

BEING SECURE IN ONE'S PERSON: DOES SEXUAL ASSAULT VIOLATE A CONSTITUTIONALLY PROTECTED RIGHT?

INTRODUCTION

On May 20, 1992, a federal grand jury indicted Judge David Lanier of, among other things, depriving a woman of a constitutionally protected liberty interest without due process; the implicated liberty interest was the right to be free from sexual assault.¹ The indictment alleged that Lanier, who at the time was the sole Chancery and Juvenile Court judge for two rural counties in western Tennessee, sexually assaulted several women in his judicial chambers.² The allegations against Judge Lanier ran the gamut from unwanted grabbing and groping to forcing a woman, over whose child custody hearing he was to preside, to have oral sex with him in his chambers while he was wearing his judicial robes.³ In the absence of state prosecution (Judge Lanier came from a politically prominent family and his brother was the local prosecutor), the federal government prosecuted Judge Lanier under 18 U.S.C. § 242 ("section 242"), which criminalizes the willful "deprivation of any rights . . . protected by the Constitution" committed by any person under "color of state law."⁴ The ensuing litigation has raised a number of issues, including whether a constitutional right to bodily integrity exists to the extent that citizens are constitutionally protected from state-occasioned sexual assault.⁵

¹ See *United States v. Lanier*, 33 F.3d 639, 645 (6th Cir. 1994), *rev'd*, 73 F.3d 1380 (1996) (en banc), *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997).

² See *id.*

³ See *id.* at 645-50.

⁴ 18 U.S.C. § 242 (1994); see *United States v. Lanier*, 73 F.3d 1380, 1383 (6th Cir. 1996) (en banc) [*Lanier II*], *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997). Section 242 states in relevant part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . [and if] such acts include . . . aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242.

⁵ See *United States v. Lanier*, 33 F.3d 639, 645 (6th Cir. 1994), *rev'd*, 73 F.3d 1380 (1996) (en banc), *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997).

PROLOGUE

Determining if sexual assault by a sitting judge violates a constitutionally protected right involves a number of distinct inquiries.⁶ This Note focuses solely on whether the right to bodily integrity is encompassed by the liberty interest protected by the Fourteenth Amendment, and, in turn, whether the right to bodily integrity incorporates the right to be free from sexual assault.⁷ Part I of this Note examines the history of substantive due process in the context of the right to bodily integrity.⁸ Part II examines the *Lanier* case, including the recent United States Supreme Court decision delineating the correct standard for determining if conduct falls within the meaning of 18 U.S.C. § 242.⁹ Part III reviews how the Supreme Court and various appeals courts have recognized the right to bodily integrity.¹⁰ Part IV addresses whether sexual abuse violates a recognized right of bodily integrity and concludes that it does.¹¹

I. BACKGROUND

This Part is broken into three subsections. Subsection A discusses 18 U.S.C. § 242 and how this statute has been interpreted by the Supreme Court.¹² Subsection B discusses past Supreme Court decisions with respect to whether or not bodily integrity is a recognized constitutional right.¹³ Subsection C discusses past circuit court decisions and the existence of a constitutionally protected right to bodily integrity and, more specifically, the right to be free from sexual abuse.¹⁴

A. 18 U.S.C. § 242

Congress adopted 18 U.S.C. § 242 in 1874.¹⁵ The language of section 242 was part of an attempt by Congress to merge and thereby

⁶ For example, one issue is whether fundamental unenumerated rights are entitled to constitutional protection under the rubric of substantive due process and the Fourteenth Amendment. The validity of substantive due process, however, is beyond the scope of this Note. This Note assumes it to be valid within the context of past Supreme Court precedent. Likewise, this Note will not address the issue of what constitutes an act "under color of law."

⁷ See *infra* Parts I, II, III and IV.

⁸ See *infra* notes 12–151 and accompanying text.

⁹ See *infra* notes 152–278 and accompanying text.

¹⁰ See *infra* notes 279–306 and accompanying text.

¹¹ See *infra* notes 307–28 and accompanying text.

¹² See *infra* notes 15–35 and accompanying text.

¹³ See *infra* notes 36–116 and accompanying text.

¹⁴ See *infra* notes 117–51 and accompanying text.

¹⁵ See 18 U.S.C. § 242 (1994); *United States v. Lanier*, 73 F.3d 1380, 1384 (6th Cir. 1996) (en banc) [*Lanier II*], *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997).

codify sections of the 1866 Civil Rights Act, the 1870 Civil Rights Act and the 1871 Ku Klux Klan Act—statutes that punished corruption and distortion of lawful state processes by state officials.¹⁶ Section 242, as codified in 1874, criminalized the deprivation of any rights protected by the Constitution by any person under color of law.¹⁷ In 1909, Congress amended the statute to add the requirement of willfulness.¹⁸ In 1988, Congress amended section 242 by including an additional penalty provision for bodily injury.¹⁹ Congress again amended the statute in 1994 to include the death penalty and other enhanced penalty provisions, including penalties for sexual abuse and attempted sexual abuse.²⁰

In 1945, in *Screws v. United States*, the United States Supreme Court held in a plurality decision that section 242 was not unconstitutionally vague.²¹ In *Screws*, the defendants—the sheriff of Baker County, Georgia along with two other policemen—made a late night arrest of Robert Hall.²² After arresting Hall, a young black man, and driving him to the courthouse, the defendants severely beat the handcuffed Hall for fifteen to thirty minutes.²³ The defendants then dragged Hall feet first through the courthouse and threw him into a jail cell.²⁴ Hall died shortly thereafter.²⁵ The federal government charged the defendants with depriving Hall of his constitutionally protected rights in violation of section 242.²⁶ The defendants argued that, although they may have violated state law, they did not violate any of Hall's constitutionally protected rights.²⁷ In addition, they challenged the constitutionality of section 242 itself, arguing that the statute lacked the basic specificity necessary for criminal statutes to give notice to potential violators.²⁸ Although it acknowledged the danger that a vague criminal statute poses, the Court emphasized that the word "willful" in a criminal

¹⁶ See 18 U.S.C. § 242; 17 Stat. 13 (1871); 16 Stat. 144 (1870); 14 Stat. 27 (1866); *Lanier II*, 73 F.3d at 1384–86.

¹⁷ 18 U.S.C. § 242; see *Lanier II*, 73 F.3d at 1384 & n.1.

¹⁸ 18 U.S.C. § 242; see *Lanier II*, 73 F.3d at 1384 n.1.

¹⁹ 18 U.S.C. § 242; see *Lanier II*, 73 F.3d at 1384 n.1.

²⁰ See 18 U.S.C. § 242; *Lanier II*, 73 F.3d at 1384 n.1.

²¹ 325 U.S. 91, 103 (1945).

²² *Id.* at 92.

²³ See *id.* at 92–93.

²⁴ See *id.* at 93.

²⁵ See *id.*

²⁶ See *Screws*, 325 U.S. at 93. In *Screws*, the defendants were convicted under § 20 of the Criminal Code, 18 U.S.C. § 52, which has since been codified as 18 U.S.C. § 242. *Id.*; see *United States v. Lanier*, 73 F.3d 1380, 1383 (6th Cir. 1996) (en banc) [*Lanier II*], *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997).

²⁷ See *Screws*, 325 U.S. at 94 n.1.

²⁸ See *id.* at 96.

statute denotes an act done intentionally and with a malign purpose.²⁹ The Court reasoned that the specific intent required by the statute is the intent to deprive a person of a right that has been "*made specific* either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."³⁰ The Court further reasoned that this definition of rights "*made specific*" provides adequate notice to potential violators that they are criminally liable under section 242.³¹ In *Screws*, the Court concluded that the defendants—by taking the law into their own hands and acting as prosecutor, judge and jury—deprived Hall of his constitutionally protected right to a trial in a court of law, subjecting him instead to a "trial by ordeal."³² The Court reasoned that the concept of a jury trial is basic to the concept of due process.³³ The Court further reasoned that the fact that the defendants were not thinking in constitutional terms was not material; as long as their aim was to deprive a citizen of a constitutionally protected right rather than to enforce local law, then they did so in reckless disregard of constitutional prohibitions or guarantees.³⁴ Thus, the Supreme Court held that the requirement of specific intent to deprive a person of a federal right saves section 242 from being unconstitutionally vague.³⁵

B. Bodily Integrity and United States Supreme Court Precedent

In 1952, in *Rochin v. California*, the United States Supreme Court held that pumping the stomach of a suspect against his will violated the Due Process Clause of the Fourteenth Amendment.³⁶ In *Rochin*, the police, acting on a tip, conducted a drug raid on a private residence.³⁷ Before the police could confiscate two unidentified capsules on a night stand in the defendant's room, however, the defendant swallowed the capsules.³⁸ The police then took the defendant to a hospital and ordered a doctor to force an emetic solution through a tube into the defendant's stomach to induce vomiting.³⁹ The police

²⁹ *Id.* at 96-97, 101.

³⁰ *Id.* at 104 (emphasis added).

³¹ *Id.*

³² *Screws*, 325 U.S. at 106.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 103.

³⁶ 342 U.S. 165, 173-74 (1952).

³⁷ *Id.* at 166.

³⁸ *See id.*

³⁹ *See id.*

found two morphine capsules in the vomit.⁴⁰ The two capsules were the primary evidence against the defendant at trial.⁴¹ On the strength of this evidence, the defendant was convicted.⁴² On appeal, the California District Court of Appeal affirmed the conviction.⁴³ The California Supreme Court denied the defendant's petition for a hearing without opinion.⁴⁴

Having exhausted his appeals in state court, the defendant appealed to the United States Supreme Court.⁴⁵ The United States Supreme Court granted certiorari and reversed.⁴⁶ The Court reasoned that the Due Process Clause of the Fourteenth Amendment is a constitutional guarantee of respect for those personal immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁴⁷ The Court also drew an analogy between obtaining evidence by pumping an unwilling suspect's stomach and coercing a confession.⁴⁸ The Court reasoned that it would be incongruous to hold that "in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."⁴⁹ The Court further recognized that the forcible extraction of evidence from a person's stomach is so offensive to human dignity that it "shocks the conscience."⁵⁰ In so doing, the Court implicitly reasoned that the brutality of the force exercised by the State in obtaining the evidence offended the Due Process Clause.⁵¹ Thus, the Supreme Court held that forcibly extracting evidence from a suspect's stomach violates the constitutional guarantee of respect for personal immunities protected by the Due Process Clause of the Fourteenth Amendment.⁵²

In 1977, in *Ingraham v. Wright*, the United States Supreme Court held that individuals have a constitutionally protected liberty interest

⁴⁰ *See id.*

⁴¹ *See Rochin*, 342 U.S. at 166.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.* at 167.

⁴⁵ *See id.* at 168.

⁴⁶ *Rochin*, 342 U.S. at 174.

⁴⁷ *Id.* at 168-69 (quoting *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934)).

⁴⁸ *Id.* at 172-73. The Court noted that not only are coerced confessions unreliable but, more importantly, they offend the community's sense of fair play and decency. *Id.* at 173.

⁴⁹ *Id.* at 173.

⁵⁰ *Id.* at 172, 174.

⁵¹ *See Rochin*, 342 U.S. at 173-74.

⁵² *Id.* at 168-69.

in being free from bodily restraint and punishment.⁵³ In *Ingraham*, two pupils from a Dade County, Florida junior high school filed a class action suit in district court for damages as well as injunctive and declaratory relief, alleging that the school subjected students to disciplinary corporal punishment in violation of their constitutional rights.⁵⁴ Corporal punishment in Dade County consisted of paddling recalcitrant students on the buttocks with a flat wooden paddle as a means of maintaining discipline in the classroom.⁵⁵ The district court granted a motion for a directed verdict in favor of the school district, concluding that the punishment authorized and practiced in the county school did not violate any constitutional right.⁵⁶ A panel of the Court of Appeals for the Fifth Circuit reversed, concluding that the punishment was so severe and oppressive that it violated the Eighth and Fourteenth Amendments and that the procedures outlined in the statute authorizing the use of corporal punishment failed to satisfy the requirements of the Due Process Clause.⁵⁷ Subsequently, the Fifth Circuit, sitting *en banc*, rejected these conclusions and affirmed the judgment of the district court.⁵⁸

In affirming the *en banc* court of appeals judgment, the Supreme Court reasoned that the Cruel and Unusual Punishments Clause of the Eighth Amendment did not apply outside of the criminal process context.⁵⁹ Nevertheless, the Court acknowledged that corporal punishment did implicate a constitutionally protected liberty interest.⁶⁰ Specifically, the Court reasoned that the right to be free from unjustified

⁵³ 430 U.S. 651, 672-73 (1977).

