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Bodily Integrity: A Substantive Due Process Right to Be Free from Rape by Public Officials

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COMMENT

BODILY INTEGRITY: A SUBSTANTIVE DUE PROCESS RIGHT TO BE FREE FROM RAPE BY PUBLIC OFFICIALS

Between 1989 and 1991, David Lanier, a Tennessee State Chancery Court Judge, forcibly raped or sexually assaulted five women in his chambers. Following a jury trial, Lanier was convicted on two felony accounts and five misdemeanor accounts of willfully depriving a person of constitutional rights in violation of 18 U.S.C.A. §242.[1] The felony convictions were based on several incidents of forcible oral rape, while the misdemeanors were based on various incidents of sexual assault.[2] The trial court instructed the jury that Lanier's indictment was based on a substantive due process right to be free from unauthorized physical intrusion,[3] essentially advising the jury that the victims had a constitutional right to bodily integrity. The Sixth U.S. Circuit Court of Appeals reversed Lanier's conviction, concluding that sexual assault could not be prosecuted in federal court as a violation of the constitutional substantive due process right to bodily integrity.[4] In

1. 18 U.S.C. § 242 provides that "[w]hoever, under color of any law, . . . willfully subjects any person in any State, . . . to the deprivation of any rights, . . . secured or protected by the Constitution or laws of the United States, . . . on account of such person being an alien, or by reason of his color or race, . . . shall be fined . . . or imprisoned . . . or both . . . ." 18 U.S.C. § 242 (1996) [hereinafter Section 242]. *See infra* note 8 for a discussion of application of this statute to rape assault by state actors.

2. One of the most extreme examples of Lanier's conduct involved a woman whose divorce proceedings were previously handled in Judge Lanier's court. The woman had received custody of her child, however, the child's custody remained subject to Judge Lanier's jurisdiction. While the woman was applying for a secretarial position at the courthouse where Judge Lanier presided, Judge Lanier threatened to reopen the custody issue, unless the woman accompanied him to his chambers. While in his chambers, Judge Lanier grabbed the woman's hair and neck, forced her jaws open, forced his penis into her mouth and ejaculated, all while threatening her that she would lose custody of her child if she refused. *See* Elkan Abramowitz, *'U.S. v. Lanier': The 'Under Color of Law' Rule*, N.Y. L.J., May 6, 1997, at 3; U.S. v. Lanier, 33 F.3d 639, 648 (6th Cir. 1994).

3. *See* Frederick M. Lawrence, *In the U.S. Supreme Court: Revisiting the Scope of Federal Civil Rights Crimes—Is Sexual Assault by a State Judge a Federal Crime?*, Jan. 9, 1997, *available in* 1997 WL 6056.

4. A unanimous panel on the 6th U.S. Circuit Court of Appeals affirmed the trial court's convictions, relying on *Ingraham v. Wright*, discussed *infra* note 61, which estab-

fact, the majority entirely rejected the existence of a substantive due process right to bodily integrity. On a writ of certiorari, the Supreme Court held that the Court of Appeals applied the wrong standard for determining whether the "fair warning requirement" of 18 U.S.C. §242 was satisfied.[5] However, the Supreme Court avoided declaring a constitutional right to freedom from sexual assault, and actually failed to address whether there is a substantive due process right to bodily integrity at all.

Although the Supreme Court avoided declaring bodily integrity a substantive due process right within the Fourteenth Amendment[6] by denying certiorari when the case came before it (again), the issue should not be ignored. In fact, the implications of extending the constitutional right to bodily integrity to encompass rape by officials would reach far beyond the *Lanier* case. Specifically, a constitutional right to bodily integrity would provide victims of rape and sexual assault by state actors with remedies that might otherwise be unavailable.[7] Here, the civil rights statute implicated by rape and sexual assault requires a deprivation of rights "*secured or protected*

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lishes a substantive due process right to bodily integrity. *See* United States v. Lanier, 33 F.3d 639 (6th Cir. 1994). However, this judgment was vacated on a grant of rehearing *en banc*, 43 F.3d 1033 (6th Cir. 1995), and upon rehearing *en banc*, the Court of Appeals reversed Lanier's convictions. *See* United States v. Lanier, 73 F.3d 1380 (6th Cir. 1996).

5. *See* U.S. v. Lanier, 117 S. Ct. 1219, 1221 (1997). Instead of focusing on the constitutional issues clearly implicated by the *Lanier* case, the Supreme Court addressed the "made-specific" standard of fair warning enunciated in *Screws v. United States*, 325 U.S. 91 (1945). In *Screws*, a plurality opinion declared that a criminal defendant could receive the requisite notice that a constitutional right existed (and therefore that its deprivation was a crime under § 242) only if the right had been "made specific by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Id.* at 104. In focusing on this notice requirement, the majority in *Lanier* explained that the Court of Appeals had applied a much too stringent standard. *Lanier*, 117 S. Ct. at 1221. The majority explained that the Screws' "made specific" requirement did not require a prior decision by the United States Supreme Court to identify the existence of a constitutional right in a case with facts fundamentally similar to the case being prosecuted. The majority remanded the case to the Court of Appeals, explaining that a more relaxed standard of warning should be applied. Specifically, the majority indicated that criminal liability "may be imposed under § 242 if, but only if, in the light of pre-existing law the unlawfulness of the defendant's conduct is apparent." *Id.* at 1222. Ultimately, the Supreme Court denied certiorari. *See* Lanier v. U.S., 118 S. Ct. 1200 (1998). However, cases involving similar facts will inevitably be raised in the future.

