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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. 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. 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. 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.” 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.

2 See id.
3 See id. at 645–50.

   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.

Determining if sexual assault by a sitting judge violates a constitutionally protected right involves a number of distinct inquiries. 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. Part I of this Note examines the history of substantive due process in the context of the right to bodily integrity. 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. Part III reviews how the Supreme Court and various appeals courts have recognized the right to bodily integrity. Part IV addresses whether sexual abuse violates a recognized right of bodily integrity and concludes that it does.

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. Subsection B discusses past Supreme Court decisions with respect to whether or not bodily integrity is a recognized constitutional right. 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.

A. 18 U.S.C. § 242

Congress adopted 18 U.S.C. § 242 in 1874. The language of section 242 was part of an attempt by Congress to merge and thereby...
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. Section 242, as codified in 1874, criminalized the deprivation of any rights protected by the Constitution by any person under color of law. In 1909, Congress amended the statute to add the requirement of willfulness. In 1988, Congress amended section 242 by including an additional penalty provision for bodily injury. 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.

In 1945, in Screws v. United States, the United States Supreme Court held in a plurality decision that section 242 was not unconstitutionally vague. In Screws, the defendants—the sheriff of Baker County, Georgia along with two other policemen—made a late night arrest of Robert Hall. 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. The defendants then dragged Hall feet first through the courthouse and threw him into a jail cell. Hall died shortly thereafter. The federal government charged the defendants with depriving Hall of his constitutionally protected rights in violation of section 242. The defendants argued that, although they may have violated state law, they did not violate any of Hall's constitutionally protected rights. 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. Although it acknowledged the danger that a vague criminal statute poses, the Court emphasized that the word "willful" in a criminal

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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.
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. 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." 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. 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." The Court reasoned that the concept of a jury trial is basic to the concept of due process. 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. 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.

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. In Rochin, the police, acting on a tip, conducted a drug raid on a private residence. Before the police could confiscate two unidentified capsules on a night stand in the defendant's room, however, the defendant swallowed the capsules. 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. The police

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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.
37 Id. at 166.
38 See id.
39 See id.
found two morphine capsules in the vomit. The two capsules were the primary evidence against the defendant at trial. On the strength of this evidence, the defendant was convicted. On appeal, the California District Court of Appeal affirmed the conviction. The California Supreme Court denied the defendant's petition for a hearing without opinion.

Having exhausted his appeals in state court, the defendant appealed to the United States Supreme Court. The United States Supreme Court granted certiorari and reversed. 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." The Court also drew an analogy between obtaining evidence by pumping an unwilling suspect's stomach and coercing a confession. 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." 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." 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. 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.

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

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40 See id.
41 See id.
42 See id.
43 See id.
44 See id. at 167.
45 See id. at 168.
46 Id. at 168–69 (quoting Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105 (1934)).
47 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.
48 Id. at 173.
49 Id. at 172, 174.
50 See id.
51 See id.
52 Id. at 168–69.
in being free from bodily restraint and punishment.\textsuperscript{53} In \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{57} Subsequently, the Fifth Circuit, sitting \textit{en banc}, rejected these conclusions and affirmed the judgment of the district court.\textsuperscript{58}

In affirming the \textit{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.\textsuperscript{59} Nevertheless, the Court acknowledged that corporal punishment did implicate a constitutionally protected liberty interest.\textsuperscript{60} Specifically, the Court reasoned that the right to be free from unjustified

\begin{itemize}
  \item \textsuperscript{53} 430 U.S. 651, 672–73 (1977).
  \item \textsuperscript{54} Id. at 653–54.
  \item \textsuperscript{55} See id. at 655. Normal punishment was limited to one to five blows with the paddle. See id.
  \item \textsuperscript{56} 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.
  \item \textsuperscript{57} See id. at 654, 658.
  \item \textsuperscript{58} 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:

\begin{quote}
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.
\end{quote}

U.S. CONST. amend. XIV.
  \item \textsuperscript{59} See \textit{Ingraham}, 430 U.S. at 658.
  \item \textsuperscript{60} Id. at 668–69.
  \item \textsuperscript{61} Id. at 672.
intrusions on personal security by the state is a historically protected right. In addition, the Court recognized that this historic liberty interest encompasses freedom from bodily restraint and punishment. Thus, the Court concluded that corporal punishment implicated a constitutionally protected right to be free from bodily restraint and punishment.

