Although systems varied from state to state, the due process rights of juveniles across the country were severely limited, with access to counsel, the right to be free from self-incrimination, the right to trial by jury, and the right to notice all diminishing or being entirely eliminated under the new court systems.41 Courts reasoned that as juveniles did not face the same potential for loss of liberty as adults, they no longer required the same protections from the criminal justice system.42 Carter explains the link between the downfall of the infancy defense and the nature of the new juvenile justice systems by saying, “Once criminal culpability and punishment were removed from the equation, the courts generally concluded that the capacity to form criminal intent—to know right from wrong—became irrelevant and the infancy defense, therefore, inapposite.”43

The irrelevancy of the capacity to form criminal intent continues to form the basis for the inadmissibility of infancy defenses in juvenile courts in a number of states. In State v. D.H., the Florida Supreme Court applied this logic in finding that the “extensive protections” granted by the juvenile justice system made capacity determinations irrelevant,44 and that the infancy defense was inapplicable and would “frustrate the remedial purposes” of juvenile sanctions.45 Some judicial decisions not only reject the notion that infancy should absolve juveniles of culpability in delinquency proceedings, but seem to see delinquency findings as providing a solution for a young offender’s lack of mens rea, saying “[t]he child is

40. See Carter, supra note 2, at 721 (citing Juvenile Court of Shelby Cnty. v. State ex rel Humphrey, 201 S.W. 771, 773 (Tenn. 1918)).
42. See Francis Barry McCarthy, The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings, 10 U. MICH. J.L. REFORM 181, 194–95 (1977) (citing In re Betty Jean Williams, No. 27-220-J (D.C. Juv. Ct. Oct. 20, 1959)) (holding that mens rea was an inappropriate consideration because the purpose of juvenile proceedings is to provide treatment).
43. Carter, supra note 2, at 722.
45. Id. at 1165.
delinquent, not because he committed a crime, but . . . because he requires supervision, treatment or rehabilitation . . . . He is not to be punished but afforded supervision and treatment to be made aware of what is right and what is wrong so as to be amenable to the criminal laws.”46 As of 2007, thirteen states continued to maintain that the rehabilitative nature of the juvenile justice system rendered infancy defenses inadmissible in juvenile courts.47

II. RECOGNITION OF PUNITIVE JUVENILE SYSTEMS AND A REINTRODUCTION OF INFANCY?

While the rehabilitative origins of juvenile courts continue to impact juvenile justice policy in a number of states, in recent decades many jurisdictions have begun to recognize the punitive nature of juvenile adjudications. This process undoubtedly began in the 1960s, when the Supreme Court began to scrutinize the due process rights that had been stripped out of juvenile adjudications.48 The Court admonished juvenile courts for offering child defendants “the worst of both worlds,” affording them “neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”49 In the landmark decision In re Gault, the Supreme Court heard a habeas corpus appeal from the parents of a fifteen-year-old boy who was committed to a prison-like state industrial school for six years after he and another boy were accused of making “lewd telephone calls” to a neighbor, an offense for which the maximum adult sentence was only two months in jail.50 The Court found the Arizona Juvenile Code unconstitutional and asserted that juvenile defendants are entitled to due process protections under the Fourteenth Amendment, specifically, the privilege against self-incrimination and the rights to notice, counsel, confrontation and cross-examination, and appellate review.51

Throughout the opinion, the Court placed significant emphasis on the “tremendous consequences” of the sanctions leveled by juvenile courts.52 However, the Court in Gault only addressed due process procedures afforded to adults that were denied to juvenile offenders, leaving unanswered the question of whether the infancy defense, which was similarly stripped from delinquency proceedings

49. Kent, 383 U.S. at 556.
50. Gault, 387 U.S. at 1, 3–4, 7–8.
51. Id. at 31–58.
52. Id. at 57 (citing Kent, 382 U.S. at 554).
because of their non-punitive nature, should be reinstated in light of the Court’s decision.

In the decades following *Gault*, juvenile justice systems underwent undeniably punitive transformations as the “get tough” theory of criminology came to dominate national discourse in the 1980s and ’90s. This move towards more punitive justice policies has been attributed to a number of factors. For some scholars, criminal and juvenile justice policy during this era can be seen as an outgrowth of the Republican “Southern Strategy,” which began in the 1960s and came to its zenith during the Reagan Administration.53 Following the Democratic Party’s decision to support civil rights legislation in the 1960s, the previously impenetrable South became open to political party conversion.54 By using “crime” and “welfare” as code words for race in deeply racialized Southern communities, Republican politicians were able to use “get tough” criminal justice platforms to their electoral advantage.55

Other scholars have identified a spike in juvenile homicides between 1986 and 1994,56 as well as increased news coverage of crime,57 as possible motivations behind “get tough” on crime policies aimed at juveniles. This increase in coverage might help explain why eighty-two percent of adults polled in 1994 indicated a sincere belief that serious juvenile crime increased in their states during the preceding three years, despite the fact that the 1990s saw the steepest decline in violent crime in over five decades.58

Whatever the motivations behind shifting public sentiment on juvenile justice, states across the country responded with a bevy of “get tough” juvenile policies. Between 1992 and 1995, forty states passed laws that made it easier for prosecutors to have juveniles tried in adult courts.59 As a result of these changes, the