⁵⁴ *Id.* at 653-54.

⁵⁵ *See id.* at 655. Normal punishment was limited to one to five blows with the paddle. *See id.* By statute, teachers were required to consult with the principal prior to paddling students. *See id.* Nonetheless, teachers would often paddle students on their own authority without first consulting the principal. *See id.*

⁵⁶ *See id.* at 654, 658.

⁵⁷ *See id.* at 658. The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Fourteenth Amendment to the United States Constitution states in relevant part:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

⁵⁸ *See Ingraham*, 430 U.S. at 658.

⁵⁹ *Id.* at 668-69.

⁶⁰ *Id.* at 672.

intrusions on personal security by the state is a historically protected right.⁶¹ In addition, the Court recognized that this historic liberty interest encompasses freedom from bodily restraint and punishment.⁶² Thus, the Court concluded that corporal punishment implicated a constitutionally protected right to be free from bodily restraint and punishment.⁶³

The Court recognized, however, the historical and widely accepted notion that reasonable corporal punishment in school is justified.⁶⁴ Consequently, the Court balanced the child's liberty interest in avoiding corporal punishment while in the care of public school authorities against the school's interest in preserving a traditional and widely accepted means of discipline.⁶⁵ The Supreme Court concluded that Florida's preservation of common-law constraints and remedies on the use of corporal punishment satisfied the Fourteenth Amendment's due process requirement.⁶⁶ Thus, the Supreme Court held that the Fourteenth Amendment protects a liberty interest that encompasses the right to be free from bodily restraint and punishment but that a long-standing accommodation of interests precluded a substantive due process violation, provided that the disciplinary corporal punishment is within the limits of the common-law privilege.⁶⁷

In 1982, in *Youngberg v. Romeo*, the United States Supreme Court held that the right to personal security and the right to be free from bodily restraint are constitutionally protected by the Due Process Clause of the Fourteenth Amendment.⁶⁸ In *Youngberg*, the mother of a severely retarded man sued the state facility where her son was committed, alleging that the facility failed to institute adequate preventative procedures to protect her son from injury.⁶⁹ After the trial judge instructed the jury on the proper standard for liability under the Eighth Amendment, the jury rendered a verdict in favor of the defendants.⁷⁰ The Court of Appeals for the Third Circuit, sitting *en banc*, reversed and remanded for a new trial, reasoning that the involuntar-

⁶¹ *Id.*

⁶² *Id.* at 673-74.

⁶³ *Ingraham*, 430 U.S. at 674.

⁶⁴ *Id.* at 675-76.

⁶⁵ *Id.*

⁶⁶ *Id.* at 675-76, 683.

⁶⁷ *Id.* at 672.

⁶⁸ 457 U.S. 307, 317-21, 325 (1982).

⁶⁹ *Id.* at 309-10. The mother became concerned with the number and severity of the injuries befalling her son, alleging that her son suffered injury on 63 occasions from July 1974 to November 1976. *See id.* at 310.

⁷⁰ *See id.* at 312.

ily-committed retain liberty interests in freedom of movement and in personal security which are properly protected by the Fourteenth Amendment.⁷¹

On appeal, the United States Supreme Court agreed with the Third Circuit and further held that involuntary commitment did not extinguish the right to personal security or the right to freedom from bodily restraint as protected by the Fourteenth Amendment.⁷² The Court reasoned that confinement, even in a criminal context, did not extinguish these rights, and, therefore, they must necessarily survive involuntary confinement.⁷³ The Court then stated that a determination of whether an individual's rights had been violated required balancing the "liberty of the individual" against the "demands of an organized society" by weighing the individual's interest in liberty against the State's asserted reason for restraining the individual.⁷⁴ In balancing the competing interests of the State and the individual, the Court reasoned that the Constitution only requires that courts "make certain that professional judgment was in fact exercised."⁷⁵ Consequently, the Court vacated the appeals court decision and remanded for a new trial consistent with the Court's decision.⁷⁶ Thus, the Supreme Court held that the Fourteenth Amendment protects liberty interests in personal security and the freedom from bodily restraint.⁷⁷

In 1989, in *DeShaney v. Winnebago County Department of Social Service*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not impose an affirmative duty on the state to prevent an individual from being deprived of life, liberty or property without due process by means other than state action.⁷⁸ In *DeShaney*, the mother of a child who suffered permanent brain damage after being severely beaten by his father filed an action on behalf of her son pursuant to 42 U.S.C. § 1983 ("section 1983").⁷⁹

⁷¹ See *id.* The *en banc* court did not, however, agree on a standard for determining if the plaintiff's rights had been violated. See *id.* at 313.

⁷² *Id.* at 315-16. The Court also determined that the plaintiff was entitled to minimally adequate training to help him keep from hurting himself and thereby prevent an unconstitutional infringement of his protected rights to personal security and freedom from bodily restraint. *Id.* at 322-23.

⁷³ *Youngberg*, 457 U.S. at 316.

⁷⁴ *Id.* at 320.

⁷⁵ *Id.* at 321-22. The Court added that the professional judgment standard is lower than the "compelling" or "substantial" state interest standard that a state would have to meet in order to justify use of restraints or conditions of less than absolute safety. *Id.* at 322.

⁷⁶ *Id.* at 325.

⁷⁷ *Id.* at 317-21.

⁷⁸ 489 U.S. 189, 195 (1989).

⁷⁹ *Id.* at 193. Section 1983 states in relevant part:

The complaint alleged that the Winnebago County Department of Social Services ("DSS") failed to intervene and protect the boy from his father, thereby depriving the boy of his liberty interest in bodily integrity in violation of his substantive due process rights under the Fourteenth Amendment.⁸⁰ The district court granted summary judgment for the defendants.⁸¹ On appeal, the Seventh Circuit affirmed, holding that petitioners had failed to state a claim because the Fourteenth Amendment does not require state or local governments to protect citizens from "private violence."⁸²

In affirming the Seventh Circuit, the Supreme Court determined that the Due Process Clause of the Fourteenth Amendment functions as a limit on state action and does not provide a general guarantee of certain minimal levels of safety and security.⁸³ The Court reasoned that the purpose of the Due Process Clause of the Fourteenth Amendment was to protect the people from the state, not to ensure that the state protected people from one another.⁸⁴ The Court further reasoned that only an affirmative exercise of state power to limit an individual's liberty can trigger a corresponding affirmative duty to provide for that individual's basic needs.⁸⁵ Accordingly, the Court concluded that the Due Process Clause does not confer an entitlement to government aid, even if such aid is necessary to protect life, liberty or property interests of which the government may not deprive the individual.⁸⁶ Thus, the Supreme Court held that a state's failure to protect an individual from violence perpetrated by private parties does not constitute a violation of the Fourteenth Amendment guarantee of due process.⁸⁷

In 1990, in *Cruzan v. Director, Missouri Department of Health*, the United States Supreme Court upheld a Missouri statute requiring clear

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1996).

⁸⁰ See *DeShaney*, 489 U.S. at 193.

⁸¹ See *id.*

⁸² See *id.* at 193-94. The court also held, in the alternative, that the causal connection between the conduct of the DSS and the boy's injuries was too attenuated to establish a deprivation of constitutional rights. See *id.*

⁸³ *Id.* at 195.

⁸⁴ *Id.* at 196.

⁸⁵ *DeShaney*, 489 U.S. at 200.

⁸⁶ *Id.* at 196.

⁸⁷ *Id.* at 197.

and convincing evidence of an incompetent person's wishes to have life-sustaining treatment withdrawn.⁸⁸ In so doing, however, the Court recognized that a competent person has a Fourteenth Amendment liberty interest in determining what shall be done with his or her own body.⁸⁹ In *Cruzan*, Nancy Beth Cruzan suffered severe cerebral injuries in an automobile accident that left her in a persistent vegetative state.⁹⁰ Cruzan's parents sought a court order to remove her from artificial feeding and hydration once it became apparent that she had little or no chance of recovery.⁹¹ The trial court granted the request finding that she had a fundamental right to refuse treatment and that prior to her accident, she had expressed a desire, if sick or injured, not to continue her life unless she could live "at least halfway normally."⁹² The Supreme Court of Missouri reversed.⁹³

On appeal, the United States Supreme Court affirmed the judgment of the Missouri Supreme Court.⁹⁴ The Court recognized that "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person"⁹⁵ The Court reasoned that the requirement of informed consent is derivative of this notion of bodily integrity.⁹⁶ The Court further reasoned that the logical corollary to the informed consent doctrine is the right to refuse treatment.⁹⁷ Thus, the Court concluded that a competent person has a constitutionally protected liberty interest in refusing medical treatment.⁹⁸

The Court further reasoned, however, that the liberty interest in refusing medical interest must be balanced against relevant state inter-

⁸⁸ 497 U.S. 261, 281 (1990).

⁸⁹ *Id.* at 269, 278.

⁹⁰ *Id.* at 266. A persistent vegetative state is generally characterized as "a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function." *Id.*

⁹¹ *See id.* at 267.

⁹² *See id.* The trial court based its finding on a serious discussion Nancy Cruzan had at age 25 with a housemate in which she expressed that if injured or sick, she would not want to continue her life unless she could live a halfway normal life. *See id.* at 268.

⁹³ *Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 427 (Mo. 1988). The problem for the parents was that they did not have "clear and convincing" evidence that their daughter would have wanted them to discontinue life support. *See Cruzan*, 497 U.S. at 268. The Supreme Court of Missouri found Nancy's statements to her housemate regarding her desire to live or die under certain conditions to be "unreliable for the purpose of determining her intent." *Cruzan by Cruzan*, 760 S.W.2d at 424.

⁹⁴ *Cruzan*, 497 U.S. at 287.

⁹⁵ *Id.* at 269 (quoting *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

⁹⁶ *Id.*

⁹⁷ *Id.* at 270.

⁹⁸ *Id.* at 278.

ests.⁹⁹ The Court reasoned that establishing a procedural safeguard—requiring clear and convincing evidence—to assure that a decision on behalf of an incompetent patient conforms with the express wishes of the patient while competent does not contravene the Constitution.¹⁰⁰ Thus, although the Court determined that a competent person has a constitutionally protected liberty interest in refusing treatment, the Court held that a state may apply a clear and convincing evidence standard in situations where a guardian seeks to discontinue life support for a person in a persistent vegetative state.¹⁰¹

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the United States Supreme Court held that the liberty interest in the Due Process Clause of the Fourteenth Amendment encompassed a woman's decision to terminate her pregnancy.¹⁰² In so doing, the Court held that a state may not prohibit a woman from making the ultimate decision to terminate her pregnancy before viability.¹⁰³ In *Casey*, abortion clinics and physicians challenged the constitutionality of several provisions of the Pennsylvania Abortion Control Act ("Abortion Act").¹⁰⁴ Implicit in the challenge to the law was an assertion that the law infringed upon a woman's right, guaranteed in the Due Process Clause of the Fourteenth Amendment, to terminate her pregnancy as was held in the seminal abortion case *Roe v. Wade*.¹⁰⁵

In analyzing the claim, the Court revisited its previous holding in *Roe* and reaffirmed the "essential" holding of *Roe*.¹⁰⁶ The Court reiter-

⁹⁹ *Cruzan*, 497 U.S. at 279.

¹⁰⁰ *Id.* at 282.

¹⁰¹ *Id.* at 284.

