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Reclaiming the Right to Consent: Judicial Bypass Mechanism as a Way for Persons with Disabilities to Lawfully Consent to Sexual Activity in Ohio

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RECLAIMING THE RIGHT TO CONSENT: JUDICIAL BYPASS MECHANISM AS A WAY FOR PERSONS WITH DISABILITIES TO LAWFULLY CONSENT TO SEXUAL ACTIVITY IN OHIO

MELISSA S. OBODZINSKI *

ABSTRACT

In Ohio, it is a criminal offense to engage in sexual conduct with another when his or her ability to consent is “substantially impaired” because of a mental or physical condition. There is no mechanism for persons with intellectual and/or developmental disabilities to receive judicial notice of whether their ability to consent is “substantially impaired” prior to criminal adjudication, nor is there a way for them to affirmatively prove that they have the capacity to consent to sexual activity. Thus, under Ohio law, intellectually and/or developmentally disabled individuals may be functionally and irrevocably barred from engaging in sexual intimacy for fear of criminal penalties against their partner.

Ohio’s criminal sexual violence laws serve an important function by protecting vulnerable populations. However, they may also harm those they are designed to protect by stripping entire classes of persons from engaging in lawful sexual intimacy without providing any remedy for those that choose to do so. In *Lawrence v. Texas*, the Court held that the Fourteenth Amendment right to privacy includes the right of adult persons to engage in consensual sexual activity. Ohio undermines these privacy rights when it fails to allow individuals to demonstrate that they are deserving of the chance to prove they are capable of consenting to sexual activity.

This Note provides a solution to this problem, balancing the need to protect vulnerable populations against sexual violence with an individual’s right to privacy: the creation of a judicial bypass mechanism allowing an individual to reclaim his or her right to engage in consensual sexual activity by demonstrating that he or she is

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sufficiently well-informed and mature to make the decision to engage in consensual sexual activity.

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I. INTRODUCTION

Sex is a prominent aspect of the human experience. From childhood, we are promised that one day we will find a partner of our choosing, possibly have children with that person, and live “happily ever after.” In school, children learn about sexual health and wellness and—even in abstinence-based programs—there is a presumption that eventually all persons will be able to experience this most private form of intimacy and connection. Movies, television shows, books, magazines, and even news sources further perpetuate the idea that sexual activity¹ is a part of what it means to be fundamentally human; that it is something everyone is thinking about and wants to experience with another person or persons.²

¹ Ohio’s criminal code defines “sexual conduct” as vaginal or anal penetration, and “sexual contact” as any touching of an erogenous zone for the purpose of arousal or gratification. OHIO REV. CODE. ANN. § 2907.01(A)–(B) (LexisNexis 2019). To avoid confusion with these statutory definitions, this Note generically uses “activity” throughout to encompass both sexual conduct and contact, although it should be noted that “sexual activity” is also statutorily defined. *Id.* § 2907.01(C) (defining “sexual activity” as sexual conduct, sexual contact, or both).

² See, e.g., Christina Grant, *Teens, Sex and the Media: Is there a Connection?*, 8 PAEDIATRICS & CHILD HEALTH 285, 285–86 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2792686/pdf/pch08285.pdf>; DALE KUNKEL ET AL., THE HENRY J. KAISER FAM. FOUND., SEX ON TV: CONTENT AND CONTEXT A BIENNIAL REPORT 1 (1999), <https://www.kff.org/wp-content/uploads/2013/01/sex-on-tv-a-biennial-report-to-the-kaiser-family-foundation-1999-report.pdf>; Chao-hua Lou et al., *Media’s Contribution to Sexual Knowledge, Attitudes and Adolescents and Young Adults in Three Asian*

Under Ohio law, however, some individuals are stripped of their ability to legally engage in sexual activity (despite what may be an authentic desire to do so) because of their persisting mental or physical condition. In Ohio, it is a criminal offense to engage in sexual conduct with another when “[their] ability to resist or consent is substantially impaired because of a mental or physical condition” and the offender knows, or has reasonable cause to believe, that the person’s ability to resist or consent is so impaired.³ While this statute does not criminalize the actions of the person whose ability to consent is “substantially impaired” because of a mental, psychological, or physical condition, a sexual partner of that person’s choosing could be charged with, and convicted of, a first-degree felony. The effect of that criminalization is that some persons cannot legally consent to sexual activity, despite their status as a legal adult and desire to engage in such conduct.

Ohio’s criminal sexual violence laws, such as its forcible rape statute, are designed to protect vulnerable populations.⁴ However, in doing so, these laws may cause harm to those that they are designed to protect by stripping entire classes of persons of the ability to engage in lawful, consensual sexual activity. These laws protect persons with intellectual and/or developmental disabilities⁵ by creating a blanket rule that no person may engage in sexual conduct with the protected individual.⁶ The formulation of this law forces persons with intellectual and/or developmental disabilities into one of two

Cities, 3 J. ADOLESCENT HEALTH 26, 26–36 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4235612/>.

³ OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (LexisNexis 2002).

⁴ Kathleen C. Basile, et al., *Disability and Risk of Recent Sexual Violence in the United States*, 5 AM. J. PUB. HEALTH 928, 932 (2016) (“For both women and men, having a disability was associated with an increased risk of sexual coercion and noncontact unwanted sexual experiences.”).

⁵ This Note will strive to use the language of “intellectual and/or developmental disabilities” to describe a variety of mental and physical conditions that may cause a person to be deemed as unable to consent to sexual conduct or contact under Ohio Law. At times, quotes will be used from cases that use language no longer accepted by the American Psychological Association, persons with disabilities themselves, or disability rights groups, such as “mental retardation”. See James Harris, *New Terminology for Mental Retardation in DSM-5 and ICD-11*, 26 CURRENT OP. PSYCHIATRY 260, 261, https://journals.lww.com/psychiatry/Citation/2013/05000/New_terminology_for_mental_retardation_in_DSM_5.6.aspx#:~:text=In%20the%20United%20States%2C%20a,affected%20in%20all%20federal%20laws (“The diagnostic term ‘mental retardation’ is finally being eliminated in the upcoming international classifications of diseases and disorders. The term ‘mental retardation’ was introduced by the American Association on Mental Retardation in 1961 and soon afterwards was adopted by the American Psychiatric Association (APA) in its Diagnostic and Statistical Manual for Mental Disorders (DSM-5). Mental retardation replaced older terms such as feeble-mindedness, ideocracy, and mental subnormality that had become pejorative. Now, over five decades later, the term ‘mental retardation’ is being eliminated for similar reasons.” (footnotes omitted)); 20 C.F.R. § 404, subpt. P, app. 1 (2013) (replacing the term “mental retardation” with “intellectual disability” in the Listing of Impairments used to evaluate claims involving mental disorders under the Social Security Act).