55. Feld, supra note 53, at 1451; see also C.K. Rowland et al., *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: the Reagan Judges,* 22 LAW & SOC’Y REV. 191, 194 (1988) (discussing how Reagan used criminal justice in campaigns by alluding that if the Democrats gained control of the Senate, they would jeopardize federal judge appointments, stating, “‘We don’t need a bunch of sociology majors on the bench. What we need are strong judges . . . who do not hesitate to put criminals where they belong, behind bars’”); *Tonry,* supra note 53, at 303–04 (explaining in detail how the use of the Willie Horton anecdote in the 1988 presidential election represented a continuation of the Southern Strategy focusing on “crime” as a racially-coded topic).
58. *Id.* at 409 (quoting Gary LaFree, *Explaining the Crime Bust of the 1990s,* 91 J. CRIM. L. & CRIMINOLOGY 269, 269 (2000)).
number of delinquency cases moved into adult criminal courts increased by seventy-one percent between 1985 and 1994. Sentencing within the juvenile justice system became harsher as well, with about half of the states adopting determinate or mandatory minimum sentencing criteria for juvenile adjudications. Finally, involvement with the juvenile courts began to have longer-term implications, with forty-seven states opting to eliminate or reduce the confidentiality of juvenile court records and proceedings.

Many states even took the time to change the stated objectives of their juvenile justice systems, shying away from statements of rehabilitation and switching instead to public safety. Texas is a prime example of such shifts in rhetoric, revising the primary statutory purpose of the Juvenile Justice Code in Texas in 1995 from “provid[ing] for the care, the protection, and the wholesome moral, mental, and physical development of children,” to “provid[ing] for the protection of the public and public safety . . . [and] promot[ing] the concept of punishment for criminal acts.” Given the shifts in policy, sentencing, and public perception discussed above, it is no wonder that many scholars now argue that, in terms of its social implications, being branded delinquent no longer differs substantially from being labeled criminal. Put into this context, the notion that children facing delinquency adjudications only have need of due process protections but not the substantive protections that were once afforded them at common law begins to ring hollow, and a number of jurisdictions and scholars have started to call for the restoration of the infancy defense.

One example of courts reconsidering infancy defenses within delinquent adjudications can be seen in the Court of Special Appeals of Maryland’s decision to overrule its previous ban on the infancy defense in juvenile proceedings in In re Devon T. In the case, a thirteen-year-old youth was accused of possessing heroin after he was instructed to turn out his pockets by a middle school security guard. While the court acknowledged its former position that the rehabilitative nature of juvenile proceedings made the infancy defense unnecessary, it ultimately overruled its holding in In re Davis and required the prosecution to overcome a presumption of criminal incapacity in cases involving respondents under the age of

61. Feld, supra note 53, at 1567 & n.529.
64. Id. at 233–34 (quoting Tex. Fam. Code Ann. § 51.01(2)(A) (West 1996)) (quotation marks omitted).
65. See Kaban & Orlando, supra note 11, at 42–43.
67. Id. at 1289.
In doing so, the court concluded that in light of the constitutional need to prove both the mental and the physical elements of a juvenile case beyond a reasonable doubt, and the undeniably punitive nature of juvenile delinquency proceedings, reinstatement of common law infancy defenses in juvenile court was necessary to insure juvenile due process. In speaking about the evolution of the juvenile courts into a more punitive system, the court made clear its view of current juvenile justice processes in saying, “Although continuing to stress rehabilitation over retribution more heavily than did the adult criminal courts, delinquency adjudications nonetheless took on, in practice if not in theory, many of the attributes of junior varsity criminal trials.”

III. INFANCY TRENDS IN IN RE B.W.

In 2011, the Texas Supreme Court handed down a decision in In re B.W., which held that children under the age of consent cannot be adjudicated delinquent for the crime of prostitution because of their statutory inability to consent to sex. In so doing, the court left open the question of whether or not children could continue to be adjudicated delinquent for other sexual crimes with similar knowledge and intent requirements. Although Texas courts have thus far managed to avoid deciding on that issue, the holding in In re B.W. does present a new potential avenue for infancy protections within juvenile justice systems, one which relies on current statutory law rather than well-reasoned, but dated, common law practices.

A. The In re B.W. Decision

While it did not deal directly with infancy defenses, the decision handed down by the Texas Supreme Court in In re B.W. relied on the prevailing arguments in favor of the infancy defense in construing statutory rape laws as a determination of the inability of children to fulfill the mens rea requirement of prostitution. In In re B.W., a thirteen-year-old girl was adjudicated delinquent for engaging in prostitution after she offered to perform oral sex on an undercover cop for twenty dollars. Under Texas Penal Code section 43.02(a)(1), a person commits the crime of prostitution if the person “knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee.” A person commits the crime of prostitution if the person “knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee.” Under Texas law, “[a] person acts knowingly, or with knowledge, with respect to the nature of his conduct . . . when