The Court recognized, however, the historical and widely accepted notion that reasonable corporal punishment in school is justified. 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. 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. 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.

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. 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 preventive procedures to protect her son from injury. 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. The Court of Appeals for the Third Circuit, sitting en banc, reversed and remanded for a new trial, reasoning that the involuntar-

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61 Id.
62 Id. at 673-74.
63 Inghram, 430 U.S. at 674.
64 Id. at 675-76.
65 Id.
66 Id. at 675-76, 683.
67 Id. at 672.
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

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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.
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
and convincing evidence of an incompetent person’s wishes to have life-sustaining treatment withdrawn. 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. In Cruzan, Nancy Beth Cruzan suffered severe cerebral injuries in an automobile accident that left her in a persistent vegetative state. 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. 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.” The Supreme Court of Missouri reversed.

On appeal, the United States Supreme Court affirmed the judgment of the Missouri Supreme Court. 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 . . . .” The Court reasoned that the requirement of informed consent is derivative of this notion of bodily integrity. The Court further reasoned that the logical corollary to the informed consent doctrine is the right to refuse treatment. Thus, the Court concluded that a competent person has a constitutionally protected liberty interest in refusing medical treatment.

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

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.
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. 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.

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. 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. In Casey, abortion clinics and physicians challenged the constitutionality of several provisions of the Pennsylvania Abortion Control Act ("Abortion Act"). 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.

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

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. 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. 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. 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. 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...
traception should fail.\textsuperscript{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.\textsuperscript{116}

C. Circuit Court Precedent

In 1980, in \textit{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.\textsuperscript{117} In \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{120} The court reasoned that the right to bodily security is the most fundamental element of personal privacy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{123} Thus, the Fourth Circuit held that the disciplinary paddling of a student could violate the

\textsuperscript{115} \textit{Casey}, 505 U.S. at 854, 856.
\textsuperscript{116} Id. at 900.
\textsuperscript{117} 621 F.2d 607, 613 (4th Cir. 1980).
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{120} Id. at 611, 613.
\textsuperscript{121} Id. at 613.
\textsuperscript{122} \textit{Hall}, 621 F.2d at 613.
\textsuperscript{123} Id. at 614-15.
student's substantive due process right to be free from state-occasioned invasions of his or her bodily integrity.  

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. In Davila, the defendants stopped an automobile containing two United States Army privates accompanied by two women who had entered the country illegally. The border patrol officers kept the two women in their custody and took them to an apartment owned by one of the officers. There, the officers coerced the women into having sexual intercourse with them in exchange for their freedom. 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. 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.

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. 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. 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. The defendants, however, maintained

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124 See id. at 749, 750 (5th Cir. 1983).
125 See id. at 751.
126 704 F.2d 729, 726-27 (3d Cir. 1989).
127 See id. at 724-25.
128 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." 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.

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. 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. 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. Thus, the Third Circuit held that sexual assault violated a constitutionally protected right to be free from invasions of a person's bodily integrity.

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. 890, 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 729-24; see DeShaney v. Winnebago County Dep't of Soc. Servs., 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.\textsuperscript{141} In \textit{Contreras}, an on-duty police officer forced a woman to have sex with him in the back of his patrol car.\textsuperscript{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.\textsuperscript{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.\textsuperscript{144}

In 1994, in \textit{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.\textsuperscript{145} In \textit{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.\textsuperscript{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.\textsuperscript{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

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

\textsuperscript{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.

\textsuperscript{143} Id. at 244.

\textsuperscript{144} Id. at 236, 244.

\textsuperscript{145} 15 F.3d 443, 445 (5th Cir. 1994).

\textsuperscript{146} Id. at 449–50.

\textsuperscript{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. 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. 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. 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.


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. 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. A panel of the Sixth Circuit upheld Judge Lanier's conviction. On rehearing en bane, however, the Sixth Circuit reversed the panel decision and dismissed the indictment against Judge Lanier. Subsequently, the United States Supreme Court reversed the Sixth Circuit and dismissed the indictment against Judge Lanier.
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

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\(^{157}\) 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.
The touching and grabbing continued on a daily basis until Mahoney could no longer tolerate it. 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. At that point, Judge Lanier put his arms around her, aggressively hugging her and pressing his pelvis against her. After two weeks on the job, Mahoney quit.