6. The Fourteenth Amendment provides, in pertinent part, that no state shall "deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV. The essence of substantive due process is that laws will be reasonable and not arbitrary. The guarantee of substantive due process requires the court to review the substance of the law itself rather than the procedure used. *See, e.g.*, Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984).

7. Although rape and sexual assault by state actors may appear to be a unique and isolated problem, Department of Justice figures indicate that there have been seventeen such prosecutions since 1989, including two judges besides Lanier who were convicted of assault in violation of Section 242. *See* Abramowitz, *supra* note 2, at n.6.

by the Constitution or laws of the United States."[8] Therefore, recognizing that rape or sexual assault by a public official violates the substantive due process right to bodily integrity would bring this conduct within the purview of 18 U.S.C. §242. Once courts establish that rape by public officials violates a constitutional right, Section 242 provides alternate remedies, namely, fines and/or imprisonment for persons who are deprived of their bodily integrity by state actors.[9]

The remedies provided by Section 242 seem especially beneficial after looking at the sparse statutory remedies for victims of rape and sexual assault.[10] Many commentators feel that the recently enacted federal rape law is insufficient,[11] and that state law can be inadequate.[12] In addition, there are certain circumstances under which state law is not used.[13] In these cases, where statutory remedies are inadequate or inapplicable, the plaintiff will have a federal remedy only if she can prove the defendant violated a right secured by the Constitution. Herein lies the importance of extending the constitutional right to bodily integrity to include rape by public officials. If the courts do not allow the Constitution to evolve to protect the right to

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8. 18 U.S.C. § 242 (1996). See *supra* note 1, for the full text of this statute. Interestingly, this statute is the one hundred and twenty three year old Ku Klux Klan Act, enacted after the Civil War to allow federal officials to prosecute Southern Sheriffs. Applying this statute to rape and sexual assault seems to comport with the original legislative intent of preventing abuse by state actors.

9. It is essential for application of Section 242 for the perpetrator of the crime to be a state actor because of the "color of law" requirement. Circuit court opinions have consistently held that an actual nexus between the state authority and the criminal act satisfies the "under color of law" element. *See* Brief for the National Organization for Women at *27, n.36, U.S. v. Lanier, 73 F.3d 1380 (6th Cir. 1996) (No. 95-1717).

10. For example, the Violence Against Women Act [hereinafter "VAWA"] provides for the first time that violent crimes motivated by gender are discriminatory and violate the victim's civil rights under federal law. *See* 42 U.S.C. § 13981 (1994).

11. *See, e.g.*, David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & LAW 163 (1993).

12. Many supporters of VAWA indicate that state laws on violence against women are not adequate to provide women with a remedy because they require proof of force, which is difficult in circumstances when the rape involves coercion or threats. *See, e.g.*, Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy, a Panel Discussion Sponsored by the Association of the Bar of the City of New York, September 14, 1995*, 4 J. L. & POL'Y. 391, 392 (1996).

13. For example, in the *Lanier* case, Judge Lanier's brother was the only local prosecutor so several victims explained that they were afraid to complain to local law enforcement officials because the Judge was so politically connected. As a result, Judge Lanier was charged under Section 242 rather than under state criminal laws. *See Ex-Judge Cites States' Rights in Attempt to Avoid Federal Charges that He Deprived Women of Their Constitutional Rights*, NASHVILLE TENNESSEAN, July 7, 1996, at 1A. In fact, the victims were so scared to complain that their rapes were only discovered as a result of an unrelated federal investigation into possible political corruption involving Judge Lanier and his prosecutor brother. *See* Brief for the National Organization for Women at *26, n.33, U.S. v. Lanier, 73 F.3d 1380 (6th Cir. 1996) (No. 95-1717).

bodily integrity in different contexts, namely rape and sexual assault by public officials, then there will be a shrinking of the civil rights statute and of the types of civil rights it will protect.[14]

The Supreme Court has consistently upheld a substantive due process right to bodily integrity found within the Fourteenth Amendment of the Constitution. Specifically, the Court has determined that the right to bodily integrity allows women to have abortions,[15] entitles individuals to make end of life decisions free from government intervention,[16] and permits families to make birth control decisions without governmental involvement.[17] Because of the similarities between abortion, end of life issues, contraception choices and rape or sexual assault, the substantive due process right that the courts have relied upon for years should be extended to encompass rape and sexual assault by public officials.

The *Lanier* prosecution raised several complex issues regarding the scope of 18 U.S.C. §242.[18] However, this Comment focuses specifically on the scope of the constitutional substantive due process right to bodily integrity. In light of the historical development of the right to bodily integrity and its previous application in a variety of cases, this Comment suggests that rape or sexual assault by a state actor violates the substantive due process right to bodily integrity. Procedurally, the United States Supreme Court's decisions in *Griswold*,[19] *Cruzan*,[20] and *Casey*[21] should be extended to encompass rape or sexual assault by public officials.

