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Case Comments: Constitutional Law: Reaffirming Every Floridian's Broad and Fundamental Right to Privacy

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CASE COMMENTS

CONSTITUTIONAL LAW: REAFFIRMING EVERY FLORIDIAN'S BROAD AND FUNDAMENTAL RIGHT TO PRIVACY

North Florida Women's Health & Counseling Services v. State, No. SC01-843, 2003 WL 21546546 (Fla. July 10, 2003)

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In 1999, the Florida Legislature passed the Parental Notice of Abortion Act (the Act), which required minors seeking an abortion to either notify a parent prior to the procedure or obtain court approval to waive parental notice.[1] A minor choosing the latter option must demonstrate to a court that she is either mature enough to make the decision or that, despite a court's finding that she lacks sufficient maturity, parental notification is clearly not in her best interest.[2]

The statute has never been enforced.[3] Pro-choice activists[4] quickly filed suit in circuit court and obtained an injunction to enjoin enforcement of the Act.[5] The circuit court ruled that the Act violated a minor's right to privacy

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* I dedicate this Comment to my parents, John and Lourdes Dick. I also wish to thank Danaya Wright for her help and guidance.

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1. The Act reads in pertinent part:

> A termination of pregnancy may not be performed or induced upon a minor unless the physician performing or inducing the termination of pregnancy has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor of his or her intention to perform or induce the termination of pregnancy. . . . If actual notice is not possible after a reasonable effort has been made, the physician or his or her agent must give 48 hours' constructive notice.

Parental Notice of Abortion Act § 1, FLA. STAT. § 390.01115(3)(a) (2003). Parental notice is not necessary if the procedure is performed because of a medical emergency, if the parent or guardian has waived notice in writing, or if the patient waives notice based on her status as a married or emancipated minor or because she already is the parent of a dependent child. *Id.* § 390.01115(3)(b)(1)-(5).

2. *Id.* § 390.01115(4).

3. N. Fla. Women's Health & Counseling Servs. v. State, No. SC01-843, 2003 WL 21546546, at *1 (Fla. July 10, 2003).

4. *Id.* The plaintiffs below included "several women's clinics, women's rights groups, and physicians." *Id.*

5. *Id.* The plaintiffs below argued that the Act was an unconstitutional infringement on a minor's right to privacy under the Florida Constitution and corresponding case law. *Id.*

under the Florida Constitution.[6] The First District Court of Appeal reversed, finding that although the Act interfered with a fundamental right, it advanced a compelling state interest and was therefore valid.[7] The Supreme Court of Florida granted a petition for discretionary review,[8] and, recognizing that the Florida Constitution contains a broad right of privacy applicable to minors,[9] HELD, that the Act was unconstitutional because it failed to further a compelling state interest.[10]

The Florida Constitution declares that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life."[11] As interpreted by the Supreme Court of Florida in *Winfield v. Division of Pari-Mutuel Wagering*,[12] this enumerated right is fundamental and was intended to be much broader than any privacy right guaranteed by the United States Constitution.[13] The state may not infringe

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6. *Id.*

7. *Id.* at *2. The district court recognized that a minor's privacy rights encompass her decision to seek an abortion, but nonetheless held that the Act was a valid advancement of compelling state interests through the least intrusive means. State v. N. Fla. Women's Health & Counseling Servs., 825 So. 2d 254, 270 (Fla. 1st DCA 2001). Specifically, the court found that the Act enabled parents and guardians to assist dependent minors following a surgical procedure. *Id.*

8. *N. Fla. Women's Health & Counseling Servs.*, 2003 WL 21546546, at *2.

9. *Id.* at *16.

10. *Id.* at *20. The court reaffirmed its holding in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), quashed the district court's ruling, and affirmed the trial court's permanent injunction to prevent the Act's enforcement. *Id.*

11. FLA. CONST. art. I, § 23. The section further provides that the right of privacy "shall not be construed to limit the public's right of access to public records and meetings as provided by law." *Id.*

12. 477 So. 2d 544 (Fla. 1985).