¹⁰² 505 U.S. 833, 846 (1992). The Court also held, however, that states are permitted to regulate abortion provided the regulations do not place an undue burden on a woman's right to choose. *Id.* at 878-79.

¹⁰³ *Id.* at 879.

¹⁰⁴ *Id.* at 844. The challenged provisions included an informed consent requirement that a woman seeking an abortion be provided certain information at least twenty-four hours before the abortion is to be performed; an informed consent requirement that minors seeking an abortion obtain the informed consent of a parent or avail themselves of a judicial bypass option if they could not obtain a parent's consent; a spousal consent requirement; and, a reporting requirement on facilities performing abortions. *See id.*

¹⁰⁵ *See id.* at 845; *Roe v. Wade*, 410 U.S. 113, 153 (1972). In 1972, in *Roe v. Wade*, the United States Supreme Court held that a woman's right to choose to terminate her pregnancy was protected by the Fourteenth Amendment. 410 U.S. at 153. In *Roe*, the plaintiffs challenged the constitutionality of a Texas statute prohibiting abortions with a few narrow exceptions. *Id.* at 117-22. The Court reasoned that the right of a woman to terminate her pregnancy fell within the ambit of a right to privacy protected by the Fourteenth Amendment. *Id.* at 153. Thus, the Supreme Court held that a woman's right to choose to terminate her pregnancy was protected by the Constitution. *Id.*

¹⁰⁶ *Casey*, 505 U.S. at 846; *see Roe*, 410 U.S. at 153. The Court reaffirmed that: 1) a woman

ated that a woman's decision to terminate her pregnancy derives its constitutional protection from the liberty guarantee in the Due Process Clause of the Fourteenth Amendment.¹⁰⁷ The Court plainly rejected the interpretation that liberty, as protected by the Constitution, encompasses only those rights already guaranteed to citizens against federal interference by the express provisions of the first eight Amendments to the Constitution.¹⁰⁸ Similarly, the Court rejected an interpretation of substantive due process that protects only those practices that were specifically defined and protected from government interference when the Fourteenth Amendment was adopted.¹⁰⁹ Instead, the Court recognized that the definition of liberty lies on a rational continuum; its boundaries are not susceptible to expression in a simple rule but rather rely upon reasoned judicial judgment and restraint.¹¹⁰

The Court continued by noting that substantive due process affords constitutional protection to personal decisions related to marriage, procreation, contraception, family relationships, child rearing and education.¹¹¹ The Court reasoned that not only do these matters involve the most intimate and personal choices a person can make, but such choices are central to personal dignity and autonomy, which, in turn, are central to the liberty protected by the Fourteenth Amendment.¹¹² In particular, the Court reasoned that a state could not insist that a woman undergo the unique pain, physical constraints and anxieties that are implicit in carrying a child to term.¹¹³ The Court also drew an analogy between the decision to terminate a pregnancy and the decision to use contraception, which has been granted constitutional protection.¹¹⁴ Finally, the Court paid great deference to the rule of *stare decisis*, recognizing that for two decades of economic and social development, people have organized intimate relationships and decisions in reliance on the availability of abortion in the event that con-

has the right to choose to have an abortion before viability and obtain it without undue interference from the state; 2) a state may restrict abortions after fetal viability, provided the law makes exceptions for the health of the mother; and 3) a state has a legitimate interest from the outset of the pregnancy in protecting the health of the woman and the life of the fetus. *Casey*, 505 U.S. at 846.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 847.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 847-48.

¹¹¹ *Casey*, 505 U.S. at 849.

¹¹² *Id.* at 851.

¹¹³ *Id.* at 852.

¹¹⁴ *Id.*; see, e.g. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (protecting right of unmarried couples to use contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting right of married couples to use contraception).

traception should fail.¹¹⁵ The Court ultimately held, however, that all of the contested provisions of the Abortion Act, with the exception of the provision requiring spousal approval, did not unreasonably infringe upon a woman's right to choose, and, therefore, were not unconstitutional.¹¹⁶

C. Circuit Court Precedent

In 1980, in *Hall v. Tawney*, the United States Court of Appeals for the Fourth Circuit held that the infliction of corporal punishment implicated a constitutionally protected right to be free from state-occasioned invasions of personal privacy and bodily integrity.¹¹⁷ In *Hall*, Naomi Hall, through her parents, appealed the dismissal of their suit against school officials under 42 U.S.C. § 1983 for violations of their constitutional rights when Naomi was paddled by her schoolteacher.¹¹⁸ The court first determined that Hall's substantive due process claim was distinct from any rights she may have under the State's assault and battery law.¹¹⁹ The court concluded that Hall's claim was appropriately grounded in a constitutional right protected by the substantive due process component of the Due Process Clause; namely the right to be free from state-occasioned invasions of personal security and bodily integrity.¹²⁰ The court reasoned that the right to bodily security is the most fundamental element of personal privacy.¹²¹ The court further reasoned that if criminal suspects in the custody of the police are protected from invasions of their personal security, then public school students, under the disciplinary control of school officials, have the same right.¹²² The court concluded that the complaint alleged facts sufficient to state a claim against the participants in the paddling incident but not against their supervisors.¹²³ Thus, the Fourth Circuit held that the disciplinary paddling of a student could violate the

¹¹⁵ *Casey*, 505 U.S. at 854, 856.

¹¹⁶ *Id.* at 900.

¹¹⁷ 621 F.2d 607, 613 (4th Cir. 1980).

¹¹⁸ *Id.* at 609. In addition, Hall alleged that her right to procedural due process, freedom from cruel and unusual punishment and equal protection of the laws, as well as her parents' rights to substantive due process, were violated. *See id.* at 609-10.

¹¹⁹ *Id.* at 613. The court recognized that relief under 42 U.S.C. § 1983 is not dependent upon the unavailability of state remedies. *Id.* at 612. The court noted, however, that not every violation of state tort or criminal assault laws becomes a federal tort, violative of the constitution, simply because it is committed by a state employee. *Id.* at 613.

¹²⁰ *Id.* at 611, 613.

¹²¹ *Id.* at 613.

¹²² *Hall*, 621 F.2d at 613.

¹²³ *Id.* at 614-15.

student's substantive due process right to be free from state-occasioned invasions of his or her bodily integrity.¹²⁴

In 1983, in *United States v. Davila*, the United States Court of Appeals for the Fifth Circuit held that two border patrol officers were properly convicted under section 242 for depriving two women of their liberty by coercing sexual favors from them.¹²⁵ In *Davila*, the defendants stopped an automobile containing two United States Army privates accompanied by two women who had entered the country illegally.¹²⁶ The border patrol officers kept the two women in their custody and took them to an apartment owned by one of the officers.¹²⁷ There, the officers coerced the women into having sexual intercourse with them in exchange for their freedom.¹²⁸ The court reasoned that the evidence produced at trial was sufficient to allow a reasonable jury to find the officers guilty of coercing sexual favors from their victims and, thereby, depriving the women of their liberty as protected by the Fourteenth Amendment.¹²⁹ Thus, the Fifth Circuit upheld convictions under section 242 resulting from the deprivation of the constitutionally protected liberty interest in being free from sexual coercion.¹³⁰

In 1989, in *Stoneking v. Bradford Area School District*, the United States Court of Appeals for the Third Circuit held that sexual assault violates a liberty interest—which is protected by the substantive due process component of the Fourteenth Amendment—to be free from state-occasioned invasion of a person's bodily integrity.¹³¹ In *Stoneking*, Kathleen Stoneking filed suit under 42 U.S.C. § 1983 against the principal and assistant principal of the Bradford Area High School as well as the superintendent of the Bradford Area School District for maintaining a policy of reckless indifference to known or suspected sexual abuse and, thereby, creating a climate that condoned the sexual abuse of students by teachers.¹³² Stoneking alleged that school officials were aware that Edward Wright, the Bradford High Band Director, sexually abused Stoneking and forced her to engage in various sexual acts beginning in 1980, when Stoneking was a sophomore in high school, and continuing through 1985.¹³³ The defendants, however, maintained

¹²⁴ *Id.* at 614.

¹²⁵ 704 F.2d 749, 750 (5th Cir. 1983).

¹²⁶ *Id.* at 751.

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *Id.* at 750, 752.

¹³⁰ *Davila*, 704 F.2d at 750.

¹³¹ 882 F.2d 720, 726–27 (3d Cir. 1989).

¹³² *Id.* at 724–25.

¹³³ *See id.* at 722. Wright ultimately pled guilty to various sex-related crimes and school officials conceded that some of the acts occurred in the band room at the high school and on school

that they were entitled to qualified immunity because their conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹³⁴ The court's inquiry focused first on whether an existing right had been violated, and, second, whether reasonable school officials should have known, in light of clearly established law, that they could be held liable for maintaining a custom, practice or usage that communicated condonation of assaultive behavior.¹³⁵

In the first instance, the court concluded that it was not only impermissible for school teachers to sexually molest students, but also that sexual assault violated the constitutionally protected right to be free from unjustified intrusions on personal security.¹³⁶ The court reasoned that sexual molestation of a student is not substantively different, for constitutional purposes, from corporal punishment and that reasonable officials would have understood that the "contours" of a student's right to bodily integrity under the Due Process Clause included the right to be free from sexual assault.¹³⁷ The court further reasoned that by 1981 it was clearly established that maintaining a custom, practice or usage that communicated tolerance of assaultive behavior violated the law.¹³⁸ After examining the information possessed by the defendants and the actions taken in response to what they knew, the court concluded that the principal and assistant principal were not entitled to qualified immunity but that the superintendent was entitled to qualified immunity.¹³⁹ Thus, the Third Circuit held that sexual assault violated a constitutionally protected right to be free from invasions of a person's bodily integrity.¹⁴⁰

In 1991, in *United States v. Contreras*, the United States Court of Appeals for the Fifth Circuit held that a police officer was properly convicted under section 242 for willfully depriving a woman of her

trips, as well as in his own home and car after Stoneking babysat for him or after he gave her a music lesson. *See id.*

¹³⁴ *Id.* at 726 (quoting *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1992)).

¹³⁵ *Id.* at 726.

¹³⁶ *Stoneking*, 882 F.2d at 726-27 (citing *Ingraham v. Wright*, 430 U.S. 651, 673 & n.41 (1977)). In light of *DeShaney*, the court did not rest its analysis on an affirmative duty by school officials to protect students from harm. *Id.* at 723-24; *see Deshaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189 (1989). The court nevertheless distinguished *DeShaney* on the grounds that a private citizen inflicted *DeShaney's* injuries, whereas *Stoneking* was assaulted by a state employee. *Stoneking*, 882 F.2d at 724; *Deshaney*, 489 U.S. at 189.

¹³⁷ *Stoneking*, 882 F.2d at 727.

¹³⁸ *Id.* at 727, 730.

¹³⁹ *Id.* at 731. The court reasoned that the superintendent was entitled to qualified immunity because there was no evidence that the superintendent took any affirmative action to indicate tolerance, condonation or encouragement of assaultive behavior. *Id.*

¹⁴⁰ *Id.* at 726.

constitutional rights by sexually assaulting her.¹⁴¹ In *Contreras*, an on-duty police officer forced a woman to have sex with him in the back of his patrol car.¹⁴² The court reasoned that there was sufficient evidence for a reasonable jury to find the defendant guilty of depriving his victim of her constitutional rights by sexually assaulting her.¹⁴³ Thus, the Fifth Circuit held that the defendant was properly convicted under section 242 for depriving a woman of her constitutionally protected right to be free from sexual abuse.¹⁴⁴

In 1994, in *Doe v. Taylor Independent School District*, the United States Court of Appeals for the Fifth Circuit held that sexual abuse violates the right to bodily integrity protected by the Due Process Clause of the Fourteenth Amendment.¹⁴⁵ In *Taylor*, Jane Doe, a high school student, brought suit under 42 U.S.C. § 1983 against her biology teacher—Jessie Stroud, the principal of Taylor High and the superintendent of the Taylor Independent School District as a result of being sexually molested by Stroud.¹⁴⁶ The principal and superintendent appealed the denial of their motions for summary judgment on qualified immunity grounds arguing, among other things, that Jane Doe was not deprived of any constitutional right and that even if she was deprived of a constitutional right, that the issues of law with respect to her constitutional right were not “clearly established” in 1987 when the violations took place.¹⁴⁷ The court concluded that the Due Process Clause of the Fourteenth Amendment protects the right to be free from state-occasioned damage to a person’s bodily integrity and that bodily integrity is “necessarily violated” when a state actor sexually

¹⁴¹ 950 F.2d 232, 236, 244 (5th Cir. 1991).