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68. Id. at 1291–92 (citing In re Davis, 299 A.2d 856, 856 (Md. Ct. Spec. App. 1973)).
69. Id. (citing Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970)).
70. Id. at 1292.
71. Id. at 1291.
72. In re B.W., 313 S.W.3d 818 (Tex. 2010).
73. See In re O.D.T., No. 13-12-00518-CV, 2013 WL 485754, at *1 (Tex. App. Feb. 7, 2013) (avoiding the defense’s argument about In re B.W. by finding that the habeas petition was not yet timely).
74. In re B.W., 313 S.W.3d at 819.
75. TEX. PENAL CODE ANN. § 43.02(a)(1) (West 2013).
76. In re B.W., 313 S.W.3d at 820 (quoting § 43.02(a)(1)) (quotation marks omitted).
he is aware of the nature of his conduct.”77 Going off of this definition of knowledge, the court framed the issue on appeal around the question of whether or not children under fourteen are aware of the nature of sexual conduct.78

In its explanation of the doctrine, the court stated, “[t]he rule’s underlying rationale is that younger children lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent.”79 Through this assertion, the court directly engaged with the common law theories on children, which addressed their impaired decision-making by both limiting children’s ability to consent in sexual and contractual matters and by giving them the benefit of infancy protections in criminal proceedings.

The court next incorporated Texas’ statutory rape laws into this framework. According to the court, by disallowing the defense of actual consent from being raised by people accused of having sexual contact with minors under the age of fourteen, the legislature communicated an absolute determination that, under Texas law, children under fourteen cannot legally consent to sex.80 Applying this statutory and common law determination to the crime of prostitution, the court concluded: “Given the longstanding rule that children under fourteen lack the capacity to understand the significance of agreeing to sex,” they are incapable of meeting the knowledge requirement the prostitution statute requires.81 For the court, this finding was made even more compelling by the method through which criminal law is applied to juveniles in Texas, where the criminal law was transferred into juvenile courts almost wholesale.82 As such, the court asserted that in writing the prostitution statute for adults, the legislature likely had no intent to criminalize the actions of children under the age of fourteen, all of whom are statutorily identified as victims of sexual crime whenever they are involved in sexual activity. In making this legislative intent argument, the court built off of the laws regarding incest, which, if strictly applied, would criminalize both the actions of fathers and their minor children, but which Texas courts have rightfully decided to apply differently to minors.83

The reasoning given by the court after its application of consent laws is particularly relevant to the relationship between In re B.W. and the reintroduction of the infancy defense in juvenile courts more generally in other states. Following

77. Id. (quoting § 6.03(b)) (quotation marks omitted).
78. Id. at 823.
79. Id. at 820.
81. Id. at 822.
82. Id. at 819–20 (“[T]he Legislature made a blanket adoption of the Penal Code into the Texas Family Code, which provides that the juvenile justice courts have jurisdiction in all cases involving delinquent conduct of children between the ages of ten and seventeen.”) (citing TEX. FAM. CODE §§ 51.02(2), .04(a) (West 2013)).
83. See id. at 822 (citing Duby v. State, 735 S.W.2d 555, 557 (Tex. App. 1987) (holding that a minor victim of incest cannot be charged as an accomplice because she is incapable of giving consent as a matter of law)).
its analysis of statutory rape laws, the court rejected the state’s arguments that the authority to adjudicate minors delinquent on prostitution charges is necessary to provide them with treatment they need. In so doing, the court seemed to be rejecting arguments based on the rehabilitative nature of juvenile adjudications, saying that preventing minors under the age of fourteen from being charged with prostitution will prevent them from being burdened by “the permanent stigma associated with being adjudged a prostitute” and will protect them from judges who might subject them to “harsh and punitive sentence[s].” The dissent directly recognized the majority’s conceptualization of juvenile adjudications as primarily punitive in nature saying, “The misguided result of the Court’s attempt to help has turned the juvenile justice system’s rehabilitative objective on its head.” The dissent’s support for the continued adjudications of children under fourteen for acts of prostitution rested largely on faith in the rehabilitative nature of the Juvenile Justice Code, which he asserted continued to function “to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions” as the legislature intended.

B. Application of In re B.W. to Other Sex Crimes

The dissent in In re B.W. made it clear that at the time the decision was passed down the justices were likely aware of the far reaching potential of the decision. Justice Wainwright’s dissent twice construed the decision to have implications on other sexual offenses, ending his argument by stating that through this decision, “[t]he Court globally declares that all thirteen-year-olds lack capacity to commit sex crimes.” However, since this decision was handed down there have been a number of cases where children under age fourteen have been charged with aggravated sexual assault, a sexual crime with a similar mens rea requirement. Because of the nature of family courts, many adjudicatory records are not available, so the actual number of juveniles adjudicated delinquent for sexual assault is unknown. From Texas’ reporting of its crime statistics, however, it is clear that in 2013, over 1500 of the 18,812 offenders involved in reported sexual

84. See id. at 825.
85. Id.
86. Id. at 827 (Wainwright, J., dissenting).
87. Id. at 835 (Wainwright, J., dissenting) (quoting Tex. Fam. Code § 51.01(3) (West 2013)) (quotation marks omitted). The rehabilitative nature of the juvenile justice system is listed again as a primary reason for his dissent in his conclusion where he states that “[t]he Legislature addressed the plight of minors such as B.W. by creating the juvenile justice system to offer a means, albeit not perfect, of hopeful rehabilitation.” Id. at 836.
88. Id. at 836 (Wainwright, J., dissenting).
assaults were fourteen or younger, suggesting that a significant number of youth under age fourteen continue to be processed through the juvenile court for sex offenses.