⁶ OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (LexisNexis 2002).

categories: substantially impaired or not substantially impaired.⁷ This imprecise classification ignores the complexities of persons living with these disabilities by presuming that they are all irrevocably incapable of engaging in safe, consensual sex. Thus, they are barred from enjoying a private and personal liberty based solely on another's assessment of their abilities and capacity (and ultimately, their sexuality, or lack thereof).

This Note argues that there should be a mechanism by which persons with mental, intellectual, and/or developmental disabilities can obtain the legal right to consent to sexual activity when that ability may be stripped under criminal sexual violence statutes. Part II of this Note addresses the issues of personal privacy and liberty (as they relate to the right to engage in sexual activity) as a substantive right under the Due Process Clause of the Fourteenth Amendment.⁸ In this Part, a discussion of the history of constitutional challenges to state statutes that criminalize otherwise private sexual conduct between adults will lay a foundation for understanding the intersection of the State's interest in promoting the health, safety, and welfare of its citizens and a person's right to privacy within the home.⁹ Part II then uses the holdings of these cases to examine the State's interest in creating a statute that criminalizes sexual activity with persons who have a mental and/or physical condition, which prevents them from being able to legally consent, and whether that interest can be overcome by an adult person's right to engage in private sexual activity with a person of his or her choosing.

Part III of this Note examines the possibility of creating a judicial bypass mechanism by which persons with mental, intellectual, and/or developmental disabilities can obtain the legal right to consent to sexual activity, despite a statutory presumption that they lack the capacity to do so under any circumstances. This mechanism would be similar to the process available to an unemancipated pregnant minor when she is seeking an abortion without the knowledge or consent of her parents. Under Ohio law, a pregnant minor may obtain an order authorizing her ability to consent to an abortion, without parental consent or notification, by demonstrating to a judge that she is sufficiently informed and mature to make such a decision, and that an abortion would be in her best interest.¹⁰ Similarly, a person with intellectual and/or developmental disabilities would be able to demonstrate his or her ability to make a sufficiently well-informed and mature decision to engage in sexual activity to a judge in order to obtain the ability to engage in lawful consensual sex. Finally, Part

⁷ *See id.*

⁸ U.S. CONST. amend. XIV, § 1 (“[No state shall] deprive any person of life, liberty, or property, without due process of law . . .”).

⁹ *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

¹⁰ OHIO REV. CODE ANN § 2151.85(C)(1) (LexisNexis 1986) (“A woman who is pregnant, unmarried, under eighteen years of age, and unemancipated and who wishes to have an abortion without the notification of her parents . . . may file a complaint . . . requesting the issuance of an order authorizing her consent to the performance or inducement of an abortion.”); *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (“[W]here the pregnant minor goes to her parents and consent is denied, she still must have recourse to a prompt judicial determination of her maturity or best interests.”).

III of this Note will address possible arguments against the creation of a judicial bypass mechanism. It will demonstrate that successful prosecution against a person who commits a crime of sexual violence against a person who receives a bypass order is still possible. It will then argue that judges are well-equipped to make determinations about whether a petitioner has sufficiently demonstrated his or her maturity and is sufficiently well-informed to consent to sexual activity.

II. BACKGROUND

The right to engage in sexual activity is grounded in the right to privacy under the Due Process Clause.¹¹ The idea that persons have a protected interest in engaging in sexual activity is foundational to the issue presented in this Note. A person's interest in privacy and bodily autonomy is not something that should be erased without significant consideration by a legislative body.¹² This Part first explores the history of protection of privacy rights in the context of bodily autonomy and sexual activity. This Part will then discuss notable challenges to state laws that criminalize sexual activity under the Due Process Clause. Finally, this Part will discuss the use of judicial bypass mechanisms in Ohio and other states as a way for a pregnant minor to assert her legal right to abortion without the otherwise statutorily-required consent of her parents. This background discussion will create a framework for understanding the scope of the problem of criminalizing sexual activity with persons with intellectual and/or developmental disabilities in all circumstances, and why a judicial bypass mechanism is an effective way to combat this problem.

A. *The Right to Privacy in Intimate Sexual Activity*

Under the Due Process Clause, the government is prohibited from depriving any person of "life, liberty or property, without due process of the law."¹³ This clause articulates an individual's right to fair judicial processes and creates substantive limitations on governmental power. In *Lawrence v. Texas*, the Supreme Court analyzed a state's power to criminalize private sexual activity between two consenting, unmarried adults under the Due Process Clause, and found that "[l]iberty presumes an autonomy of self that includes freedom of . . . certain intimate conduct."¹⁴ The law at issue in that case was a Texas statute which criminalized sexual activity between two persons of the same sex.¹⁵ The petitioners in that case were two men who

¹¹ U.S. CONST. amend. XIV, § 1. ("[No state shall] deprive any person of life, liberty, or property, without due process of law . . .").

¹² *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) ("[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.").

¹³ U.S. CONST. amend. XIV, § 1. ("[No state shall] deprive any person of life, liberty, or property, without due process of law . . ."); see *Griswold*, 381 U.S. at 485.

¹⁴ *Lawrence*, 539 U.S. at 562.

¹⁵ *Id.* ("The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: 'A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.' The statute defines 'deviate sexual intercourse' as follows: '(A) any contact

were engaging in consensual sexual intercourse when the police entered their home in response to an unrelated report.¹⁶ The men were convicted, and the Court granted a writ of certiorari to consider the constitutionality of the anti-sodomy statute.¹⁷ In a 5–4 decision, the majority held that Texas had violated the petitioners’ right to liberty under the Due Process Clause when it enacted a statute that furthered no legitimate state interest which justified an intrusion into the petitioners’ personal and private lives.¹⁸ In holding so, the Court relied on the fact that the case did not involve adult persons who “might be injured or coerced”¹⁹ and that the statute criminalized otherwise lawful sexual activity.²⁰ This case was significant; it marked a departure from earlier cases that had upheld statutes criminalizing sexual activity between persons of the same sex,²¹ and did so by recognizing a substantive right to sexual activity under the Due Process Clause.

B. Limitations on the Right to Privacy and the State’s Interest in Protecting Vulnerable Populations

Following *Lawrence*, there has been an ongoing question of what types of sexual activity are constitutionally protected, and under what circumstances a state has a legitimate interest that justifies creating a law that criminalizes such conduct. In 2011, an Ohio statute that criminalized engaging in sexual conduct with an adult stepchild²² was challenged under the Fourteenth Amendment’s substantive right to privacy.²³ The Ohio Supreme Court upheld the law, finding that the statute bore a rational relationship

between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.”).

¹⁶ *Id.* at 562.

¹⁷ *Id.* at 563.