13. *Id.* at 548. The *Winfield* decision explained:

> 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. As the court later explained in *T.W.*, while federal privacy jurisprudence acknowledges a privacy right that extends to the individual's decision-making in issues related to "marriage, procreation, contraception, family relationships, and child rearing and education," the Florida constitutional right of privacy protects a much broader range of interests than the federal right of privacy. *In re* T.W., 551 So. 2d 1186, 1191-92 ("We have found the right implicated in a wide

upon a fundamental right unless it does so to advance a compelling interest through the least intrusive means.[14] In a constitutional challenge, the state bears the burden of demonstrating that its actions meet this test.[15] Any state infringement upon the right to privacy, regardless of the class of persons involved, should be analyzed under the *Winfield* standard.[16]

In *Winfield,* the first case to interpret the privacy provision, state officials[17] issued subpoenas to financial institutions requesting access to petitioners' bank records.[18] Petitioners, private citizens, were not informed of the investigation.[19] When they discovered that their records had been subpoenaed, petitioners filed suit alleging that the state unlawfully violated their privacy rights.[20] The court held that although the compelling interest standard provides strong protection for fundamental rights, the standard does not create an absolute prohibition against state intrusion.[21] Thus, although Floridians have a reasonable expectation that their banking records will remain shielded from public view,[22] the state has a compelling interest in investigating gambling in the racing industry.[23] By issuing subpoenas to obtain records, the state utilized the least intrusive means of achieving its interest.[24]

The broad, enumerated right to privacy, and its privileged status based on *Winfield*'s compelling state interest standard, was extended to minors in *In re T.W.*[25] In that case, a parental consent statute required minors to seek parental consent or obtain court approval for an abortion.[26] Since the

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range of activities dealing with the public disclosure of personal matters. Florida courts have also found the right involved in a number of cases dealing with personal decision-making.").

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

15. *Id.* The *Winfield* test is one of "strict scrutiny" review. *Id.* Although the court never uses this phrase, the articulated test is consistent with the highest level of review in constitutional challenges. The Supreme Court of Florida has used the phrases "compelling state interest" and "strict scrutiny standard" interchangeably to refer to the same rigid test. Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 79 (Fla. 1983).

16. *See In re T.W.,* 551 So. 2d at 1193. For a discussion of this decision's impact on privacy jurisprudence, see *infra* notes 25-33 and accompanying text.

17. *Winfield,* 477 So. 2d. at 546. Respondents were agents of the Florida Department of Business Regulation and the Division of Pari-Mutuel Wagering. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 547.

22. *Id.* at 548.

23. *Id.*

24. *Id.*

25. 551 So. 2d 1186, 1193 (Fla. 1989).

26. *Id.* at 1188-89. A minor choosing the latter option would have to demonstrate to a court that she is either mature enough to make the decision, or that, despite a court's finding that she lacks sufficient maturity, the abortion is in her best interests. *Id.* at 1189. The parental consent statute required parental *approval* for an abortion, rather than mere notification. *See id.*

language of the constitutional amendment provides that the right extends to "'[e]very natural person,'" the court found that this necessarily included those under the age of eighteen.[27] Although the statute failed to conform to the requirements of federal abortion decisions,[28] the court also acknowledged that, in the case of minors, the state might have additional interests that necessitate a departure from prior United States Supreme Court holdings.[29] Notably, the state has an interest in protecting minors and facilitating family autonomy.[30]

To determine whether these interests were compelling, the court looked to the legislature's treatment of minors in similar laws and found vast inconsistencies.[31] Because of the lack of concern for the treatment of minors in other medical situations, the court found the state's interest in protecting minors by requiring parental consent and involvement insufficiently compelling.[32] The state's interests in protecting vulnerable minors and promoting family harmony, though significant, did not support an infringement on a minor's right to privacy.[33] After *Winfield* and *T.W.*, it seemed that all infringements on privacy were to be analyzed under strict scrutiny. However, this clear rule would not stand for long.

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27. *Id.* at 1193 (quoting FLA. CONST. art. 1, § 23).

28. *See id.* at 1193-94. Specifically, the court found the Act violated the minor's right of privacy for the entire duration of her pregnancy. *Id.* at 1194. This invasion did not advance the state's interests, as recognized in *Roe v. Wade*, in protecting potential human life or the health of the mother. *Id.* at 1193-94 (citing Roe v. Wade, 410 U.S. 113, 163 (1973)).