Since 2010, a number of cases in Texas involving offenders under age fourteen charged with sexual offenses have come up on appeal and are available for evaluation. While some of these cases do not comment at all on the mens rea element of the charge, two of them explicitly touch on the matter. In In re H.L.A., a thirteen-year-old boy was accused of sexually assaulting and unlawfully restraining a fifteen-year-old boy with high functioning autism. Although the charges for sexual assault were dismissed by the state, H.L.A was still subject to sex offender registration after he was adjudicated delinquent for unlawful restraint. The court found that he could still be registered as a sex offender despite his minor age at the time of the offense. However, in so doing, the court relied heavily on the fact that findings for unlawful restraint did “not require proof that H.L.A. engaged or offered or agreed to engage in sexual conduct,” and therefore was not subject to the ruling of In re B.W. By basing its decision on these grounds, the court inadvertently reaffirmed Justice Wainwright’s assertion that the precedent of In re B.W. applies in all cases where an element of the offense requires a child to knowingly engage in an activity to which they cannot consent.

Although it was decided on other grounds, the defendant’s brief in In re O.D.T. outlined the ways in which In re B.W. must preclude the adjudication of children under fourteen for sex offenses. O.D.T., an eleven-year-old charged with two counts of aggravated sexual assault of a child under fourteen, filed a habeas corpus petition on the grounds that adjudicating him delinquent under such charges was “fundamentally invalid as a matter of law” under In re B.W. The defense laid out three main justifications for a finding of mandatory infancy under the existing statutory and precedential framework—the legislative intent behind sexual assault laws, the inability to knowingly engage in acts one cannot consent to, and the

93. Id.
94. Id. at *6.
95. Id.
96. See id.
97. O.D.T.’s habeas appeal was dismissed on the grounds that the juvenile adjudication process had not yet taken place, and since juvenile delinquency findings are civil cases, the general rule that “an appeal may be taken only from a final judgment” applied. In re O.D.T., No. 13-12-00518-CV, 2013 WL 485754, at *1 (Tex. App. Feb. 7, 2013).
98. Id.
violation of equal protection in recognizing the incapacity of some but not all children to consent to and knowingly engage in sexual activity.99

In many ways the legislative intent arguments of the defense mirrored the framework of the legislative intent argument made in In re B.W. The defense argument rested largely on the wholesale adoption of the Penal Code into the Family Code as an indication that many of the provisions were not made with child offenders in mind.100 Because all sexual contact with children under the age of fourteen is automatically escalated to aggravated sexual assault, a charge otherwise reserved for forcible rape, the effect is such that even a finding of consensual sexual activity between two children under the age of fourteen would expose them both to high-level sexual assault charges. Playing off the absurdity of this result, the defense asserted that “the Legislature could not have contemplated that [section] 22.021 would be used to criminalize a sex act between two children who are both under fourteen years of age.”101

The defense then went on to assert the precedent of In re B.W. as standing for a blanket ban on findings of criminal culpability for children thirteen and under in crimes involving knowing engagement in sexual activity.102 The defense relied both on the wording of In re B.W. itself, and on constitutional standards of equal protection, saying:

The capacity of a child under fourteen to act knowingly about sex should not depend on whether he is being looked at as the alleged actor or the alleged victim. To be treated equally under the law, the same standard of protection should be given to any child under fourteen years of age. If O.D.T. is within that same protected age group or class of citizens recognized by the Legislature as a group of young children who cannot appreciate or understand sex, then O.D.T. should be afforded the same protection and not be prosecuted for an alleged act he cannot have appreciated or understood.103

The arguments laid out by the defense in In re O.D.T. capture many of the compelling reasons for extending the holding of In re B.W. to children under fourteen accused of other crimes requiring proof of knowing engagement in sexual conduct. The legislature’s communication through statutory rape laws of children’s inability to consent to sex clashes with the adoption of Penal Code section 22.021 into the Family Code just as forcefully as it conflicts with the statute criminalizing prostitution. Scholars from around the country have critiqued the application of statutes designed to criminalize adult pedophilia to underage offenders, who are medically incapable of being pedophiles themselves104 and

100. Id. at 4.
101. Id. (referring to TEX. PENAL CODE ANN. § 22.021).
102. Id. at 5.
103. Id. at 7.
104. See ZIMRING, supra note 39, at 65.
whose offenses against children are more a product of “hormones and opportunity”\textsuperscript{105} than a compulsive sexual attraction to children.

Furthermore, the decision not to limit the holding by distinguishing prostitution from other crimes that require knowing engagement in sexual conduct—especially when one of the justices hearing the case specifically flagged the application of the holding to sexual assault as a possibility—seems to validate such an application. Logically, there is no justification for having children’s ability to knowingly engage in conduct turn on the social reprehensibility of the conduct in question. Such an application of the precedent of \textit{In re B.W.} would be arbitrary and capricious. Accordingly, in the absence of a statutory response reaffirming the culpability of children under fourteen for sexual crimes, the holding of \textit{In re B.W.} should be applied to all children charged with crimes that require them to knowingly engage in conduct to which they cannot constructively consent.