¹⁸ *Id.* at 578. (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without interventions of the government.”).

¹⁹ *Id.* (“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

²⁰ *Id.* at 575.

²¹ *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding Georgia’s anti-sodomy law).

²² OHIO REV. CODE ANN. § 2907.03(A)(5) (Lexis Nexis 1994) (making it a crime to “engage in sexual conduct with another, not the spouse of the offender, when . . . [t]he offender is the other person’s natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person”).

²³ *State v. Lowe*, 861 N.E.2d 512, 516 (Ohio 2007); *Lowe v. Swanson*, 663 F.3d 258, 258–59 (6th Cir. 2011).

to Ohio's legitimate interest in protecting the family from the "destructive influence" of sexual relationships between stepparents and their (adult) stepchildren.²⁴ On appeal, the Sixth Circuit similarly distinguished this case from *Lawrence*, reasoning that the stepchild-stepparent relationship is one in which a person might be injured or coerced or where "consent might be easily refused, regardless of age, because of the inherent power dynamic within such a relationship."²⁵ The court therefore affirmed the decision of the Ohio Supreme Court, finding that Ohio's interest in criminalizing incest is different from, and greater than, the interest that Texas had in criminalizing same-sex sexual activity, because it was concerned with protecting the family.²⁶ The U.S. Supreme Court unanimously denied certiorari to further consider this issue.²⁷

Ohio's criminal sexual violence code includes a number of enumerated offenses relating to a person's capacity to consent, or lack thereof, because of a diminished mental and/or physical capacity.²⁸ Under Ohio's forcible rape statute, any person who engages in sexual conduct with another, who is not his or her spouse, when "the other person's ability to resist or consent is substantially impaired because of a mental or physical condition . . . and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition" is guilty of a first degree felony.²⁹ Similarly, Ohio's sexual battery statute dictates that "no person shall engage in sexual conduct with another . . . when . . . the offender knows the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired."³⁰

Ohio courts have used the language of these statutes to infer that where a certain person is found to have an intellectual and/or developmental disability ("mental retardation"),³¹ the substantial impairment element of these crimes is met. However, there are difficulties in determining what evidence is considered sufficient to support such a finding in cases regarding the mental impairment of a victim, and to what degree that evidence is persuasive.

In *State v. Zeh*, the Ohio Supreme Court noted that, while the phrase "substantially impaired" is not legislatively defined, it "must be given the meaning generally understood in common usage."³² In that case, the defendant had been convicted of

²⁴ *Swanson*, 663 F.3d at 260 (quoting *State v. Lowe*, 861 N.E.2d 512, 518 (Ohio 2007)).

²⁵ *Id.* at 264.

²⁶ *Id.* ("Unlike sexual relationships between unrelated same-sex adults, the stepparent-stepchild relationship is the kind of relationship in which a person might be injured or coerced or where consent might not be easily refused, because of age, because of the inherent influence of the stepparent over the stepchild.").

²⁷ *Lowe v. Swanson*, 566 U.S. 992 (2012) (denying petition for writ of certiorari).

²⁸ See OHIO REV. CODE ANN. §§ 2907.02, .03(A)(2), .05(A)(5), .06(A)(2) (LexisNexis 2022).

²⁹ *Id.* § 2907.02.

³⁰ *Id.* § 2907.03(A)(2).

³¹ See *supra* note 5.

³² *State v. Zeh*, 509 N.E.2d 414, 418 (Ohio 1987) ("[S]ubstantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim's ability,

sexual battery³³ against a victim whose impairment was the result of an “asserted mental retardation with which the young man had been afflicted with for a good number of years.”³⁴ The prosecution entered tests conducted by a psychologist, prior to the trial, into evidence to establish the mental condition of the victim.³⁵ These tests assessed the victim’s mental and social capacities regarding special education curriculum, rather than sexuality, and the administering psychologist did not have expertise in human sexual behavior.³⁶ The defendant argued that he was treated unfairly by being denied the opportunity to bring his own expert in to conduct an examination of the victim to assess his mental condition.³⁷ The court agreed, and held that in cases where the mental condition of the victim is contested and is an essential element of the crime charged, the defendant may move to have previous independent clinical interviews of the victim excluded, unless the victim voluntarily agrees to a court-appointed, independent examination.³⁸ The case was therefore remanded.³⁹

More recently, in *State v. Browder*, the Eighth District Court of Appeals of Ohio construed the holding of *Zeh* to mean that the State’s burden of establishing substantial impairment is not met by showing “mental retardation” or some form of psychological disease, but rather by showing a reduction or decrease in the victim’s ability to think or act.⁴⁰ In that case, the defendant had been convicted of the forcible rape of a 16-year-old victim who was “cognitively challenged.”⁴¹ The court found that the State had met its burden of establishing substantial impairment based on a number of witnesses describing the victim’s cognitive deficiencies, and the “conspicuous nature of [the victim’s] limitations.”⁴²

either to appraise the nature of his conduct or to control his conduct. This is distinguishable from a general deficit in an ability to cope, which condition might be inferred from or evidenced by a general intelligence or I.Q. report.”).

³³ § 2907.03(A)(2).

³⁴ *Zeh*, 509 N.E.2d at 418.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* The court noted that this holding and opinion were fashioned upon a “very narrow basis, and with limited scope.” *Id.*

³⁹ *Id.* at 419.

⁴⁰ *State v. Browder*, No. 99727, 2014 Ohio App. LEXIS 93, at *11–12 (Ohio Ct. App. Jan. 16, 2014).

⁴¹ *Id.* at *1–2.

⁴² *Id.* at *11–12 (“Several witnesses, including [the victim’s] family, the responding EMS and police personnel, and [the victim’s] school counselor established evidence that [the victim] is cognitively challenged. One responding officer went so far as treating [the victim] as if she were much younger than an average 16-year-old, and another officer made a similar assessment after a brief two-minute conversation.”).

