

## NOTES

### FLORIDA'S STATUTORY RAPE LAW: A SHIELD OR A WEAPON? — A MINOR'S RIGHT OF PRIVACY UNDER FLORIDA STATUTES § 794.05

*B.B. v. State*, 659 So. 2d 256 (Fla. 1995).

Anthony M. Amelio\*

#### I. INTRODUCTION

On January 21, 1993, state prosecutors initially charged B.B., sixteen years old, with sexual battery after he had consensual sex with a sixteen-year-old female victim.<sup>1</sup> After deposing the victim, the State amended the petition to include a charge for unlawful carnal intercourse under section 794.05 of the Florida Statutes.<sup>2</sup> B.B. filed a motion to dismiss, which the circuit court judge denied.<sup>3</sup> In re-

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\* B.S., Florida State University, 1991; M.S., Florida State University, 1993; J.D., Stetson University College of Law, 1996.

1. *B.B. v. State*, 659 So. 2d 256, 257 (Fla. 1995).

2. *Id.* Section 794.05 is commonly known as the statutory rape statute and provides:

(1) Any person who has unlawful carnal intercourse with any unmarried person, of previous chaste character, who at the time of such intercourse is under the age of 18 years, shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) It shall not be a defense to a prosecution under this section that the prosecuting witness was not of previous chaste character at the time of the act when the lack of previous chaste character in the prosecuting witness was caused solely by previous intercourse between the defendant and the prosecuting witness.

FLA. STAT. § 794.05 (1995).

3. Petitioner's Brief on the Merits at 1, *B.B. v. State*, 659 So. 2d 256 (Fla. 1995). The motion to dismiss was made because the original petition was filed in excess of 45

sponse B.B. filed a motion to declare the statute unconstitutional and to dismiss the petition.<sup>4</sup> The circuit judge, relying on *In re T.W.*,<sup>5</sup> granted B.B.'s motion, finding section 794.05 unconstitutional by harming B.B.'s right to privacy under Article I, section 23 of the Florida Constitution.<sup>6</sup>

The State appealed, and relying on *Jones v. State*,<sup>7</sup> the Second District Court of Appeal reversed.<sup>8</sup> The court in the recently-decided *Jones* case found that another statutory rape section, section 800.04, was constitutional against a challenge of the right to privacy pursuant to Article I, section 23.<sup>9</sup> The Second District Court of Appeal also certified the following question to the Florida Supreme Court as a matter of great public importance: "Whether Florida's privacy amendment . . . renders section 794.05 . . . unconstitutional as it pertains to a minor's consensual sexual activity?"<sup>10</sup> HELD: Section

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days after Petitioner was taken into state custody. *Id.*

4. *B.B.*, 659 So. 2d at 258.

5. 551 So. 2d 1186 (Fla. 1989); see *infra* notes 101–20 and accompanying text.

6. *B.B.*, 659 So. 2d at 258. Article I, § 23 states: "Right of privacy. — Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, § 23. See *infra* notes 84–120 and accompanying text for a background discussion of this section.

7. 619 So. 2d 418 (Fla. 5th Dist. Ct. App. 1993), *aff'd*, 640 So. 2d 1084 (Fla. 1994).

8. *B.B.*, 659 So. 2d at 258.

9. *Id.* Section 800.04 states in pertinent part:

Lewd, lascivious, or indecent assault or act upon or in presence of child — A person who:

(1) Handles, fondles, or assaults any child under the age of 16 years in a lewd, lascivious, or indecent manner;

(2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;

(3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or

(4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years, without committing the crime of sexual battery, commits a felony of the second degree . . . . Neither the victim's lack of chastity nor the victim's consent is a defense to the crime . . . .

FLA. STAT. § 800.04 (1995). See *infra* notes 134–49 and accompanying text for a discussion of *Jones*.

10. *B.B.*, 659 So. 2d at 257.

794.05 is unconstitutional as it applies to a minor.<sup>11</sup> A minor has a right to privacy under Article I, section 23; and although there is a compelling governmental interest in regulating the activity, the State failed to show that the statute was the least intrusive means of regulating the minor's sexual behavior.<sup>12</sup>

The significance of the *B.B.* holding is that it essentially creates a privacy right for minors to engage in consensual sexual conduct with other minors.<sup>13</sup> This decision expands privacy rights jurisprudence in Florida, and the *B.B.* court's conclusion that the statute was not the least intrusive means to regulate the sexual activity of sixteen- to eighteen-year-olds is contrary to Florida precedent.<sup>14</sup> Giving minors the same privacy rights as adults may raise questions in the future concerning the constitutionality of other statutes regulating activities involving minors that may implicate privacy rights.<sup>15</sup>

This Note will begin with an overview of statutory rape laws across the country, and the constitutional challenges that those statutes have withstood.<sup>16</sup> The Note will then turn to the statutory rape statutes in Florida, with a brief historical discussion of the laws and previously asserted constitutional challenges.<sup>17</sup> The Note will also give a background of Florida's privacy amendment, including a discussion of the standard of review and the level of governmental scrutiny afforded to this constitutional protection.<sup>18</sup> The Note will also compare the background of Florida's privacy amendment

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11. *Id.*

12. *Id.* at 258–60.

13. *See id.* at 262 (Grimes, J., dissenting). Justice Grimes stated, “[i]n holding section 794.05 unconstitutional as applied, the majority appears to be saying that a sixteen-year-old child has a constitutional right to engage in sex with another sixteen-year-old child, though an older person would not have such a right.” *Id.* *See infra* notes 182–91 and accompanying text for a critique of the majority on this point.

14. *See Jones v. State*, 640 So. 2d 1084 (Fla. 1994); *see infra* notes 134–49 and accompanying text.

15. The state prohibits minors from engaging in a variety of activities that are available to adults including purchasing alcohol and gambling. *See* FLA. STAT. § 562.11 (1995) (possession of an alcoholic beverage by a minor); FLA. STAT. § 849.04 (1995) (gambling by a minor).

16. *See infra* notes 35–75 and accompanying text.

17. *See infra* notes 76–83 and accompanying text.

18. *See infra* notes 84–149 and accompanying text.

with the federal right to privacy.<sup>19</sup> After discussing the *B.B.* court's analysis, this Note will criticize the *B.B.* court's application of the standard of review in view of Florida precedent and will conclude that a privacy right did not attach.<sup>20</sup> Finally, the Note will suggest legislative alternatives that will clarify and modernize Florida's statutory rape laws.<sup>21</sup>

## II. HISTORICAL OVERVIEW

Statutory rape laws have been in existence as long as laws have existed.<sup>22</sup> They are "at least as ancient as the 4000-year-old Code of Hammurabi."<sup>23</sup> England adopted its statutory rape law in 1275, with the age of consent set at twelve years old.<sup>24</sup> The English law, later adopted by the American legal system, made statutory rape a strict liability offense for which mistake of age or consent would not exculpate a defendant.<sup>25</sup> However, many statutory rape laws, including Florida's statutory rape laws, allow for the "promiscuity defense" in which the victim's previous sexual activity can be asserted to exonerate the accused.<sup>26</sup>

The age of consent in the United States was originally rather low, from ten to twelve years old.<sup>27</sup> But, around the turn of the century, states began raising the age, some to twenty-one years old.<sup>28</sup> The increased minimum age reflected a change in the purpose of the statute. Originally, the statute reflected the notion that young girls were unable to give legal consent.<sup>29</sup> However, "in an effort to protect young women of marriageable age from consensual nonmarital sex-

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19. See *infra* notes 85–86 and accompanying text.

20. See *infra* notes 180–91 and accompanying text.

21. See *infra* notes 206–15 and accompanying text.

22. See Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 24 (1994).

23. Rita Eidson, *The Constitutionality of Statutory Rape*, 27 UCLA L. REV. 757, 762 (1980).

24. Oberman, *supra* note 22, at 24.

25. *Id.*

26. *Id.* at 26; see *B.B. v. State*, 659 So. 2d 256, 260–61 (Fla. 1995) (Kogan, J., concurring) (criticizing the "previously chaste character" requirement in § 794.05 of the Florida Statutes); see *supra* note 2 for the current text of § 794.05.