¹⁴² *Id.* at 235. The officer stopped the woman for questioning. *See id.* When she could not produce identification, he told her to get into his cruiser for the purpose of transporting her to the Immigration and Naturalization Service (“INS”). *See id.* Instead of taking her to the INS, the officer took her to an isolated area and sexually assaulted her in the back of the police cruiser. *See id.* In addition, because he kept his gun within reach at all times—taking off his holster to keep it near him while he sexually assaulted his victim—he was charged with using and carrying a weapon in relation to a crime of violence. *See id.* at 235–36. The officer testified, however, that the woman offered to have sex with him, willingly removed her clothes and participated in consensual intercourse. *See id.* at 235. Finally, the officer was also convicted of conspiring to kill the woman to prevent her from testifying at trial. *See id.* at 236, 244.

¹⁴³ *Id.* at 244.

¹⁴⁴ *Id.* at 236, 244.

¹⁴⁵ 15 F.3d 443, 445 (5th Cir. 1994).

¹⁴⁶ *Id.* at 449–50.

¹⁴⁷ *See id.* at 450. In addition, the principal and the superintendent argued that even if Doe had been deprived of a constitutional right, they owed her no duty with respect to the violation of this right and even if they did, their response to the situation satisfied any obligation they owed Doe. *See id.*

abuses a schoolchild.¹⁴⁸ The court drew an analogy to corporal punishment, but reasoned that unlike corporal punishment, there can never be any justification for sexually molesting a schoolchild.¹⁴⁹ In addition, the court concluded that the "contours" of Doe's substantive due process right to be free from sexual abuse were clearly established in 1987.¹⁵⁰ Thus, the Fifth Circuit held that sexual abuse violates the right to be free from state-occasioned invasions of a person's bodily integrity as protected by the Fourteenth Amendment.¹⁵¹

II. DEFINING A CONSTITUTIONAL RIGHT WITHIN THE SCOPE AND MEANING OF 18 U.S.C. § 242: THE CASE OF JUDGE DAVID LANIER

In December of 1992, a jury found Judge David Lanier guilty of sexual assault and convicted him under 18 U.S.C. § 242 for violating his victims' constitutionally protected rights.¹⁵² Judge Lanier appealed his conviction to the United State Court of Appeals for the Sixth Circuit, arguing, among other things, that sexual assault does not violate a constitutionally protected right.¹⁵³ A panel of the Sixth Circuit upheld Judge Lanier's conviction.¹⁵⁴ On rehearing *en banc*, however, the Sixth Circuit reversed the panel decision and dismissed the indictment against Judge Lanier.¹⁵⁵ Subsequently, the United States Supreme

¹⁴⁸ *Id.* at 451-52.

¹⁴⁹ *Id.* The court acknowledged that there has not been a similar case directly on point. *Id.* at 455. Nevertheless, as with the hypothetical case of welfare officials selling foster children into slavery, it does not follow that in such a case officials would be immune from liability. *See id.* Given the similarly egregious conduct involved in this case, the court reasoned that any reasonable public school official would have known that sexually assaulting a schoolchild violated the constitutional protected right to be free from invasions of bodily integrity. *Id.*

¹⁵⁰ *Taylor*, 15 F.3d at 451, 455 (relying primarily on *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987) (holding that schoolchild's substantive due process right was violated when teacher lashed schoolchild to chair for two days) and *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (holding that police officer violated tourist's right to be free from state-occasioned damage to bodily integrity by striking tourist, who was taking picture of arrest, with nightstick)). The court also concluded that the principal and superintendent's duty with respect to the violation of Doe's constitutional rights was clearly established by 1987. *Id.* The court similarly determined that Doe stated facts sufficient to withstand a motion for summary judgment that the principal did not fulfill the duty owed to her. *Id.* at 457. The court, however, concluded that Doe did not sufficiently state facts sufficient to withstand a motion for summary judgment against the superintendent with respect to the duty owed to her. *Id.* at 458.

¹⁵¹ *Id.* at 451-52.

¹⁵² *See* *United States v. Lanier*, 33 F.3d 639, 650 (6th Cir. 1994) [*Lanier*], *rev'd*, 73 F.3d 1380 (1996) (en banc), *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997).

¹⁵³ *See id.* at 650-51.

¹⁵⁴ *See id.* at 666.

¹⁵⁵ *United States v. Lanier*, 73 F.3d 1380, 1394 (6th Cir. 1996) (en banc) [*Lanier II*], *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997).

Court reversed the Sixth Circuit, remanding the case for further consideration under the proper standard for determining whether a generally phrased constitutional right has been made specific for purposes of section 242.¹⁵⁶

This Part is broken into three subsections. Subsection A discusses the Sixth Circuit panel decision.¹⁵⁷ Subsection B discusses the *en banc* decision of the Sixth Circuit.¹⁵⁸ Subsection C discusses the Supreme Court decision.¹⁵⁹

A. *Take One: The Conviction Is Upheld*

In 1994, in *United States v. Lanier*, a three-member panel of the United States Court of Appeals for the Sixth Circuit held that the right to be free from state-occasioned damage to a person's bodily integrity included the right to be free from sexual assault.¹⁶⁰ In *Lanier*, a Tennessee Chancery Court judge appealed his conviction under 18 U.S.C. § 242 for willfully depriving several women of their constitutional rights under color of law.¹⁶¹ Judge Lanier's appeal was, among other things, based upon evidentiary and procedural issues as well as an assertion that his conduct did not violate the Constitution.¹⁶²

The jury found Judge Lanier guilty on seven of eleven counts of sexual assault in violation of section 242.¹⁶³ The jury convicted Judge Lanier of sexually assaulting Patty Mahoney, an employee of the Chancery Court of Dyer County.¹⁶⁴ In the fall of 1990, Judge Lanier hired Mahoney to be his secretary.¹⁶⁵ By the second day of the job Judge Lanier was hugging her, touching her buttocks and touching her breasts.¹⁶⁶ Judge Lanier soon became even more aggressive, grabbing and squeezing her breasts rather than just placing his hands on them.¹⁶⁷ Mahoney confronted Judge Lanier only to be told that if she reported his behavior "it would hurt her more than it would hurt

¹⁵⁶ *United States v. Lanier*, 117 S. Ct. 1219, 1228 (1997) [*Lanier III*].

¹⁵⁷ See *infra* notes 160–213 and accompanying text.

¹⁵⁸ See *infra* notes 214–55 and accompanying text.

¹⁵⁹ See *infra* notes 256–78 and accompanying text.

¹⁶⁰ 33 F.3d at 651 (citing *Jamieson v. Shaw*, 772 F.2d 1205, 1210 (5th Cir. 1985)).

¹⁶¹ See *Lanier*, 33 F.3d at 645.

¹⁶² See *id.*

¹⁶³ See *id.* at 645, 650. At the close of the trial, the court granted Judge Lanier's motion for a judgment of acquittal on one count of sexual assault and the jury found him not guilty on three other counts. See *id.*

¹⁶⁴ See *id.* at 646.

¹⁶⁵ See *id.* at 647.

¹⁶⁶ See *Lanier*, 33 F.3d at 647.

¹⁶⁷ See *id.*

him."¹⁶⁸ The touching and grabbing continued on a daily basis until Mahoney could no longer tolerate it.¹⁶⁹ She begged Judge Lanier to stop because she needed the job to support her two children and told Judge Lanier that if he did not stop, she would be forced to quit.¹⁷⁰ At that point, Judge Lanier put his arms around her, aggressively hugging her and pressing his pelvis against her.¹⁷¹ After two weeks on the job, Mahoney quit.¹⁷²

The jury also convicted Judge Lanier of sexually assaulting Vivian Archie, over whose divorce he presided.¹⁷³ Subsequent to her divorce, Archie interviewed with Judge Lanier for a secretarial job.¹⁷⁴ During the interview, Judge Lanier told Archie that her ex-husband had been to see him about gaining custody of her child but that he could not talk about the case because he would preside over the matter.¹⁷⁵ Thereafter, Judge Lanier grabbed Archie and held her down in a chair while trying to kiss and fondle her.¹⁷⁶ Finally, Judge Lanier stood over Archie, exposed himself and pulled her head down and her jaws open, forcing her to perform oral sex on him.¹⁷⁷ Fearful of losing custody of her child, Archie did not scream or report him.¹⁷⁸ Soon after this incident, Judge Lanier inveigled Archie, with information of another job prospect, to return to his chambers.¹⁷⁹ When Archie arrived at Judge Lanier's chambers, he told her about a secretarial position available in a doctor's office.¹⁸⁰ Before she could leave, however, Judge Lanier again sexually assaulted Archie, once more orally raping her.¹⁸¹

In addition, the jury convicted Judge Lanier of sexually assaulting Fonda Bandy.¹⁸² Bandy worked for a federal program, Drug Free Housing, and wanted to implement a new parenting program for parents

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *See Lanier*, 33 F.3d at 647.

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ *See Lanier*, 33 F.3d at 648.

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ *See id.* Judge Lanier lured Archie back to his chambers by leaving a message with Archie's mother for Archie about a job interview but said that Archie had to come to his chambers to get the information. *See id.* Archie's mother insisted that Archie go to see Judge Lanier to obtain the information. *See id.*

¹⁸⁰ *See id.*

¹⁸¹ *See Lanier*, 33 F.3d at 648.

¹⁸² *See id.* at 646.

who lived in public housing and who had children in juvenile court before Judge Lanier.¹⁸³ After presenting her project to Judge Lanier in chambers, Judge Lanier put his arms around her and began kissing her and fondling her breasts.¹⁸⁴ Bandy freed herself and went into the bathroom before leaving his chambers.¹⁸⁵ To exit the chambers, however, Bandy had to pass Judge Lanier's desk.¹⁸⁶ As she passed the desk, Judge Lanier put his hand on Bandy's crotch.¹⁸⁷ Before she left, Judge Lanier told her that if she came back, she would have all the clients she wanted.¹⁸⁸ Bandy never returned and Judge Lanier referred only two individuals whose cases had been pending at the time of his meeting with Bandy.¹⁸⁹

Finally, the jury convicted Judge Lanier of sexually assaulting Sandy Sanders and Sandy Attaway.¹⁹⁰ Judge Lanier hired Sanders to be the Youth Services Officer of Dyer County Juvenile Court.¹⁹¹ During a weekly meeting between Judge Lanier and Sanders, during which Judge Lanier reviewed the work of her office, Judge Lanier grabbed her breasts.¹⁹² After she confronted him about the incident, Judge Lanier began complaining about the quality of her work and eventually removed her supervisory authority.¹⁹³

In March of 1991, Lanier hired Sandy Attaway as his secretary.¹⁹⁴ He made it his practice to make sexually suggestive comments and to slap her on her buttocks during the course of the day.¹⁹⁵ At one point, Judge Lanier came up behind Attaway and pushed his pelvis into her buttocks and made gyrating motions.¹⁹⁶ Thereafter, Judge Lanier fired Attaway and Attaway testified that Judge Lanier told her after he fired her that ". . . they would have gotten along fine if she had liked to have oral sex."¹⁹⁷

Judge Lanier was sentenced to twenty-five years imprisonment—ten years for each count of forcible oral sex and one year for each of

¹⁸³ *See id.* at 650.

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See Lanier*, 33 F.3d at 650.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.* at 646–47, 649–50.

¹⁹¹ *See Lanier*, 33 F.3d at 646.

¹⁹² *See id.*

¹⁹³ *See id.* at 646–47.

¹⁹⁴ *See id.* at 649.

