J.A.A. v. State: Striking a Balance Between Minors’ Right of Privacy and Florida’s Interest in Protecting Minors’ Adolescent Development

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I. INTRODUCTION

Until 1980, the State of Florida was without any textual provision that afforded its citizens a right of privacy. However, the Supreme Court of Florida, at least to some degree, recognized that a right of privacy was protected in some manner by the state constitution. Since the introduction of Article I, Section 23, the right of privacy amendment to the Florida Constitution, the Supreme Court of Florida has had many opportunities to replace the arguably vague and ambiguous language of the amendment with more concrete terms. J.A.S. v. State, decided in February of 1998, is one recent Supreme Court of Florida decision in which the court had an opportunity to express its views on privacy rights and, in particular, how those rights relate to minors. Fundamentally, the J.A.S. decision is premised upon a minor’s right of privacy and how far the government may out stretch its arm to limit that right. In order to understand the basis for the right to privacy argument, it is important to consider the origin of the right to privacy in the State of Florida.

2. FLA. CONST. art I, § 23.
3. 705 So. 2d 1381 (Fla. 1998).
4. Id.
5. Id.
Unlike the right of privacy that the United States Constitution provides, which emanates from the Fourteenth Amendment, the Florida Constitution specifically sets forth a right to privacy in Article I, Section 23. Article I, Section 23 states that “[e]very 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.” It seems important to mention that this amendment, proposed by the state legislature and approved by Florida voters, apparently evidenced a strong commitment on the part of Florida voters to protect privacy rights.

This seemingly strong commitment on the part of Florida voters is consistent with the Supreme Court of Florida’s ruling in Winfield v. Division of Pari-Mutuel Wagering, where the court recognized the importance of Article I, Section 23 by extending the highest standard of review to cases in which the right of privacy is implicated. The court in Winfield set the standard by which all subsequent cases dealing with the right of privacy would be adjudicated. The right of privacy was recognized by the court as a “fundamental right,” and as such, one that could only be limited based upon a “compelling” state interest. The court then set the test by which an alleged governmental intrusion into an individual’s right of privacy would be measured. Once a right of privacy is implicated the burden of proof shifts to the state. “The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.” The Winfield court noted that the right of privacy was not absolute and was subject to the compelling interest of the state, which further cemented the power of both the individual

10. 477 So. 2d 544 (Fla. 1985).
11. Id. at 547.
12. Id. at 548
13. Id. at 547.
14. Id.
15. Winfield, 477 So. 2d at 547.
16. Id.
and the state in this area. Arguably, it was the suggestion of the court that the mere implication of the right to privacy would not easily overcome the potential strength of the state's interest.

It is difficult to determine when an individual's right to privacy is implicated, given the vagueness of Article I, Section 23. However, the Winfield court stated that "before the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist." "A reasonable expectation of privacy" and "the right to be let alone" give little guidance with regard to the implication of privacy rights. However, the court in Winfield was willing to say that:

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.

Whenever the court determines whether privacy rights exist in any given situation, based upon a "reasonable expectation of privacy," a broad or narrow reading of Article I, Section 23 will result. Consequently, Article I, Section 23 might be a vehicle for judicial legislation when the legislature drafts imprecise laws that implicate an individual's right of privacy. Regardless, the court has found privacy rights implicated in a diverse array of areas from financial records to abortion.

In J.A.S., the court was essentially being asked whether these previous findings supported the conclusion that a minor's right of privacy includes a right to "consensual" sexual activity that outweighs the states compelling interest in protecting minors from such activity. Specifically, the question certified to the Supreme Court of Florida in J.A.S. was:

WHETHER THE POTENTIAL PENALTY FOR VIOLATION OF SECTION 800.04, FLORIDA STATUTES, BY A MINOR UNDER THE AGE OF SIXTEEN FURThERS A COMPELLING

17. Id.
18. Id.
19. Id.
20. Winfield, 477 So. 2d at 547.
22. Winfield, 477 So. 2d at 548.
23. In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989).
Briefly stated, J.A.S. involved two fifteen-year-old boys who had "consensual" sexual intercourse with two twelve-year-old girls. These facts triggered serious constitutional questions and raised doubts about the consistency of prior court decisions.

Part II of this article will focus on the cases which underscore the J.A.S. decision. Part III of this article will dissect the J.A.S. decision, including the district court opinion and the concerns outlined by the trial court. Part IV will attempt to offer some rationale for J.A.S. and its progeny.