27. See Eidson, *supra* note 23, at 762.

28. *Id.*

29. *Id.*

ual intercourse,” the age of consent was increased in the United States.<sup>30</sup> Reflecting this underlying rationale, all statutory rape statutes originally punished only males.<sup>31</sup> Although many states now have gender-neutral statutory rape provisions, some states retain the gender-specific language.<sup>32</sup>

Statutory rape laws initially did not address the relative age of the “perpetrator” and “victim.” Because “the male's age is not an element of the crime, traditional statutory rape laws have failed to distinguish the consensual acts of peers from the sexual exploitation of adolescent females by older men.”<sup>33</sup> However, many states now vary the degree of punishment based on the disparity in the ages of “victim” and the “perpetrator.”<sup>34</sup>

#### A. Constitutional Challenges of Statutory Rape Laws

Statutory rape statutes nationwide have faced constitutional challenges on many grounds, including equal protection, vagueness, and privacy, either under a state constitutional provision or under substantive due process.<sup>35</sup> The constitutionality of statutory rape laws has been almost universally upheld.<sup>36</sup> The cases discussed in

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30. *Id.* at 762–63.

31. *Id.* at 760.

32. Eidson, *supra* note 23, at 765.

33. *Id.* at 757.

34. *Id.* at 766 n.51. See ALA. CODE § 13A-6-61 (1995), for an example of varying punishment based on the relative age of the perpetrator and victim.

35. See Ferris v. Santa Clara County, 891 F.2d 715 (9th Cir. 1989), *cert. denied*, 498 U.S. 850 (1990).

36. See Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 467 n.1 (1980); Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979) (upholding Maine's statutory rape statute against challenges based on equal protection); Anderson v. Alaska, 562 P.2d 351 (Alaska 1977) (upholding the constitutionality of Alaska's statutory rape statute against challenges of overbreadth and violation of privacy rights under Alaska's constitution); *In re B.L.S.*, 449 S.E.2d 823 (Ga. 1994) (finding Georgia's statutory rape provision constitutional against equal protection challenge from a minor); Barnes v. Georgia, 260 S.E.2d 40 (Ga. 1979) (upholding statutory rape statute against an equal protection challenge); Iowa v. Munz, 355 N.W.2d 576 (Iowa 1984) (finding Iowa's statutory rape statute constitutional against a challenge of violation of right to privacy under the United States Constitution); Goodrow v. Perrin, 403 A.2d 864 (N.H. 1979) (upholding the constitutionality of New Hampshire's statutory rape statute against a privacy challenge under the Fourteenth Amendment of the United States Constitution).

The author has found only three cases, aside from the Note case which held a statutory rape statute unconstitutional — all on equal protection grounds; see *United States v. Hicks*, 625 F.2d 216 (9th Cir. 1980), *vacated*, 450 U.S. 1036 (1981); *Navedo v.*

this section are instances in which statutory rape statutes were upheld against constitutional challenges.

1. *Statutory Rape Provisions Surviving  
Constitutional Challenges*

Perhaps the most notorious case challenging a statutory rape statute was the United States Supreme Court case of *Michael M. v. Superior Court of Sonoma County*.<sup>37</sup> In *Michael M.*, a defendant challenged California's gender-specific statutory rape statute on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>38</sup> The Supreme Court upheld the constitutionality of the California statute and used mid-level scrutiny in its analysis.<sup>39</sup> The Court held that there was a sufficiently strong state interest in the gender-based classification to justify the distinction.<sup>40</sup> The Court determined that the impact of teenage pregnancy, the primary ill which the statute was designed to prevent, fell "more heavily on the female than on the male," and thus, the gender-based classification was permissible.<sup>41</sup>

Another case demonstrating a typical constitutional challenge to a statutory rape statute is *Vermont v. Barlow*.<sup>42</sup> In *Barlow*, the Vermont Supreme Court addressed a constitutional challenge to Vermont's statutory rape provision which alleged that the statute violated the defendant's right to privacy under Vermont's due process clause and violated the right to equal protection under the Fourteenth Amendment of the United States Constitution.<sup>43</sup> The defendant contended that since the statute provided a marriage defense to a criminalized sexual act with someone under the age of sixteen, the statute effectively compelled marriage to avoid prosecu-

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Preisser, 630 F.2d 636 (8th Cir. 1980); *Meloon v. Helgemoe*, 564 F.2d 602 (1st Cir. 1977), cert. denied, 436 U.S. 950 (1978). See *infra* notes 60–75 and accompanying text for a discussion of these cases.

37. *Michael M.*, 450 U.S. at 464. See generally Alice S. Andre-Clark, *Whither Statutory Rape Laws: Of Michael M., The Fourteenth Amendment, and Protecting Women from Sexual Aggression*, 65 S. CAL. L. REV. 1933 (1992) (discussing *Michael M.*).

38. *Michael M.*, 450 U.S. at 467.

39. *Id.*

40. *Id.* at 472–73.

41. *Id.* at 476.

42. 630 A.2d 1299 (Vt. 1993).

43. *Id.*

tion.<sup>44</sup> And, since the decision to marry is a fundamental right, the *Barlow* defendant argued that the statute violated his right to due process.<sup>45</sup> Moreover, the *Barlow* defendant asserted that the statute violated the Equal Protection Clause because it treated married and unmarried minors differently.<sup>46</sup>

The Vermont Supreme Court held that the state had a compelling interest in protecting minors from “others and themselves” and from the dangers accompanying premature sexual activity.<sup>47</sup> In so doing, the *Barlow* court disposed of the issue without deciding whether there was a recognized right of privacy under the Vermont Constitution, and if so, whether this right extended to minors.<sup>48</sup>

In addressing the equal protection issue, the Vermont Supreme Court determined that the married minor and the unmarried minor are not similarly situated.<sup>49</sup> The court pointed to the Vermont statute that requires minors between fourteen and sixteen to obtain parental consent and a certificate from a judge before marriage.<sup>50</sup> Therefore, the court opined, when a minor engages in sex with his or her spouse, the “state has already taken steps to protect the minor.”<sup>51</sup>

The federal circuits have grappled with the constitutionality of statutory rape statutes as well. In *Ferris v. Santa Clara County*,<sup>52</sup> the Ninth Circuit addressed a constitutional challenge to California's statutory rape statute.<sup>53</sup> In *Ferris*, a criminal defendant

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44. *Id.*

45. *Id.*

46. *Id.* at 1300.

47. *Barlow*, 630 A.2d at 1300 (citing *Jones v. State*, 619 So. 2d 418 (Fla. 5th Dist. Ct. App. 1993)). The court stated: “We agree with the Florida court that any infringement on the minor's privacy interest under the state constitution is limited in duration and is outweighed by a compelling state interest.” *Id.* The *Barlow* court addressed the dangers that statutory rape laws seek to prevent which include “pregnancy, venereal disease, damage to reproductive organs, the lack of considered consent, heightened vulnerability to physical and psychological harm, and the lack of mature judgement.” *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. 891 F.2d 715 (9th Cir. 1989).

53. *Id.* at 716. California's statutory rape statute's § 261.5 of the penal code states in pertinent part that “[u]nlawful sexual intercourse is an act of sexual intercourse with a person not the spouse of the perpetrator, if the person is a minor.” CAL. PENAL CODE § 261.5 (West 1993).

asserted that the statute violated his constitutional right to privacy, denied him substantive due process under the Fourteenth Amendment, and violated the Equal Protection Clause.<sup>54</sup>

The Ninth Circuit, like the *Barlow* court, disposed of the issue by determining that there was a compelling state interest without determining whether the defendant's consensual sexual activity with girls was protected by a privacy right under the Fourteenth Amendment.<sup>55</sup> The court stated that "it is beyond cavil that these statutes are aimed at protecting youth from physical and psychological harm as a result of specified sexual activities. California has a compelling interest in safeguarding youth in this manner."<sup>56</sup>

The Ninth Circuit summarily rejected as frivolous the equal protection arguments offered by the *Ferris* defendant that the statute unconstitutionally required a different age of consent than other states, thus resulting in "uneven prosecution" across the country.<sup>57</sup> The *Ferris* defendant also argued that the gender-specific language of the statute violated the Equal Protection Clause.<sup>58</sup> On the strength of the Supreme Court's decision in *Michael M.*, the *Ferris* court also rejected this argument without discussion.<sup>59</sup>

## 2. *Statutory Rape Statutes Found Unconstitutional*

Criminal defendants challenging a statutory rape provision often cite *Meloon v. Helgemoe*.<sup>60</sup> In *Meloon*, the First Circuit found New Hampshire's statutory rape statute unconstitutional on equal protection grounds.<sup>61</sup> The *Meloon* court determined that New

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54. *Ferris*, 891 F.2d at 716. The adult defendant was charged under the statute after having sexual intercourse with two minors, fifteen and seventeen years old. *Id.* The defendant asserted a federal action under 42 U.S.C. § 1983 against the state for enforcing the state laws against him, asserting the constitutional arguments. *Id.* The district court struck the defendant's complaint, and he appealed. *Id.*

55. *Ferris*, 891 F.2d at 717.