The First District Court of Appeals of Ohio, similarly, found that a “finding of mental retardation . . . could logically lead one to believe that a person who is mentally retarded is substantially impaired” within the meaning of Ohio’s sexual battery statute.⁴³ In that case, the defendant had been convicted of sexual battery against a minor with a “mental impairment.”⁴⁴ The appellate court overruled the defendant’s assignment of error (asserting that the court erroneously found that “mental retardation” is equivalent to substantial impairment) because it found the record showed that the trial court did not predicate its conclusion solely on that basis.⁴⁵ The same appellate court, in a different case, concluded that a psychologist’s report provided sufficient evidence for reasonable minds to disagree as to whether the victim had the ability to appraise the nature of or control her conduct for the purposes of the sexual battery statute.⁴⁶ In that case, the defendant had been convicted of four counts of sexual battery⁴⁷ against a twenty-six-year-old woman who was a resident of a group residence for persons with intellectual and/or developmental disabilities.⁴⁸ Finding that reasonable minds could reach different conclusions about whether the prosecution proved the element of substantial impairment beyond a reasonable doubt, the court found that the defendant’s motion for acquittal was properly overruled.⁴⁹

These cases demonstrate that there is a lack of consistency and clarity in the way that courts interpret “substantial impairment” for the purpose of proving that a person with an intellectual and/or developmental disability is not capable of consent in criminal sexual violence cases. Further, the Court’s holding in *Lawrence* offered little to no guidance on when sexual activity between two adults may be permissibly criminalized by a state, other than when personal injury or coercion could occur.⁵⁰

⁴³ *State v. Joseph*, No. C-840751, 1985 Ohio App. LEXIS 6953, at *9 (Ohio Ct. App. July 24, 1985); OHIO REV. CODE ANN. § 2907.03(A)(2) (LexisNexis 2009).

⁴⁴ *Joseph*, 1985 Ohio App. Lexis 6953, at *1. The appellate court did not recount the exact facts of the case but did indicate that the trial court properly concluded that the defendant had knowledge that the victim’s ability to appraise the nature of his conduct was substantially impaired because it heard from witnesses and had the opportunity to observe the victim’s demeanor in the courtroom and witness stand. *Id.* at *10.

⁴⁵ *Id.* at *8 (“[T]he court found in evidence *many* factors which led to the conclusion that the victim was substantially impaired.”).

⁴⁶ *State v. Bohannon*, No. C-880004, 1989 Ohio App. LEXIS 831, at *3 (Ohio Ct. App. Mar. 15, 1989).

⁴⁷ *Id.* at *1; OHIO REV. CODE ANN. § 2907.03(A)(2) (LexisNexis 2009).

⁴⁸ *Bohannon*, 1989 Ohio App. LEXIS 831, at *1.

⁴⁹ *Id.*

⁵⁰ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“The [anti-sodomy] statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution that the law protects. It suffices for us to acknowledge that adults may choose to enter upon this

This lack of uniformity in statutory interpretation and guidance on the balance between state interest in criminalizing sexual violence and individual interest in engaging in private sexual activity leaves persons with intellectual and/or developmental disabilities with a patchwork of protections and liberties. The determination of whether a person is “substantially impaired” may be based on psychological reports, medical diagnoses, or even the generalized perception of others as to the individual’s capacity.⁵¹ This determination is also made post-hoc, after someone has been charged with a crime of sexual violence. Thus, persons with intellectual and/or developmental disabilities may or may not fall under the protections of these laws, but it is impossible to assess where they fall within that legal binary before engaging in sexual activity. If having an intellectual and/or developmental disability of a specific type is enough to convince a court that the individual was incapable of consent under any circumstance, then these persons cannot have lawful sex. This concern, the concern that the State is impermissibly interfering with a person’s right to engage in private intimate activity within their home, is precisely what the Court in *Lawrence* addressed when it invalidated Texas’s anti-sodomy statute.⁵²

C. *Judicial Bypass Mechanisms to Override a Lack of Statutory Consent*

The Ohio legislature has created a mechanism for ordering legal consent for a person where it is otherwise unavailable in another instance where a person’s right to privacy in intimate affairs is statutorily limited.⁵³ Under Ohio law, a minor may seek an abortion without the requisite consent or knowledge of the minor’s parent or guardian using a “judicial bypass mechanism.”⁵⁴ This law allows a pregnant and unmarried minor to file a complaint, in the juvenile court of the county in which she resides, requesting a judicial order authorizing her to consent to the performance or inducement of an abortion without the notification or consent of her parents, guardian, or custodian.⁵⁵ The complainant must include an allegation that she is “sufficiently mature and well enough informed to intelligently decide whether to have an abortion without the notification of her parents, guardian or custodian” or alternatively, that one of her parents, guardian, or custodian had committed abuse against her, or that notifying them would otherwise not be in her best interest.⁵⁶ The court is, by statute, required to appoint a guardian ad litem and an attorney, if the guardian ad litem is not

relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”).

⁵¹ See, e.g., *Bohannon*, 1989 Ohio App. LEXIS 831, at *3 (finding that the psychologist report was sufficient to determine the level of the victim’s disability).

⁵² See *Lawrence*, 539 U.S. at 578 (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).

⁵³ See OHIO REV. CODE ANN. § 2151.85 (LexisNexis 1986).

⁵⁴ *Id.*

⁵⁵ *Id.* § 2151.85(A).

⁵⁶ *Id.* § 2151.85(A)(4)(a)–(b).

admitted to the practice of law, to protect the interest of the complainant at the hearing, if one is granted.⁵⁷

The Supreme Court has held that laws creating a judicial bypass mechanism for minors to obtain abortion without parental consent are permissible so long as the procedure allows the pregnant minor to go before a judge in a proceeding that ensures her anonymity and is conducted with “sufficient expedition” to actually allow her to obtain abortion care.⁵⁸ The judge must then decide whether she has proven that that she is “mature enough and well enough informed to make her abortion decision, in consultation with her physician, independent of her parents’ knowledge; or that the desired abortion would be in her best interests, even if she is not able to make this decision independently.”⁵⁹ In its opinion, the Court discussed the vulnerability of minors to deprivation of liberty by the State, and emphasized that children have many rights under the Fourteenth Amendment that are coextensive with those of adult persons.⁶⁰ Thus, the Court found that the judicial bypass law permissibly granted an avenue by which a minor could petition for recognition of her right to privacy.

The creation and use of the judicial bypass mechanism in relation to a minor child’s right and ability to obtain an abortion in the absence of parental consent thus, in the Court’s view, strikes a fair balance between individual liberty interests and Ohio’s interest in protecting vulnerable populations. These mechanisms have been upheld even where a (lawful) abortion statute criminalizes the actions of other parties who engage with the protected person. A similar mechanism, therefore, could serve as a solution to the issue of judicially pre-determining a person’s ability or right to legally consent to sex when the law has criminalized having sex with that person.

III. ANALYSIS

The purpose of this Note is to consider the use of a judicial bypass mechanism by which individuals with an intellectual and/or developmental disability may obtain a court order affirming their right to consent to sexual activity, so that they may engage in lawful sex with another person or persons. *Lawrence* created precedent asserting that adults have a liberty right to privacy in their sexual relations, when those relations are between consenting adults.⁶¹ A logical deduction from the holding of *Lawrence*, therefore, is that a state does have a legitimate interest in criminalizing sexual activity

⁵⁷ *Id.* § 2151.85(B)(2).

⁵⁸ *Bellotti v. Baird*, 443 U.S. 622, 644 (1979).