II. CASE LAW OVERVIEW

A. In re T.W.—A Minor's Right to Abortion

In re T.W. was one of the first opportunities the Supreme Court of Florida had to explore the right of privacy with regard to minors. T.W., a fifteen-year-old minor, sought an abortion as a result of an unwanted pregnancy. Pursuant to section 390.001(4)(a) of the Florida Statutes, T.W., as a minor, was required to obtain "written informed consent of a parent, custodian, or legal guardian" or seek a judicial bypass in order to

25. Id. at 1382.
26. "Intercourse" is generally used to refer to any act which would constitute a violation of sections 800.04 (Supp. 1991) and 794.05 (Supp. 1996) of the Florida Statutes.
27. J.A.S., 705 So. 2d at 1382.
28. See id. at 1385-87.
29. Id., 551 So. 2d at 1192.
30. Id.
31. Id. at 1189.
32. Florida Statutes section 390.001(4)(a)(1) (Supp. 1988) provides:
If the pregnant woman is under 18 years of age and unmarried, in addition to her written request, the physician shall obtain the written informed consent of a parent, custodian, or legal guardian of such unmarried minor, or the physician may rely on an order of the circuit court, on petition of the pregnant unmarried minor or another person on her behalf, authorizing, for good cause shown, such termination of pregnancy without the written consent of her parent, custodian or legal guardian. The cause may be based on: a showing that the minor is sufficiently mature to give an informed consent to the procedure; the fact that a parent, custodian, or legal guardian unreasonably withheld consent; the minor's fear of physical or emotional abuse if her parent, custodian, or legal guardian were requested to consent; or any other good cause shown.

Id.
obtain an abortion. T.W. sought a judicial bypass on the grounds that "(1) she was sufficiently mature to give an informed consent to the abortion, (2) she had a justified fear of physical or emotional abuse if her parents were requested to consent, and (3) her mother was seriously ill and informing her of the pregnancy would be an added burden." Using the standard of review set forth in *Winfield v. Pari-Mutuel Wagering*, the court found the statute unconstitutional because the state's interests were not "sufficiently compelling under Florida law to override Florida's privacy amendment." The court began its analysis of the case by citing *Roe v. Wade*, noting that this landmark case announced "a right to privacy implicit in the fourteenth amendment" which embraces a woman's decision concerning abortion. The court stated that for section 390.001(4)(a) to pass judicial scrutiny, it must be reconciled with both the United States Constitution and the *Florida Constitution*. However, the court reasoned that review under the *Florida Constitution* was the most prudent starting point because unless the statute could be held constitutional within the meaning of the *Florida Constitution*, there would be no reason to determine whether it would pass scrutiny under the United States Constitution.

The court started with the premise that a woman's decision to have an abortion is a fundamental right, which is undoubtedly supported by the right of privacy amendment in the *Florida Constitution*. More important to the discussion of a minor's right of privacy, the court stated that the "freedom of choice concerning abortion extends to minors . . . based on the unambiguous language of the amendment: The right of privacy extends to '[e]very natural person.'" The court did, however, add the caveat that "[c]ommon sense dictates that a minor's rights are not absolute." Nevertheless, the court declared that for section 390.001(4)(a) to pass judicial scrutiny and be held constitutional, it must serve a compelling state interest by the least intrusive means.

33. *T.W.*, 551 So. 2d at 1189.
34. *Id.*
35. 477 So. 2d 544 (Fla. 1985).
38. *T.W.*, 551 So. 2d at 1190 (citing *Roe v. Wade* 410 U.S. 113 (1973)).
40. *T.W.*, 551 So. 2d at 1190.
41. *Id.*
42. *Id.*
43. *Id.* at 1193.
44. *Id.*
45. *T.W.*, 551 So. 2d at 1195.
With regard to the interests of the state, the court was quick to note that "protecting minors" and "preserving family unity are worthy objectives" yet the court did not believe that these objectives were "compelling." This assertion relied upon other decisions holding that the above objectives were not strong enough state interests to justify the imposition of a parental consent requirement when minors sought other medical procedures, some of which were potentially "life-or-death" decisions. The court found it interesting that a minor may place a child up for adoption without parental consent, a decision the court stated was "fraught with intense emotional and societal consequences."

The court also found that neither parental consent nor a judicial bypass was the least intrusive means to protect the state’s interests and, therefore, was contrary to the test set forth in Winfield. The court seemed to suggest that the procedural pitfalls of the statute rendered the statute unconstitutional with regard to its intrusiveness. Specifically, the Court found "[i]n proceedings wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy, counsel is required under our state constitution." Therefore, statute 390.001(4)(a) did not seek the interests of the state by the least intrusive means because it neither made a "provision for a lawyer for the minor or for a record hearing."

It might be argued, that the decision of the Supreme Court of Florida in T.W. expressed strong support for a minor’s right of privacy, especially in the area of personal autonomy. When the court ruled that a minor could access abortions, free of parental consent or judicial intervention, via a judicial by-pass, it seemingly indicates a commitment by the court to advance increased freedom for minors within the realm of intimate personal relations. The T.W. holding opened the door for future litigants to assert their contention that minors may consent to intercourse. Arguably, if the court was willing to allow a minor to deal with the possible ramifications of sexual intercourse, for example, abortion or adoption, it would also seem logical that the court would allow a minor to legally consent to sexual intercourse, which could lead to those consequences.