56. *Id.* at 718.

57. *Id.*

58. *Id.*

59. *Id.*

60. 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978); see *Rundlett v. Oliver*, 607 F.2d 495, 496 (1st Cir. 1979) (upholding Maine's statutory rape statute and limiting the decision in *Meloon*); *Barnes v. Georgia*, 260 S.E.2d 40, 42 (Ga. 1979) (upholding Georgia's statutory rape statute against equal protection challenge, distinguishing *Meloon*). See also *Eidson supra* note 23, at 791, for a discussion of *Meloon*.

61. *Meloon*, 564 F.2d at 608.



Hampshire's gender-specific statute was a classification based on sex, and that as such, it required a more heightened scrutiny than a non-suspect classification, but less than the strict scrutiny afforded to the suspect classes.<sup>62</sup> On the strength of the United States Supreme Court case of *Craig v. Boren*,<sup>63</sup> the First Circuit enunciated the test that such a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>64</sup>

New Hampshire proffered four reasons for the classification: 1) males are "incapable" of becoming victims of the consensual offense; 2) female minors are more likely to suffer from physical injury than males; 3) males are more likely to commit the offense than females due to a condition among males known as pedophilia; and 4) only the female can become pregnant.<sup>65</sup>

The court asserted that the first two reasons articulated by the State related to the physical size of the victim and that of the members of the "offender class."<sup>66</sup> The First Circuit stated that, under the stricter scrutiny, the State failed to make a showing that the law would effectuate the purpose stated with more success than a gender-neutral law.<sup>67</sup> Similarly, the third articulated reason, that males are more likely to be pedophiles, was not substantiated by the State, nor was it shown how the gender-specific statute would address the problem, thus failing the stricter scrutiny.<sup>68</sup> The *Meloon* court also felt some "wariness" about the argument that since only females could get pregnant, this was a valid reason for the gender-based legislation.<sup>69</sup> The court stated that there was not "an iota of testimony . . . that the prevention of pregnancy was a purpose of the statutory rape law."<sup>70</sup> The *Meloon* court thus found that the state of New Hampshire's gender-specific statutory rape law failed to satisfy the stricter scrutiny set forth in *Craig v. Boren* for gender-based

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62. *Id.* at 604.

63. 429 U.S. 190 (1976).

64. *Meloon*, 564 F.2d at 604 (quoting *Craig*, 429 U.S. at 197).

65. *Id.* at 605.

66. *Id.* at 606.

67. *Meloon*, 564 F.2d at 606.

68. *Id.*

69. *Id.* at 607.

70. *Id.* at 607.

classification.<sup>71</sup>

Similarly, in the Eighth Circuit's decision in *Navedo v. Preisser*,<sup>72</sup> a criminal defendant challenged Iowa's statutory rape statute on, among other things, equal protection grounds.<sup>73</sup> Relying on the scrutiny requirement of *Craig* and comparing it to the Ninth Circuit case of *United States v. Hicks*,<sup>74</sup> the *Navedo* court found that the State failed to produce any evidence supporting the alleged justification of the gender differentiation. The objectives the State gave for the statute were to prevent physical and emotional injuries to the female and to prevent pregnancy.<sup>75</sup>

## B. Florida's Statutory Rape Laws

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71. *Id.* at 609. The court, however, warned of the "limited nature" of its decision. "We have not reflected on nor do we intend to question the constitutionality of the laws of other states. We express no opinion as to whether on a different record some other statute would pass constitutional scrutiny." *Id.*

72. 630 F.2d 636 (8th Cir. 1980).

73. *Id.* at 637. The defendant was sentenced to a five-year prison term which was suspended, and the defendant was placed on probation. *Id.* The Iowa Court of Appeals affirmed the conviction, and after the Supreme Court of Iowa denied certiorari, Navedo petitioned the federal district court for a writ of habeas corpus, alleging the unconstitutionality of the Iowa statute. *Id.* The district court upheld the constitutionality of the Iowa statute by determining that the "discrimination was substantially related to the achievement of important governmental objectives — namely protecting young females from unwanted pregnancy and emotional trauma . . ." *Id.* The Iowa statute provided:

If any person ravish and carnally know any female by force or against her will, or if any person carnally know and abuse any female under the age of seventeen years, he shall be imprisoned in the penitentiary for life, or any term of years, not less than five, and the court may pronounce sentence for a lesser period than the maximum, the provisions of the indeterminate sentence law to the contrary not withstanding.

IOWA CODE § 698.1 (1975).

74. 625 F.2d 216 (9th Cir. 1980) (finding federal Indian statutory rape law unconstitutional on equal protection grounds), *vacated*, 450 U.S. 1036 (1981).

75. *Navedo*, 630 F.2d at 639–40. The court held that the State had the burden of showing that the means were substantially related to achievement of important governmental objectives and that it failed to meet that burden because the "[State] has produced no evidence showing the frequency and severity of physical injury to sixteen-year-old females from consensual intercourse with males over twenty-five." *Id.* at 640. Moreover, the Eighth Circuit found that the State failed to demonstrate that "young females are more likely to experience emotional trauma than young males if intercourse results with an older person." *Id.*

Florida's first statutory rape statute, the original section 794.05, was enacted over one hundred years ago, in 1892.<sup>76</sup> The statute was originally enacted "for the purpose of `protecting virtuous young women . . . within the specified age from defilement.'"<sup>77</sup> The statute was changed in 1921 to apply to both males and females.<sup>78</sup> In 1943, the Florida Legislature "broadened its policy of protecting minors" by enacting section 800.04.<sup>79</sup> Florida currently has two statutory rape provisions, section 794.05 and section 800.04. Neither statute has a *mens rea* requirement. Section 794.05 applies to victims under the age of eighteen, and section 800.04 applies to those under the age of sixteen.<sup>80</sup>

### C. Constitutional Challenges in Florida

Equal protection challenges have not occurred in Florida because of the gender-neutral language of the statutory rape laws.<sup>81</sup> Rather, constitutional challenges in Florida have centered around vagueness<sup>82</sup> and the right to privacy, and they have mainly come against section 800.04.<sup>83</sup> Both statutory rape statutes have with-

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76. *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995).

77. *Id.* (quoting *State v. Bowden*, 18 So. 2d 478, 481 (Fla. 1944)); *see also* *Simmons v. State*, 10 So. 2d 436, 438 (Fla. 1942) (finding that the "statute was obviously enacted for the purpose of protecting the virginity of young maidens").

78. 1921 Fla. Laws ch. 8596 (current version at FLA. STAT. § 794.05 (1995)).

79. 1943 Fla. Laws ch. 21974 (current version at FLA. STAT. § 800.04 (1995)).

80. *See supra* notes 2 and 9 for the text of these statutes.

81. *Id.*

82. In the case of *Chesebrough v. State*, 255 So. 2d 675 (Fla. 1971), *cert. denied*, 406 U.S. 976 (1972), the Florida Supreme Court upheld the constitutionality of section 800.04 against a challenge that the language "lewd and lascivious" in the text of the statute was unconstitutionally vague. *Id.* at 679. In *Chesebrough*, the defendant, Rebecca Chesebrough, was charged under § 800.04 after her fourteen-year-old son inquired "as to how babies were made." *Id.* at 676. In response to his inquiry, Mrs. Chesebrough and her husband proceeded to show him, "in the bedroom." *Id.*

After a great exposition on the various definitions of the terms and a history of their usage at common law, the Florida Supreme Court held that the statute was constitutional. The supreme court stated that "[i]t is well settled that a criminal statute is sufficiently certain, though it may use general terms, if the offense is so defined as to convey to a person of ordinary understanding an adequate description of the evil intended to be prohibited." *Id.* at 678; *see* *J.E.J. v. State*, 505 So. 2d 516 (Fla. 2d Dist. Ct. App. 1987) (upholding the constitutionality of § 800.04 against a challenge of vagueness); *L.L.N. v. State*, 504 So. 2d 6 (Fla. 2d Dist. Ct. App. 1987).

83. *See infra* notes 121–49 and accompanying text for a discussion of the constitutional challenges.

stood all constitutional challenges until the recent decision of *B.B. v. State*.

### 1. *A History of Florida's Privacy Provision*

While the majority of defendants across the country who have challenged statutory rape statutes based on privacy have done so under the Fourteenth Amendment of the United States Constitution, in Florida such challenges have come under Florida's privacy provision of Article I, section 23.<sup>84</sup> Florida is only one of four states that has a separate constitutional provision explicitly protecting against invasion of privacy.<sup>85</sup> Florida's privacy rights have, therefore, been described as much broader than those privacy rights delineated under the penumbra of the Fourteenth Amendment's right of privacy.<sup>86</sup>

Since its passage by the Florida electorate in November of 1980,

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84. See *supra* note 6 for the text of Article I, section 23 of the Florida Constitution.