⁵⁹ *Id.*

⁶⁰ *Id.* at 634 (“The Court’s concern for the vulnerability of children is demonstrated in its decisions dealing with minors’ claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child’s right is virtually coextensive with that of an adult. For example, the Court has held that the Fourteenth Amendment’s guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings.”).

⁶¹ *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

that is not consensual and/or not between adult persons.⁶² However, there are challenges to balancing these interests entirely in favor of the State when the persons a statute purports to protect are stripped of a personal freedom by categorizing them with a broad brush.⁶³ The following Part of this Note will first discuss the importance of protecting the rights of adults to engage in sexual activity. It will then propose the use of a judicial bypass mechanism as a way for adult persons with intellectual and/or developmental disabilities to obtain the legal right to consent to sexual activity. Finally, it will examine and challenge arguments in opposition to the use of a judicial bypass mechanism in this context.

A. *Consideration of the Right of All Persons to Engage in Sexual Conduct*

Lawrence v. Texas was a seminal case which defined the rights of nonmarried adults to engage in private and consensual activity in their homes under the Due Process Clause of the Fourteenth Amendment.⁶⁴ In *Lawrence*, the Court specifically noted that the case at bar did not involve minor children or “persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused,” but rather two adults who chose to engage in sexual activity with “full and mutual consent for each other.”⁶⁵ The Court specifically distinguished same-sex sexual activity from sexual activity in which one party lacks the legal capacity to consent when it found that the Texas statute furthered no legitimate state interest so as to justify the intrusion into the private lives of individuals engaging in sodomy. Ohio’s sexual violence statutes, where they seek to protect individuals whose ability to consent is substantially impaired, therefore, are more likely to survive a Due Process Clause challenge under *Lawrence* than a law that criminalizes same-sex sexual activity between two adults.

In *Haynes v. Boyd*, the Sixth Circuit upheld the constitutionality of a Tennessee statute which criminalizes sexual activity with persons whose ability to consent is impaired due to a mental disability, similar to Ohio’s forcible rape statute.⁶⁶ In that

⁶² *Id.* at 578 (“The present case does not involve minors. It does not involve persons who might be easily coerced or who are situated in relationships where consent might not easily be refused.”).

⁶³ Recall that in *Zeh*, an Ohio appellate court highlighted that “substantial impairment” is not legislatively defined and must be given its common usage meaning. 509 N.E.2d at 417. *See also supra* Part II.B (discussing the difficulties in determining what evidence may be admitted to determine substantial impairment due to a “mental or physical condition” under the Ohio Revised Code).

⁶⁴ *Lawrence*, 539 U.S. at 578–79 (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”); U.S. CONST. amend. XIV, § 1. (“[No state shall] deprive any person of life, liberty, or property without due process of law”).

⁶⁵ *Lawrence*, 539 U.S. at 578.

⁶⁶ *Haynes v. Boyd*, No. 16-cv-01258, 2020 U.S. Dist. LEXIS 72612, at *14–15 (W.D. Tenn. Apr. 24, 2020) (“[T]he Supreme Court limited its ruling in *Lawrence* to cases involving sexual activity between ‘mutual[ly] consent[ing]’ adults The Court was careful to note that its

case, a “mentally challenged” man was charged with the rape of two other “mentally challenged” adults.⁶⁷ The court found that the victims both lacked the ability to consent, and the defendant was found to be “higher functioning” than the victims.⁶⁸ On appeal, the defendant claimed that he had received ineffective assistance of counsel because his attorney did not challenge the constitutionality of the Tennessee rape statute under the Due Process Clause.⁶⁹ The court determined that an argument under *Lawrence* was not persuasive because it involved sexual activity between non-consenting adults.⁷⁰

In *Lawrence*, the Court overturned *Bowers v. Hardwick*,⁷¹ noting that the laws and traditions of the previous five decades of literature and case law showed “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,” and that history and tradition are only the starting point of the substantive due process inquiry.⁷² Thus, an inquiry into the history of the condemnation of sexual activity with persons living with mental, intellectual, and/or developmental disabilities is the starting point in examining such a person’s rights under the Due Process Clause.

People in the United States tend to view people with intellectual and/or developmental disabilities as asexual and uninterested in sex, much like children.⁷³ This societal perception does not go unnoticed, and people with intellectual and/or developmental disabilities regularly report stigma experiences related to their sexuality and bodily autonomy.⁷⁴ People with intellectual and/or developmental

ruling does not apply to cases ‘involv[ing] persons who are situated in relationships where consent might not easily be refused.’” (citation omitted)).

⁶⁷ *Id.* at *1–4. The victims in this case were intellectually disabled adult twin grandsons of the Defendant’s girlfriend. *Id.*

⁶⁸ *Id.* at *3. (“Forensic and clinical psychiatrist Dr. Fred Steinberg testified regarding his evaluations of the victims and the Defendant . . . He reported ‘that the victims were both mildly mentally retarded[,] . . . had a low I.Q.,’ and ‘functioned at a five-year-old level with regard to their development, including language development, self-direction, and socialization.’ . . . Dr. Steinberg related that the Defendant was mildly mentally retarded, had ‘a higher level of executive functioning’ than the victims, and could understand and ‘plan . . . sexual activity[.]’” (citation omitted)).

⁶⁹ *Id.* at *8–9.

⁷⁰ *Id.* at *14–16.

⁷¹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that state laws that criminalize same-sex sodomy were constitutional under the Due Process Clause when they represented an essentially moral choice by the legislature).

⁷² *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

⁷³ Lorna Collier, *Sex and Intellectual Disabilities*, 48 MONITOR ON PSYCH. 52 (2017), <http://www.apa.org/monitor/2017/12/seeking-intimacy-sidebar>.

⁷⁴ See generally NAT’L P’SHIP FOR WOMEN AND FAMS. & AUTISTIC SELF-ADVOC. NETWORK, ACCESS, AUTONOMY, AND DIGNITY: COMPREHENSIVE SEXUAL EDUCATION FOR PEOPLE WITH DISABILITIES (2021); Kelsey A. Bonfils et al., *Sexuality and Intimacy Among People Living with Serious Mental Illnesses: Factors Contributing to Sexual Activity*, 38 PSYCHIATRIC REHAB. J.

disabilities often express a desire to be loved and experience romantic relationships, but report that caregivers rarely discuss sexuality with them and restrict their opportunities to engage in sexual experiences.⁷⁵ While this perception is not the primary basis for legislation that seeks to criminalize sexual activity with these persons,⁷⁶ it may shed light on why states like Ohio have not sought to create a mechanism by which persons with intellectual and/or developmental disabilities may affirmatively assert their right or ability to consent prior to engaging in sexual activity.