IV. Why Does It Matter?

While the holding of \textit{In re B.W.} does seem to readily extend to juveniles accused of other sexual crimes, the holding, and other potential holdings grounded in statutory rape laws, speak only to infancy in sexual crimes, a far cry from the universal infancy standards afforded at common law. While this type of an infancy standard does offer its own advantages to young offenders by precluding sexual infancy from being rebutted for children thirteen and under, its scope may seem to some advocates to cover too limited a population to be worth pursuing. However, the introduction of sexual infancy defenses,\textsuperscript{106} like the one put forth in \textit{In re B.W.}, have the potential to have a tremendous impact on youthful offenders.

A. Patterns of Juvenile Sex Offense in America

The need for legal recognition of children’s inability to form criminal intent is particularly crucial when addressing juvenile sex offenses. This is due in part to the fact that sexual crimes are significantly more common among offenders under the age of fourteen than other types of crimes. According to the Office of Juvenile Justice and Delinquency Prevention, children under fifteen accounted for twenty-


\textsuperscript{106} It is worth noting that the infancy of sexual crime offenders was considered by some American courts at common law prior to the formation of juvenile courts. See, \textit{e.g.}, State v. Jones, 3 So. 57, 58 (La. 1887) (suggesting that fourteen was too high a limit to presume an incapacity to rape because most children hit puberty before fourteen, but stating that the legislature should establish an age with an non-rebuttable presumption of incapacity); Williams v. State, 14 Ohio 222, 225 (Ohio 1846) (determining that “[a]n infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or an attempt to commit it; but that presumption may be rebutted by proof that he has arrived at the age of puberty and is capable of emission and consummating the crime”).
seven percent of all juvenile arrests nationwide in 2011. \(^{107}\) During the same year, that age group accounted for an astounding forty-nine percent of the juveniles arrested for sex offenses other than prostitution and forcible rape. \(^ {108}\) The statistics for other years show similar patterns of offending, with the median age of all juveniles arrested for sex crimes other than forcible rape dipping as low as fourteen in 2001. \(^ {109}\) Studies have shown that juvenile sex offending increases substantially at age twelve and plateaus at fourteen. \(^ {110}\)

While the increase at twelve is well documented, this is not to say that children under twelve never offend. One in eight juvenile sexual offenders nationally are younger than twelve, \(^ {111}\) and children under twelve make up twenty-one percent of juvenile offenders with offenses against minors. \(^ {112}\) Ironically, these least culpable of offenders are committing crimes with the longest lasting criminal sanctions. \(^ {113}\) Because of these high offense rates, consideration of a subject-specific infancy standard is more than just a pedagogical exercise. For thousands of these children, the introduction of sexual infancy would allow for better recognition of their mental development in juvenile court and would better shield them from the adult-like registration requirements that often accompany such adjudications, while jurisprudentially recognizing their lack of capacity to form sufficient intent to be held culpable for their youthful offenses.

### B. Lifelong Consequences of Delinquent Adjudications for Sexual Offense

For many of these children, being adjudicated delinquent for a sexual offense has lifelong effects. Under the Sex Offender Registration and Notification Act of 2006, all sex offenders over the age of fourteen are required to register within the SORNA system. \(^ {114}\) While the act deliberately excludes offenders under the age of fourteen, at least twenty-six states have extended registration requirements to apply to juveniles in more extensive ways. \(^ {115}\) As a result, children as young as nine have been placed onto these registries, some of them for the remainder of their lives. \(^ {116}\) Being placed on a sex offender registry may exclude children from getting

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108. Id.

109. ZIMRING, supra note 39, at 45.


111. Id.

112. Id. at 4.

113. See Meiners-Levy, supra note 105, at 504.


115. Meiners-Levy, supra note 105, at 502 n.3.

116. See, e.g., In re Ronnie A., 585 S.E.2d 311 (S.C. 2003) (holding that the lifelong registration of nine-year-old did not violate due process).
vocational licenses,\(^{117}\) taking a job at companies that run background checks (including entry-level jobs at chain retail and fast food restaurants), or even living within a certain distance of a school.\(^{118}\) In addition to these formal barriers, many children whose names are on the sex offender registry have reported instances of serious harassment from peers and community members.

One fourteen-year-old girl who was subjected to a registration requirement explained the trauma of being featured on the sex offender registry.\(^{119}\) The girl was adjudicated delinquent when she was eleven years old for engaging in non-forcible fondling. When her registration was made public, news of her adjudication spread through her middle school like wild fire. She lost all her friends, had neighbors ask her parents to move away, and even began receiving anonymous phone calls from men asking her if she wanted to “hook up.”\(^{120}\)

For many children, the strain of being on the registry is too much to take and, unsurprisingly, suicide among children placed on the registry is fairly common.\(^{121}\) Even the threat of the registry is too much for some children, such as Noah M., a child who was adjudicated delinquent for a sexual offense at the age of eleven and committed suicide just shy of his eighteenth birthday when he would be forced to go on the public registry.\(^{122}\) According to his mother, the impending registration was a significant source of anxiety for Noah leading up to his suicide: “His picture, address and information on the Web . . . . He just couldn’t bear it.”\(^{123}\)

This issue is compounded by the fact that the types of crimes for which juveniles are being adjudicated delinquent, and publically branded, often appear to be more violent and pedophilic than they were. This is due to the fact that in forty states, juvenile offenders are adjudicated under adult criminal statutes,\(^{124}\) creating a situation where children under fourteen who offend against other children their age are subject to the same sex offender classifications as adult child molesters.\(^{125}\) In many states, crimes against minor children are automatically bumped up to

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\(^{120}\) Id.