The jury also convicted Judge Lanier of sexually assaulting Vivian Archie, over whose divorce he presided. Subsequent to her divorce, Archie interviewed with Judge Lanier for a secretarial job. 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. Thereafter, Judge Lanier grabbed Archie and held her down in a chair while trying to kiss and fondle her. 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. Fearful of losing custody of her child, Archie did not scream or report him. Soon after this incident, Judge Lanier inveigled Archie, with information of another job prospect, to return to his chambers. When Archie arrived at Judge Lanier's chambers, he told her about a secretarial position available in a doctor's office. Before she could leave, however, Judge Lanier again sexually assaulted Archie, once more orally raping her.

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

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168 Id.
169 See id.
170 See id.
171 See id., 33 F.3d at 647.
172 See id.
173 See id.
174 See id.
175 See id.
176 See id., 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 id., 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. After presenting her project to Judge Lanier in chambers, Judge Lanier put his arms around her and began kissing her and fondling her breasts. Bandy freed herself and went into the bathroom before leaving his chambers. To exit the chambers, however, Bandy had to pass Judge Lanier's desk. As she passed the desk, Judge Lanier put his hand on Bandy's crotch. Before she left, Judge Lanier told her that if she came back, she would have all the clients she wanted. Bandy never returned and Judge Lanier referred only two individuals whose cases had been pending at the time of his meeting with Bandy.

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

In March of 1991, Lanier hired Sandy Attaway as his secretary. He made it his practice to make sexually suggestive comments and to slap her on her buttocks during the course of the day. At one point, Judge Lanier came up behind Attaway and pushed his pelvis into her buttocks and made gyrating motions. 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."

Judge Lanier was sentenced to twenty-five years imprisonment—ten years for each count of forcible oral sex and one year for each of
the five remaining sexual assault charges. Judge Lanier was also ordered to pay a $25,000 fine. 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.

In appealing his convictions to the Sixth Circuit, Judge Lanier argued that his actions did not deprive his victims of any constitutionally protected right. The Sixth Circuit disagreed. 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. The court concluded that the right to bodily integrity had been made specific by prior court decisions.

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

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. 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.\textsuperscript{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.\textsuperscript{211} The court concluded that the record clearly indicated that the jury did not convict Judge Lanier merely because of "unwanted sexual touching."\textsuperscript{212} Thus, the Sixth Circuit held that sexual assault under color of law constituted a violation of a constitutionally protected right to bodily integrity.\textsuperscript{213}

B. \textit{Take Two: The Sixth Circuit Reverses The Panel Decision}

In 1996, on rehearing \textit{en banc}, a sharply divided Sixth Circuit reversed the judgment below and instructed the trial court to dismiss the indictment.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{218}

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

\textsuperscript{210} Id.
\textsuperscript{211} \textit{Lanier}, 33 F.3d at 652.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 651.
\textsuperscript{215} Id. at 1382.
\textsuperscript{216} Id. at 1388.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} \textit{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. The original statutes criminalized deprivations of all constitutional rights. The Civil Rights Act of 1866 criminalized interference with certain statutorily enumerated rights—such as contract, property and equal protection—under color of law. 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. 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).

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.

The Sixth Circuit also examined the case law regarding sexual assault as a constitutional crime. 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. 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-

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220 *Id.* at 1384.
221 See 17 Stat. 13 (1871); 16 Stat. 144 (1870); 14 Stat. 27 (1866); *Lanier II*, 73 F.3d at 1386 & n.2-4.
222 See 14 Stat. 27. The statute enumerated those rights as follows:

[All 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.
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. 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. 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.

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. 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. 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. 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.

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223 Id. at 1392.
224 Id. at 1393.
225 Lanier II, 73 F.3d at 1393.
226 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.
227 Lanier II, 73 F.3d at 1388.
228 Id.
229 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) ("Surely 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.
230 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. 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. 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.

Finally, the court recognized that section 242, unlike most criminal statutes, does not criminalize conduct; rather, it criminalizes violations of abstract rights. Therefore, conduct that may be illegal under state law, such as murder, is not necessarily deprivation of a constitutional right. 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. Consequently, the court emphasized that it was not holding that sexual assault could never violate section 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.