In *Lawrence*, the Court specifically stated that the case at bar did not pertain to sexual activity between persons who lacked the ability to consent.⁷⁷ However, it also specifically noted that the Framers “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”⁷⁸ This concept could be applied to the emerging awareness: that people with mental, intellectual, and/or developmental disabilities can and do, in fact, have sexual desires. This Note does not argue or suggest that Ohio’s criminal sexual violence statutes are unconstitutional under the Fourteenth Amendment as applied to all persons, but rather that there should be an opportunity for persons with disabilities to challenge the law as it applies to them individually.

Suppose there is a woman in Ohio who is living with an intellectual or developmental disability. She has a low I.Q. and received special services throughout her education. Now, in adulthood, she works part-time at a store and continues to live with her parents. For all intents and purposes, this person is living a happy, well-rounded life. However, her parents are protective and firmly believe that their child cannot and should not engage in sexual activity under any circumstance because of her disability. Now suppose she meets someone at her job, a man who is also living

249, 250 (2015), <https://psycnet.apa.org/fulltext/2015-05637-001.pdf>; Milton L. Wainberg et al., *Mental Illness Sexual Stigma: Implications for Health and Recovery*, 39 PSYCHIATRIC REHAB. J. 90, 90 (2016), <https://psycnet.apa.org/fulltext/2016-15746-001.pdf>.

⁷⁵ Dilana Schaafsma et al., *People with Intellectual Disabilities Talk About Sexuality: Implications for the Development of Sex Education*, 35 SEXUALITY AND DISABILITY 21, 22 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5306299/pdf/11195_2016_Article_9466.pdf.

⁷⁶ *Sexual Abuse of People with Disabilities: Understanding the Crime*, RAPE, ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/articles/sexual-abuse-people-disabilities> (last visited Oct. 14, 2020) (noting that people with disabilities are sexually assaulted at higher rates than the general population); Vilissa Thompson et al., *Sexual Violence and the Disability Community*, CTR. FOR AM. PROGRESS (Feb. 12, 2021), <https://www.americanprogress.org/issues/disability/news/2021/02/12/495746/sexual-violence-disability-community/> (“Sexual violence against disabled people is a silent epidemic . . . people with disabilities [are] more than three times more likely than nondisabled people to experience serious violent crime such as rape and sexual assault The myths people believe about the sexuality and autonomy of disabled people fuel these assaults. These myths including stereotyping all disabled people as asexual, believing disability means an inability to participate equally in an intimate relationship, and assuming that disabled people cannot control their urges.”).

⁷⁷ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁷⁸ *Id.* at 579.

with a developmental disability but is “higher functioning” than she is. He also works part-time but is able to live in a small apartment by himself. The couple falls in love and decides together that they want to engage in sexual activity. They go back to the woman’s parents’ home and begin to engage in such activity. Her parents, enraged, call law enforcement and the woman’s new partner is arrested and charged with sexual battery. The case is then tried, and the man is found guilty because the prosecution successfully demonstrated that he was higher functioning than the woman, and the jury believed that he had taken advantage of her.⁷⁹ In this hypothetical, the law has afforded the woman no way to lawfully engage with persons of her choosing, and thus perhaps extends beyond the exceptions seemingly carved out of *Lawrence*, because she has been deemed to have no right to privacy within the scope of sexual contact or conduct.

B. *Judicial Bypass as a Method of Affirming a Person’s Right to Engage in Intimate Sexual Activity*

In *Planned Parenthood v. Casey*, the Court found that in balancing a woman’s right to terminate her pregnancy⁸⁰ against a State’s valid interest in protecting potential life, the State had the power to regulate abortion, so long as such regulations do not “create a substantial obstacle to a woman’s exercise of the due process right.”⁸¹ In *Bellotti v. Baird*, the Court, in interpreting *Casey*, held that States that have a parental consent statute regulating abortion must also enact a law that allows a minor to obtain a court order to bypass her parent’s or guardian’s consent.⁸² Here, the Court noted that “a child, merely on account of his minority, is not beyond the protection of the Constitution . . . [the] Fourteenth Amendment [is] not for adults alone.”⁸³ It

⁷⁹ As was the case in *Haynes v. Boyd* (where the defendant and the victim(s) were both determined to be “mildly mentally retarded” but the defendant was higher functioning). *Haynes v. Boyd*, No. 16-cv-01258, 2020 U.S. Dist. LEXIS 72612, at *3 (W.D. Tenn. Apr. 24, 2020).

⁸⁰ See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that a woman has a right to terminate her pregnancy under the Due Process Clause).

⁸¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

Our precedents ‘have respected the private realm of family life which the state cannot enter.’ These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 851 (quoting *Prince v. Massachusetts*, 321 U.S. 156, 166 (1944)).

⁸² *Belloitti v. Baird*, 443 U.S. 622, 650–51 (1979).

⁸³ *Id.* at 633–34. (“The Court’s concern for the vulnerability of children is demonstrated in its decisions dealing with minors’ claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child’s right is virtually coextensive with that of an adult. For example, the Court has held that the Fourteenth Amendment’s guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings.”).

identified that constitutional principles are generally applied “with sensitivity and flexibility to the special needs . . . of children” due to their vulnerability and their inability to make critical decisions in an informed and mature manner.⁸⁴ Thus, the Court found that a pregnant minor is entitled to the option to show that she is mature and well-informed enough to make a decision regarding abortion in consultation with a physician and without the permission of her parents, and that any laws which require parental consent without a bypass mechanism imposed an undue burden upon the minor’s right to seek an abortion.⁸⁵

The judicial bypass mechanism, thus, imposes a situation whereby a minor may assert her liberty right to privacy under the Due Process Clause by coming before a judge, despite the State having regulated based on its interests in both protecting potential life, the health and safety of minors, and a parent’s right to be involved in medical decisions for a child. A judicial bypass mechanism, which would allow a person with an intellectual and/or developmental disability to obtain the right to consent, would function in a similar manner. The goal would be for the petitioner to sufficiently demonstrate that he or she is mature and well-informed enough to make the decision to engage in consensual sexual activity.

The stigma associated with people with intellectual and/or developmental disabilities, combined with a societal perception that these people are uninterested in sexual activity, leads this population to know less about sex than those without such disabilities.⁸⁶ As a part of demonstrating to the court that he or she is mature and well-informed enough to make decisions regarding sexual activity, an individual may seek a specialized sexual education program. There are a number of non-profit organizations that offer sexual education programs designed for persons with disabilities.⁸⁷ In many sexual assault cases in which the victim’s ability to consent is at issue, the court will ask targeted questions to determine whether the victim understands the nature of sexual activity.⁸⁸ If these persons are not offered comprehensive sexual education in school, due to their enrollment in special education programs, they may have no basis to understand such conduct. By offering this

⁸⁴ *Id.* at 634.