Several commentators have examined various forms of conduct that violate the constitutional right to bodily integrity; however, there is little

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14. *See* Russ Loar, *Lawyer's Special Interest Pays Off Gender Bias Expert at 29 Before U.S. Supreme Court*, L.A. TIMES, Feb. 10, 1997 (quoting Mary-Christine Sungaila). Although this Comment argues that denying a constitutional right to bodily integrity would shrink Section 242, other commentators fear that a right to bodily integrity would greatly increase the scope of Section 242 by making assault committed by public officials subject to federal prosecution, without any discernible limitation. *See* Respondent's Brief at *2, U.S. v. Lanier, 73 F.3d 1380 (6th Cir. 1996) (No. 95-1717).

15. *See* Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833 (1992).

16. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 277-78 (1990).

17. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

18. Some of the more interesting issues raised by this case include potential violations of federalism, specifically, the possibility that conduct that would otherwise be a state crime may be considered to be a federal crime when the commission of the crime is "under color of law." In addition, there are vagueness concerns underlying the application of Section 242, which punishes the deprivation of rights secured by the Constitution but declines to enumerate these rights. There are also concerns raised regarding the application of a Reconstruction Era statute to the crimes of rape and sexual assault. Finally, some commentators voice opposition to allowing the Supreme Court to virtually create new due process rights whenever a case warrants the existence of such a right. For a discussion of the federalism and vagueness concerns, see Lawrence, *supra* note 3.

19. *Griswold*, 381 U.S. at 479.

20. *Cruzan*, 497 U.S. at 261.

21. Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833 (1992).

analysis of whether and how rape by public officials violates this right.[22] Because rape by a public official is similar to the other conduct which courts have held violates bodily integrity, it follows that the Fourteenth Amendment should also include a right to be free from rape by public officials.

Historical factors support an argument in favor of extending the constitutional right to bodily integrity to rape by public officials.[23] For example, the courts have identified and applied the right to bodily integrity to conduct that destroys personal autonomy much like rape and sexual assault by public officials.[24] Generally speaking, courts have applied the right to bodily integrity to protect people from governmental interference with decisions about their bodies. More specifically, courts have defined bodily integrity as "personal privacy,"[25] the "right to determine what shall be done with [one's] own body,"[26] and the "right of every individual to the possession and control of his own person."[27] Ultimately, despite the context, bodily integrity is the "centuries-old right to be left alone."[28]

The determination of this issue will have a large impact on victims of rape by public actors. Previously, the courts have stated that when police excessively beat someone in custody, this violates the Constitution;[29] and yet, something seemingly more invasive, like rape, may not violate the Constitution.[30] If the courts decide that the constitutional right to bodily integrity cannot be extended to cover rape and sexual assault by public officials, this will send a message to women that the Constitution protects them from

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22. The articles that mention bodily integrity as a constitutional right, without actually analyzing whether such a right legally exists, deal with the right to die, abortion and reproductive rights, and unlawful searches and seizures. Articles mentioning a right to bodily integrity in these contexts include Samantha Catherine Halem, Note, *At What Cost?: An Argument Against Mandatory AZT Treatment of HIV-Positive Pregnant Women*, 32 HARV. C.R.-C.L. L. REV. 491 (1997); Randall Miller, *The Limits of U.S. International Law Enforcement After Verdugo-Urquidez: Resurrecting Rochin*, 58 U. PITT. L. REV. 867 (1997); and Kenneth R. Thomas, *Confronting End-of-Life Decisions: Should We Expand the Right to Die?*, 44 FED. LAW. 30 (1997).

23. The reasons behind the enactment of Section 242 argue in favor of recognizing a constitutional right to bodily integrity. Intended to protect newly freed slaves from abuse by state officials, Section 242 provides remedies for those who deprive others of constitutional rights. As argued by Professor Frederick Lawrence, "[i]f we were to change gender to race in [the Lanier case], it reads like one of those cases during the 1870s that led to the enactment of the section 242 precursor and the cases since the 1940s that have led the Department of Justice to apply and enforce this statute." Lawrence, *supra* note 3, at 4.

24. *See, e.g.*, *Cruzan*, 497 U.S. at 261; *Casey*, 505 U.S. at 833, discussed *infra* Part I.

25. Winston v. Lee, 470 U.S. 753, 760 (citing Schmerber v. California, 384 U.S. 757, 767 (1966)).

26. Schloendorff v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914).

27. Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

28. Aaron Epstein, *Suicide Issue Heard*, LAS VEGAS REVIEW-JOURNAL, Jan. 9, 1997 (quoting New York Attorney General Dennis Vacco).

29. *See* United States v. Koon, 34 F.3d 1416 (9th Cir. 1994) (holding that Los Angeles police officers violated Rodney King's constitutional rights by beating him during an arrest).

30. *See* Loar, *supra* note 14.

being beaten by a public official, but it does not protect them from being sexually violated by a public official.[31] This mixed-message could be resolved by expanding bodily integrity to include the right to be free from rape by officials.

Part I of this Comment examines cases in which the courts have recognized bodily integrity in contexts other than rape and sexual assault. The evolution of the right to bodily integrity is tracked from the right to be let alone in the 1800s, to a substantive due process right within the Fourteenth Amendment. Part II then analogizes rape and sexual assault to other situations where the court has applied the right to bodily integrity. Part III examines the Violence Against Women Act, the recently created federal rape law, and discusses why a constitutional right is also essential for victims of rape or sexual assault by public officials. Part IV briefly discusses other alternative remedies that victims of rape or sexual assault by public officials may pursue if the courts decide that bodily integrity does not encompass rape or sexual assault by public officials. This Comment concludes that the courts should extend the constitutional right to bodily integrity to encompass rape and sexual assault by public officials.