46. Id.
47. Id.
48. Id.
49. Id.
50. T.W., 551 So. 2d at 1195.
51. Id. at 1196.
52. Id.
53. Id.
54. See infra note 71.
B. Jones v. State— "Adult-Minor" Statutory Rape

Clearly, the defendant in Jones v. State\textsuperscript{55} believed the decision in T.W. afforded expansive privacy rights for minors, when he argued that the holding in T.W. supported the conclusion that minors may consent to sexual relations.\textsuperscript{56} Jones, an eighteen-year-old, was charged with statutory rape\textsuperscript{57} under section 800.04 of the Florida Statutes,\textsuperscript{58} which states in relevant part that an individual may not, among other things, have "sexual intercourse" with a "minor under the age of 16" and that "the victim's consent" is not a defense.\textsuperscript{59} Jones was charged and convicted of violating section 800.04, as a result of having sexual intercourse with a minor under the age of sixteen.\textsuperscript{60} Jones appealed and questioned the constitutionality of section 800.04 because it made no provision for consent on the part of the minor in violation of the minor's privacy rights.\textsuperscript{61} Essentially, he argued that because T.W. afforded a minor the unrestricted right to an abortion, it was only logical that a minor could consent to sexual intercourse.\textsuperscript{62} The Supreme Court of Florida disagreed with Jones's reading of the T.W. decision and

\textsuperscript{55} 640 So. 2d 1084, 1084 (Fla. 1994).
\textsuperscript{56} Id. at 1087.
\textsuperscript{57} Id. at 1085.
\textsuperscript{58} FLA. STAT. § 800.04 (1991) Lewd, lascivious, or indecent assault or act upon or in presence of child.—Any person who:

(1) Handles, fondles or makes an assault upon 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, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.

\textsuperscript{59} Id.
\textsuperscript{60} Jones, 640 So. 2d at 1085.
\textsuperscript{61} Id. Jones had standing to make his assertion because of precedent, which stated "sellers of obscene materials had vicarious standing to raise the privacy rights of their customers." Id.
\textsuperscript{62} Id. at 1086–87.
found section 800.04 constitutional. The court stated that "T.W. did not transform a minor into an adult for all purposes." Though the plurality opinion of the court never addressed the question directly, the opinion suggested that a minor's privacy rights did not extend to sexual relations. However, the court did say "Florida has an obligation and 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.'" The use of the phrase "compelling interest" with respect to privacy rights should arguably have led to a Winfield analysis, yet the court never spoke in terms of privacy rights and, thus, one might conclude that no such privacy right exists with regard to minors and "consensual" sex.

For more guidance, Justice Kogan, in his concurring opinion, stated quite clearly that "T.W., in sum, does not create a right for young adolescents to 'consent' to sex." Kogan illuminated the heart of section 800.04, something the plurality had trouble doing, when he pointed out that the purpose of section 800.04 was to "prevent children and young adolescents from being exposed to the wide-ranging risks associated with sexual exploitation and premature sexual activity." Kogan also reasoned that in T.W. the court found the irrational application of section 390.001(4)(a) problematic because minors could consent to certain types of dangerous medical procedures but they could not consent to abortion without running a procedural maze. He found it ridiculous to suggest that the T.W. decision, one designed to help minors deal with the consequences of sexual activity, supported the conclusion that minors could consent to intercourse.

By contrast, Kogan explained that the purpose of section 800.04 to protect minors from "predatory exploitation," "clearly outweighs whatever

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63. Id. at 1087.
64. Jones, 640 So. 2d at 1087.
65. Id.
66. Id. at 1087 (quoting Jones v. State, 619 So. 2d 418, 424 (Fla. 5th Dist. Ct. App. 1993)(Sharp, J., concurring specially)).
67. Id. at 1087 n.5 (Kogan J., concurring).
68. Id. at 1088 (Kogan, J., concurring).
70. Jones, 640 So. 2d at 1087 (Kogan, J., concurring).
71. Id. Some have argued that recognizing a minor's right to an abortion, however limited that right may be, necessarily means there is a corresponding right for minors to engage in "consensual" sex. Such an argument is no different than saying that, because minors have a right to consent to alcohol-and drug-abuse treatment, § 397.601, FLA. STAT. (1991), they also must have a right to consume alcohol and ingest drugs in the first instance. This is an unsupportable brand of logic. Jones, 640 So. 2d at 1087 n.5.
'right' children may have in consenting" to sexual activity. Justice Kogan then went on to explain the effects of such exploitation, highlighting studies indicating the pervasive nature of sexual abuse of children and the far reaching results such abuse has on children who are affected by it. Further, Kogan explained the merits of the legislature’s "bright-line cut-off at a specific age" with regard to an individual's ability to give consent to intercourse. So long as that age is "within a range that bears a clear relationship to the objectives the legislature is advancing," he reasoned that the legislature must choose an age at which an individual can understand the ramifications of certain critical and life long decisions, such as consenting to intercourse.

The plurality opinion in Jones clearly expressed the view that section 800.04 is constitutional, albeit with little clear-cut reasoning. Justice Kogan's concurrence offered a lengthy explanation with regard to the soundness of section 800.04, but his reasoning did not gain the full support of the court. Though the rationale of the Supreme Court of Florida was not clear from the Jones decision, it appeared that the court was committed to protecting minors from sexual activity by not recognizing any right to engage in "consensual" intercourse. This might have been a fair assessment of the court's reasoning had Jones been the final word on whether a minor could "consent" to intercourse.