85. *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989). Other states having a separate constitutional right of privacy are Alaska, California, and Montana. *Id.* at 1190 n.4. See ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; MONT. CONST. art. II, § 10.

86. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985). The *Winfield* Court stated:

The citizens of Florida opted for more protection from governmental intrusion when they approved Article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23 was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

*Id.* at 548; see also Scott Denson, *Florida's Constitutional Shield: An Express Right to Be Let Alone by Government and the Private Sector*, 20 FLA. ST. U. L. REV. 907, 932 (1993).

The author states that Florida's privacy rights are broader:

[B]ecause Floridians hold a reasonable expectation of a *fundamental* right to privacy in both disclosural and autonomy cases . . . [and] because the federal privacy right — especially in the autonomy zone — has been strictly limited to matters essential to the concept of ordered liberty; matters involving "marriage, procreation, contraception, family relationships and child-bearing and education."

*Id.* at 931-32. But see John Sanchez, *Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow*, 18 NOVA L. REV. 775 (1994) (questioning the true breadth of Florida's privacy amendment).

this provision has been invoked in a number of areas ranging from access to public records,<sup>87</sup> to privacy in medical decisions,<sup>88</sup> to privacy in sexual matters,<sup>89</sup> and to privacy in a minor's abortion decision.<sup>90</sup> Many recently-decided opinions have established the scope and standard of review of the privacy amendment.<sup>91</sup>

The first Florida case establishing the appropriate standard of review in privacy cases was *Winfield v. Division of Pari-Mutuel Wagering*.<sup>92</sup> The supreme court in *Winfield* established Florida's right of privacy as "fundamental" and as such, required the compelling governmental interest standard.<sup>93</sup> Once this fundamental right had been established, the burden shifts to the State to "justify" the intrusion.<sup>94</sup> In order to justify the state action restricting the right to

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87. See *Winfield*, 477 So. 2d at 544 (holding that the subpoena of bank records without notice to the owner of the account does not violate the right to privacy).

88. See *In re Browning*, 568 So. 2d 4 (Fla. 1990) (holding that Florida's privacy amendment implicates a "right of self-determination" regarding a living will which outlined decedent's objection to life support).

89. See *Schmitt v. State*, 563 So. 2d 1095 (Fla. 4th Dist. Ct. App. 1990), *approved in part and quashed in part*, 590 So. 2d 404 (Fla. 1991), *cert. denied*, 503 U.S. 964 (1992).

90. See *In re T.W.*, 551 So. 2d 1186 (Fla. 1989); see *infra* notes 101-20 and accompanying text.

91. One author points to the following cases as "essential to understanding the state right to privacy and the elements of a successful claim under [A]rticle I, § 23." *Schmitt*, 590 So. 2d at 404; *Stall v. State*, 570 So. 2d 257 (Fla. 1990), *cert. denied*, 501 U.S. 1250 (1991); *In re Browning*, 568 So. 2d 4 (Fla. 1990); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989); *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989); *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533 (Fla. 1987); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985); *John F. Kennedy Memorial Hosp., Inc. v. Blutworth*, 452 So. 2d 921 (Fla. 1984); *In re Applicant*, 443 So. 2d 71 (Fla. 1983); *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980). See *Denson*, *supra* note 86, at 909 n.27.

92. 477 So. 2d 544 (Fla. 1985).

93. *Id.* at 547. There is evidence that the "compelling governmental interest test" implicated under Florida's privacy provision is not as strict as the federal test of the same name. As the *Winfield* court points out, "this constitutional provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual." *Id.* (quoting *In re Applicant*, 443 So. 2d 71, 74 (Fla. 1983)). The Florida Supreme Court further stated that "the right of privacy does not confer a complete immunity from governmental regulation and will yield to compelling governmental interests." *Id.*; see Thomas C. Marks, *Three Ring Circus: The Supreme Court Balances Interests*, 18 STETSON L. REV. 301, 329-30 (1989). The compelling governmental interest test implicated in cases involving suspect classification under the federal Equal Protection Clause consistently results in the government regulation failing constitutional muster. *Id.*

94. *Winfield*, 477 So. 2d at 547.

privacy, the State must show that it has a compelling interest and that the state action accomplishes that interest "through the use of the least intrusive means."<sup>95</sup> However, the *Winfield* court found that in order for such a privacy right to attach, there must be a "reasonable expectation of privacy."<sup>96</sup> This threshold question, whether "the law recognizes an individual's legitimate expectation of privacy" in the activity in which the government regulates, must first be answered in the affirmative before continuing with the remainder of the analysis.<sup>97</sup>

The determination of what is a reasonable expectation of privacy is not always a completely objective standard. In *Shaktman v. State*,<sup>98</sup> the Florida Supreme Court stated that the expectation of privacy "can be dictated only by . . . [an] individual . . . [and] [t]he central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over 'majoritarian sentiment' and thus cannot be universally defined by consensus."<sup>99</sup> Chief Justice Ehrlich set forth the reasonable expectation of privacy test in his concurrence in *Shaktman*. The Chief Justice stated that the "determination of whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially the objective manifestations of that expectation . . . ."<sup>100</sup>

A seminal case in Florida applying the test set forth in *Winfield* was *In re T.W.*,<sup>101</sup> in which Florida's privacy right was expanded to include a minor's right to an abortion.<sup>102</sup> In this case, a minor challenged the constitutionality of a Florida statute requiring parental consent or a judicial determination for a minor to obtain an abor-

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95. *Id.*

96. *Id.*

97. *Id.*

98. 553 So. 2d 148 (Fla. 1989).

99. *Id.* at 151.

100. *Id.* at 153 (Ehrlich, C.J., concurring); see *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995) (citing Chief Justice Ehrlich's concurring opinion and finding no legitimate expectation of privacy in the fact that the job applicant smoked); *Stall v. State*, 570 So. 2d 257 (Fla. 1990) (utilizing the *Shaktman* "legitimate expectation of privacy" test and determining none existed with regard to purchasing obscene materials from a retail establishment), *cert. denied*, 501 U.S. 1250 (1991).

101. 551 So. 2d 1186 (Fla. 1989).

102. *Id.*

tion.<sup>103</sup> The court acknowledged the federal line of cases which state that a privacy right is implicated in a woman's decision to have an abortion.<sup>104</sup> The court reiterated the idea that Florida's privacy provision "may provide even greater protection" than that of the federal government.<sup>105</sup>

Recognizing the *Winfield* standard of review, the *T.W.* court differentiated those cases which are "disclosural" in nature from those which involve "personal decisionmaking."<sup>106</sup> In so doing, the court noted that in disclosural cases, governmental intrusion has been consistently upheld, while in the personal decision cases, "no governmental intrusion . . . has survived."<sup>107</sup> The *T.W.* court then determined that the privacy provision "is clearly implicated in a woman's decision of whether or not to continue her pregnancy."<sup>108</sup> However, the court questioned whether this privacy right extends to a minor.<sup>109</sup> The court answered this question in the affirmative by looking to the plain language of Article I, section 23 and by noting that the right extends to "every natural person."<sup>110</sup>

Turning to the *Winfield* standard, the court recognized that two state interests which were set forth in *Roe v. Wade*,<sup>111</sup> were implicated in the decision to have an abortion: 1) the health of the mother; and 2) the "potentiality of life in the fetus."<sup>112</sup> Following the *Roe*

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103. *Id.* at 1189. The statute which was found unconstitutional was § 394.001(4)(a) of the Florida Statutes. *Id.* at 1188.

104. *Id.* at 1190; *see Roe v. Wade*, 410 U.S. 113 (1973).

105. *T.W.*, 551 So. 2d at 1191.

106. *Id.* at 1192.

107. *Id.*

108. *Id.*

109. *Id.* at 1193.

110. *T.W.*, 551 So. 2d at 1193. *But see Bellotti v. Baird*, 443 U.S. 622, 633-34 (1978) (noting the three reasons that "the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing"); *Anderson v. State*, 562 P.2d 351, 358 (Alaska 1977) (stating that "[a]ssuming that juveniles have certain rights to sexual privacy, we nevertheless conclude that the State may exercise control over the sexual conduct of children beyond the scope of its authority to control adults"); *Vermont v. Barlow* 630 A.2d 1299, 1300 (Vt. 1993) (quoting *Ginsberg v. New York*, 390 U.S. 629, 638 (1968), for the proposition that "even where there is an invasion of protected freedoms `the power of the state to control the conduct of children reaches beyond the scope of its authority over adults'").