¹⁹⁵ *See id.*

¹⁹⁶ *See Lanier*, 33 F.3d at 649.

¹⁹⁷ *Id.* at 649–50.

the five remaining sexual assault charges.¹⁹⁸ Judge Lanier was also ordered to pay a \$25,000 fine.¹⁹⁹ Judge Lanier was further ordered to pay \$1,492 per month to cover the costs of his incarceration, provided that he was entitled to receive and did receive a pension from the State of Tennessee.²⁰⁰

In appealing his convictions to the Sixth Circuit, Judge Lanier argued that his actions did not deprive his victims of any constitutionally protected right.²⁰¹ The Sixth Circuit disagreed.²⁰² The court reasoned that, according to *Screws v. United States*, if a due process right has been defined and made specific by court decisions, then a violation of that right can be vindicated under section 242.²⁰³ The court concluded that the right to bodily integrity had been made specific by prior court decisions.²⁰⁴

Furthermore, the court acknowledged that individuals have a historic liberty interest in being free from bodily restraint and punishment.²⁰⁵ The court reasoned that one aspect of this liberty interest is the right of personal security protected by the Fourth Amendment.²⁰⁶ The court recognized that the overriding function of the Fourth Amendment is to "protect personal privacy and dignity against unwarranted intrusion by the State."²⁰⁷ The court then reasoned that this historical liberty interest is violated when a state actor sexually assaults or sexually molests anyone.²⁰⁸

Finally, the court concluded that there was sufficient evidence to establish that Judge Lanier had sexually assaulted the victims and, therefore, that he deprived them of their constitutionally protected right not to be sexually assaulted by a state actor.²⁰⁹ The court added, however, that not every unjustified or unwanted touching or grabbing

¹⁹⁸ See *id.* at 646, 650.

¹⁹⁹ See *id.* at 650.

²⁰⁰ See *id.*

²⁰¹ See *Lanier*, 33 F.3d at 651. The court noted, however, that at trial Judge Lanier had taken the position that freedom from sexual assault was a recognized constitutional right. *Id.* It was only after his conviction that he changed his position on appeal. See *id.* The Sixth Circuit again noted, however, that Judge Lanier did not cite any authority for the proposition that freedom from sexual assault is not a recognized right. *Id.*

²⁰² *Id.* at 651-52.

²⁰³ *Id.* at 651. (applying *Screws v. United States*, 325 U.S. 91, 104 (1945)).

²⁰⁴ *Id.*

²⁰⁵ *Id.* The court noted, however, that courts had not yet defined the precise contours of this historic liberty interest. *Id.* at 652.

²⁰⁶ *Lanier*, 33 F.3d at 652.

²⁰⁷ *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977)).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

by a state official constitutes a violation of that person's constitutional rights.²¹⁰ The court defined the requisite abuse as abuse that must be of a serious and substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's conscience.²¹¹ The court concluded that the record clearly indicated that the jury did not convict Judge Lanier merely because of "unwanted sexual touching."²¹² Thus, the Sixth Circuit held that sexual assault under color of law constituted a violation of a constitutionally protected right to bodily integrity.²¹³

B. *Take Two: The Sixth Circuit Reverses The Panel Decision*

In 1996, on rehearing *en banc*, a sharply divided Sixth Circuit reversed the judgment below and instructed the trial court to dismiss the indictment.²¹⁴ At the outset, the court determined that the specific question to be answered was whether sexual harassment and assault of state judicial employees and litigants by a judge violates section 242.²¹⁵ The court, however, framed its analysis around the "fundamental" question of whether constitutional rights, for the purposes of criminal liability, should receive a fixed definition or whether they should be treated as evolving over time to include the transgression of new constitutional rights as manifested in civil cases.²¹⁶ Consequently, the court began by emphasizing that, as a general rule, penal laws are to be construed strictly because it is for the legislature, not the court, to define a crime and delineate its punishment.²¹⁷ Furthermore, the court recognized that it is inappropriate for courts to create or extend criminal law by using a common law process of interpretation; if Congress was unclear about what it intended to criminalize, courts should not hold a defendant criminally liable by defining a new federal crime.²¹⁸

As a result, the court embarked on an exhaustive investigation of section 242's legislative history to determine congressional intent.²¹⁹

²¹⁰ *Id.*

²¹¹ *Lanier*, 33 F.3d at 652.

²¹² *Id.*

²¹³ *Id.* at 651.

²¹⁴ *United States v. Lanier*, 73 F.3d 1380, 1394 (6th Cir. 1996) (*en banc*) [*Lanier II*], *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997).

²¹⁵ *Id.* at 1382.

²¹⁶ *Id.* at 1383.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Lanier II*, 73 F.3d at 1384-87.

The court concluded that the broad language of section 242 could be attributed to changes made in a congressionally commissioned one-volume compilation of federal statutes as opposed to any specific congressional intent.²²⁰ None of the original statutes criminalized deprivations of all constitutional rights.²²¹ The Civil Rights Act of 1866 criminalized interference with certain statutorily enumerated rights—such as contract, property and equal protection—under color of law.²²² The Ku Klux Klan Act of 1871 created penalties for violations of any constitutional right under color of law, but only with respect to civil liability.²²³ Yet, after the compilation was completed, it contained in section 242 what had not been in the original statutes—criminal liability for violations of *any* constitutional right under color of law (as opposed to only contract, property and equal protection rights).²²⁴ Thus, the Sixth Circuit concluded that the legislative record of section 242 did not support an interpretation of the statute that included newly-created constitutional rights.²²⁵

The Sixth Circuit also examined the case law regarding sexual assault as a constitutional crime.²²⁶ The court interpreted the “make specific” language in *Screws* to mean that only those constitutional rights enumerated in the Constitution or specifically delineated in Supreme Court precedent are within the meaning and scope of section 242.²²⁷ The court reasoned that, outside of clearly enumerated constitutional rights in the Constitution, only a Supreme Court decision could provide adequate notice to the whole nation that violating a particular constitutional right carries criminal as well as civil penal-

²²⁰ *Id.* at 1384.

²²¹ See 17 Stat. 13 (1871); 16 Stat. 144 (1870); 14 Stat. 27 (1866); *Lanier II*, 73 F.3d at 1385 & n.2–4.

²²² See 14 Stat. 27. The statute enumerated those rights as follows:

[A]ll persons . . . shall have the same right, in every State or Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of the person and property

Id.

²²³ See 17 Stat. 13; *Lanier II*, 73 F.3d at 1385–86 & n.4.

²²⁴ Compare 17 Stat. 13 (imposing civil penalties for violating any constitutional right), and 14 Stat. 27 (criminalizing interference with contract, property and equal protection rights) with 18 U.S.C. § 242 (criminalizing interference with any constitutional right). See *Lanier II*, 73 F.3d at 1386.

²²⁵ *Lanier II*, 73 F.3d at 1387.

²²⁶ *Id.* at 1387–89. The court specifically limited the scope of its decision to a legal theory based on substantive due process and not a crime based on equal protection, state-sanctioned abuse or any other theory. *Id.* at 1384.

²²⁷ *Id.* at 1391–92.

ties.²²⁸ Moreover, the court reasoned that the Supreme Court must not only have enunciated the existence of a specific right but must also have applied its ruling in a case with facts "fundamentally similar" to the one being prosecuted.²²⁹ In fact, the court concluded that if there was any ambiguity over the applicability of an enunciated right to a particular factual situation, then the right had not been adequately defined.²³⁰ In so doing, the court held that the "make specific" standard for determining if a criminal defendant was put on adequate notice that his or her conduct carried with it criminal liability is substantially higher than the "clearly established" standard used to determine if a defendant in a civil case knew or should have known that specific conduct violated a constitutionally protected right.²³¹

Consequently, the court noted that, although the language of cases such as *Ingraham v. Wright* or *Rochin v. California* could be used to construct a right to bodily integrity, neither case enforced such a right.²³² In addition, the court distinguished *Cruzan v. Director, Missouri Department of Health* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* by noting that neither deals with assault, and concluded that neither stands for the proposition that state law crime of sexual assault has been recognized by the Supreme Court as a constitutional tort under section 1983 or a constitutional crime under section 242.²³³ The court further distinguished circuit court of appeals cases that have recognized a constitutional right to be free from sexual assault as civil in nature, not criminal.²³⁴ The court also dismissed *United States v. Davila* because the defendants in that case did not challenge the application of section 242 to sexual assault.²³⁵

²²⁸ *Id.* at 1392.

²²⁹ *Id.* at 1393.

²³⁰ *Lanier II*, 73 F.3d at 1393.

²³¹ *Id.* In order for public officials to be liable under 42 U.S.C. § 1983, the contours of the right which the victim claims was violated must be clearly established in judicial decisions prior to or at the time of the official's action, such that a reasonable official would understand that what he or she was doing violated that right. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If the right is not "clearly established" at the time of the public official's conduct, then the official is entitled to qualified immunity—immunity from liability for actions taken in his or her official capacity. See *id.* at 638–40.

²³² *Lanier II*, 73 F.3d at 1388.

²³³ *Id.*

²³⁴ *Id.* (citing *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995) (Parker, J., concurring) ("The notion that individuals have a fundamental substantive due process right to bodily integrity is beyond debate."); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir. 1994) (en banc) ("[S]urely the Constitution protects a schoolchild from physical sexual abuse . . . by a public school teacher."). In addition, the court criticized the cases for simply making assertions rather than basing their decision on precedent. *Lanier II*, 73 F.3d at 1388.

²³⁵ *Lanier II*, 73 F.3d at 1388 (citing *United States v. Davila*, 704 F.2d 749 (1983) (affirming

The court further concluded that recognizing sexual assault as a constitutional crime would be tantamount to creating a new crime and subjecting defendants to an *ex post facto* effect.²³⁶ In so doing, the court determined that recognizing sexual assault as a constitutional crime would violate three general canons governing judicial construction of criminal statutes: that the legislature, not the judiciary, is the primary source of federal criminal law; that ambiguous statutes should be construed in favor of the defendant; and that criminal statutes are normally strictly construed by the courts.²³⁷ Thus, the Sixth Circuit concluded that holding Judge Lanier criminally liable would be meting out punishment without fair notice of criminal liability and would violate these canons of federal criminal jurisprudence.²³⁸

Finally, the court recognized that section 242, unlike most criminal statutes, does not criminalize conduct; rather, it criminalizes violations of abstract rights.²³⁹ Therefore, conduct that may be illegal under state law, such as murder, is not necessarily deprivation of a constitutional right.²⁴⁰ The court noted that even in *Screws*, murder had to constitute a "trial by ordeal" to rise to the level of a procedural due process violation.²⁴¹ Consequently, the court emphasized that it was not holding that sexual assault could never violate section 242.²⁴² Rather, under the facts of this case, the court held only that sexual assault could not be prosecuted as a violation of a constitutional substantive due process right to bodily integrity.²⁴³

The court's opinion engendered five separate dissents.²⁴⁴ Two judges dissented from the dismissal of the felony counts relating to the oral rapes but concurred in dismissing the misdemeanor counts relating to lesser assault and harassment charges.²⁴⁵ Three judges dissented

a section 242 conviction for sexual assault which constituted a deprivation of constitutional rights)). For a discussion of *Davila*, see *supra* notes 125-30 and accompanying text.

²³⁶ *Lanier II*, 73 F.3d at 1390.

²³⁷ *Id.* at 1389-91 (citing *United States v. Wiltberger*, 18 U.S. 76, 93 (1820)).

²³⁸ *Id.* at 1389-91.

²³⁹ *Id.* at 1393.

²⁴⁰ See *id.* at 1393.

²⁴¹ *Lanier II*, 73 F.3d at 1393 (citing *Screws*, 325 U.S. at 92-93, 106 (holding that beating and resultant death of suspect was "trial by ordeal," depriving suspect of constitutional rights in violation of section 242)).

²⁴² *Id.*

²⁴³ *Id.* Specifically, the court explained that it was not considering whether sexual assault could constitute a constitutional crime based on equal protection, state-sanctioned abuse or some other legal theory. *Id.* at 1384.