The court's decision in B.B. v. State appeared to call into question whether the court was truly committed to preventing minors from participating in consensual intercourse. The facts in B.B. are strikingly similar to those of Jones, yet the result was completely opposite. B.B., a sixteen-year-old, was charged with having sexual intercourse with another

73. Jones, 640 So. 2d at 1088 (Kogan, J., concurring) (quoting Schmitt v. State, 590 So. 2d 404, 418-19 n.17 (Fla. 1991) (Kogan, J., concurring in part, dissenting in part)). "Some studies, for example, indicate that 5 to 9 percent of males and 8 to 28 percent of females in the general population report that they were sexually exploited as youths." Jones, 640 So. 2d at 1088 (Kogan, J., concurring).
74. Id. at 1088-89 (Kogan, J., concurring).
75. Id. at 1089.
76. Id. at 1090.
77. Id. at 1087.
78. Jones, 640 So. 2d at 1087.
79. 659 So. 2d 256 (Fla. 1995).
80. Id. at 257.
sixteen-year-old. B.B. was charged under section 794.05 of the Florida Statutes, which states in relevant part, "[a]ny 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 . . ." B.B. beckoned the court to find section 794.05 "unconstitutional as violative of his right to privacy." The court seemingly agreed with the assertion of the petitioner, finding section 794.05 unconstitutional.

In both Jones and B.B., the court was dealing with statutory rape statutes. It was undisputed that the individuals had intercourse with minors under the statutory age, yet in Jones the court held the statute constitutional and thus upheld the conviction and in B.B. the court held the statute unconstitutional and remanded the decision. It seems quite logical to conclude, "the court arrived at diametrically opposed results." Practically speaking, this conclusion seems sound. However, the court's decisions, when examined, indicate that the court had little choice given the language of section 794.05 and the factual distinction between B.B. and Jones.

In both cases the court clearly stated that it would not and was not endorsing consensual intercourse between minors. In Jones, the court

82. B.B., 659 So. 2d at 257.
83. Florida Statute section 794.05 (1991) provides:
Carnal intercourse with unmarried person under 18 years.—
   (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 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 (1991).
84. Id.
85. Id.
86. B.B., 659 So. 2d at 258.
87. Id. at 260. "Thus, we do not hold that section 794.05 is facially unconstitutional but only that it is unconstitutional as applied to this 16-year-old as a basis for a delinquency proceeding." Id.
88. Id. at 257, 259.
89. Jones, 640 So. 2d at 1087.
90. B.B., 659 So. 2d at 260.
92. See B.B., 659 So. 2d at 258; Jones, 640 So. 2d at 1087.
stated that "T.W., in sum, does not create a right for young adolescents to 'consent' to intercourse." In B.B., the court maintained, in dictum, that "if [their] decision were based upon whether minors could consent to sexual activity as though they were adults, [their] decision would be 'no.'" This quote raises the obvious question, upon what was their decision based?

The answer to this question appears to lie within the somewhat subtle differences between the factual circumstances giving rise to each case. First, the court framed the issue in B.B. so that they would not have to reach the question of whether minors may consent to intercourse. Second, as previously stated, Jones and B.B. were charged under different statutes, a fact that would prove extremely important. Next, the court in B.B. unequivocally stated that section 794.05 implicated B.B.'s privacy rights and therefore required a thorough Winfield analysis, a step not truly taken in Jones. Finally, the defendant and the victim in B.B. were both minors, whereas the defendant in Jones was an adult. These factors coalesced and led the court to its conclusion; a conclusion one might argue was manufactured to avoid a question the court did not want to answer.

The question certified to the Supreme Court of Florida, by the Second District Court of Appeal, was whether "Florida's privacy amendment, article I, section 23 of the Florida Constitution, render section 794.05... unconstitutional as it pertains to a minor’s consensual sexual activity?" However, the Supreme Court of Florida stated the issue to be "whether a minor who engage[d] 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." The difference between the question certified and the issued ruled upon, seemingly infinitesimal, was actually infinite. The court removed the question of "consensual activity" and refocused the issue toward the nature and language of the statute as it pertains to the right of privacy in Florida with regard to minors. This essentially allowed the court to withhold judgment on the issue of consensual intercourse between minors. Having changed the question presented, the court set out to answer

93. Jones, 640 So. 2d at 1087 n.5 (Kogan J., concurring).
94. B.B., 659 So. 2d at 258.
95. Id. at 257.
96. Id. at 258.
97. Id. at 260.
98. Id. at 259.
99. After B.B. it was truly unclear how courts were going to deal with minors engaging in sexual intercourse and subsequently being charged with statutory rape.
101. B.B., 659 So. 2d at 258.
102. Id.
its own contrived question. It should be noted that Justice Harding dissented based on the court’s failure to reach the actual question presented. He also suggested that the court would have had to find the statute constitutional if it had answered the certified question.

Having first reiterated the court’s assertion in T.W., that the right of privacy extends to minors, the court then moved to the question they failed to definitively opine upon in Jones, that is, whether a right of privacy is implicated with regard to minors and “consensual” intercourse. It would seem that the court’s position with regard to whether a right of privacy exists in “consensual” intercourse between minors is clearly stated in their assertion “that Florida’s clear constitutional mandate in favor of privacy is implicated in B.B., a sixteen-year-old, engaging in carnal intercourse.” Thus, the court was willing to say that a minor’s right to privacy was implicated when that minor engaged in consensual sexual activity. However, the court went no further with this line of thought.