111. 410 U.S. 113 (1973).

112. *T.W.*, 551 So. 2d at 1193.

lead, the *T.W.* court determined that the health of the mother becomes compelling only at the end of the first trimester of pregnancy, "because it is clear that prior to this point no interest in maternal health could be served by significantly restricting the manner in which abortions are performed by qualified doctors, whereas after this point the matter becomes a genuine concern."<sup>113</sup> Similarly, following *Roe*, the *T.W.* court recognized a compelling state interest in protecting the fetus when it becomes viable, which is at the point that it is "capable of meaningful life outside the womb, albeit with artificial aid."<sup>114</sup> The court thus decided that "[s]uch a substantial invasion of a pregnant female's privacy by the state for the full term of the pregnancy is not necessary for the preservation of maternal health or the potentiality of life."<sup>115</sup>

The *T.W.* court then noted additional state interests peculiar to minors desiring an abortion.<sup>116</sup> The court recognized that since parental rights over the minor child are implicated, the additional state interests of protection of the minor and the "preservation of the family unit" are also a concern.<sup>117</sup> However, the court determined that neither of those interests are "sufficiently compelling" to warrant an invasion into the minor's privacy.<sup>118</sup>

The court also found that the statute failed the "second prong" of the *Winfield* standard, in that it was not the least intrusive means to accomplish the state goals.<sup>119</sup> The court noted that the statute, although providing for a "judicial by-pass procedure," does not provide for an attorney for the minor in the proceeding, and was

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113. *Id.*

114. *Id.* "Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures. Under current standards, this point generally occurs upon completion of the second trimester." *Id.* at 1194.

115. *Id.*

116. *Id.*

117. *T.W.*, 551 So. 2d at 1194.

118. *Id.* at 1195. While the court agreed that the objectives set forth were "worthy objectives," they were not sufficiently compelling. *Id.* The *T.W.* court noted that these reasons were not sufficiently compelling to "justify a parental consent requirement where procedures other than abortion are concerned." *Id.* (citing § 743.065 of the Florida Statutes, which provides that a minor unwed mother may consent to medical services for the minor's child).

119. *Id.*



therefore not the least intrusive means.<sup>120</sup>

## 2. *Privacy and Florida's Statutory Rape Laws*

Constitutional challenges to Florida's statutory rape laws based on privacy have come primarily against section 800.04.<sup>121</sup> Courts have consistently upheld the statute in the face of these challenges, finding the existence of a compelling state interest in protecting Florida's youth.

In the case of *State v. Phillips*,<sup>122</sup> a defendant charged under section 800.04 challenged the statute, alleging that it violated the victim's right to privacy by not allowing a consent defense.<sup>123</sup> Recognizing that in certain situations a defendant can assert the constitutional rights of another, the *Phillips* court determined that the case before it did not constitute a situation in which the defendant could assert another's rights.<sup>124</sup> Citing the United States Supreme Court case of *Eisenstadt v. Baird*,<sup>125</sup> the court noted that, in order to assert the constitutional right of another, there must be a "special relationship" between the two parties.<sup>126</sup> Moreover, the *Phillips* court recognized an additional inquiry of the impact of "the litigation on the third party interests."<sup>127</sup> That is, if third parties are not subject to prosecution, they may be "denied a forum in which to assert their own rights."<sup>128</sup>

The Fourth District determined that in the case before it, these requirements were not met.<sup>129</sup> The court found that there was no special relationship between the defendant and the minor victim.<sup>130</sup> Additionally, the defendant could not be determined to have engaged in the illegal activity for the purpose of challenging the stat-

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120. *Id.* at 1196.

121. *See infra* notes 122-49 and accompanying text.

122. 575 So. 2d 1313 (Fla. 4th Dist. Ct. App. 1991).

123. *Id.* at 1314.

124. *Id.*

125. 405 U.S. 438 (1972) (finding that a Massachusetts statute that prohibited distribution of contraceptives to single people violated the Equal Protection Clause).

126. *Phillips*, 575 So. 2d at 1314.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

ute's constitutionality.<sup>131</sup> The court asserted that "the impact of such litigation on third party interests, namely the right of all minors to engage in consensual sexual activity, is not vindicated in a criminal prosecution where the minor victim is maintaining a lack of consent."<sup>132</sup>

The *Phillips* court never addressed the statute's constitutionality on privacy grounds and "did not tip its hand . . . regarding how a minor might ever challenge the statute's constitutionality . . ." <sup>133</sup> However, in *Jones v. State*,<sup>134</sup> the Fifth District disagreed with *Phillips* and held that a defendant charged under section 800.04 did have standing to assert the privacy right of the minor victim.<sup>135</sup>

In *Jones*, the defendant, nineteen, had consensual sexual intercourse with a fourteen-year-old female.<sup>136</sup> The *Jones* court found that "the boyfriend who assists the minor child in achieving her constitutional right to engage in sexual activity (if, in fact, she has such a right) has the same standing as the doctor who assists the minor in obtaining her constitutionally protected right to have an abortion."<sup>137</sup> The Florida Supreme Court affirmed the *Jones* court's rationale.<sup>138</sup>

After declaring that the defendant had standing to assert the constitutional claim, the supreme court addressed the merits of the argument that the minor victim who consents under section 800.04 has a privacy right under Article I, section 23.<sup>139</sup> The court initially acknowledged the Florida Legislature's "unquestionably strong policy interest in protecting minors from harmful sexual conduct."<sup>140</sup> The *Jones* court further expounded on the societal ills that accom-

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131. *Phillips*, 575 So. 2d at 1314. The court stated, "[w]hile there is some evidence which respondents claim support a defense of consent, it was the victim herself who reported the sexual battery and testified against the respondents at the bond hearing. Based on the foregoing we can hardly say that the victim could be looking to the respondents to assert *her* right of privacy." *Id.*

132. *Phillips*, 575 So. 2d at 1314.

133. Sanchez, *supra* note 86, at 796.

134. 619 So. 2d 418 (Fla. 5th Dist. Ct. App. 1993), *aff'd*, 640 So. 2d 1084 (Fla. 1994).

135. *Id.* at 419.

136. *Id.*

137. *Id.*

138. *Jones v. State*, 640 So. 2d 1084 (Fla. 1994).

139. *Id.* at 1085.

140. *Id.*

pany sexual activity with a child, such as sexual exploitation, physical harm, and psychological damage.<sup>141</sup> Recognizing that the right to be let alone “protects adults from government intrusion into matters relating to marriage, contraception, and abortion,” the *Jones* court, quoting *Anderson v. Alaska*,<sup>142</sup> also found that the State may wield “control over the sexual conduct of children beyond the scope of its authority to control adults.”<sup>143</sup>

The *Jones* court next addressed the petitioner's argument that in light of *In re T.W.*,<sup>144</sup> section 800.04 should be held unconstitutional.<sup>145</sup> The supreme court rejected this argument and dismissed the comparison of a minor's right to privacy in choosing to have an abortion with that involving a privacy right to engage in sexual conduct.<sup>146</sup> The supreme court stated that “the rationale for declaring a right of privacy in *T.W.* was based on the fact that a minor possessed a right of privacy with respect to other types of medical and surgical procedures. *T.W.* did not transform a minor into an adult for all purposes.”<sup>147</sup>

The *Jones* court thus held that the State of Florida has a compelling interest in protecting children from “sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe and healthy for them,” and therefore, the court upheld the constitutionality of section 800.04.<sup>148</sup> On the

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141. *Id.* at 1086.

142. 563 P.2d 351, 358 (Alaska 1977).

143. *Jones*, 640 So. 2d at 1087.

144. 551 So. 2d 1186 (Fla. 1989); *see supra* notes 101–20 and accompanying text.

145. *Jones*, 640 So. 2d at 1087.

146. *Id.*

147. *Id.*; *accord* *Garcia v. State*, 633 So. 2d 518, 519 (Fla. 4th Dist. Ct. App. 1994) (upholding constitutionality of § 800.04 against right of privacy and due process challenges).