\(^{121}\) See Human Rights Watch, supra note 118, at 52–53.

\(^{122}\) Id. at 53.

\(^{123}\) Id.

\(^{124}\) Meiners-Levy, supra note 105, at 499 n.1.

\(^{125}\) Id. at 504 (explaining that “[s]tates prosecute children under ‘aggravated sexual battery’ and ‘aggravated rape’ statutes because of the age of the victim, regardless of whether the victim is either a same age peer or close in age to the child charged”).
aggravated sexual assault based on the victim’s age.126 While the mandatory minimums and other sentencing features are not carried over to juvenile courts, once registered, youth who offend, or adults who offended as children, are indistinguishable from adult offenders. In the case of the fourteen-year-old girl discussed above, these classifications can lead to significant misunderstandings when viewed by community members. “People think I’ve done something worse than I did . . . [t]hey think I’m not a virgin,” she told Maggie Jones of the New York Times.127

These occurrences are not inexplicable externalities but rather the unanticipated consequences of the wholesale adoption of criminal codes into juvenile courts. “Nobody is making policy for 12-year-olds in American legislatures . . . they’re making crime policy and then almost by accident extending those policies to 12-year-olds—with poisonous consequences.”128 The prevalence of non-nuanced adoption of criminal codes into family court systems demonstrates the need for holdings like that in In re B.W., where courts decline to extend such criminal statutes to certain minors when they conflict with statutes specifically designed to protect children.129

In Texas, a state that fully adopted its criminal code into juvenile courts and so escalates charges when victims are under fourteen irrespective of the age of the offender, juveniles adjudicated delinquent for aggravated sexual assault are required to register as sex offenders.130 However, juvenile courts are required to enter an order exempting an offender from registration if the court finds: (1) that the protection of the public would not be increased by registration, or (2) that any potential increase in protection of the public resulting from registration is clearly outweighed by the anticipated substantial harm to the juvenile and the juvenile’s family that would result from registration.131 While this seems to offer significant protection to juveniles adjudicated delinquent for sexual assault in Texas, and certainly offers them more protections than some other states,132 in

127. Jones, supra note 119.
129. It is worth noting that there is national precedent for not extending statutes to populations the legislature did not intend to bind. In Gebardi v. United States, 287 U.S. 112 (1932), the Court considered whether a woman who had travelled across state lines for the purposes of engaging in “illicit sexual relations” could be prosecuted under Section 2 of the Mann Act, 18 U.S.C. § 398, for conspiring to transport herself. The Court determined that the statute had been enacted with the intention of protecting women from male traffickers and overturned the woman’s conviction on the grounds that holding women criminally liable for acquiescing to travel across state lines was clearly not the intent of Congress when it passed the Mann Act. Id.; see also Meiners-Levy, supra note 105, at 509.
130. TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(A) (West 2013).
131. Id. art. 62.352(a).
132. See, e.g., S.C. CODE ANN. § 23-3-430 (2012) ("Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere
application this statute has been far from protective—in 2007, over 3400 people were listed on the registry for offenses committed as juveniles.\textsuperscript{133}

The case \textit{In re Z.P.H.} exemplifies the way in which, even with these protections in place, the registration of children adjudicated delinquent for sexual offenses while under fourteen can affect low-risk youth.\textsuperscript{134} Z.P.H. was ten years old when he was adjudicated delinquent for aggravated sexual assault.\textsuperscript{135} Upon finding him delinquent, the court sentenced him to twenty-four months of probation.\textsuperscript{136} His probation required that he not only commit no further offenses and complete a sex-offender treatment program, but also that he not possess or view pornographic material and not have overnight guests at his house who were under seventeen-years-old.\textsuperscript{137} Over a year later, he was found in violation of probation for having viewed pornographic material, and, as a result, his probation was extended “for ‘not more than 53 months.’”\textsuperscript{138} When he was fifteen years old, he was found in violation of probation once more, this time for viewing pornography and “allowing his sixteen-year-old girlfriend to spend multiple nights with him in his bedroom.”\textsuperscript{139} The court responded to these probation violations by committing him indefinitely to detention under the Texas Juvenile Justice Department and requiring him to publicly register as a sex offender.\textsuperscript{140} \textit{In re Z.P.H.} demonstrates the way in which otherwise typical adolescent behavior, once viewed through the hypercritical lens of sex offender status, can have dire consequences for young children.