I. THE CASE LAW EVOLUTION OF THE SUBSTANTIVE DUE PROCESS RIGHT TO BODILY INTEGRITY

The Supreme Court has repeatedly held that there is a right to be free from unjustified intrusions on personal bodily integrity, suggesting that such a right is protected by the due process clause of the Fourteenth Amendment.[32] The lower courts have also recognized this right, and have applied it in a variety of contexts.[33] These include unsolicited medical procedures,[34] forcible stomach pumping,[35] corporal punishment in schools,[36] the decision to forego medical treatment,[37] decisions regarding birth control,[38] and abor-

31. *See id.* The focus on rape and sexual assault by public officials is the pivotal point of this Comment since only a state actor can violate the Fourteenth Amendment. Although some may argue that the problem of rape by public officials is not widespread enough to warrant a constitutional violation for rape by officials, it may be more common than expected due to the unequal positions of power between victims and officials. Specifically, the power to coerce and manipulate victims may be greater when the perpetrator holds a powerful position, such as a judge or a police officer. *See supra* note 7 for the Department of Justice statistics on the number of prosecutions of this sort.

32. U.S. CONST. amend. XIV, see *supra* note 6 for the text of the Fourteenth Amendment.

33. *See id.* For example, the right to bodily integrity has been implicated in lower court decisions regarding abortion, forced Cesarean sections, and blood tests to determine blood alcohol levels.

34. *See* Union Pacific Ry. Co. v. Botsford, 41 U.S. 250 (1891).

35. *See* Rochin v. California, 342 U.S. 165 (1952).

36. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

37. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990).

38 *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

tion.[39] The progression of bodily integrity in the courts from the right to be let alone, to a well founded substantive due process right, helps define the scope of this right and supports its expansion into the arena of rape by public officials.

A. Early Bodily Integrity: The Right to Be Let Alone

Beginning in the 1800s, courts have treated bodily integrity as a right protected by the Constitution.[40] In *Botsford*, the Supreme Court held that the lower court had no right to order the plaintiff to submit to a surgical exam without her consent.[41] Justice Gray reasoned: "[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 and interference of others, unless by clear and unquestionable authority of law."[42]

Quoting Judge Cooley, Justice Gray added that "the right to one's person may be said to be a right of complete immunity; to be let [sic] alone."[43] This is one of the first, indefinite references to bodily integrity, and since *Botsford*, many courts have followed Justice Gray's interpretation of the right.

Applying similar reasoning to a less physically intrusive invasion of privacy, Justice Brandeis dissented from the Supreme Court's decision in *Olmstead v. United States*.[44] In *Olmstead*, the Court upheld the use of wire tapping to secure convictions of several defendants under the National Prohibition Act.[45] Expressing concern with the Court's reasoning, Justice Brandeis indicated that the protections guaranteed by the Constitution are much broader in scope than as construed by the majority.[46] In his dissent, Justice Brandeis explained that:

> [t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[47]

Applying the right to be let alone, Brandeis determined that wire tap-

39. *See* Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833 (1992).
40. *See* Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).
41. *Id.* at 257.
42. *Id.* at 251.
43. *Id.* (quoting JUDGE COOLEY, COOLEY ON TORTS 29 (1st ed. 1888)).
44. Olmstead v. United States, 277 U.S. 438 (1928).
45. *Id.* at 469.
46. *See id.* at 478.
47. *Id.*

ping is a crime that should not be used to secure convictions.[48]

B. Modern Bodily Integrity: A Substantive Due Process Approach

Substantive Due Process is the constitutional guaranty that no person can be arbitrarily deprived of his life, liberty, or property.[49] Specifically, substantive due process provides protection from arbitrary and unreasonable action by government actors.[50]

The liberty guaranteed by the Due Process Clause of the Fourteenth Amendment "is not a series of points pricked out in terms of the taking of property; the freedom of speech, press and religion; . . . and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial and arbitrary impositions and purposeless restraints."[51] Over the years, courts have used the liberty guaranteed by the due process clause to protect various invasions on bodily integrity. A brief overview of the cases in which courts have applied the right to bodily integrity to areas of personal autonomy and family decisions demonstrates the logic in extending this right to encompass rape by public officials.

The Supreme Court recognized and protected the substantive due process right to bodily integrity in *Rochin v. People of California.*[52] In *Rochin,* the Court held that sheriffs violated the due process clause of the Fourteenth Amendment when they forced defendant to turn over evidence by forcibly inducing him to vomit.[53] Justice Frankfurter explained, forcing defendant to vomit did "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience."[54] This action was "bound to offend even hardened sensibilities. [It was] too close to the rack and the screw to permit of [sic] constitutional differentiation."[55]

Faced with an even more egregious violation of bodily integrity, the Supreme Court invalidated a Connecticut statute imposing fines or imprisonment for "any person who uses any drug, medicinal article or instrument for the purpose of preventing conception."[56] In *Griswold,* the Director of Planned Parenthood and a physician who gave medical advice about contraception to married couples were found guilty as accessories under the Connecticut law.[57] The Court invalidated the statute as violative of the due

48. *See id.* at 479.
49. *See* Babineaux v. Judiciary Commission, 341 So. 2d 396, 400 (La. 1976).
50. *See id.*
51. Poe v. Ullman, 367 U.S. 497, 543 (1961).
52. Rochin v. California, 342 U.S. 165 (1952).
53. *Id.* at 174.
54. *Id.* at 172.
55. *Id.*
56. Griswold v. Connecticut, 381 U.S. 479, 480 (1965).
57. *Id.* at 480.