148. *Jones*, 640 So. 2d at 1087 (citing *Jones v. State*, 619 So. 2d 418, 424 (Fla. 1st Dist. Ct. App. 1993) (Sharp, J., concurring); *see also* *Ferris v. Santa Clara County*, 891 F.2d 715 (9th Cir. 1989) (upholding California's statutory rape statute against privacy challenge and finding that there is a compelling state interest in safeguarding the well-being of minors), *cert. denied*, 498 U.S. 850 (1990); *Anderson v. Alaska*, 562 P.2d 351 (Alaska 1977) (upholding Alaska's statutory rape statute against a privacy challenge); *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991) (finding that the state has a compelling state interest in protecting children), *cert. denied*, 503 U.S. 964 (1992); *Griffin v. State*, 396 So. 2d 152 (Fla. 1981) (finding child pornography statute constitutional against free speech and overbreadth challenge and stating that the “well being of children is a subject within the state's constitutional power to regulate”); *Garcia v. State*, 633 So. 2d 518

strength of the *Jones* decision, courts across Florida have upheld the constitutionality of both section 794.05 and section 800.04, until the Florida Supreme Court case of *B.B. v. State*.<sup>149</sup>

### III. THE B.B. DECISION

#### A. The Majority

Justice Wells began the opinion by noting that section 794.05 is “materially different” from section 800.04, the constitutionality of which the court upheld in *Jones*.<sup>150</sup> The court noted that the issue in the case before it was not whether consent to intercourse is a defense to a statutory rape statute, as it was in *Jones*, but “whether a minor who engages in ‘unlawful’ carnal intercourse with an unmarried minor of previous chaste character can be adjudicated delinquent of a felony of the second degree in light of the minor’s right to privacy guaranteed by the Florida Constitution.”<sup>151</sup>

Citing *In re T.W.*,<sup>152</sup> the *B.B.* court stated that the right of privacy extends to minors as well as adults.<sup>153</sup> The court next followed the standard of review set forth in *Winfield v. Division of Pari-Mu-*

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(Fla. 4th Dist. Ct. App. 1994) (upholding the constitutionality of § 800.04 against a privacy challenge by an adult, and finding that there was a compelling state interest in protecting children “from the consequences of their sexual activity”); *Goodrow v. Perrin*, 403 A.2d 864 (N.H. 1979) (upholding New Hampshire’s statutory rape statute and finding a “significant interest” in protecting children); *Vermont v. Barlow*, 630 A.2d 1299 (Vt. 1993) (upholding the Vermont statutory rape statute against a privacy challenge and finding a compelling state interest in protecting minors).

149. 659 So. 2d 256 (Fla. 1995). *Cf.* *Casado v. State*, 648 So. 2d 714 (Fla. 1995) (upholding the constitutionality of § 800.04 in accordance with the *Jones* decision); *Conyers v. State*, 638 So. 2d 1055 (Fla. 2d Dist. Ct. App. 1994) (upholding § 800.04 against the victim’s privacy challenge asserted through defendant in accordance with *Jones*); *State v. B.B.*, 637 So. 2d 936 (Fla. 2d Dist. Ct. App. 1994) (upholding § 794.05 against a privacy challenge by a minor defendant), *overruled by B.B. v. State*, 659 So. 2d 256 (Fla. 1995); *Garcia v. State*, 633 So. 2d 518 (Fla. 4th Dist. Ct. App. 1994) (citing to *Jones* and holding § 800.04 constitutional against a challenge that it violated the defendant’s privacy rights).

150. *B.B.*, 659 So. 2d at 258.

151. *Id.*

152. 551 So. 2d 1186 (Fla. 1989).

153. *B.B.*, 659 So. 2d at 258–59. The court stated that “the right to privacy extends to ‘every natural person.’ Minors are natural persons in the eyes of the law and ‘constitutional rights do not mature and come into being magically only when one attains the statutorily defined age of majority.” *Id.* at 258 (quoting *T.W.*, 551 So. 2d at 1192).

*tuel Wagering*<sup>154</sup> and determined whether B.B. had a reasonable expectation of privacy in engaging in sexual intercourse.<sup>155</sup> The court cited the case of *Shevin v. Byron*<sup>156</sup> which, prior to the adoption of Article I, section 23, recognized that “various intimate personal activities such as marriage, procreation, contraception, and family relationships” were within the area of privacy guaranteed by the Federal Constitution.<sup>157</sup> The court further noted that the Florida privacy amendment provides an “explicit textual foundation for those privacy interests inherent in the concept of liberty” and as such “extends to minors with respect to the right to abortion.”<sup>158</sup> The court, thus, determined that B.B. did indeed have a legitimate expectation of privacy in sexual intercourse.<sup>159</sup>

In determining that a privacy right had attached to B.B.'s activities, the court recognized that the burden shifted to the State to show a compelling interest in invading the privacy right.<sup>160</sup> On this issue, the court dispelled the State's argument that the compelling state interest was the same as the one articulated in *Jones*.<sup>161</sup> The court distinguished *Jones* by pointing out that the *Jones* defendant was an adult charged with engaging in sexual activity with a minor under the age of sixteen, unlike the *B.B.* defendant, who was a minor.<sup>162</sup>

The court posited that the consensual sexual activity of two sixteen-year-olds implicated a different state interest in regulating those activities than the situation involving an adult and a minor victim.<sup>163</sup> The court stated that the compelling state interest under the *Jones* factual setting was the sexual exploitation of children by adults, whereas the compelling interest in regulating the sexual activity of two minors engaging in sexual activity was protecting the “minor from the sexual activity itself for reasons of health and qual-

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154. 477 So. 2d 544 (Fla. 1985).

155. *B.B.*, 659 So. 2d at 258.

156. 379 So. 2d 633 (Fla. 1980).

157. *B.B.*, 659 So. 2d at 258–59.

158. *Id.* at 259 (citing *In re T.W.*, 551 So. 2d at 1192).

159. *Id.*

160. *Id.*

161. *Id.*

162. *B.B.*, 659 So. 2d at 259.

163. *Id.*

ity of life.”<sup>164</sup> Although this state interest was recognized as compelling, the court determined that the State failed to show that the “application of section 794.05 is the least intrusive means of furthering what we have determined to be the State's compelling interest.”<sup>165</sup>

The court stated that the purpose of section 794.05 is to “protect minors from sex acts imposed by adults.”<sup>166</sup> In the case before it, the court opined, this section was not being used as a “shield” to protect the minor, but as a “weapon.”<sup>167</sup> For this reason, and because the statute did not represent the least intrusive means required under *Winfield*, the court held that section 794.05 was unconstitutional as applied to a minor on the grounds that it was violative of the right to privacy.<sup>168</sup>

#### B. The Kogan Concurring Opinion

Justice Kogan focused his concurrence not on the issue of privacy but on the “archaically worded statute” which affords protection only to those minors of a “previously chaste character.”<sup>169</sup> Recognizing the implications of premature sexual activity, Justice Kogan was “utterly at a loss to explain how the state [could] justify a statute . . . that seem[ed] to regard unchaste minors as being somehow less deserving of the state's protection than those who [were] otherwise.”<sup>170</sup> Justice Kogan suggested that the legislature modernize the statute or decide whether it was “genuinely necessary in the light of the variety of other statutes more than adequately protecting children from sexual predation.”<sup>171</sup>

#### C. The Grimes Dissenting Opinion

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164. *Id.*

165. *Id.*

166. *B.B.*, 659 So. 2d at 260 (citing *Victor v. State*, 566 So. 2d 354 (Fla. 4th Dist. Ct. App. 1990)).

167. *Id.*

168. *Id.* The court did not “debate morality in respect to the statute or debate whether this century-old statute fits within the contemporary `facts of life.’” *Id.* However, the court did extol the virtues of abstinence recognizing that the “plague” of AIDS and other sexually transmitted diseases were a “sad product of sexual promiscuity.” *Id.*

169. *B.B.*, 659 So. 2d at 260 (Kogan, J., concurring).

170. *Id.* at 260–61.

171. *Id.* at 261.

Chief Justice Grimes did not find compelling the differences between *Jones* and *B.B.*<sup>172</sup> Further, the dissent failed to “see how *In re T.W.* . . . [could] be read to support the proposition that a sixteen-year-old child has a privacy right to have sex.”<sup>173</sup> The Chief Justice also disputed the court's conclusion that the only purpose of section 794.05 was the protection of children from exploitation by adults.<sup>174</sup> Quoting from Justice Kogan's concurrence in *Jones*, Chief Justice Grimes found that the State had a “right to prevent children and young adolescents from being exposed to the wide-ranging risks associated with premature sexual activity.”<sup>175</sup>

The dissent then intimated that *B.B.* may have had an argument that section 794.05, making him a second-degree felon, was cruel and unusual punishment.<sup>176</sup> However, Chief Justice Grimes suggested that the true issue before the court was “whether it [was] for the legislature or the courts to determine the age of consent for minors to engage in sex.”<sup>177</sup> Thus, the Chief Justice suggested that the court may have crossed the line into legislative territory, stating that the “legislature has established the cutoff as being at the age of eighteen. The fact that in contemporary society many couples may be engaging in sex below the age of eighteen makes it neither legal nor right.”<sup>178</sup>

#### D. The Harding Dissenting Opinion

In a one paragraph dissent, Justice Harding stated that the majority decided the case outside the limits set forth in the certified question, and that *Jones* required the court to answer the question in the negative.<sup>179</sup>

### IV. CRITICAL ANALYSIS

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172. *Id.* at 261–62 (Grimes, J., dissenting).