Rather, the court then focused upon two key distinctions between B.B. and Jones, which allowed them to dodge the broader issue of minor’s “consenting” to intercourse. First, the court explained that the compelling state interest in Jones was protecting a minor from the sexual exploitation of an adult. By contrast, the court held that the interest in B.B. could not be sexual exploitation because both the defendant and victim in B.B. were minors. Rather, the court recognized the state’s asserted interest was “protecting the minor from the sexual activity itself for reasons of health and quality of life.”

Having placed the interest of the state in these terms, the court concluded “that the State ha[d] failed to demonstrate in this minor-minor situation that the adjudication of B.B. as a delinquent through the application of section 794.05 [was] the least intrusive means of furthering what we have determined to be the State’s compelling interest.” To reach this conclusion the court pointed to the archaic language of the statute, which essentially created a preferred class of minors. The court found it

103. Id. at 262 (Harding, J., dissenting).
104. Id.
105. Id. at 258.
106. B.B., 659 So. 2d at 259.
107. Id.
108. Id.
109. Id. at 258–59.
110. Id. at 259.
111. B.B., 659 So. 2d at 259.
112. Id.
113. Id.
114. Id.
impossible to reconcile the fact that the alleged purpose of the statute was to protect minors from the dangers of sexual activity, yet the statute only extended to those minors of "chaste" character.\textsuperscript{115} As a point of clarity, the court wished to add, "[w]e do say that if our decision was what should be taught and reasoned to minors, the unequivocal text of our message would be abstinence."\textsuperscript{116} The court was restrained by what it reasoned was constitutionally sound, not wanting their opinion to be based upon their own moral or political views, a noble approach for Florida's high court, yet a confusing notion for most.

Some perspective on the potential pitfalls of adjudicating minors delinquent in minor-minor statutory rape cases might be gained by the assertions of Justice Kogan's concurring opinion and Chief Justice Grime's dissent. These opinions have particular weight with respect to the J.A.S. court's decision and arguably strike at the heart of the minor-minor statutory rape debate. Justice Kogan offered, with respect to who should be charged in minor-minor statutory rape cases, that "[a]tempting to brand one as the aggressor and the other as the victim raises very serious questions of equal protection, especially where prosecutors always assume that one type of child—such as 'the boy,' or the one who is 'unchaste'—must be the aggressor."\textsuperscript{117} Chief Justice Grime's fear of events to come might easily be

\textsuperscript{115} Id.

Thus, by its own terms the statute at issue here does not protect unmarried minors who had lost their virginity through a liaison with a third party prior to the act in question. This singularly odd state of affairs indicates that the real objective of this statute is not to protect children as a class, but to prevent the loss of chastity of those not already 'despoiled'. Any person—child or adult—thus does not violate this particular statute by a sexual liaison with an unchaste minor.

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 261 (Kogan, J., concurring). Justice Kogan's statement raises serious concerns about the inherent potential for equal protection violations when one minor is singled out and charged with statutory rape in minor-minor situations. Id. Although Justice Kogan raised the equal protection issue, he did not analyze this potential problem under either the Florida or United States Constitution. However, the United States Supreme Court has opined with respect to equal protection and statutory rape statutes. See also, Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), which held a statutory rape statute, which only applied to males, constitutional despite the argument that the statute violated the equal protection clause because "the gender classification [was] not invidious, but rather realistically reflect[ed] the fact that the sexes [were] not similarly situated in certain circumstances" particularly, "that the consequences of sexual intercourse and pregnancy [f]all more heavily on the female than on the male." Id. at 464. However, Michael M. dealt with a statute that facially discriminated against males, whereas, Florida's statutory rapes statutes are facially neutral. See also, Washington v. Davis, 426 U.S. 229, 239 (1976) (asserting that "our
evidenced by his response that “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.”118 The Chief Justice also noted that, if convicted, B.B. might have a viable challenge based upon cruel and unusual punishment.119 Further, Chief Justice Grime’s fears might not have been assuaged when the Florida Legislature changed the language of section 794.05. The relevant change came by way of removing any language relating to “chaste character” and clearly prohibiting an adult over the age of twenty-four from having sexual relations with a sixteen or seventeen-year-old.120

In many ways the trepidation found in both Chief Justice Grime’s dissent and Justice Kogan’s concurrence are in essence the true problems when dealing with statutory rape, where both victim and accused are minors claiming consent. The court must deal with the problem of who is the victim.

118. B.B., 659 So. 2d at 262 (Grimes, C.J., dissenting).
119. Id.
120. FLA. STAT. § 794.05 (1996).

Unlawful sexual activity with certain minors.

(1) A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. As used in this section, “sexual activity” means oral, anal, or vaginal penetration by, or in union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose.

(2) The provisions of this section do not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under chapter 743.

(3) The victim’s prior sexual conduct is not a relevant issue in a prosecution under this section.