process clause of the Fourteenth Amendment, finding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[58]

Shortly after *Griswold*, the Supreme Court was faced with an even greater restriction of bodily integrity. In the landmark case of *Roe v. Wade*, the Supreme Court held that the right of privacy, founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[59] The Court explained that, although "[t]he Constitution does not explicitly mention any right of privacy. . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[60]

In an entirely different context, the Supreme Court upheld a person's right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[61] In *Ingraham*, the Court held that the Due Process Clause of the Fourteenth Amendment did not require notice prior to the imposition of corporal punishment in public schools.[62] In *Ingraham*, the Court reasoned that "[a]mong the historic liberties so protected was a right to be free from, and to obtain judicial relief, for unjustified intrusions on personal security."[63] The Court applied this right to be free from intrusions on personal security to students who were subjected to corporal punishment at school without consent.[64] The Court concluded that, in order to satisfy the due process clause of the Fourteenth Amendment, intrusions by officials on personal security must, at a minimum, be justified by a permissible governmental purpose.[65]

The Supreme Court has also applied the right to bodily integrity to cases where the patient chooses to forego medical treatment. In *Cruzan v. Director, Missouri Department of Health*, the Court held that the Constitution does not forbid Missouri from requiring clear and convincing evidence[66] of an incompetent person's wishes to be withdrawn from life sustaining

58. *Id.* at 484.
59. Roe v. Wade, 410 U.S. 113, 153 (1973).
60. *Id.* at 152.
61. Ingraham v. Wright, 430 U.S. 651, 673 (1977) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
62. *Id.* at 683.
63. *Id.* at 673.
64. *See id.* at 651.
65. *See id.* at 675.
66. The clear and convincing evidence standard is an intermediate standard of proof that falls between the preponderance of the evidence standard and the criminal beyond the reasonable doubt standard. It is noteworthy that the *Cruzan* court applied this standard because it requires more proof than the preponderance of the evidence standard to show an incompetent person's wishes.

treatment.[67] The Court explained that the "notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."[68] In *Cruzan*, Justice Rehnquist referred to Cardozo's early definition of bodily integrity, stating that, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."[69]

Two years later, in the abortion context, the Supreme Court held that the Constitution places limits on a state's right to interfere with a person's most basic decisions about family, parenthood and bodily integrity.[70] In *Casey*, the court upheld its prior decision in *Roe v. Wade*[71] recognizing a woman's right to choose to have an abortion before fetal viability.[72] The Court reasoned that the right to bodily integrity in the abortion context is "implicit in the meaning of liberty" protected by the Fourteenth Amendment.[73] For example, certain "attributes of personhood" are recognized as so fundamental that they receive protection under the Due Process Clause as a matter of substantive liberty.[74]

Finally, the right to bodily integrity protects women against forced Cesarean sections.[75] Therefore, orders to compel women to undergo Cesarean sections, like late term abortions, can be justified only when necessary for the survival of the fetus.[76] In *Jefferson v. Griffin Spalding County Hospital Authority*, the court ordered the mother of an unborn child to submit to a Cesarean section although the mother was opposed to the surgery because of religious beliefs.[77] The mother was thirty-nine weeks pregnant and suffering from placenta previa, a condition which was impossible to cure before childbirth.[78] Due to the severity of the condition, the doctors estimated that the child had only a one percent chance of surviving natural child birth, and that the mother had only a fifty percent chance of surviving natural child birth.[79] However, if a Cesarean section were performed, both the mother and the child would have a 100 percent chance of survival.[80] The court found

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67. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 282 (1990).

68. *Id.* at 269.

69. *Id.* (quoting Schloendorff v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914)).

70. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

71. Roe v. Wade, 410 U.S. 113 (1973).

72. *Casey*, 505 U.S. at 837.

73. *Id.* at 869.

74. *Id.*

75. *See* Lois Shepherd, *Protecting Parents' Freedom to Have Children With Genetic Differences*, 1995 U. ILL. L. REV. 761, 786 (1995).

76. *See, e.g.*, Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981). *But see In re* Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994).

77. *Jefferson*, 274 S.E.2d at 460.

78. *See id.* at 458.

79. *See id.*

80. *See id.*

that the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live outweighed the intrusion upon the life (and body) of the mother.[81]

More recently however, two appellate courts have not permitted a forced Cesarean section even to protect the fetus, suggesting that the mother's right to select medical birth methods is even more fundamental than the right to terminate a pregnancy. In both *In re A.C. and In re Baby Boy Doe* the courts upheld the right of the pregnant woman to determine the course of medical treatment for herself and her fetus, even where the woman's choice may be harmful to the fetus.[82] Both courts described the right of the pregnant woman as one of bodily integrity derived from common law and the Constitution.[83] In *In re Baby Boy Doe*, the court reasoned that "a woman's right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy."[84]

As evidenced throughout the common law evolution of bodily integrity, the courts rely on the substantive due process right to privacy or bodily integrity whenever the government impinges upon a person's autonomy over his or her body. The progression of bodily integrity in the courts confirms that the Supreme Court recognizes and protects people from governmental invasions on personal security. Therefore, since the courts have consistently held that the right to bodily integrity encompasses unwanted surgery, compulsory pregnancies and mandated contraception methods, the courts should hold that the right encompasses rape by public officials.