173. *Id.* at 262.

174. *B.B.*, 659 So. 2d at 262 (Grimes, J., dissenting).

175. *Id.* at 262.

176. *Id.*

177. *Id.* at 263.

178. *B.B.*, 659 So. 2d at 263 (Grimes, J., dissenting).

179. *Id.* (Harding, J., dissenting).

A. Does a Right of Privacy Attach to a Minor's  
Consensual Sexual Activity?

Florida's "right to be let alone" under Article I, section 23 was intended to be broader than the federal right to privacy.<sup>180</sup> However, it was not intended to be so broad as to constitutionally protect minors from governmental interference into their consensual sexual activity. Florida's electorate was not voting to prohibit all governmental intrusion into "private affairs," including sexual intercourse among minors that technically constitutes statutory rape, when it voted to amend the constitution in 1980. As Judge Cobb of the Fourth District Court of Appeal stated in his concurrence in *Jones v. State*, the electorate, when voting for the privacy amendment in 1980 "had not the faintest idea it was voting to abolish the crime of statutory rape in this state."<sup>181</sup>

1. *Do Minors have the Same Privacy Rights as Adults?*

While recognizing that minors may have privacy rights under Article I, section 23, there is substantial precedent that indicates that such rights may not be equal to those of adults.<sup>182</sup> That is, while adults may have a privacy right to engage in consensual sexual intercourse, the same is not true for minors. The Florida Supreme Court itself found a year before the *B.B.* decision that, "[a]lthough the right to be let alone protects adults from government intrusion into matters relating to marriage, contraception, and abortion, the State may exercise control over the sexual conduct of children beyond the scope of its authority to control adults."<sup>183</sup>

The majority in *B.B.* supported its finding by looking to the textual language of Article I, section 23, which states that "every natural person" was to be free from governmental intrusion, and as such, the right to privacy should be afforded to minors.<sup>184</sup> But that

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180. *See supra* notes 85–91 and accompanying text.

181. *Jones v. State*, 619 So. 2d 418, 422 (Fla. 5th Dist. Ct. App. 1993) (Cobb, J., concurring), *approved*, 640 So. 2d 1084 (Fla. 1994).

182. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622 (1979); *Anderson v. Alaska*, 562 P.2d 351 (Alaska 1977); *Jones v. State*, 640 So. 2d 1084 (Fla. 1994); *Vermont v. Barlow*, 630 A.2d 1299 (Vt. 1993).

183. *Jones*, 640 So. 2d at 1086 (quoting *Anderson*, 562 P.2d at 358).

184. *B.B. v. State*, 659 So. 2d 256, 258 (Fla. 1995).



right is not equivalent to the right offered to adults. The right should not be applied equally to both adults and minors.

The United States Supreme Court case of *Bellotti v. Baird*<sup>185</sup> sets forth an exposition on why “the constitutional rights of children cannot be equated with those of adults.”<sup>186</sup> Quoting Justice Frankfurter, Justice Powell articulated the idea that “[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty towards children.”<sup>187</sup> The often cited reasons that constitutional provisions do not apply equally to children, set forth by Justice Powell in *Bellotti*, are that: 1) children are particularly vulnerable; 2) they do not possess the ability to make “critical decisions in an informed, mature manner;” and 3) parents have the preeminent role in the raising of the child.<sup>188</sup>

The *In re T.W.* decision, on which the *B.B.* majority relied, recognized these reasons and determined that the protection of minors and the preservation of family unity were “worthy objectives” but not a “compelling” state interest.<sup>189</sup> The *T.W.* court, referring to parental consent statutes, noted that the federal government allows intrusion “based on a ‘significant’ state interest” but the “Florida Constitution requires a ‘compelling’ state interest in all cases where the right to privacy is implicated.”<sup>190</sup> The State must show a compelling state interest in order to overcome a constitutional challenge once a reasonable expectation of privacy is implicated. Therefore, as Justice Grimes stated in his dissenting opinion, “[i]n effect, the Court has said that the state's interest in regulating abortions is no different with respect to minors than it is with adults.”<sup>191</sup>

Because minors provide a unique situation, for those reasons set forth in *Bellotti*, Florida's privacy amendment should be applied

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185. 443 U.S. 622 (1979).

186. *Id.* at 634.

187. *Id.* at 633–34 (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)).

188. *Id.* at 634.

189. *In re T.W.*, 551 So. 2d 1186, 1195 (Fla. 1989).

190. *Id.*

191. *Id.* at 1203 (Grimes, J., dissenting). Justice Grimes further stated that “I do not agree with either the majority's broad interpretation of the privacy amendment or its limited view of the state's interest concerning the conduct of minors.” *Id.*

with particular care. The *B.B.* court failed to consider B.B.'s minority status in determining whether any privacy right attached, or the extent of any such right. The court failed to consider, for example, the role of the parents in the life of the minor, nor did it consider the peculiar vulnerability and mental immaturity of minors in making critical decisions when it summarily determined that the right of privacy extends to minors. The court made no differentiation between adults and children as to the extent of the right of privacy. In the eyes of the *B.B.* court, their rights are equal.

## 2. *Reasonable Expectation of Privacy*

Assuming, arguendo, that minors have privacy rights equal to those of adults under Article I, section 23, the next question that should be addressed under the *Winfield* standard, and that was addressed by the *B.B.* court, was whether the minor had a legitimate expectation of privacy in engaging in consensual sexual intercourse.<sup>192</sup> The *B.B.* court determined that B.B. had a reasonable expectation because the privacy amendment provides “an explicit textual foundation for those privacy interests inherent in the concept of liberty.”<sup>193</sup> And, since those interests were extended to minors with regard to abortion, there existed a “clear constitutional mandate in favor of privacy” which was implicated in B.B.'s consensual sexual activity.<sup>194</sup>

However, it is debatable whether the reasonable expectation of privacy that existed for minors in their decision to obtain an abortion can be imputed to the minor's decision to engage in sexual intercourse. As the *T.W.* court stated, “[w]e can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill patient in their choice of whether to discontinue necessary medical treatment” than the decision of whether or not to continue a pregnancy.<sup>195</sup>

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192. *B.B. v. State*, 659 So. 2d 256, 258 (Fla. 1995).

193. *Id.* at 259.

194. *Id.*

195. *In re T.W.*, 551 So. 2d 1186, 1195 (Fla. 1989); see *Michael M. v. Superior Court*, 450 U.S. 464 (1980) (Blackmun, J., concurring) (stating “I am persuaded that, although a minor has substantial privacy rights in intimate affairs connected with pro-

Indeed, the majority in *Jones* recognized the substantial difference in the right afforded to a minor in the decision to have an abortion and in the case of a minor consenting to sexual intercourse. The *Jones* court asserted that “the rationale for declaring a right of privacy in *T.W.* was based on the fact that a minor possessed a right of privacy with respect to other types of medical and surgical procedures. *T.W.* did not transform a minor into an adult for all purposes.”<sup>196</sup>

Additionally, the *B.B.* court failed to utilize the often used test to determine if B.B. had a legitimate expectation of privacy. That is, “considering all the circumstances, especially objective manifestations of that expectation,” did B.B. have a legitimate expectation of privacy in engaging in sexual intercourse with another minor?<sup>197</sup> The circumstances would include B.B.'s subjective expectations.<sup>198</sup> However, the court did not address the factual background of the incident involving B.B. and the minor nor any subjective expectations B.B. had regarding his sexual activity with the sixteen-year-old, to determine whether there was indeed a legitimate expectation of privacy.

The *B.B.* court did make the point, however, that activities such as “marriage, procreation, contraception, and family relationships” were recognized in Florida as privacy interests under the Federal Constitution.<sup>199</sup> And, accepting the fact that the freestanding Privacy Amendment in Florida offers a broader grant of protection than that of the Federal Constitution, the sexual activity of B.B. could implicate a reasonable expectation of privacy for which the State

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creation, California's efforts to prevent teenage pregnancy are to be viewed differently from Utah's efforts to inhibit a woman from dealing with pregnancy once it has become an inevitability”).