(4) If an offense under this section directly results in the victim giving birth to a child, paternity of that child shall be established as described in chapter 742. If it is determined that the offender is the father of the child, the offender must pay child support pursuant to the child support guidelines described in chapter 61. Id. (It seems that this change does in fact allow a sixteen-year-old to engage in sexual intercourse with another sixteen-year-old.)

FLA. STAT. § 794.05 (1996).
and who is the victimizer, but remain mindful of the equal protection implications. The court must also balance on the very thin line between constitutionally entitled activity and endorsing intercourse between minors. Essentially, the three cases outlined above, T.W., Jones, and B.B., placed the court squarely in the middle of this very confusing and sensitive problem and set itself up to ultimately decide the issue of "consensual" intercourse between minors. After B.B. was decided, the court's record on the issue of a minor's right to privacy was not quite clear. They had allowed minors the unrestrained right to abortion, then failed to recognize any consensual right to intercourse with respect to minors and adults, and finally struck down a statute that allowed a minor to be charged with statutory rape of another minor.

III. J.A.S. v. STATE—A CRITICAL ANALYSIS

A. The Trial and District Court

State v. J.A.S. may have been the court's opportunity to finally determine the issue of adjudicating minors delinquent of so called "minor-minor" consensual intercourse. The facts surrounding the case were relatively simple. Two fifteen-year-old boys had "consensual" intercourse with two twelve-year-old girls and were charged with statutory rape under section 800.04, the same statute applied in Jones. Perhaps relying upon the B.B. decision, the trial judge mirrored the sentiments of the concurrence and dissent. He found section 800.04 unconstitutional as applied to both minors in J.A.S., because section 800.04 "violated their right to privacy and equal protection under the law" and because "the potential sanction was grossly disproportionate to the crime and would constitute cruel and unusual punishment." The trial court's line of thought might seem predictable, given the suggestions of the B.B. court. However, the district court was unmoved. The district court was quick to dismiss the assertions of equal protection and cruel and unusual punishment, but could not be as dismissive with the right of privacy issue.

The court first found it unreasonable for the trial judge to have assumed, based solely on his "experience of five years as juvenile judge,"

121. In re T.W., 551 So. 2d 1186, 1188 (Fla. 1989).
123. B.B. v. State, 659 So. 2d 256 (Fla. 1995).
125. Id. at 1367.
126. Id.
127. Id. at 1367, 1369.
that "whenever sexual misconduct is charged between the opposite sexes, the boys are always charged by the state." Further, because the defense presented no evidence to support such a conclusion, the State had nothing tangible to dispute. The State did, however, present evidence that one of the juveniles charged had had extensive juvenile "referrals" and "previously engaged in intercourse with the victim's [thirteen-year-old] sister." Apparently, this was the court's way of saying the State had accurately charged the victimizer and therefore there were no equal protection problems. Regardless, the court stated that choosing who would be charged was a matter of the prosecutor's discretion.

The court then moved to the issue of cruel and unusual punishment. Essentially, the court said that they could not say whether the juveniles would be subject to cruel and unusual punishment because the trial court dismissed the charges against the juveniles. Further, they stipulated that it might be appropriate for the juveniles to be punished harshly if the crime they committed warranted such punishment.

The court finally addressed the question of privacy rights when both the defendant and the victim are minors. The court did not apply the Winfield test, which they recognized was the proper means to address a right to privacy question. Rather, the court focused upon whether it was proper to charge a minor under section 800.04. The court recognized the inherent problem a court faced when adjudicating one minor a delinquent in "minor-minor" statutory rape cases. However, the court had both precedent and the indecision of the state legislature to rely upon.

128. Id. at 1367.
129. J.A.S., 686 So. 2d at 1368.
130. Id.
131. Id.
132. Id.
133. Id.
134. J.A.S., 686 So. 2d at 1368.
135. Id.
136. Id. at 1369.
137. Id. at 1368.
138. Id. at 1369 n.2. The court in J.A.S. recognized:

[[the potential incongruity of punishing one under 16 who is supposed to be protected from the sexual advances of others because of his or her age and inability to fully consent to sex, equally with one 16 or 60, who is presumed to be of an age and maturity to understand his sexual decisions.

J.A.S., 686 So. 2d at 1369 n.2.

139. Id. at 1369. "The failure to enact any legislation before retiring from the 1996 session indicates to us that the members of the legislature have no better idea of how to deal with problem than that adopted by L.L.N." The fact that the debate in the legislature existed
Citing precedent set forth in *L.L.N. v. State*, the court denied any attempt to claim that section 800.04 was constitutionally vague with respect to minors. In *L.L.N.*, a minor, charged under section 800.04, unsuccessfully claimed that the statute was unconstitutionally vague because it was being used to "prosecute a member of the protected class." The court was quick to note that the Supreme Court of Florida denied certiorari in *L.L.N.*, implying that the high court was satisfied that *L.L.N.* was decided properly. The court also suggested that the failure on the part of the legislature in the previous term to decide whether it is proper for minors to be charged under section 800.04 was proof that the legislature realized a problem existed and that they, too, had no better solution than that used by the courts. However, the court recognized in *B.B.* that the Supreme Court of Florida found it problematic to adjudicate a minor delinquent in a statutory rape case because of the potential penalties involved. Regardless, the court believed that the *B.B.* decision was inconclusive with regard to the potential penalty and therefore suggested that the Supreme Court of Florida wished to leave the question to the legislature.