⁸⁵ *Id.* at 643–44.

⁸⁶ Collier, *supra* note 73; Thompson et al., *supra* note 76 (“Sexuality is a key part of human nature: All people deserve to express themselves sexually—and safely—regardless of ability. Achieving this goal requires a comprehensive and intentional effort to overcome myths, misinformation, and a lack of information. Disabled people should be empowered with knowledge about consent and have access to appropriate sex education in school from an early age The disability community endures much higher rates of sexual violence, lack of access to sex education, and the failure of society to understand that sexuality belongs to everyone.”).

⁸⁷ See, e.g., *Developmental Disability Education Program*, FAM. RES. NETWORK OF OHIO, https://www.frn ohio.org/resources/listing/developmental-disability-education-program?tab=related&p=2&category=0&zoom=10&is_mile=1&directory_radius=100&view=list&sort=title#sabay-inline-content-related (last visited May 6, 2022).

⁸⁸ See generally *State v. Lopez*, No. 94312, 2011 Ohio App. LEXIS 191 (Ohio Ct. App. Jan. 20, 2011); *State v. Brady*, No. 87854, 2007 Ohio App. LEXIS 1332 (Ohio Ct. App. Mar. 29, 2007); *State v. Dorsey*, No. 2007-CA-091, 2008 Ohio App. LEXIS 2125 (Ohio Ct. App. May 23, 2008).

education proactively, and by the person's demonstration of mastery of the content, he or she would be empowered to engage in sexual activity from a more mature and well-informed mental state.

Another way a person may demonstrate to the court that he or she is mature and well-informed enough to consent to sexual activity is by presenting affidavits from licensed psychologists or other experts supporting the petitioner's claim. This would be similar to the types of assessments and tests that are used in criminal cases to demonstrate that a person lacks the ability to consent.⁸⁹ These tests, similarly, could be conducted by a forensic psychologist assigned by the court, or by a private practitioner that has provided either therapeutic services to the person generally or evaluation services solely for the purpose of the petition.

Generally, to demonstrate his or her ability to consent, a person would have to meet requirements that mirror those that are used to prove that they did not have such ability during a criminal trial. The main difference here is that the process would be proactive, prior to an arrest for sexual assault. Returning to the hypothetical case, imagine now that the woman who has fallen in love goes before a judge and demonstrates that she has received sexual education, understands the nature of sexual activity and how to consent, and that her doctor agrees that she is capable of engaging in safe sex. The court rules that she has demonstrated with sufficiency that she is mature and well-informed enough to consent to sexual activity. Now, when the woman's parents call law enforcement to report the sexual activity between their daughter and her partner, she will present the court order. The police would likely still investigate whether she, in fact, consented to the sexual activity, and, upon finding that she did, would not arrest or charge her partner. By granting the judicial bypass request, the court has not only reaffirmed the woman's bodily autonomy and right to engage in private intimate conduct, but also saved her the pain and embarrassment of going through a criminal trial in which her intimate sexual activity and mental abilities are litigated and made public record.

C. *Judicial Bypass in the Context of Criminal Sexual Assault Prosecutions*

Opponents of this proposed judicial bypass mechanism will argue: (1) that it will be difficult to prosecute crimes of sexual violence against persons who have obtained such an order, and (2) it will be difficult for judges to determine whether a person has demonstrated that they have the ability to understand the nature of sexual activity and therefore consent. However, in analyzing arguments about consent that arise in criminal sexual violence trials and the context by which judicial bypass mechanisms have worked to assist minors in abortions, these arguments are without merit. A judicial bypass mechanism in this context will not lead to more difficulty in prosecuting crimes of sexual violence, and local judges are more than capable of evaluating a petitioner's ability to consent and ruling appropriately on the facts available.

Securing a conviction for crimes of sexual violence is challenging. National statistics show that very few cases prosecuted for forcible rape result in a conviction,

⁸⁹ See, e.g., *State v. Browder*, No. 99727, 2014 Ohio App. LEXIS 93, at *11 (Ohio Ct. App. Jan. 16, 2014); *State v. Zeh*, 509 N.E.2d 414, 418 (Ohio 1987); *State v. Joseph*, No. C-840751, 1985 Ohio App. LEXIS 6593, at *3 (Ohio Ct. App. July 24, 1985); *Haynes v. Boyd*, No. 16-cv-01258, 2020 U.S. Dist. LEXIS 72612, at *3 (W.D. Tenn. Apr. 24, 2020).

and even fewer result in incarceration.⁹⁰ Criminal laws in Ohio and throughout the country have sought to encourage prosecution and help secure convictions, while still upholding defendants' procedural due process rights.⁹¹ As acts of sexual violence are more likely to occur in private and without witnesses, prosecutors have specific challenges in proving not only that the alleged sexual activity occurred, but also that both the victim and the perpetrator had the requisite state of mind required to secure a conviction. In Ohio, to secure a conviction for rape of a victim who is over the age of thirteen, the prosecution must prove beyond a reasonable doubt that sexual conduct occurred and that the victim's ability to consent or resist was substantially impaired.⁹² Assuming that the offender did not act to impair the victim for the purpose of preventing resistance, either by force, threat of force, administration of an intoxicant, or deception, the prosecution can prove that an act of sexual conduct was legal by demonstrating that the victim's ability to resist or consent was substantially impaired because of a mental condition.⁹³ Therefore, an opponent to the creation of a judicial bypass mechanism might argue that this avenue of proving that a rape occurred would be barred by the existence of a judicial order demonstrating that the person may consent to sexual activity.

The key to understanding how the judicial bypass mechanism this Note proposes is understanding that it simply offers the recipient the *option* to consent to sexual activity; an order granting a person such an ability does not deem them to have consented to any sexual activity occurring between them and another person or persons. Rather, the bypass mechanism would remove the presumption that the individual could not consent or lacked the ability to consent, and instead ask them whether they had *in fact* consented—much the way criminal sexual violence investigations and prosecutions operate for persons or victims without intellectual and/or developmental disabilities. If a prosecutor is unable to prove the elements of the sexual violence offense beyond a reasonable doubt based solely on the existence of the victim's intellectual and/or developmental disability, he or she could still pursue a conviction under the rape statute by demonstrating that the person did not in fact consent, and the defendant purposely compelled them to submit by force, threat, deception, or through the administration of intoxicants.

⁹⁰ *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Oct. 12, 2020) (showing that out of every 1,000 sexual assaults, 28 cases will lead to a felony conviction and 25 defendants will be incarcerated).