II. THE RATIONAL CONTINUUM: FREEDOM FROM RAPE AND SEXUAL ASSAULT BY PUBLIC OFFICIALS AS COMPARED TO OTHER RIGHTS ENCOMPASSED BY BODILY INTEGRITY

An examination of specific scenarios in which the Supreme Court has applied the substantive due process right to bodily integrity supports an expansion of this right. This comparison is predicated on the theory that the liberty guaranteed by the Fourteenth Amendment is not a series of isolated points, but instead, a rational continuum which includes freedom from all substantial, arbitrary impositions and purposeless restraints.[85] As such, general constitutional references to liberty and due process seen throughout the cases in Part I include privacy and bodily integrity.[86]

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81. *See id.* at 460.

82. *In re* Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994).

83. *See* Shepherd, *supra* note 75, at 786 (citing *In re Baby Boy Doe*, 632 N.E.2d at 330-31).

84. *In re Baby Boy Doe*, 632 N.E.2d at 332.

85. *See* Poe v. Ullman, 367 U.S. 497, 543 (1961).

86. This Comment focuses specifically on bodily integrity because this term is most clearly implicated by rape. However, bodily integrity seems to be merely a subsection of

A. *Bodily Integrity Encompasses Mandated Methods of Contraception*

The right to bodily integrity was early recognized under the right to privacy doctrine in *Griswold.* In that case, the Supreme Court upheld the right to privacy to include the right to control one's own bodily functions, such as avoidance of unwanted pregnancy.[87] As discussed in Part I, the physician who was charged under the statute merely advised a married couple about the means of preventing pregnancy.[88] The Court held that forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy.[89] In addition, the Court stated that state mandated contraception methods are "repulsive to the notions of privacy surrounding the marriage relationship."[90]

Like mandated contraception, rape and sexual assault are repulsive to the notions of privacy over one's body. If a state cannot force people to refrain from using contraception, a fortiori, a state cannot force people to submit to rape by public officials. Just as mandated contraception seeks to achieve its goals by means having a maximum destructive impact upon the marital relationship, forced sex has a maximum destructive impact on the victim.

The Court in *Griswold* facetiously hypothesized the situation where police search marital bedrooms for contraceptives, and indicated that this would never be allowed in a free society.[91] However, rape and sexual assault by public officials are even more invasive than the search of one's bedroom; and yet they continue to go unnoticed under the Constitution. If the substantive due process right within the Fourteenth Amendment protects against state mandated contraception, it should necessarily be extended to protect against rape by officials.

B. *Bodily Integrity Encompasses Unwanted Surgery*

Moving forward along the substantive due process continuum to *Cruzan,* the Supreme Court held that the Constitution did not forbid Missouri from requiring clear and convincing evidence of an incompetent's wishes regarding the withdrawal of life sustaining treatment.[92] However, more important to this analysis is the Court's determination that a competent person has a liberty interest under the due process clause in refusing unwanted

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privacy, which is merely a subsection of liberty. Therefore, despite what each individual court calls it, this right protects against violations against one's person.

87. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

88. *See id.* at 481.

89. *See id.* at 485-86.

90. *Id.* at 486.

91. *Id.*

92. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 282 (1990).

medical treatment.[93] In fact, the Court found that a competent person has the right to refuse life saving nutrition and hydration.[94]

Like forced medical procedures, rape and sexual assault violates the right to bodily integrity. If the state cannot force people to accept life sustaining treatment, it follows that the state cannot force people to have sex against their will. After *Cruzan*, it is clear that compelling people to continue with medical treatment violates the right to possession and control over one's person. Likewise, compelling victims to submit to unwanted intercourse even more strongly violates the right to possession and control over one's person. If the Constitution protects the right to die, it should also protect the right to choose sexual partners.

C. Bodily Integrity Encompasses Compulsory Pregnancies

Finally, in *Roe* and later in *Casey*, the Supreme Court protected the right to control over one's body, or bodily integrity.[95] In *Roe*, the Supreme Court held that a woman's right to terminate her pregnancy is a liberty protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment.[96] Upholding the Court's decision in *Roe*, the Court in *Casey* held, in part, that the undue burden test should be used to evaluate abortion restrictions before viability, and that the spousal notification provision of the statute imposed an undue burden on pregnant women.[97]

In *Casey*, Justice Blackmun found that state restrictions on abortion violate a woman's right to privacy in two ways.[98] First, he argued that "compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm."[99] He added that labor and delivery impose health risks and physical demands on women.[100] Accordingly, "restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts."[101]

Second, restrictive abortion statutes also deprive women of the right to

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93. *See id.* at 278.

94. *See id.*

95. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833, 851 (1992).

96. *See Casey*, 505 U.S. at 851 (referring to *Roe*, 410 U.S. at 153).

97. *Id.* at 899.

98. *Id.* at 927.