The court seemed to endorse the view that minors can be constitutionally charged and convicted under section 800.04 because of the strength of the statutory language and the apparent commitment on the part of the Supreme Court of Florida to prevent "consensual" intercourse between minors. Although the district court did vacate the dismissal of the trial court, it is difficult to grasp the rationale that motivated their findings. Particularly, because the court certified the following question to the Supreme Court of Florida:

suggested to the court that "the legislature [was] aware of the serious problem of sexual activity among minors." *Id.*

140. 504 So. 2d 6 (Fla. 2d Dist. Ct. App. 1987).
141. *J.A.S.*, 686 So. 2d at 1368 (citing *L.L.N. v. State*, 504 So. 2d 6 (Fla. 2d Dist. Ct. App. 1987)).
142. *L.L.N.*, 504 So. 2d at 7.
143. *J.A.S.*, 686 So. 2d at 1368.
144. *Id.* at 1369.
145. *Id.*
146. *Id.*

[The current supreme court was unable to accept the potential penalty appropriate for an adjudication of guilt of a second degree felony in *B.B.* The result attained in *B.B.* was to refer the matter back to a legislature that was unable to resolve the matter during its entire 1996 session.

*Id.*

147. *J.A.S.*, 686 So. 2d at 1368. "The conclusion to be drawn from the supreme court's statements in *B.B.* and the legislature's statement in section 800.04 is that sexual activity between minors is prohibited whether or not each of the participants believe that they have 'consented.'" *Id.*
WHETHER THE POTENTIAL PENALTY FOR VIOLATION OF SECTION 800.04, FLORIDA STATUTES, BY A MINOR UNDER THE AGE OF SIXTEEN FURTHERS A COMPELLING STATE INTEREST THROUGH THE LEAST INTRUSIVE MEANS.\(^{148}\)

B. The Supreme Court of Florida

The factual circumstances of B.B. and J.A.S. are similar because they both deal with minors charged with statutory rape based upon "consensual" intercourse with other minors.\(^ {149}\) The court's conclusion in B.B., that the state's compelling interest was not furthered by the least intrusive means by adjudicating B.B., a minor delinquent,\(^ {150}\) might lead one to reason that J.A.S., a minor, would not be adjudicated delinquent. However, in J.A.S. the court "conclude[d] that section 800.04, as applied herein, furthers the compelling interest of the State in the health and welfare of its children, through the least intrusive means, by prohibiting such conduct and attaching reasonable sanctions through the rehabilitative juvenile justice system."\(^ {151}\) Support for the court's conclusion was essentially derived from distinguishing B.B. from J.A.S. and explaining the similarities between J.A.S. and Jones.\(^ {152}\)

The court began its discussion by outlining their holdings in both Jones and B.B. and explaining why those holdings support the J.A.S. decision.\(^ {153}\) The court stated that section 794.05,\(^ {154}\) the statute used to charge B.B., was designed to protect minors from adults.\(^ {155}\) Because B.B. was a minor, prosecuting B.B was not furthering the purpose of the legislation.\(^ {156}\) Though both defendant and victim in J.A.S. were minors, the court found a distinction between J.A.S. and B.B. in the fact that B.B. dealt with two sixteen-year-olds, while J.A.S. dealt with two fifteen-year-olds (the defendants) and two twelve-year-olds (the victims).\(^ {157}\) This factual distinction between the cases proved extremely important because the court found that "twelve-year-old children are entitled to considerable protection

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148. Id. at 1370.
151. J.A.S., 705 So. 2d at 1386.
152. Id.
153. Id. at 1383–85.
155. J.A.S., 705 So. 2d at 1384.
156. Id. at 1385.
157. Id. at 1386.
by the State, even when some of them resist its extension to them."\textsuperscript{158} Of course, one wonders if the court was suggesting that a sixteen-year-old was not entitled to the same protection.

In \textit{B.B.}, the court explained that "[s]ection 794.05 is not being utilized as a shield to protect a minor, but rather, it is being used as a weapon to adjudicate a minor delinquent."\textsuperscript{159} In \textit{J.A.S.}, the court summarily found that "section 800.04 is being primarily utilized as a shield to protect the twelve-year-old girls."\textsuperscript{160} The court offered no explanation for this distinction, yet there is little doubt that the family of the sixteen-year-old female victim in \textit{B.B.} was equally confused by the court's failure to "shield" her from the defendant, instead choosing to "shield" him from punishment.\textsuperscript{161}