²⁴⁴ See *id.* at 1394 (Wellford, J., dissenting), 1397 (Nelson, J., dissenting), 1399 (Keith, J., dissenting), 1400 (Jones, J., dissenting), 1403 (Daughtrey, J., dissenting).

²⁴⁵ See *id.* at 1394 (Wellford, J., dissenting), 1398-99 (Nelson, J., dissenting).

as to the dismissal of all charges.²⁴⁶ The primary dissent was written by Judge Daughtrey, who argued that the court incorrectly applied a heightened standard for determining if a constitutional right has been "made specific" and concluded that the constitutional guarantee of bodily integrity extends to sexual assault.²⁴⁷ Judge Daughtrey found the majority's foray into the legislative history of section 242 unwarranted because the language of the statute lacks any ambiguity.²⁴⁸ Judge Daughtrey also outright rejected the majority's interpretation that only a Supreme Court decision involving a fundamentally similar factual situation can "make specific" a right for purposes of section 242.²⁴⁹ Moreover, Judge Daughtrey noted that over the years, Congress had amended section 242 but had chosen not to restrict its scope.²⁵⁰ Therefore, Judge Daughtrey reasoned that the proper inquiry was whether court decisions had made specific a constitutional right to be free from bodily integrity.²⁵¹

Examining both Supreme Court and appellate court decisions, Judge Daughtrey concluded that not only does a constitutional right to bodily integrity exist, but a specific right to be free from sexual assault also exists.²⁵² Judge Daughtrey reasoned that the widely held assumption that a right to be free from invasions of bodily integrity under color of law exists, provided a basis upon which to recognize that such a right has been made specific.²⁵³ Judge Daughtrey further

²⁴⁶ See *Lanier II*, 73 F.3d at 1399 (Keith, J., dissenting), 1400 (Jones, J., dissenting), 1403 (Daughtrey, J., dissenting).

²⁴⁷ *Id.* at 1409-13 (Daughtrey, J., dissenting).

²⁴⁸ *Id.* at 1408 (Daughtrey, J., dissenting).

²⁴⁹ *Id.* at 1409 (Daughtrey, J., dissenting). Judge Nelson also did not agree that lower courts are estopped from applying section 242 in the absence of a Supreme Court case directly on point. *Id.* at 1399 (Nelson, J., dissenting). Indeed, it was unclear to him how such a case would ever reach the Supreme Court if such a standard were required. See *id.* (Nelson, J., dissenting).

²⁵⁰ *Id.* at 1408 (Daughtrey, J., dissenting).

²⁵¹ *Lanier II*, 73 F.3d at 1408 (Daughtrey, J., dissenting).

²⁵² *Id.* at 1408-12 (Daughtrey, J., dissenting). Judge Nelson reasoned that there is nothing "new" about this liberty interest. *Id.* at 1398 (Nelson, J., dissenting). In his view, Judge Lanier literally and humiliatingly deprived Archie of her liberty when he pinned her down in a chair and forced her to perform oral sex on him. *Id.* (Nelson, J., dissenting). Judge Nelson noted that in addition to physically restraining Archie, Judge Lanier also mentally and emotionally coerced Archie by suggesting that he would take Archie's daughter away in a custody suit if she resisted. *Id.* (Nelson, J., dissenting). Judge Nelson concluded that Judge Lanier deprived Archie of the possession and control of her own person and subjugated her to the "vilest sort of restraint and interference." *Id.* at 1399 (Nelson, J., dissenting). Judge Wellford also reasoned that the Supreme Court has recognized that people have a constitutional right to bodily integrity. *Id.* at 1396 (Wellford, J., dissenting). Judge Jones, for the purposes of section 242, concluded that the right to be free from invasions of bodily integrity has indeed been "made specific" by court decisions. *Id.* at 1401 (Jones, J., dissenting).

²⁵³ *Id.* at 1412 (Daughtrey, J., dissenting). Judge Jones, in particular, dissented from the

reasoned that sexual assault is one of the most blatant and serious invasions of a person's bodily integrity.²⁵⁴ Thus, Judge Daughtrey concluded that the majority was unjustified in determining that the right to be free from a willful sexual assault under color of law has not been "made specific" by prior court decisions simply because no Supreme Court case has explicitly involved a judge so misusing his position and influence.²⁵⁵

C. Take Three: The Supreme Court Reverses the Reversal and Clarifies the Proper Standard for Determining if Conduct Violates 18 U.S.C. § 242

In 1997, in a unanimous decision, the United States Supreme Court reversed the Sixth Circuit, holding that the circuit court applied the incorrect standard for determining whether or not conduct falls within the scope of criminal liability under section 242.²⁵⁶ Because the Sixth Circuit used the wrong standard, the Court remanded the case for consideration under the appropriate standard as articulated in the Court's opinion.²⁵⁷ Thus, the Court's decision left undecided whether Judge Lanier deprived his victims of a constitutionally protected right to be free from sexual assault.²⁵⁸

In delineating the correct standard for determining if conduct falls within the scope of criminal liability under section 242, the Su-

majority's rejection of the right to bodily integrity as grounds for a section 242 conviction because the right has been largely defined in civil rather than criminal cases. *Id.* at 1401 (Jones, J., dissenting). Judge Jones reasoned that the protections of the Constitution do not change according to the procedural context in which they are enforced. *Id.* at 1401-02 (Jones, J., dissenting).

²⁵⁴ *Id.* (Daughtrey, J., dissenting).

²⁵⁵ *Id.* at 1414 (Daughtrey, J., dissenting). Judge Keith joined Judge Daughtrey's dissenting opinion. *Id.* at 1399-1400 (Keith, J., dissenting). In his dissent, Judge Keith chastised the majority for ignoring the "clearly established" law protecting each person's right to be free from interference with bodily integrity as well as for ignoring the outrageous nature of Judge Lanier's conduct. *Id.* at 1400 (Keith, J., dissenting). Judge Keith further deplored the result of the majority opinion as sanctioning Judge Lanier's conduct. *Id.* (Keith, J., dissenting). In addition, Judge Keith reasoned that releasing a judge who has repeatedly victimized women back into the community will further undermine the public's confidence in the justice system. *Id.* (Keith, J., dissenting).

²⁵⁶ *Lanier III*, 117 S. Ct. 1219, 1224 (1997).

²⁵⁷ *Id.* at 1228.

²⁵⁸ See *id.* The Court also left open other issues for the court of appeals to consider on remand. See *id.* at n.7. For example, the Court expressed no opinion on whether Judge Lanier acted "under color of law." See *id.* at n.2. The Court, however, explicitly dismissed several of the arguments raised by Lanier for lack of merit. *Id.* at n.7. First, the Court dismissed Lanier's contention that *Screws* excluded rights protected under the Due Process Clause of the Fourteenth Amendment from the ambit of section 242. *Id.* Second, the Court dismissed Lanier's contention that there is no constitutional right to be free from state-occasioned assault outside of a custodial setting. *Id.* Third, the Court dismissed Lanier's contention that constitutional claims relating to state-occasioned physical abuse must arise under either the Fourth or Eighth Amendments. *Id.*

preme Court noted that section 242 criminalizes conduct that is not defined with particularity and that the general terms of section 242 incorporate constitutional law by reference.²⁵⁹ The Court reasoned, however, that any concern over the due process requirement of notice is satisfied if potential defendants have "fair warning" of what constitutes constitutionally impermissible conduct such that they are not "held criminally responsible for conduct which [they] could not reasonably understand to be proscribed."²⁶⁰ The touchstone, as determined by the Court, is whether "the statute, [either] standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."²⁶¹ The Court further reasoned that *Screws* articulated the "fair warning" standard by limiting the scope of section 242 to "rights fairly warned of, having been 'made specific' by the time of the charged conduct."²⁶²

To further elucidate the "fair warning" standard, the Supreme Court equated the "fair warning" requirement to the "clearly established" immunity standard in the civil context.²⁶³ Each, the Court explained, "seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability'. . . by attaching liability only if '[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . .'"²⁶⁴ The Court reasoned that the difference in application—the fact that the "fair warning" standard is applied in a criminal context and the "clearly established" immunity standard is applied in a civil context—is of no consequence because both serve the same purpose.²⁶⁵ In fact, according to the Court, the qualified immunity test

²⁵⁹ *Id.* at 1224 n.1 & n.2. The Court acknowledged that the consolidated statute of 1874 expanded the scope of its statutory predecessors to apply to deprivations of all constitutional rights despite assertions at the time by the proponents of section 242 that they had merely clarified and reorganized the law without changing its substance. *Id.* at 1224 n.1. The Court emphasized, however, that since the 1874 recodification and the *Screws* Court's interpretation of section 242, Congress has amended section 242 on numerous occasions, increasing the penalties for violating the statute without limiting the substantive scope of section 242. *Id.* (citing 35 Stat. 1092 (1909) (adding willfulness requirement); 82 Stat. 75 (1968) (enhancing penalties for some violations); 102 Stat. 4396 (1988) (same); 108 Stat. 1970, 2109, 2113, 2147 (1994) (same)); see *Screws v. United States*, 325 U.S. 91 (1945). Thus, the Court concluded that the Sixth Circuit had placed too much emphasis on the tarnished origin of the recodification and, therefore, misapprehended the proper scope and intent of section 242. *Lanier III*, 117 S. Ct. at 1224 n.1 & 1226 n.6.

²⁶⁰ *Id.* at 1224–25. (citing *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954))).

²⁶¹ *Lanier III*, 117 S. Ct. at 1225.

²⁶² *Id.* at 1226.

²⁶³ *Id.* at 1227–28. See *supra* note 231 for a discussion of qualified immunity.

²⁶⁴ *Id.* at 1227.

²⁶⁵ *Id.*

is simply an adaptation of the "fair warning" standard, designed to afford officials and governments the same protection from civil liability that individuals have traditionally been granted from vague criminal statutes.²⁶⁶ Thus, the Supreme Court held that the Sixth Circuit erred in determining that the "make specific" standard under section 242 demands more specificity than the "clearly established" law used to judge qualified immunity in section 1983 civil cases.²⁶⁷

In so doing, the Supreme Court assigned error to the Sixth Circuit's conclusions that only a Supreme Court decision that enunciates the existence of a constitutional right *and* applies it to fundamentally similar factual situation can provide sufficient notice that a constitutional right has been made specific within the meaning of *Screws*.²⁶⁸ Specifically, the Court reasoned that "the universe of relevant interpretive decisions" for purposes of providing "fair warning" is *not* limited to Supreme Court decisions.²⁶⁹ Contrary to the Sixth Circuit's conclusion, the Court noted that in the past it has relied on appeals court decisions in determining if a right has been "clearly established."²⁷⁰ The Court also reasoned that, although the Sixth Circuit articulated a valid concern that disparate court opinions may create uncertainty in the law (even on a point widely considered), any such uncertainty may be taken into account in deciding if the defendant, in fact, had "fair warning."²⁷¹

In addition, the Court concluded that the strict factual identity to precedent required by the Sixth Circuit is both unwarranted and problematic.²⁷² The Court reasoned that as long as prior decisions give reasonable notice that the conduct at issue violates a constitutional right, then such precedent may be relied upon to provide "fair warning," despite notable factual differences.²⁷³ Moreover, the Court reasoned that the Sixth Circuit's "fundamentally similar" standard is problematic because it would lead trial judges to demand an unnecessarily high degree of certainty and require something beyond "fair warning."²⁷⁴ Thus, the Supreme Court held that neither a Supreme Court decision nor the strict factual identity required by the Sixth Circuit is

²⁶⁶ *Lanier III*, 117 S. Ct. at 1227.

²⁶⁷ *Id.* at 1226-27.

²⁶⁸ *Id.* at 1226.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Lanier III*, 117 S. Ct. at 1226-27.

²⁷² *Id.* at 1227.