99. *Id.*

100. *See id.*

101. Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833, 927 (1992) (citing Winston v. Lee, 470 U.S. 753 (1985) and Rochin v. California, 342 U.S. 165 (1952)).

make their own decisions about reproduction and family planning.[102] Blackmun argued that the decision to terminate a pregnancy has no less an impact on women's lives than decisions about contraception or marriage.[103] Thus, because motherhood has such an impact on women's education and employment opportunities, restrictive abortion laws deprive women of the basic control over their lives.[104]

Forced sex violates a woman's right to bodily integrity in the same ways restrictive abortion legislation violates bodily integrity. First, forced sex, like forced pregnancy, imposes substantial physical intrusions and significant risks of physical harm on the woman. In fact, women are more likely to experience physical harm during rape than in pregnancies. Second, rape is the ultimate way to deprive women of the basic control over their lives. Like choosing whether to terminate a pregnancy, choosing one's sexual partners involves the "most intimate and personal choices a person can make in a lifetime, choices central to personal dignity and autonomy."[105] Therefore, if the constitutional right to bodily integrity protects against compulsory pregnancy, it should also protect against the even more intrusive violation of personhood, namely rape.

D. Bodily Integrity Should Encompass Rape by Public Officials

The right to bodily integrity is the essence of the constitutional right to privacy, as the Supreme Court recognized in *Griswold, Cruzan,* and *Casey.* In those cases, the Supreme Court afforded constitutional protection to personal decisions relating to contraception, medical procedures and abortion. If substantive due process encompasses protection against mandated methods of contraception, forced medical procedures and compulsory pregnancies, surely it encompasses compulsory intercourse or sexual advances by public officials. Because rape implicates the same violations of personal autonomy and control over one's body as the conduct the Court has already determined violates the right to bodily integrity, the courts should apply the decisions in *Griswold, Cruzan,* and *Casey* to rape by public officials. In so doing, courts will expand the constitutional right to bodily integrity to encompass rape by officials. In fact, applying bodily integrity to rape by officials fits well within the rational continuum of substantive due process and is consistent with precedent.

Ultimately, if bodily integrity is not expanded to encompass rape by public officials, there will be a shrinking of the types of civil rights that 18 U.S.C. §242 covers.[106] Once bodily integrity is extended to cover rape by

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102. *See id.*
103. *See id.*
104. *See id.* at 928.
105. *Id.* at 851.
106. *See* Loar, *supra* note 14.

public officials, the Fourteenth Amendment will protect against compulsory sex, just as it currently protects against compulsory contraception methods, medical care, and pregnancy.

III. THE IMPLICATIONS OF EXPANDING BODILY INTEGRITY TO ENCOMPASS RAPE BY PUBLIC OFFICIALS: THE INADEQUACY OF RAPE LAW

Extending the constitutional right to bodily integrity to cover rape by public officials is essential, especially in light of the inadequacy of rape legislation. In America, a woman is raped every six minutes.[107] This means one in five adult women will be raped at some point in their lives.[108] However, both the state and federal rape laws fail to provide victims of rape with an adequate remedy.[109]

A. The Inadequacy of State Rape Laws

The primary problem with state rape laws is that most states still require the victim to prove force or threat of force as an element of rape.[110] The problem is, "unwanted, coerced and violative sex does not always require force."[111] This is especially relevant to the discussion of rape by public officials, since, due to their positions of authority, public officials may exercise coercion but no actual force.[112]

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107. *See Violence Against Women: Victims of the System: Hearings on S. 15 Before the Senate Committee on the Judiciary*, 102nd Cong. 189 (1991).

108. *See Violence Against Women: Victims of the System: Hearings on S. 15 Before the Senate Committee on the Judiciary*, 102nd Cong. 77 (1990).

109. *See* Kerrie E. Maloney, *Gender Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act after Lopez*, 96 COLUM. L. REV. 1876 (1996); *see also* Frazee, *supra* note 11. State rape laws often require the victim to prove force. This is problematic for two reasons. First, rape does not always require force, since coercion or some quid pro quo situation may be frightening enough for the victim to submit to rape, albeit against her will. Second, this puts the onus on the victim to prove that the perpetrator used force and it opens the door for the defense to question the victim's motives, for example, whether she actually wanted and consented to the sex and changed her mind after the fact. Federal rape law, specifically VAWA, relies on state law definitions of crimes of violence, which provides victims only as much protection as the state law provides. In addition, it may be difficult to prove that rape is a crime of violence, especially rape by coercion or manipulation, since rape does not always involve actual physical force.

110. *See* Maloney, *supra* note 109.

111. *Id* at 1888. In support of the argument that not all rapes entail force or violence, see Sally I. Bowie et al., *Blitz Rape and Confidence Rape: Implications for Clinical Intervention*, 64 AM. J. PSYCHOTHERAPY 180 (1990) (explaining that "confidence rape" entails "some nonviolent interaction between the rapist and the victim before the attacker's intention to commit rape emerges").

112. For example, in the *Lanier* case, Judge Lanier implicitly conditioned a victim's receipt of child support payments on his receipt of oral sex. Although he used no actual force, the coercion was equally reprehensible behavior. This type of coercion is analogous to cases of quid pro quo sexual harassment, where the employer conditions some benefit to

Another problem with state rape laws is that criminal trials, applying state laws, are often hostile settings for victims of rape and sexual assault.[113] For example, the victim is often placed under more scrutiny than the defendant[114] and has very little control over the strategy the prosecution chooses to pursue.[115] A trial in federal court, applying the federal rape shield laws,[116] would allow the victim to have more control over her own case.[117]

B. The Inadequacy of the Violence Against Women Act

The inadequacy of state laws in addressing the nation-wide problem of violence against women led to the Violence Against Women Act of 1994 ("VAWA").[118] The VAWA provides the first civil rights remedy to victims of gender motivated violence.[119] The VAWA provides, in pertinent part:

> [a] person . . . who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and other such relief as the court may deem appropriate.[120]

This section, like the state laws that require force, requires "crimes of violence." The requirement for "crimes of violence" can be satisfied only

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the employee on acquiescence to his sexual advances. However, although sexual harassment can be a serious crime, which can include physical contact in the form of sexual assault, it is also a civil law term which includes non-contact abuse. *See* Amicus Brief of the National Organization for Women, U.S. v. Lanier, 1996 WL 468603, at *23.