⁹¹ Richard I. Haddad, *Shield or Sieve? People v. Bryant and the Rape Shield Law in High-Profile Cases*, 39 COLUM. J.L. & SOC. PROBS. 185, 189 (2005) ("Rape shield statutes were created to prevent the disclosure of information about complainants' sexual history at trial . . . Michigan passed the first rape shield law in 1974, and the rest of the states, the District of Columbia, and the federal government eventually followed suit."). See, e.g., OHIO REV. CODE ANN. § 2907.02(D) (LexisNexis 1998) (prohibiting the admission of specific instances and reputation evidence of a rape victim's sexual activity absent special circumstances); see also FED. R. EVID. 412(a) (prohibiting admission of evidence offered to prove a sex-offense victim's sexual predisposition or that the victim engaged in other sexual behavior).

⁹² OHIO REV. CODE ANN. § 2907.02(A)(1)(a)–(c) (LexisNexis 2002).

⁹³ *Id.*

Not only would a judicial bypass order affirmatively granting a person the ability to consent to sexual activity create a minimal burden or no burden to the prosecution of sexual violence crimes against someone who has received an order, it may actually prevent crimes of sexual violence from being perpetuated against the recipient. Persons with disabilities are more likely to be the victims of sexual violence than those without disabilities and are at a greater risk for being non-forcibly coerced into having unwanted sexual experiences.⁹⁴

The Center for Disease Control (“CDC”) has indicated that individual skill-based learning is “an important component of a comprehensive approach to [sexual violence] prevention.”⁹⁵ Such skill-based learning includes social and emotional skills, healthy intimate relationship skills, and healthy sexuality skills such as sexual communication, sexual respect, and consent.⁹⁶ Comprehensive sex education programs have also been shown to improve health outcomes and reduce risky sexual behavior which is a risk factor for sexual violence victimization.⁹⁷

If demonstration of such skills and understanding of healthy sexuality and affirmative consent is part of the judge’s consideration in a petitioner’s claim for a judicial bypass, then theoretically a person who is granted an order has taken affirmative actions to reduce his or her likelihood of being coerced into unwanted sexual activity in the first place. Also, they will have gained the skills to verbalize their consent or lack thereof. This Note does not suggest that a petitioner’s work with counselors or sex educators pursuing a judicial bypass will remove all risk of victimization. Rather, it suggests that some unique risk factors faced by people with disabilities may be reduced by engaging with consent-centered sexual education programming sought in pursuance of an order granting the ability to consent. Further, such an understanding of consent may give someone receiving a judicial bypass order the ability to better explain and describe the ways in which they did not affirmatively consent should they later become a victim of sexual violence.

Another argument made in opposition to a judicial bypass mechanism allowing people with intellectual and/or developmental disabilities to receive an order granting them the legal ability to sexual activity is that judges will not be able to accurately determine whether a person has demonstrated sufficient maturity and understanding of the nature of sex and consent to be able to consent.⁹⁸ This argument, if true, would also raise questions of whether it is appropriate to offer a judicial bypass mechanism for minors wishing to receive an abortion. However, the Court in *Bellotti* has already

⁹⁴ *Sexual Violence and Intimate Partner Violence Among People with Disabilities*, CTNS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/datasources/nisvs/svandipv.html> (last visited Nov. 4, 2020).

⁹⁵ KATHLEEN C. BASILE ET AL., NAT’L CTR. FOR INJ. PREVENTION AND CONTROL, STOP SV: A TECHNICAL PACKAGE TO PREVENT SEXUAL VIOLENCE 19 (2016).

⁹⁶ *Id.*

⁹⁷ Helen B. Chin et al., *The Effectiveness of Comprehensive Risk Reduction and Abstinence Education Interventions to Prevent or Reduce the Risk of Adolescent Pregnancy, HIV and STIs: Two Systematic Reviews and Meta-analyses*, 42 AM. J. PREVENTIVE MED. 272, 290 (2012).

⁹⁸ *Bellotti v. Baird*, 443 U.S. 622, 644 n. 23 (1979).

affirmatively ruled that such a mechanism is not only permissible, but rather, required.⁹⁹ As with judicial bypass for minors seeking an abortion, the judge will evaluate the evidence brought forth by the petitioner and determine whether an order is appropriate, independent of his or her moral or political beliefs of the subject.

It is also important to consider that not all people with intellectual and/or developmental disabilities would pursue a judicial bypass in order to gain the legal right to consent, and that not all persons would be granted such a right by a judge upon raising a claim. Therefore, the provision of the sexual violence statutes which criminalize sexual activity with persons with certain disabilities would not be invalidated by the creation of a judicial bypass mechanism. Similarly, the use of a judicial bypass mechanism will not create an environment in which a particularly vulnerable population has all statutory protections removed. This would simply grant people with disabilities the opportunity to demonstrate that they can consent and deserve the opportunity to choose when and whether they engage in sexual activity.

IV. CONCLUSION

Under the Due Process Clause of the Fourteenth Amendment, the government is prohibited from depriving any person of “life, liberty or property, without due process of the law.”¹⁰⁰ Under *Lawrence*, the right to private sexual activity with a partner of one’s choosing is considered a part of this right to substantive due process and concept of personal liberty. Criminal sexual violence laws such as Ohio’s forcible rape statute are designed to protect vulnerable populations. However, in doing so, they may actually cause harm by creating no opportunity for an entire class of persons to engage in lawful, consensual intimate activity. Such laws protect these populations by creating a blanket rule that no person may engage in sexual activity with that person, by deeming them as legally incapable of consent under any circumstances.

A solution to this problem is the creation of a judicial bypass mechanism which would allow an individual to obtain a court order indicating they have demonstrated that they are well informed and mature enough to make the decision to engage in consensual sexual activity. This mechanism would allow a release valve of sorts, so that a person may retain his or her substantive due process rights despite a state’s interest in protecting otherwise vulnerable populations. Judicial bypass is not a novel solution to the problem of balancing individual privacy rights against a state’s interest in protecting its citizens, and in fact has been endorsed by the Supreme Court as the proper method of granting minors the ability to obtain an abortion without parental consent.¹⁰¹ Here, a judicial bypass mechanism would operate in the same manner, and an individual could obtain the ability to lawfully consent to sexual activity by demonstrating his or her maturity and that he or she is well-informed enough to consent. The existence of a judicial bypass order would not bar prosecutors from bringing a criminal sexual violence case against a person who victimizes the recipient of an order, and local judges are well-equipped to determine when it is appropriate to grant an order. Therefore, a judicial bypass mechanism that creates the right to consent to sexual activity for persons with disabilities is a solution to protecting the privacy

⁹⁹ *Id.* at 643.

¹⁰⁰ U.S. CONST. amend. XIV, § 1.

¹⁰¹ *Bellotti*, 443 U.S. at 643.

rights of such individuals without interfering with the state's interest in protecting people with mental, intellectual, and/or developmental disabilities from sexual violence.