29. *Id.* at 1194. The court explained that there are

> three reasons justifying the conclusion that states can impose more restrictions on the right of minors to obtain abortions than they can impose on the right of adults: "[T]he 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."

Id. (quoting Bellotti v. Baird, 443 U.S. 622, 634 (1979)).

30. For example, the trial court in the instant case determined the legislature's intent by analyzing the "whereas" clauses that preceded the text of the law. N. Fla. Women's Health & Counseling Servs. v. State, No. SC01-843, 2003 WL 21546546, at *3 (Fla. July 10, 2003). The Act was intended to "protect minors from their own immaturity, preserve the family unit and parental authority, prevent, detect and prosecute sexual batteries against minors." *Id.*

31. *In re T.W.*, 551 So. 2d at 1195. Specifically, the unwed, pregnant minor may consent to medical treatment and surgery related to her pregnancy, medical treatment of her own minor children, the termination of her minor child's life support, and her minor child's adoption. *Id.*

32. *Id.*

33. *Id.* The court was unwilling to stray from its holding in *Winfield* and adopt the United States Supreme Court's lesser judicial scrutiny standard for abortion laws designed to protect minors. *See id.* at 1194-95. The court summarized: "In assessing the validity of parental consent statutes, the federal court applied a relaxed standard; the state interest need only be 'significant,' not 'compelling,' to support the intrusion." *Id.*

The court later retreated from its expansive interpretation of Florida's privacy right and signaled a departure from the *Winfield* test five years later in *Jones v. State.*[34] In that case, adult men convicted of sexual battery against female minors[35] challenged the state's statutory rape law[36] as an unconstitutional infringement on the minor's right to privacy and thus to engage in consensual, intimate acts.[37] Specifically, petitioners asserted that because *T.W.* recognized a minor's right to make personal decisions that traditionally fall within the zone of privacy, a minor should also be protected in her decision to engage in sexual intercourse.[38]

The *Jones* court rejected the defendants' broad reading of *T.W.* and concluded that the earlier decision recognized only a limited right of privacy for minors, extending solely to the realm of abortion and other medical decisions.[39] However, the court held that even if a minor had an expectation of privacy in the realm of sexual behavior, the state had a compelling interest in protecting children from sexual exploitation.[40] As the majority and separate opinions noted, this interest is reflected in the state's consistent enactment of laws to protect minors from mistreatment and is supported by secondary sources.[41] Significant empirical research details the emotional and psychological damage that occurs when minors are seduced or forced to engage in sexual activity before they are ready.[42]

The *Jones* court did not need to consider whether the challenged legislation advanced the state's compelling interests through the least restrictive means because it declined to apply the test articulated in *Winfield*, preferring a less-stringent balancing test to determine whether

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34. 640 So. 2d 1084 (Fla. 1994).

35. *Id.* at 1085. Two of the petitioners were adult men, ages nineteen and twenty, who were convicted for having sexual intercourse with fourteen-year-old females. *Id.*

36. The defendants were charged and convicted for violating FLA. STAT. § 800.04 (1991). *Id.* at 1085. That section made it a crime for any person to engage in lewd or sexual acts with, or in the presence of, "'any child under the age of 16 years.'" *Id.* (quoting FLA. STAT. § 800.04). The statute further provided that, "'[n]either the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.'" *Id.*

37. *Id.* at 1085.

38. *Id.*

39. *Id.* The court rejected a broad reading of *T.W.*, finding instead 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." *Id.* at 1087.

40. *Id.*

41. *Id.* at 1086; *id.* at 1088-90 (Kogan, J., concurring). Justice Kogan discusses findings from a broad range of sources, including academic literature published in law reviews and peer-reviewed medical and social science journals, as well as government-commissioned statistical reports. *Id.* (Kogan, J., concurring).