196. *Jones v. State*, 640 So. 2d 1084, 1087 (Fla. 1994); see *Garcia v. State*, 633 So. 2d 518, 519 (Fla. 4th Dist. Ct. App. 1994). The *Garcia* court stated that “there is a significant difference between a pregnant minor who wishes to terminate her pregnancy and a minor under 16 having sexual relations. The ramifications of requiring a pregnant child to have a child are far greater, in our view, than criminalizing sexual relations with a child.” *Id.*

197. *Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J., concurring). See *supra* notes 98–100 and accompanying text for a discussion of the *Shaktman* test.

198. *Id.* Chief Justice Ehrlich stated that “the zone of privacy covered by [A]rticle I, section 23, can be determined only by reference to the expectations of each individual, and those expectations are protected provided they are not spurious or false.” *Id.*

199. *B.B.*, 659 So. 2d at 258–59 (citing *Shevin v. Byron*, 379 So. 2d 633 (Fla. 1980)).

would have to justify an intrusion into that right. This argument would appear stronger than an attempt to compare the factual situation in *B.B.*, which involved consensual sexual intercourse, to that of *T.W.*, which involved a minor's right to an abortion.

### 3. *Compelling State Interest*

The *B.B.* court, once it found that *B.B.*'s privacy right had been implicated, correctly articulated the next step in the analysis, dictated by *Winfield*, that the burden shifts to the State to show a compelling state interest.<sup>200</sup> The court differentiated the compelling interest in the factual situation of an adult-minor sexual relationship versus a minor-minor relationship.<sup>201</sup> In so doing, the *B.B.* court acceded that there was a compelling state interest in the minor-minor situation, as such "protecting children from sexual activity before their minds and bodies have sufficiently matured to make it appropriate, safe, and healthy for them . . . ."<sup>202</sup> The court was unable to declare the statute unconstitutional based on the lack of a compelling state interest, as it had just announced such a compelling interest the previous year in *Jones v. State* in the context of section 800.04.<sup>203</sup>

However, the court determined that the punishment scheme of section 794.05 was not the least intrusive means of furthering the compelling state interest.<sup>204</sup> In so stating, the court offered no explanation of why it was not the least intrusive means, what a less intrusive means might be, or why the regulation of the adult-minor situation under section 794.05 is permissible using the same means, considering that the court articulated a compelling state interest in both situations.

Additionally, the court did not explain the reasons why section 800.04 — a statute criminalizing sexual activity with a minor under sixteen — was constitutional and presumably the least intrusive means as applied to fifteen-year-old victims; and yet a statute criminalizing the same behavior with sixteen-year-olds under sec-

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200. *Id.* at 259.

201. *Id.*

202. *Id.*

203. *Jones v. State*, 640 So. 2d 1084 (Fla. 1994).

204. *B.B.*, 659 So. 2d at 259.

tion 794.05 was not the least intrusive means of effectuating the compelling state interest, which was the same in both cases, that is, the protection of children from premature sexual activity.<sup>205</sup>

### B. Recommendations — Judicial Restraint and Legislative Activism

Clearly the *B.B.* court was dissatisfied with a statute that adjudicated a sixteen-year-old a second degree felon for having consensual sexual intercourse with another sixteen-year-old.<sup>206</sup> By holding section 800.04 (which applies to those under sixteen) constitutional against a privacy challenge and finding section 794.05 (which applies to those under eighteen) unconstitutional, the Florida Supreme Court has, in effect, lowered the age of consent.<sup>207</sup> However, the age of consent should be a legislative determination. The court accomplished this goal by expanding right to privacy jurisprudence, by virtually ignoring precedent that upheld the constitutionality of a substantially similar statutory rape statute in *Jones v. State*, and by making a spurious distinction of the factual differences between the cases.<sup>208</sup> Additionally, the court, by finding the statutory rape statute unconstitutional, did not acknowledge the long standing rule of review that when reviewing the constitutionality of a statute, “every presumption is to be indulged in favor of validity.”<sup>209</sup>

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205. See *Jones v. State*, 640 So. 2d 1084 (Fla. 1994); see also *supra* notes 134–49 and accompanying text.

206. The majority in *B.B.* determined that § 794.05 was “not being utilized as a shield to protect a minor, but rather, it [was] being used as a weapon to adjudicate a minor delinquent.” *B.B.*, 659 So. 2d at 260.

207. As Chief Justice Grimes stated in his dissent in *B.B.*, “[d]espite the majority’s effort to restate the issue, the question before us is whether it is for the legislature or the courts to determine the age of consent for minors to engage in sex.” *B.B.*, 659 So. 2d at 260 (Grimes, C.J., dissenting).

Justice Kogan stated in *Jones* that:

[T]he legislature . . . can choose any age within a range that bears a clear relationship to the objectives the legislature is advancing. Some reasonable age of consent must be established because of the obvious vulnerabilities of most youngsters and the impossibility of legally defining ‘maturity’ for allegedly precocious teens in this context.

*Jones v. State*, 640 So. 2d 1084, 1090 (Fla. 1994) (Kogan, J., concurring).

208. See *supra* notes 136–49.

209. *Griffin v. State*, 396 So. 2d 152, 155 (Fla. 1981); see *Golden v. McCarty*, 337 So. 2d 388 (Fla. 1976).

The court, by upholding the constitutionality of section 800.04 and finding section 794.05 unconstitutional as applied to two minors, has created a bizarre situation in Florida. The State can now constitutionally regulate two fifteen-year-olds having consensual sexual intercourse (falling under section 800.04), a sixteen-year-old and a fifteen-year-old “victim” having consensual sexual intercourse (also under section 800.04), and an eighteen-year-old having consensual sexual intercourse with a seventeen-year-old “victim” (under section 794.05 in the constitutional adult-minor situation). The only people with a constitutionally guaranteed privacy right to engage in consensual sexual activity under this decision are in the age group of sixteen- and seventeen-year-olds. Thus, sexual activity among this age group is exclusively free from governmental intrusion.<sup>210</sup>

The *B.B.* court created a situation that is in contrast to the situation which existed under the statutory scheme in which sexual activity with anyone under the age of eighteen was regulated, despite the relative age of the parties. This statutory regulation of activity was more predictable and clearly delineated the age at which the State would prescribe this activity.<sup>211</sup>

In today's society, perhaps the age of consent should be revisited by the legislature. In any event, it should be a legislative determination. The legislature should address the statutory scheme that exists today and determine the necessity of two provisions providing protection for children against premature sexual activity.<sup>212</sup> In addition to the age of consent issue, the antiquated language of section 794.05 regarding the previously chaste character of the victim as an element of the offense makes it a prime candidate for reconsideration or elimination.

Justice Kogan correctly asserted in the *B.B.* concurrence that if the purpose of the statute is to protect children, then it should pro-

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210. The consensual sexual relations of adults have been exempted from this analysis by the author.

211. This is an argument about consistency and not a judgment as to whether the age of eighteen is the proper age of consent. *See supra* text accompanying note 177.

212. *Accord* *B.B. v. State*, 659 So. 2d 256, 260 (Fla. 1995) (Kogan, J., concurring). Justice Kogan suggested “that the legislature revisit this statute and either modernize it or decide if it is genuinely necessary in light of the variety of other statutes more than adequately protecting children from sexual predation.” *Id.*

tect all children and not just those of previously chaste character.<sup>213</sup> Indeed, non-chaste minors are the ones that the State should be most concerned about protecting from the ills of premature sexual activity.<sup>214</sup> Section 800.04 adequately protects children without regard to the previous sexual experience of the child as should section 794.05.

In light of the foregoing, it is time for the legislature to reconsider the necessity of this provision or, in the alternative, to modernize the language to best effectuate the stated goals in the context of modern societal norms and mores. In so doing, the legislature should make a final determination as to the age at which the State has a compelling interest in regulating sexual activity.

The extension, under the *B.B.* decision, of the right of privacy under Article I, section 23 of the Florida Constitution as it relates to minors, could have unforeseen effects as it applies to the regulation of the activities of minors that may implicate privacy rights. By extending essentially the same privacy right to minors as those of adults, other activities involving minors may trigger the privacy provision. Statutes prohibiting the distribution of adult literature to minors, or statutes prohibiting the sale of nude photographs of minors, or prohibiting the sale of cigarettes and alcohol to minors may be challenged as violating the minor's right to privacy. *In re T.W. and B.B. v. State* may have opened a Pandora's box of privacy rights for minors, and those decisions may have great repercussions in the years to come.<sup>215</sup>

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213. *Id.* at 261.

214. *Id.*

215. *See supra* notes 101–20.