The court then reiterated that \textit{Jones}, among other things, stood for the proposition that minors should be protected from sexual exploitation, which the court deemed to be a compelling state interest.\textsuperscript{162} It appears that one of the similarities between \textit{J.A.S.} and \textit{Jones} rests in the notion of exploitation as a compelling state interest. In \textit{Jones}, the court was dealing with an adult-minor situation, where the court found it easy to see the propensity for sexual exploitation.\textsuperscript{163} Similarly, the age disparity in \textit{J.A.S.} seemingly led the court to conclude that the state had a compelling interest.\textsuperscript{164} Therefore, it might be argued that the court reasoned if the minor victim was quite young or if the age disparity was significant, the danger of sexual exploitation would rise to a level that supported adjudicating the older minor delinquent. This statement is supported by the court's conclusion that "whatever privacy interest a fifteen-year-old minor has in carnal intercourse is clearly outweighed by the State's interest in protecting twelve-year-old children from harmful sexual conduct."\textsuperscript{165}

The court also opined on several other issues raised by statutory rape cases dealing with minors.\textsuperscript{166} The court made it clear that "minors under sixteen have no unfettered right to engage in recreational intercourse with others under sixteen."\textsuperscript{167} Further, \textit{T.W.} gave the court the power to take steps

\begin{itemize}
  \item \textsuperscript{158} \textit{Id.} at 1385.
  \item \textsuperscript{159} \textit{B.B.}, 659 So. 2d at 260.
  \item \textsuperscript{160} \textit{J.A.S.}, 705 So. 2d at 1386.
  \item \textsuperscript{161} \textit{Id.}
  \item \textsuperscript{162} \textit{Id.} at 1384. "We noted that \textit{Jones} implicated an adult-minor situation where 'the crux of the State's interest ... [was] the prevention of exploitation of the minor by the adult.'" \textit{Id.} (quoting \textit{B.B.}, 659 So. 2d at 259).
  \item \textsuperscript{163} \textit{Jones}, 640 So. 2d at 1086 (quoting Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991)).
  \item \textsuperscript{164} \textit{J.A.S.}, 705 So. 2d at 1384.
  \item \textsuperscript{165} \textit{Id.} at 1386.
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} \textit{Id.}
\end{itemize}
necessary to prevent minors from participating or being lured into sexual activity. Also, the court reasoned that the vast amount of legislation aimed at protecting minors from sexual exploitation supported the conclusion that adjudicating a minor delinquent for statutory rape was consistent with the intent of the legislature.

The court also found that punishment could be achieved through the least intrusive means because of the "rehabilitative" nature of the juvenile justice system. Particularly, the court pointed to the fact that the defendants in J.A.S. were not charged as adults and therefore could not be sentenced to the possible "maximum fifteen-year prison sentence." The rationale that the defendants were not charged as adults begs the question whether the court would have found differently if the defendants were charged as adults.

As dictum, the court offered, "[i]f we blinded ourselves to the unique facts of each case, we would render decisions in a vacuum with no thought to the serious consequences of our decisions for the affected parties and society in general." This appears to be an attempt to reconcile the court's arguably inconsistent holdings with respect to privacy rights of minors found in T.W., Jones, B.B., and J.A.S. It is also likely that the court is illustrating the difficulty they encounter when trying to fashion a workable and clear-cut test to deal with statutory rape where the defendant and victim are both minors and the activity was "consensual."

IV. CONCLUSION

Certain conclusions may safely be drawn from the somewhat confusing line of cases cited above. Perhaps the safest conclusion can be drawn from the court's hard-line stance with respect to adult-minor "consensual" intercourse. It seems clear that the court will not recognize any privacy right to "consensual" intercourse between an adult and minor because of the overwhelming propensity for sexual exploitation of children. Though less clear, it might also be argued that the court is willing to adjudicate delinquent minors who engage in "consensual" intercourse with young children or where the age disparity is significant. The most confusing question is whether the court is willing to allow a minor to be charged when the age between the consenting minors is the same or very close.

168. Id. at 1386; see also T.W., 551 So. 2d at 1193 (holding "a minor's rights are not absolute").
169. J.A.S., 705 So. at 1385.
170. Id. at 1386.
171. Id. at 1386–87 n.15.
172. Id. at 1387.
The failure on the part of the legislature to craft statutes that finally determine these issues has forced the court to make difficult choices with respect to a minor’s right of privacy. The fear of endorsing behavior the court clearly finds reprehensible, coupled with the court’s need to decide issues based upon constitutionality rather than moral beliefs, has left the court in the difficult quandary of deciding between rights, morals, and political views. These are not easy choices, especially because the court is supposed to be apolitical, leaving its own political, moral, and religious predilections behind when stepping onto the bench.

Regardless, the fact remains, the court is dealing with an intimately sensitive subject that calls into question present day values and beliefs concerning an individual’s sexuality. At what age does one begin to understand and comprehend the potential life long decisions arising from sexual activity? Does the existence of deadly sexually transmitted diseases such as AIDS allow more leeway for the court to restrict privacy rights to protect younger people who might not have the capacity to understand the ramifications of their actions? Having raised these questions, it seems logical to ask whether these are questions the court should be answering. If these questions, which go to the heart of an individual’s personal autonomy, should not be answered by a panel of judges, then it is the duty of Floridians, who have already made a commitment to privacy rights, to force their legislators to craft statutes that clearly address and reflect the sentiments of people of the State of the Florida.

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