42. *Id.* at 1088-89 (Kogan, J., concurring).

the state's intrusion was justified.[43] Because the state was able to articulate a significant interest, the court concluded that the law was valid.[44]

After *Jones*, minors enjoyed only a limited right of privacy, possibly confined to the abortion and medical arenas. This was markedly different from the broader right of privacy extended to adults, which included autonomy in making decisions about sexual behavior.[45] Even more important, the *Jones* decision established that the right to privacy may be fluid or variable based on age or capacity,[46] and suggested that state encroachments need not be analyzed under the *Winfield* standard.[47]

In the instant case, the court signaled a return to the *T.W.* court's recognition of a minor's broad right of privacy, and re-emphasized that governmental infringements must endure strict scrutiny review.[48] The instant court reiterated the finding in *T.W.* that the privacy amendment applies to minors: "[B]ased on the unambiguous language of the amendment: The right of privacy extends to '[e]very natural person.' Minors are natural persons in the eyes of the law . . . ."[49] Moreover, the instant court repeated its earlier rejection of federal privacy jurisprudence on a minor's right to an abortion,[50] noting that the Florida Constitution's right to privacy does not permit a lesser standard of review for cases

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43. *See id.* at 1086. The court explained, "The State has the prerogative to safeguard its citizens, particularly children, from potential harm when such harm outweighs the interests of the individual." *Id.* (citing Griffin v. State, 396 So. 2d 152 (Fla. 1981)).

44. *Id.* at 1087. The court concluded that "[t]he rights of privacy that have been granted to minors do not vitiate the legislature's efforts and authority to protect minors from conduct of others. . . . Florida has an obligation and compelling interest in protecting children . . . ." *Id.* Therefore, the court upheld the decision of the district court and ruled that the statute was a valid exercise of legislative power. *Id.*

45. The decision reflects the court's reservations about extending to minors a right of privacy that includes autonomy in making decisions about sexuality or intimate behavior. *See id.*

46. This interpretation would possibly call into question the Supreme Court of Florida's earlier ruling that incompetent patients have a vested right of privacy. *See* State v. Herbert, 568 So. 2d 4, 12 (Fla. 1990). In that case, the court held that the privacy right encompasses the decision to refuse medical treatment. *Id.* at 10. Reviewing prior decisions, the court concluded that "our cases have recognized no basis for drawing a constitutional line between the protections afforded to competent persons and incompetent persons. Indeed, the right of privacy would be an empty right were it not to extend to competent and incompetent persons alike." *Id.* at 12. (citing *In re* Guardianship of Barry, 445 So. 2d 365, 370 (Fla. 2d DCA 1984)). Therefore, the incompetent patient retains the right of privacy, and a guardian or proxy may exercise that right on the patient's behalf. *Id.* at 13.

47. *See Jones*, 640 So. 2d at 1087.

48. N. Fla. Women's Health & Counseling Servs. v. State, No. SC01-843, 2003 WL 21546546, at *7 (Fla. July 10, 2003).

49. *Id.* (quoting *In re* T.W., 551 So. 2d 1186, 1192-93 (Fla. 1989)).

50. *Id.* at *20.

involving minors.[51] It retained the stringent *Winfield* test as applicable to all infringements on the right to privacy.[52]

The court reiterated that a minor's rights under *T.W.* stem from her entitlement to the broader set of privacy rights applicable to adults and protected by the Florida Constitution.[53] It also rejected the state's argument that the parental notice requirement was a mere procedural step that left a minor's right to an abortion virtually undisturbed.[54] Instead, the right to privacy is not the eventual access to an abortion, but rather the Floridian's general right of personal decision-making.[55] The Act infringed on fundamental rights by forcing the pregnant minor to reveal her situation to her family or members of the judiciary.[56]

Finding the privacy right applicable to minors, the court next considered whether the state's interests were sufficiently compelling to warrant this encroachment.[57] Citing *T.W.*, the court noted that the state's interests in protecting minors and advancing family autonomy are not compelling since the state continues to neglect these interests in related legislation.[58] Because the Act did not advance a compelling interest, the court held it to be an unconstitutional intrusion on a minor's privacy.[59]

Concurring and dissenting opinions underscored the instant court's cautious deliberation of a broader right of privacy for minors, particularly given the sensitive and controversial nature of activities normally protected by privacy jurisprudence.[60] In his dissenting opinion, Justice

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51. *Id.*

52. *Id.*

53. *See id.* at *7.

54. *Id.* at *12-*14.

55. *See id.* at *14.