²⁷³ *Id.*

²⁷⁴ *Id.*

necessary to provide a defendant with "fair warning" that the defendant's conduct violated a constitutional right.²⁷⁵

In sum, the United States Supreme Court held that a defendant will be found criminally liable under section 242, as with civil liability under section 1983, if the unlawfulness of the defendant's conduct is apparent under the Constitution and pre-existing law.²⁷⁶ Accordingly, the Court held that the Sixth Circuit applied the wrong standard in deciding whether prior decisions gave Judge Lanier "fair warning" that sexual assault violated his victims' constitutional right to be free from state-occasioned intrusions upon their bodily integrity.²⁷⁷ Thus, the Supreme Court vacated the judgment of the court of appeals and remanded the case for application of the proper standard.²⁷⁸

III. IS THE RIGHT TO BODILY INTEGRITY SUFFICIENTLY ESTABLISHED TO TRIGGER 18 U.S.C § 242?

Numerous decisions of the Supreme Court as well as courts of appeal decisions across the nation have recognized that the Due Process Clause of the Fourteenth Amendment protects the right to bodily integrity insofar as it is conceptually integrated with both the idea of being secure in one's person and the right to be free from bodily restraint.²⁷⁹ The conceptual integration of bodily integrity on the one hand and personal security on the other is evidenced by the Supreme Court's decision in *Rochin v. California*.²⁸⁰ In *Rochin*, the defendant's

²⁷⁵ *Id.* at 1226-27.

²⁷⁶ *Lanier III*, 117 S. Ct. at 1228.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) ("[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause."); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) ("Among the historic liberties . . . [protected by the Fourteenth Amendment is the] right to be free from and obtain judicial relief, for unjustified intrusions on personal security."); *Rochin v. California*, 342 U.S. 165, 169 (1952) (Pumping the stomach of a suspect violates "personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934))); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450-51 (5th Cir. 1994) (en banc) ("[T]he right to be free from state-occasioned damage to a person's bodily integrity is protected by the [F]ourteenth [A]mendment guarantee of due process." (quoting *Shillingford v. Holmes*, 643 F.2d 234, 265 (5th Cir. 1981))); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3rd Cir. 1989) (en banc) ("Reasonable officials would have understood the 'contours' of a student's right to bodily integrity, under the Due Process Clause, to encompass a student's right to be free from sexual assaults by his or her teachers."); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) ("[G]rounded in those constitutional rights given protection under the rubric of substantive due process . . . [is] the right to be free of state intrusions into realms of personal privacy and bodily security . . .").

²⁸⁰ 342 U.S. at 168-74 (holding that police violated constitutional right by pumping suspect's stomach for evidence).

stomach was pumped against his will.²⁸¹ This act was, at its most basic, a violation of the defendant's bodily integrity—the ability to maintain physical autonomy.²⁸² The Court articulated the violation as one that shocks the conscience.²⁸³ Moreover, the Court reasoned that the right to maintain one's physical autonomy outweighed a legitimate state objective of obtaining evidence.²⁸⁴ In the *Lanier* case, the conduct of Judge Lanier is aptly described as shocking to the conscience.²⁸⁵ Indeed, forcing a woman to perform oral sex and ejaculating in her mouth is certainly *no less* a violation of her bodily integrity than forcing a tube down an unwilling suspect's trachea to pump his stomach.²⁸⁶

The Court further defined the scope of bodily integrity in *Cruzan v. Director, Missouri Department of Health*.²⁸⁷ In *Cruzan*, the Court observed that: "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."²⁸⁸ The Court not only recognized the right to bodily integrity but also that the right to bodily integrity provides the conceptual underpinning for the informed consent doctrine.²⁸⁹ In so doing, the Court explicitly acknowledged that the Fourteenth Amendment constitutionally protects a liberty interest in refusing unwanted medical treatment.²⁹⁰

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court again affirmed the constitutional right that individuals have in personal autonomy and bodily integrity.²⁹¹ The Court reaffirmed earlier precedent as not only exemplary of liberty "but as a rule

²⁸¹ See *id.* at 166.

²⁸² *Id.* at 169, 172.

²⁸³ *Id.* at 172.

²⁸⁴ See *id.* at 172–73.

²⁸⁵ See *United States v. Lanier*, 73 F.3d 1380, 1395 (6th Cir. 1996) (Wellford, J., dissenting) [*Lanier II*], *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997).

²⁸⁶ Compare *Lanier II*, 73 F.3d at 1405 (Daughrey, J., dissenting) (holding that oral rape violates bodily integrity), with *Rochin*, 342 U.S. at 172–73 (holding that pumping stomach against will of suspect violates bodily integrity).

²⁸⁷ 497 U.S. 261, 269, 278–79, 281 (1990) (weighing the right to bodily integrity against relevant state interest in preserving life).

²⁸⁸ *Id.* at 269 (quoting *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

²⁸⁹ See *id.* at 269, 278.

²⁹⁰ *Id.* at 278.

²⁹¹ 505 U.S. 833, 846–47 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. . . . It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.").

... of personal autonomy and bodily integrity."²⁹² Moreover, in analyzing the spousal notification requirement—which the Court decided was unconstitutional—the Court stressed that the protected liberty interest was doubly implicated because “the State has touched upon not only the private sphere of family but upon the very bodily integrity of the pregnant woman.”²⁹³ Thus, Supreme Court precedent has recognized the existence of a liberty interest that protects individuals from state-occasioned violations of their bodily integrity.²⁹⁴

This is all the more clear if one considers the contrary: that citizens do not have the right to be free from state-occasioned violations of their bodily integrity. The idea that individuals should be secure in their persons and protected from intrusions on their bodily integrity by the state is deeply rooted in the American notion of autonomy.²⁹⁵ The Constitution does not expressly or implicitly delegate the power to abrogate a person’s bodily integrity. On the contrary, the protections of the Fourth, Fifth and Eighth Amendments make certain that limits are expressly placed upon violations of bodily integrity that the state might otherwise consider legitimate. Indeed, the right to bodily integrity sits at the core of these amendments and the American notion of limited government.

Additionally, the fact that courts balance the liberty interest individuals have in being free from invasions of bodily integrity against state interests in violating that liberty underscores the legitimacy and value of the right itself.²⁹⁶ Certainly there are legitimate reasons for an individual’s protected liberty interest to be compromised, but such compromises exist only within certain constitutional boundaries.²⁹⁷ In *Cruzan*, the Court weighed the constitutionally protected liberty interest of bodily self-determination against the state interest in requiring

²⁹² *Id.* at 857.

²⁹³ *Id.* at 896.

²⁹⁴ See *supra* notes 36–151 and accompanying text.

²⁹⁵ See, e.g., *Cruzan*, 497 U.S. at 287–88 (O’Connor, J., concurring) (“Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interest protected by the Due Process Clause.”); *Rochin v. California*, 342 U.S. 165, 169 (1952) (holding that pumping stomach of suspect violates “fundamental” right).

²⁹⁶ See, e.g., *Cruzan*, 497 U.S. at 278–81 (balancing right to refuse treatment against state interest in protecting life); *Youngberg v. Romeo*, 475 U.S. 307, 320 (1982) (balancing “liberty of individual” against “demands of an organized society”); *Ingraham v. Wright*, 430 U.S. 651, 675–76 (1977) (balancing child’s liberty interest in avoiding corporal punishment against traditionally accepted practice and need to “correct” schoolchildren.).

²⁹⁷ See, e.g., *Cruzan*, 497 U.S. at 278–81; *Youngberg*, 475 U.S. at 321; *Ingraham*, 430 U.S. at 675–76.

clear and convincing evidence of an incompetent patient's desire to have life sustaining treatment terminated.²⁹⁸ Similarly, in *Ingraham v. Wright*, the Court recognized that corporal punishment in school implicated a liberty interest protected by the Fourteenth Amendment.²⁹⁹ The Court concluded, however, that there were procedural protections as well as the need for teachers to maintain order and the general acceptance of the practice that allowed the State to abrogate the students' recognized liberty interest.³⁰⁰ In *Doe v. Taylor Independent School District*, the Court of Appeals for the Fifth Circuit recognized that although the use of corporal punishment may be justified, there can never be a justification for sexually molesting a schoolchild.³⁰¹ Similarly, in the *Lanier* case, there are no legitimate state interests that could justify a sitting judge sexually assaulting litigants, employees of the court or others with whom he conducts the business of the court.³⁰²

Finally, the conclusion that the Fourteenth Amendment protects the citizens of this country from state-occasioned violations of a person's bodily integrity is inescapable when one also considers the unanimity with which federal courts generally have reached the same conclusion in analogous circumstances.³⁰³ If, in fact, there was some significant dissension among the circuit courts it might be possible to argue that the state of the law is unclear; but that is not the case.³⁰⁴ It is also important to note that by 1989, the law clearly established that violations of a person's bodily integrity by a public official implicated

²⁹⁸ 497 U.S. at 278-81.

²⁹⁹ 430 U.S. at 674.

³⁰⁰ *Id.* at 676, 683.

³⁰¹ 15 F.3d 443, 451-52 (5th Cir. 1994).

³⁰² Compare *Lanier II*, 73 F.3d at 1388-89, with *Taylor*, 15 F.3d at 451-52 ("It is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment.").

³⁰³ See, e.g., *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc) (reiterating the Fifth Circuit's recognition that "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the [F]ourteenth [A]mendment guarantee of due process"); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (quoting *Casey* for the proposition that "[i]t is settled now . . . that the Constitution places limits on a State's right to interfere with a person's . . . bodily integrity"); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (recognizing that "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the [F]ourteenth [A]mendment guarantee of due process"); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (recognizing that the right to be free from intrusions of bodily security that shock the conscience "is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process"); *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (stating that "[t]he right violated by an assault has been described as the right to be secure in one's person, and is grounded in the due process clause of the Fourteenth Amendment").

³⁰⁴ See, e.g., *Walton*, 44 F.3d at 1302; *Canedy*, 16 F.3d at 185; *Shillingford*, 634 F.2d at 265; *Gregory*, 500 F.2d at 62.

a constitutionally protected right.³⁰⁵ Thus, any reasonable public official, and certainly a sitting judge, had fair warning that violating the bodily integrity of another person violated that person's constitutionally protected right to be secure in one's person and to be free of state-occasioned violations of one's bodily integrity.³⁰⁶

IV. SEXUAL ASSAULT VIOLATES THE RIGHT TO BODILY INTEGRITY

Recognizing that citizens have a constitutionally protected right from being sexually assaulted by public officials acting under color of law can be understood by virtue of the fact that bodily integrity is conceptually integrated with the right to be free from bodily restraint.³⁰⁷ A person cannot be sexually assaulted without being physically restrained.³⁰⁸ This is most vividly evidenced in the *Lanier* case by the oral rape of Vivian Archie: Judge Lanier had his hands on her throat, forced open her jaws and grabbed the back of her head to hold her down while he forced himself on her.³⁰⁹

Moreover, concluding that the right to bodily integrity is protected by the liberty interest of the Fourteenth Amendment leads to the seemingly axiomatic principle that a citizen's right not to be deprived of liberty without due process of law encompasses the right not to be intentionally and sexually assaulted under color of law.³¹⁰ A fundamental right that protects a criminal defendant from having his stomach pumped against his will must also protect a law abiding citizen from having her jaws forced open and being coerced into engaging in oral

³⁰⁵ See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (stating in 1982 that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause"); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (stating in 1977 that "[a]mong the historic liberties . . . [protected by the Fourteenth Amendment is the] right to be free from and obtain judicial relief, for unjustified intrusions on personal security"); *Rochin*, 342 U.S. at 169 (holding in 1952 that pumping stomach of suspect violates "personal immunities which, . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934))); *Taylor*, 15 F.3d at 450-51 (reiterating Fifth Circuit's 1981 conclusion in *Shillingford* that "[t]he right to be free from state-occasioned damage to a person's bodily integrity is protected by the [F]ourteenth [A]mendment guarantee of due process"); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 722, 726 (3d Cir. 1989) (holding that the constitutional right to be free from invasion of personal security through sexual abuse was well-established even before 1980).