The court's opinion engendered five separate dissents. 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. Three judges dissented...
as to the dismissal of all charges. 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. Judge Daughtrey found the majority’s foray into the legislative history of section 242 unwarranted because the language of the statute lacks any ambiguity. 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. Moreover, Judge Daughtrey noted that over the years, Congress had amended section 242 but had chosen not to restrict its scope. Therefore, Judge Daughtrey reasoned that the proper inquiry was whether court decisions had made specific a constitutional right to be free from bodily integrity.

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. 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. Judge Daughtrey further

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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. 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.

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. 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. Thus, the Court's decision left undecided whether Judge Lanier deprived his victims of a constitutionally protected right to be free from sexual assault.

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).


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 Serena 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. 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." 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." 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."

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. 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...'." 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. In fact, according to the Court, the qualified immunity test

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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. 4996 (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.


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. 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.

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. Specifically, the Court reasoned that "the universe of relevant interpretive decisions" for purposes of providing "fair warning" is not limited to Supreme Court decisions. 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." 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."

In addition, the Court concluded that the strict factual identity to precedent required by the Sixth Circuit is both unwarranted and problematic. 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. 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." Thus, the Supreme Court held that neither a Supreme Court decision nor the strict factual identity required by the Sixth Circuit is
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, 266 (5th Cir. 1981)));

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

The Court further defined the scope of bodily integrity in \textit{Cruzan v. Director, Missouri Department of Health.}\textsuperscript{287} In \textit{Cruzan}, the Court observed that: "\textit{[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.\textsuperscript{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.\textsuperscript{289} In so doing, the Court explicitly acknowledged that the Fourteenth Amendment constitutionally protects a liberty interest in refusing unwanted medical treatment.\textsuperscript{290}

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

\begin{footnotesize}
\begin{enumerate}
\item See id. at 166.
\item Id. at 169, 172.
\item Id. at 172.
\item See id. at 172-73.
\item Compare Lanier II, 73 F.3d at 1405 (Daughtrey, J., dissenting) (holding that oral rape violates bodily integrity), with \textit{Rochin}, 342 U.S. at 172-73 (holding that pumping stomach against will of suspect violates bodily integrity).
\item 497 U.S. 251, 269, 278-79, 281 (1990) (weighing the right to bodily integrity against relevant state interest in preserving life).
\item Id. at 269 (quoting Union Pacific Ry. Co. v. Boitos, 141 U.S. 250, 251 (1891)).
\item See id. at 269, 278.
\item Id. at 278.
\item 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.").
\end{enumerate}
\end{footnotesize}
... of personal autonomy and bodily integrity.” 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.” Thus, Supreme Court precedent has recognized the existence of a liberty interest that protects individuals from state-occasioned violations of their bodily integrity.

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. 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. Certainly there are legitimate reasons for an individual's protected liberty interest to be compromised, but such compromises exist only within certain constitutional boundaries. In Cruzan, the Court weighed the constitutionally protected liberty interest of bodily self-determination against the state interest in requiring

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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.
299 497 U.S. at 279.
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 vouched for 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. 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.

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. 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.

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. 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

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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-

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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 State 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{319} In both \textit{Doe v. Taylor Independent School District} and \textit{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.\textsuperscript{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

\textsuperscript{316} See, e.g., \textit{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.”); \textit{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”); \textit{Davila}, 704 F.2d at 750 (same).

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

\textsuperscript{318} See, e.g., \textit{Taylor}, 15 F.3d at 451 (concluding that “the Constitution protects a schoolchild from physical sexual abuse”); \textit{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”); \textit{Dang Yang v. Yang 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”); \textit{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”); \textit{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).

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

\textsuperscript{320} \textit{Taylor}, 15 F.3d at 452 n.8 (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”); \textit{Stoneking}, 882 F.2d at 724 (declining to rest decision on affirmative duty to protect students).
law. 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.

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. 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. The fact that the defendants were convicted provides fair warning that sexual assault under color of law violates section 242.

Moreover, as with the right to bodily integrity, there is no dissen-

sion among the courts as to whether sexual assault violates a constitutionally protected right. Finally, by the time Judge Lanier began harassing and sexually assaulting women in his chambers, the case law

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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." 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.

**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. 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. In addition, the right to bodily integrity is conceptually integrated with the right to be free from bodily restraint. The right to be free from bodily restraint is implicated when a person is sexually abused or raped. 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. Furthermore, constitutional protection of the right to bodily integrity does not require that all crimes involving physical invasions be "constitutional crimes." 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. Because sexual

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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.


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.\textsuperscript{396}

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\textsuperscript{396}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).