56. *Id.*

57. *Id.*

58. *Id.* Specifically, the court noted that because the Florida Legislature had not opted to amend its laws following *T.W.*, these state interests have not subsequently grown more compelling. *Id.* at *15.

59. *Id.* at *14.

60. Justice Quince wrote separately to emphasize that when courts are called upon to decide constitutional matters, the analysis should not be steered by morality or public policy considerations. *Id.* at *35 (Quince, J., specially concurring). Justice Quince further explained that in Florida, privacy is a fundamental right, which encompasses the minor's right to decide whether to terminate a pregnancy, and any state infringement must survive strict scrutiny review. *Id.* at *36 (Quince, J., specially concurring).

Justice Lewis, concurring in result only, explained that "*T.W.* should stand only for the limited principle that the State's otherwise compelling interest in looking after the health and physical welfare of its minor citizens cannot support the imposition of a categorical, dramatic parental consent restriction." *Id.* at *38 (Lewis, J., concurring in result only). Justice Lewis explained the danger of a slippery slope: if *T.W.* is interpreted to mean that the state's interest in protecting pregnant minors is unactionable, then the ruling could preclude any state regulation of the abortion procedure. *Id.* at *37 (Lewis, J., concurring in result only). Finally, he argued that parents have a

Wells asserted that the majority should have re-examined *T.W.*'s underlying proposition that minors have a reasonable expectation of privacy from their parents when weighing the abortion decision.[61] Since the *Jones* court held that minors do not have privacy rights equal to those vested in adults with regard to intimate sexual decisions, Justice Wells opined that perhaps the Supreme Court of Florida has already departed from *T.W.*'s most basic premise.[62]

The instant court acted to safeguard every Floridian's "right to be let alone,"[63] by recognizing the privacy right's continued application to "'[e]very natural person'"[64] and by rejecting erosions based on distinctions, such as age, that are not reflected in the constitutional amendment. While the *Jones* court was reluctant to find that minors have a vested right of privacy equal to that of adults,[65] the instant court rejected that distinction and clarified the substance of privacy rights. This illumination means that lower courts will not need to waver when recognizing any category of Floridians' broad and fundamental rights to privacy.[66] By clarifying that the right does not merely guarantee eventual

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fundamental right to "safeguard the physical well being of their children," and the state has a compelling interest in securing the rights of parents "to rear their child as they see fit." *Id.* at *46 (Lewis, J., concurring in result only). Lewis found that the challenged Act advances this interest through the least restrictive means, but it nonetheless fails the majority's legislative consistency test. *Id.* (Lewis, J., concurring in result only).

In a dissenting opinion, Justice Wells argued that the court should have upheld the district court's decision. *Id.* (Wells, J., dissenting). He concurred with Justice Lewis that the challenged Act properly advances a compelling state interest in protecting parental authority. *Id.* at *48 (Wells, J., dissenting). Justice Wells also questioned whether a minor has a reasonable expectation of privacy in the abortion context, and argued that the majority should have adopted the federal "undue burden" standard. *Id.* at 51-52 (Wells, J., dissenting) (citing Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992)). Finally, the dissent questioned whether legislative consistency is an appropriate means of testing whether the state's interests are compelling. *Id.* at *52 (Wells, J., dissenting).

61. *Id.* at *51 (Wells, J., dissenting).

62. *Id.* (Wells, J., dissenting).

63. FLA. CONST. art. I, § 23.

64. *N. Fla. Women's Health & Counseling Servs.*, 2003 WL 21546546, at *7 (quoting FLA. CONST. art. I, § 23).

65. In *Jones v. State*, the court explained its holding in *T.W.* as recognizing only "that the right to privacy encompasses a minor's right to terminate a pregnancy. Under the statute at issue in *T.W.*, a minor was permitted to consent without parental approval to any medical procedure involving her pregnancy or her existing child, except abortion." 640 So. 2d 1084, 1086-87 (Fla. 1994). Therefore, the *Jones* court interpreted *T.W.* as granting the minor a limited right of privacy that applies only to abortions and other medical procedures. *See id.* The *Jones* court further cautioned: "*T.W.* did not transform a minor into an adult for all purposes." *Id.* at 1087.