³⁰⁶ See, e.g., *Youngberg*, 457 U.S. at 315; *Ingraham*, 430 U.S. at 673; *Rochin*, 342 U.S. at 169; *Taylor*, 15 F.3d at 450-51; *Stoneking*, 882 F.2d at 722, 726.

³⁰⁷ See *Lanier II*, 73 F.3d at 1398 (Nelson, J., dissenting).

³⁰⁸ See *id.* (Nelson, J., dissenting).

³⁰⁹ See *id.* at 1405 (Daughtrey, J., dissenting). In addition, Judge Lanier coerced her with the thinly veiled threat that Archie would lose custody of her child if she resisted. See *id.* at 1398 (Nelson, J., dissenting).

³¹⁰ See *id.* at 1411 (Daughtrey, J., dissenting).

sex.³¹¹ If bodily integrity is to have any substantive meaning in our society, it must encompass the notion that the most intimate and private aspects of our bodies are protected from intrusion by the state and its agents.³¹²

In addition, sexual assault is qualitatively different from other types of physical abuse. Describing rape, the Supreme Court has stated:

It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self."³¹³

As the "ultimate violation of self," sexual assault, by definition, violates bodily integrity. Bodily integrity cannot be defined outside of sexual self-determination. Exposing one's body in a sexual context is one of the most intimate and private acts people share. It lies at the root of why "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood . . . as well as bodily integrity."³¹⁴ Moreover, there can never be a justification for sexual assault, as there could be for the use of force in an arrest situation.³¹⁵ Therefore, even though courts have traditionally weighed an individual's protected liberty interest against legitimate state interest, in the case of sexual assault, a per-

³¹¹ See *Rochin*, 342 U.S. at 169-72.

³¹² See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 287-88 (1990) (O'Connor, J., concurring) ("Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interest protected by the Due Process Clause."); see also *United States v. Contreras*, 950 F.2d 232, 236, 244 (5th Cir. 1991) (upholding conviction of officer under section 242 for depriving woman of her constitutionally protected right to be free of state-occasioned sexual assault); *United States v. Davila*, 704 F.2d 749, 750 (5th Cir. 1983) (same). The notion that invasions of our bodily integrity are repugnant to the Constitution explains, in part why, in both *Contreras* and *Davila*, where the defendants were convicted under section 242 for depriving women of their constitutional rights by sexually assaulting them, the convictions were upheld without raising the issue of whether or not the victims suffered a deprivation of a recognized constitutional right. *Contreras*, 950 F.2d at 236, 244; *Davila*, 704 F.2d at 750.

³¹³ *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977). In 1977, in *Coker*, a plurality of the United States Supreme Court held that the crime of rape did not warrant punishment by death. *Id.* at 592. Although the Court reasoned that rape is reprehensible, it concluded that punishment of death was not commensurate with the crime. *Id.* at 592, 597-98. Thus, the Supreme Court held that the sentence of death for the crime of rape is grossly disproportionate and excessive and, therefore, constitutionally forbidden. *Id.* at 592.

³¹⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 849 (3rd Cir. 1992).

³¹⁵ See, e.g., *Doe v. Taylor Independent School District*, 15 F.3d 443, 452 (5th Cir. 1994) (concluding that sexual abuse can never serve legitimate state interest).

petrator should be on notice that such conduct is never justified.³¹⁶ Thus, recognizing that sexual assault violates a right to bodily integrity is not the same as declaring all physical contact as violative of bodily integrity.³¹⁷

Although no Supreme Court decision has explicitly held that sexual assault violates the protected liberty interest in being free from intrusions on a person's bodily integrity, a number of appeals courts have addressed the issue.³¹⁸ Sexual assault, as a violation of a protected constitutional right, has been most directly addressed in a school setting where a public school official or teacher has sexually assaulted a student.³¹⁹ In both *Doe v. Taylor Independent School District* and *Stoneking v. Bradford Area School District*, however, each court reasoned that sexual assault violated a widely recognized constitutional right as opposed to reasoning that students are protected from their teachers in some manner unique to the student/teacher relationship.³²⁰ The fact that the assault was perpetrated by a teacher upon a student is relevant only in that the perpetrator was a public official acting under color of

³¹⁶ See, e.g., *Taylor*, 15 F.3d at 452 ("[T]here is never any justification for sexually molesting a schoolchild, and thus, no state interest, analogous to the punitive and disciplinary objectives attendant to corporal punishment, which might support it."); *Contreras*, 950 F.2d at 236, 244 (upholding conviction of officer for "willfully depriving [woman] of her constitutional rights, while acting under color of law, by sexually assaulting her, in violation of section 242"); *Davila*, 704 F.2d at 750 (same).

³¹⁷ See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 674-76 (1977) (holding that corporal punishment implicates constitutionally protected right to bodily integrity); *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that conduct that violates constitutional rights is "conduct that shocks the conscience"); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (recognizing that not all criminal assaults constitute violations of a constitutional right).

³¹⁸ See, e.g., *Taylor*, 15 F.3d at 451 (concluding that "the Constitution protects a schoolchild from physical sexual abuse"); *Contreras*, 950 F.2d at 236, 244 (upholding conviction of officer for "willfully depriving [woman] of her constitutional rights, while acting under color of law, by sexually assaulting her, in violation of section 242"); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991) (finding that the defendant clearly "used his position in the state government to deprive these women of their constitutional right to be free from sexual assault"); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726-27 (3d Cir. 1989) (holding that sexual abuse, as violation of constitutional right to be free from invasions of personal security, was well-established because "a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice"); *Davila*, 704 F.2d at 750 (upholding criminal conviction of officers under section 242 for depriving women of their constitutionally protected liberty by coercing sexual favors from them).

³¹⁹ *Taylor*, 15 F.3d at 446-49 (teacher sexually assaulting student); *Stoneking*, 882 F.2d at 726-27 (same); cf. *Contreras*, 950 F.2d at 236, 244 (officers sexually assaulting women); *Davila*, 704 F.2d at 750 (same).

³²⁰ *Taylor*, 15 F.3d at 452 n.3 (holding that fact that there was no "special relationship" does not suggest that "individuals, whether 'under state's care' or not, have no due process rights against an offending state actor"); *Stoneking*, 882 F.2d at 724 (declining to rest decision on affirmative duty to protect students).

law.³²¹ Just as it is inconceivable that a reasonable public school official could have assumed that sexually assaulting a student does not violate a constitutionally protected right, a sitting judge could not have been unaware that sexually assaulting women in his chambers while conducting the business of the court violated their constitutionally protected right to be free from invasions of bodily integrity by a public official acting under color of law.³²²

Even more specifically, in *United States v. Contreras* and *United States v. Davila*, law enforcement officers were convicted (and their convictions upheld) under 18 U.S.C. § 242 for violating their victims' constitutionally protected right to be free from sexual assault by public officials acting under color of law.³²³ It is irrelevant for the purpose of providing notice that the Court of Appeals for the Fifth Circuit did not specifically consider whether the scope of section 242 properly included sex crimes.³²⁴ The fact that the defendants were convicted provides fair warning that sexual assault under color of law violates section 242.³²⁵

Moreover, as with the right to bodily integrity, there is no dissension among the courts as to whether sexual assault violates a constitutionally protected right.³²⁶ Finally, by the time Judge Lanier began harassing and sexually assaulting women in his chambers, the case law

³²¹ See *Stoneking*, 882 F.2d at 724 (distinguishing *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) and emphasizing status of perpetrator as state actor). Whether Judge Lanier acted under color of state law is not addressed by this Note but will, undoubtedly, be considered by the Sixth Circuit on remand. See *United States v. Lanier*, 117 S. Ct. 1219, 1224 n.2 (1997) (leaving open the question whether Judge Lanier acted under color of law for review on remand) [*Lanier III*].

³²² See *Taylor*, 15 F.3d at 455 ("No reasonable public school official in 1987 would have assumed that he could, with constitutional immunity, sexually molest a minor student."); *Stoneking*, 882 F.2d at 726-27 (holding that the constitutional right to be free from invasion of personal security—in this case through sexual abuse—was well-established because "a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice"); see also *Davila*, 704 F.2d at 750 (upholding 1982 conviction of officers under section 242 for depriving women of their constitutional rights by coercing sexual favors from them).

³²³ *Contreras*, 950 F.2d at 236, 244; *Davila*, 704 F.2d at 750.

³²⁴ See *Lanier III*, 117 S. Ct. at 1227 ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

³²⁵ See *id.*

³²⁶ See, e.g., *Taylor*, 15 F.3d at 451 (concluding that "the Constitution protects a schoolchild from physical sexual abuse"); *Contreras*, 950 F.2d at 236, 244; *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991) (finding that the defendant clearly "used his position in the state government to deprive these women of their constitutional right to be free from sexual assault"); *Stoneking*, 882 F.2d at 726-27; *Davila*, 704 F.2d at 750.

declaring that sexual assault violates a constitutional right was "clearly established."³²⁷ Thus, Judge Lanier had "fair warning" that his conduct was not only prohibited by state criminal laws but also violated a constitutionally protected right to be free from sexual assault.³²⁸

CONCLUSION

Supreme Court precedent has indicated and appeals court decisions have reiterated that the Constitution does indeed protect a right that sits at the core of our individuality: the right to bodily integrity.³²⁹ Furthermore, the right to bodily integrity is embodied in the notion that the state cannot deprive citizens of their freedom as articulated in the Bill of Rights and as guaranteed by the Fourteenth Amendment.³³⁰ In addition, the right to bodily integrity is conceptually integrated with the right to be free from bodily restraint.³³¹ The right to be free from bodily restraint is implicated when a person is sexually abused or raped.³³² Similarly, the right to be free from sexual abuse perpetrated under color of state law is a right protected by the concept that the state cannot violate an individual's bodily integrity without justification.³³³ Furthermore, constitutional protection of the right to bodily integrity does not require that all crimes involving physical invasions be "constitutional crimes."³³⁴ Only physical invasions that are perpetrated by state actors under color of law and that cannot be rationally justified fall within the scope of the protected right.³³⁵ Because sexual

³²⁷ See, e.g., *Taylor*, 15 F.3d at 455 ("The 'contours' of a student's substantive due process right to be free from sexual abuse and violations of her bodily integrity were clearly established in 1987."); *Stoneking*, 882 F.2d at 726-27 (holding in 1989 that the constitutional right to be free from invasion of personal security—in this case through sexual abuse—was well-established); *Davila*, 704 F.2d at 750 (upholding 1982 criminal conviction of officers under section 242 for depriving women of their constitutionally protected liberty by coercing sexual favors from them).

³²⁸ See, e.g., *Taylor*, 15 F.3d at 455; *Stoneking*, 882 F.2d at 726-27; *Davila*, 704 F.2d at 750.

³²⁹ See *supra* Parts I.B., I.C. and III.

³³⁰ See *supra* Parts I.B. and III.

³³¹ See *supra* Part IV.

³³² See *United States v. Lanier*, 73 F.3d 1380, 1398 (6th Cir. 1996) (en banc) (Nelson, J., dissenting) [*Lanier II*], *rev'd and remanded*, 117 S. Ct. 1219, 1224 (1997).

³³³ See *id.*; see also *United States v. Contreras*, 950 F.2d 232, 236 (5th Cir. 1991); *Davila*, 704 F.2d at 750.

³³⁴ See *supra* Parts III and IV.

³³⁵ See, e.g., *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 197 (1989) ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."); *Ingraham v. Wright*, 430 U.S. 651, 676 (1977) (holding that a student's right to bodily integrity was outweighed by state interest in preserving traditionally acceptable discipline practice).

assault can never be justified as a legitimate state interest, it can never outweigh the constitutionally protected right to bodily integrity.³³⁶

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³³⁶ See, e.g., *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 (5th Cir. 1994) (en banc) (concluding that sexual abuse can never serve legitimate state interest); see also *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (holding that state interest in obtaining evidence cannot justify violating bodily integrity of defendant); *Contreras*, 950 F.2d at 236, 244 (upholding conviction of officer for "willfully depriving [woman] of her constitutional rights, while acting under color of law, by sexually assaulting her, in violation of section 242"); *Davila*, 704 F.2d at 750 (same).