\textbf{C. Sexual Behavior, in Particular, Implicates the Differences Between Adults and Children That Infancy was Designed to Address}

Given the lifelong consequences associated with sex offender registration, and the relatively high number of children under fourteen who suffer from them,\textsuperscript{141} precluding these children from infancy defenses would only seem justifiable if there was something patently dangerous about youthful sex offenders. However, studies show that juvenile sex offenders encompass an extremely diverse population of children\textsuperscript{142} who are unlikely to re-offend sexually during childhood or

\begin{footnotesize}
\begin{footnote}{South Carolina courts have upheld this registration statute, which requires offenders to be listed online for life, even when applied to a nine-year-old offender. See \textit{In re Ronnie A.}, 585 S.E.2d 311 (S.C. 2003).} \end{footnote}
\begin{footnote}{\textsuperscript{133} Jones, \textit{supra} note 119.} \end{footnote}
\begin{footnote}{\textsuperscript{134} \textit{In re Z.P.H.}, No. 02-13-00188-CV, 2014 WL 670203, at \#1 (Tex. App. Feb. 20, 2014).} \end{footnote}
\begin{footnote}{\textsuperscript{135} \textit{Id.}} \end{footnote}
\begin{footnote}{\textsuperscript{136} \textit{Id.}} \end{footnote}
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\begin{footnote}{\textsuperscript{139} \textit{Id.}} \end{footnote}
\begin{footnote}{\textsuperscript{140} \textit{Id.} at \#2.} \end{footnote}
\begin{footnote}{\textsuperscript{141} This is as compared to children of the same age receiving other types of sanctions. See discussion \textit{supra} Part III.A.} \end{footnote}
\begin{footnote}{\textsuperscript{142} \textit{See} Jessie M. Kokrda, \textit{Juvenile Sex Offenders and the Virginia Transfer Statute: Let the Treatment Fit the Crime}, 24 \textit{Dev. Mental Health L.} 2, 3 (2005).} \end{footnote}
\end{footnotesize}
adulthood, and who tend to have substantively different motivations towards victims than adult offenders. Because of these factors, more so than most crimes, the differences between juvenile and adult sexual offenders are expansive, and turn on exactly the types of developmental factors that infancy was designed to address.

Conceptualizing the children who are charged with these crimes requires an understanding of both the developmental realities of children under fourteen and the types of crimes included under the instantly inflammatory “sex crime” label. These crimes vary from harrowingly violent forcible rapes, to consensual, non-penetrative sexual contact between pre-adolescent youth. The majority of crimes fall somewhere in between, with approximately sixty percent of the sexual offense charges against children thirteen and under being categorized as “forcible fondling.” Because of the prevalence of these types of charges, many experts see heightened rates of juvenile sexual offense in recent decades as simply an indication that “[w]e are paying attention to inappropriate sexual behavior that juveniles have engaged in for generations,” and attaching sanctions where there previously were none.

The diversity of charges included under the “sex crime” umbrella necessarily results in a diverse group of children who are labeled as sex offenders. According to Mark Chaffin, one of the leading experts on child sexual deviance, child sex offenders include:

- Traumatized young girls reacting to their own sexual victimization;
- Persistently delinquent teens who commit both sexual and nonsexual crimes;
- Otherwise normal early-adolescent boys who are curious about sex and act experimentally but irresponsibly;
- Generally aggressive and violent youth;
- Immature and impulsive youth acting without thinking;
- Those who are indifferent to others and selfishly take what they want;
- Youth misinterpreting what they believed was consent or mutual interest;
- Children imitating actions they have seen in the media;
- Youth ignorant of the law or the potential consequences of their actions;
- Youth attracted to the thrill of rule violation;
- Youth imitating what is normal in their own family or social ecology;
- Depressed or socially isolated teens who turn to younger juveniles as substitutes for age-mates;
- Seriously mentally ill youth;
- Youth responding

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143. See Zimring, supra note 39, at 119 (“[M]ost juvenile sex offenders neither re-offend sexually while in the juvenile system nor become chronic sex offenders as adults.”); Jones, supra note 119 (quoting an expert estimate that ninety percent or more of juvenile sex offenders will not become adult offenders).

144. Unlike adults who offend against children, most youth who offend against minors tend to do so out of opportunity, not based on a fixed sexual preference for children. See Zimring, supra note 39, at 65.

145. See Kokrda, supra note 142, at 3 (distinguishing between “sexual status offenders” whose acts are only criminal because of the age of their sexual partners and juveniles who engage in abusive conduct).

146. Zimring, supra note 39, at 46–47.

147. Jones, supra note 119 (quoting David Finkelhor, Director of Crimes Against Children Research Center at the University of New Hampshire).
primarily to peer pressure; youth preoccupied with sex; youth under the influence of drugs and alcohol; youth swept away by the sexual arousal of the moment; or youth with incipient sexual deviancy problems.148

As the Chaffin description suggests, this diversity along with the developmental realities that help create it, make youthful sex offenders integrally different from their adult counterparts. When compared to patterns of adult sexual offense, juvenile sexual misconduct is “generally less aggressive, often more experimental than deviant, and occurs over shorter periods of time.”149 Furthermore, programs developed to rehabilitate adult offenders have been deemed by many experts to be ineffective—sometimes even directly harmful—when used to rehabilitate children.150 These ineffective means range from therapy techniques that do little but mold children’s self-conceptualization into one where they are first and foremost “sex offenders,” to more dubious methods of testing for deviance such as penile plethysmography (PPG), which involves the placement of a band around a boy’s genitals in order to track his erectile responses to stimuli.151 Experts argue that the use of these methods when addressing adolescent offenders represents a complete misunderstanding of children’s mental and sexual development processes.152