66. The instant court reiterated its findings in *T.W.* and emphasized that the right of privacy in the abortion decision-making process extended to minors "'based on the unambiguous language of the amendment: The right of privacy extends to "[e]very natural person." Minors are natural persons in the eyes of the law and "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *N. Fla. Women's Health &*

access to an abortion, the court reiterated the expansive nature of the Florida privacy right and ensured its continued application to a range of personal decisions.

The instant case also underscored that judicial recognition of a vested, fundamental right does not necessarily block future legislative curtailments of that right.[67] The state may infringe a fundamental right by satisfying the applicable standard of review.[68] Where a Floridian's right of privacy is concerned, however, the instant case confirmed that the *Winfield* strict scrutiny test must be applied; a weaker standard will not suffice.[69]

The importance of the instant case and its refinement of Florida privacy jurisprudence is illustrated by a comparison to the *Jones* decision. The *Jones* court's reluctance to accept that a minor may have a right of privacy in the realm of sexual decision-making[70] has been soundly rejected, at least in the case of consensual behavior. The instant case confirms that even if a court recognizes that minors have a vested, fundamental right to privacy spanning the decision to engage in sexual intercourse, and even if it subjects state infringements on that right to the highest standard of review, it would not necessarily deprive the state of its right to regulate sexual activity with and among minors.[71] As the *Winfield* test makes clear, the state may restrict fundamental rights in order to advance a compelling state interest through the least intrusive means.[72] Ironically, even if the *Jones* court had interpreted *T.W.* as granting a minor a right to privacy in sexual decision-making, and subjected the challenged law to the stringent *Winfield* analysis, it most likely would have upheld the statutory rape provisions anyway. The challenged legislation in *Jones* arguably advanced

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Counseling Servs., 2003 WL 21546546, at *7 (quoting *In re* T.W., 551 So. 2d 1186, 1192-93 (Fla. 1989)) (citations omitted).

67. The *Winfield* court succinctly expressed this principle: "The right of privacy does not confer a complete immunity from governmental regulation and will yield to compelling governmental interests." Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 577 (Fla. 1985).

68. *Id.*

69. *N. Fla. Women's Health & Counseling Servs.*, 2003 21546546, at *7. The instant court explained that while the federal right of privacy permits state encroachments to advance a significant state interest, Florida privacy jurisprudence demands strict scrutiny. *Id.* Therefore, compelling interests must be identified before the state may infringe on this fundamental right. *Id.*

70. *See Jones*, 640 So. 2d at 1087.

71. *See N. Fla. Women's Health & Counseling Servs.*, 2003 WL 21546546, at *7-*8.

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

the state's articulated compelling interests[73] through the least intrusive means.[74]

Indeed, the danger of a slippery slope was far more likely following the more restrictive *Jones* decision.[75] By interpreting *T.W.* as extending to minors only a limited and particularized right of privacy, and by applying a standard other than the strict scrutiny analysis adopted by the *Winfield* court,[76] *Jones* opened the door to greater amounts of governmental interference. The decision described a right that did not necessarily protect "all natural persons" or the myriad categories of daily activity that prior case law considered.[77] If the right of privacy did not fully extend to minors, then future decisions could find that the right fails to protect others who lack full legal capacity even though they are certainly "natural persons" under Florida's privacy amendment.[78] This gradual diminishing effect would pervert the constitutional guarantee of privacy that is more protective than the federal right, and extends equally to all citizens.[79] The application of a lesser standard of review would enable the state to gradually erode privacy rights simply by announcing a compelling or significant interest.

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73. Even though it chose to adopt a limited interpretation of the right to privacy recognized in *T.W.*, the *Jones* court appeared to continue its analysis in the alternative, thereby recognizing the possibility that a minor may have a right of privacy that encompasses her decisions to engage in sexual intercourse. *Jones*, 640 So. 2d at 1087. This point is evidenced by the fact that even after dispensing with the notion that *T.W.* grants the minor a right of privacy that extends beyond abortion or other medical procedures, the court continued to consider whether the state's interests outweighed those of the individual. *Id.* The court concluded that even if the minor had an expectation of privacy under these facts, the state had a compelling interest in protecting minors from sexual mistreatment. *Id.* The state's interest was supported by consistent legislation to protect vulnerable minors and by voluminous research documenting the effects of sexual assaults on children below the age of consent. *Id.* at 1088-90 (Kogan, J., concurring).

74. A court may choose to consider the arguments presented by Justice Kogan's concurring opinion and conclude that the statutory rape law satisfies the least intrusive means test. Justice Kogan explained that it would be virtually impossible to carve a "maturity exception" into the statutory rape law. *Id.* at 1089 (Kogan, J., concurring). Indeed, such a provision would likely result in an overly vague law that provided little protection to victimized minors. *Id.* (Kogan, J., concurring). For instance, a defendant charged with violating the statute need only prove to a court that although he engaged in sexual relations with a minor, his conduct was lawful because he reasonably concluded that the minor was sufficiently mature to consent. *See id.* (Kogan, J., concurring). Therefore, Justice Kogan found that, "the legislature is both reasonable and prudent in creating a bright-line cut-off at a specific age." *Id.* (Kogan, J., concurring).

75. *See supra* note 60 (discussing Justice Lewis' concerns of a slippery slope made possible by the instant court's decision).

76. *See Jones*, 640 So. 2d at 1087.

77. *See supra* note 13.

78. *See supra* note 46.

79. *See supra* note 13.

Nevertheless, even when the right is interpreted broadly, no category of Floridians enjoys absolute privacy.[80] The state may legislate to protect health, safety, and well-being—even if this requires interference with privacy—so long as the invasion advances a compelling interest through the least intrusive means.[81] Where minors are concerned, the state's long history of legislation protecting children, as well as the law's general recognition of a minor's inability to make binding contracts,[82] will often provide the support and evidence of consistency needed to uphold new protective legislation.[83] Even where the state's actions cannot be compared to prior laws,[84] the state can demonstrate that its interests are compelling by introducing objective, empirical evidence that documents a need for governmental intervention.[85]

By returning to *T.W.*'s recognition of a minor's entitlement to a broad right of privacy, and by re-emphasizing that state infringements on this right must endure strict scrutiny review,[86] the instant case upheld a more general right of privacy in Florida. By so ruling, the instant case did not render this right absolute, nor did it bind the hands of the Florida legislature. Rather, the decision purified privacy jurisprudence by vesting a broad right that can be infringed only when the state meets the *Winfield* test.[87] Indeed, the instant case carves a more difficult path for governmental infringements that purport to advance state interests which have been ignored in prior legislation and lack adequate support from

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80. Perhaps the clearest example of the state's ability to overcome the fundamental right of privacy to advance a compelling state interest through the least intrusive means is *Winfield v. Division of Pari-Mutuel Wagering*. 477 So. 2d 544 (Fla. 1985). In that case, which established the constitutional right of privacy as a fundamental right deserving of highest judicial scrutiny, the court ruled in favor of the state and found that the challenged infringement advanced a compelling interest through the least intrusive means. *Id.* at 548.

81. *Id.* at 547.

82. *See In re* T.W., 551 So. 2d 1186, 1201 (Fla. 1989) (Overton, J., concurring in part, dissenting in part).

83. The instant case reiterated the importance of legislative consistency, explaining that "'[i]t is not enough for the state to say that an interest is compelling. It must be demonstrated through comprehensive and consistent legislative treatment." N. Fla. Women's Health & Counseling Servs. v. State, No. SC01-843, 2003 WL 21546546, at *14 (Fla. July 10, 2003) (quoting the trial court record).

84. For example, as technology creates new dangers for minors, the state may need to develop novel regulations that cannot be compared to prior laws. However, the state may nonetheless demonstrate its compelling interest by providing empirical evidence of the threat to minors.

85. The *Jones* decision provides a clear example of the state's ability to demonstrate that its interests are compelling through secondary, empirical data sources. *See supra* notes 41-42 and accompanying text.

86. *N. Fla. Women's Health & Counseling Servs.*, 2003 WL 21546546, at *20.

87. *Id.*

objective, empirical sources.[88] Most often, this would include laws designed to limit access to morally or socially unpopular, though legal, prerogatives. Viewed in this light, the instant case is a powerful example of judicial intervention to protect the individual's rights from the whim and caprice of the majority.

88. *Id.* at *29.