Differences between child and adult sex offenders are especially pronounced when looking at crimes against children. “Early adolescence is the peak age for offenses against younger children.”153 Fifty-nine percent of juvenile sex offender victims are younger than twelve,154 meaning that many juveniles are being adjudicated delinquent under statutes designed to combat adult pedophilia.155 However, while these offenders often have the same registration labels attached to them, thousands of them are too young to be medically diagnosed with pedophilic tendencies. According to the American Psychiatric Association, a person must be

148. HUMAN RIGHTS WATCH, supra note 118, at 29 (quoting Mark Chaffin, 13 CHILD MALTREATMENT 110–21 (2008)).

149. Id. at 28.

150. See Jones, supra note 119 (“Experts worry that these experiences stigmatize adolescents and undermine the goals of rehabilitation.”).

151. See id. It is important to note that the use of PPG is on the decline and only about ten percent of Juvenile Sex Offender Treatment programs still employ the technique. Id. However, in the past, it was not unheard of for PPG tests to be administered on children as young as eleven or twelve. See id.; see also Jason R. Odeshoo, Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 TEMP. POL. & CIV. RTS. L. REV. 1, 36 (2004) (stating that the U.S. Department of Justice “suggests that the procedure is appropriate for children above fourteen years of age”).

152. See Jones, supra note 119 (pointing out that adult models do not take into account adolescent development); Odeshoo, supra note 151, at 37 (stating that the PPG “comes perilously close” to constituting molestation, “albeit more subtle” and “quasi-scientific”). Many experts have railed against the use of PPG by programs treating adolescents because it presumes a baseline of arousal similar to that of an adult male—not similar to other adolescent children. See Jones, supra note 119 (quoting psychologist Craig Latham, who comments on how easily children are aroused).

153. Finkelhor, supra note 110, at 2.

154. Id. at 4.

155. See discussion about incorporation of adult criminal statutes into juvenile justice codes supra Part IV.B.
at least sixteen years old and at least five years older than the prepubescent child they offend against in order for their behavior to lead to a pedophilia diagnosis.\textsuperscript{156} Furthermore, despite high rates of offense against minor children, the vast majority of juvenile sex offenders—between eighty-five and ninety-five percent—are not charged with subsequent sexual offenses.\textsuperscript{157} Among juveniles, crimes against younger children are more often “a combination of hormones and opportunity”\textsuperscript{158} than signs of serious sexual dysfunction. Elizabeth Letourneau, a professor at the Medical University of South Carolina, explains that adult sex offenders are not acting on opportunistic impulse, but tend instead to compulsively build towards their offenses, often through processes of “grooming” perspective victims.\textsuperscript{159} According to Letourneau, “[i]f you’re an adult child molester, you’re violating clear age and legal boundaries. You’re crossing over a lot of lines, so you have to be highly motivated.”\textsuperscript{160}

The need to differentiate between adult and child offenders is exceptionally crucial when considering sexual offenses. Given the prevalence of fondling and similarly non-violent interactions with victims whose consent is irrelevant, the capacity for young offenders to understand the sexual and criminal connotations of their actions is of heightened significance. Continuing to expose children to registration and other sanctions, absent an inquiry into their criminal culpability, seems logically and ethically unjustifiable.

**CONCLUSION**

The increasingly punitive nature of juvenile justice systems around the country necessitates a reconsideration of the defenses available to children who are faced with delinquent adjudications. Under the status quo, states can no longer justify diminishing the legal protections available to children on the basis of the rehabilitative benefits of delinquent adjudications. Few areas of the law make this reality more glaringly obvious than the laws and sanctions attached to sex offenses. A commitment to having a justice system based on punishing only those with the capacity to understand the nature of their crimes requires a reexamination of the application of sexual criminal codes to children.

The holding of *In re B.W.* demonstrates an avenue for restoring infancy defenses through litigation. By using sexual consent laws as evidence of a legislative communication of children’s inability to knowingly engage in sexual activity, the court in *In re B.W.* has provided a means of attacking the criminal culpability of children charged with sexual crimes in jurisdictions across the country. The diminished capacity for children under of the age of fourteen to understand the real

\textsuperscript{156} Zimring, *supra* note 39, at 65.

\textsuperscript{157} Finkelhor, *supra* note 110, at 3.

\textsuperscript{158} Meiners-Levy, *supra* note 105, at 506.

\textsuperscript{159} Jones, *supra* note 119.

\textsuperscript{160} *Id.*
meaning and consequences of sexual activity makes counseling, not arrest, trial, commitment, and registration on sex offender registries, the appropriate method for addressing young offenders. This approach allows for children to be dealt with on a case-by-case basis, without statutory labels grouping them with adult pedophiles, while still allowing juvenile courts to intervene when particularly violent youth engage in behavior that constitutes assault or other non-sexual offenses. The array of available methods of intervention adequately addresses and treats these problematic behaviors, without subjecting these children to the lifetime stigma and consequences associated with sex offender registry. This avenue of treatment and meaningful rehabilitation represents the best way of pursuing both the state prerogative in seeing the perpetrators of crimes punished for their actions, as well as our justice system’s commitment to rehabilitating youth while ensuring that punishment is only doled out to those with the intellectual capacity to understand the nature of their offenses.