113. *See* Carolyn Peri Weiss, *Title III of the Violence Against Women Act: Constitutionally Safe and Sound*, 75 WASH. UNIV. LAW Q. 723 n.17 (1997) (citing Frazee, *supra* note 11, at 254).

114. In rape prosecutions applying state law, the federal rape shield statutes do not apply. Therefore, a victim may be questioned about her past sexual history, as well as her current sexuality, raising inferences that the victim actually wanted or even initiated the sexual relations.

115. *See* Weiss, *supra* note 113.

116. *See* FED. R. EVID. 412 is also known as the "rape shield law." Rule 412 states in pertinent part:

> (a) The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in (b) and (c): (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim's sexual predisposition.

State evidence codes differ in this area.

117. *See id.* Weiss considers the possibility that, by allowing the victim to control her own case, "the case itself would become part of the remedy that functions to restore equality" *See* Weiss, supra note 113 (citing Sara E. Lesch, *A Troubled Inheritance: An Examination of Title III of the Violence Against Women Act in Light of Current Critiques of Civil Rights Law*, 3 COLUM. J. GENDER & L. 535, 539 (1993)).

118. 42 U.S.C. § 13981 (1994) [hereinafter "VAWA"].

119. *See* Maloney, *supra* note 109.

120. 42 U.S.C. § 13981(c).

by violent felonies.[121] As discussed above, not all rapes or sexual assaults include traditional forms of violence. Unfortunately, the VAWA definition of "crimes of violence" relies on state law definitions which are often inadequate.[122] Finally, the VAWA is also inadequate since it may not be constitutional.[123]

The inadequacy of the VAWA is best seen by examining its track record. There have been only three cases brought under the VAWA since its enactment in 1994.[124] Surely, with the statistics referred to above, women are clearly not using the VAWA as a remedy for rape. This may be due in part to the excessive level of force that women are required to prove under the VAWA, or the lack of knowledge that a federal rape statute exists.

Therefore, given the above critiques of state and federal rape law, allowing victims of rape to bring suit under Section 242 (via a constitutional right to bodily integrity) would provide alternate remedies for victims of rape and sexual assault by officials. It would alleviate the challenges of proving force under state law, or traditional violence under federal law. In addition, applying Section 242 to rape by public officials appears to comply with the legislative intent behind Section 242. The Supreme Court has indicated that one of the main reasons for the passage of Section 242 was "to afford a federal right . . . because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced, and the claims of citizens to the enjoyment of rights . . . guaranteed by the Fourteenth Amendment might be denied by the state agencies."[125] Because rape by public officials may often involve situations where state laws are not enforced, acknowledging a right to bodily integrity and applying Section 242 to the deprivation of this right would grant victims a more reliable basis for

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121. *See* Frazee, *supra* note 11, at 169. Frazee points out that, because of VAWA's excessive force requirement, victims of sexual assault may have to prove force beyond the definition of the crime itself. This appears to be a harsh requirement, especially given the sensitive nature of rape and sexual assault.

122. *See* 42 U.S.C. § 13981(d)(2); *see also* Frazee, *supra* note 11 (arguing that it seems absurd to create a federal civil rights remedy "dependent on the very state laws whose inadequacies are part of the justification for the federal remedy itself").

123. In light of Congress' potentially diminishing Commerce Clause power under *U.S. v. Lopez*, violence against women may not sufficiently affect interstate commerce to be regulated by Congress. Since there is the possibility that this statute will not withstand judicial scrutiny in the future, the VAWA cannot be considered a sufficient remedy for victims of rape and sexual assault. *See* Frazee, *supra* note 11; Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996) (holding that VAWA was not within the authority of Congress, either under the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment). *But see* Weiss, *supra* note 113 (arguing that VAWA is constitutional even after *U.S. v. Lopez*).

124. *See* Doe v. Abbott Lab., 892 F. Supp. 811 (E.D. La. 1995) (Section (c) of the VAWA does not apply retroactively); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (a domestic violence case); Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996).

125. Abramowitz, *supra* note 2 (quoting Monroe v. Pape, 365 U.S. 167, 180 (1961)).

recovery against an oppressive local regime.[126]

IV. OTHER POTENTIAL SOLUTIONS TO THE INADEQUACY OF FEDERAL RAPE REMEDIES

Because neither federal nor state rape laws provide victims of rape by public officials an adequate remedy, the courts should extend the constitutional right to bodily integrity to cover these situations. However, if the courts do not extend the right to bodily integrity to cover rape by public officials, there are two other potential remedies available.

A. Legislation that Affirms an Individual's Interest in Bodily Integrity

One possible solution in the event the Court does not extend the right to bodily integrity to rape or sexual assault by public officials is for individuals to encourage their legislators to adopt legislation that reaffirms the privacy interest and interest in bodily autonomy established in the Constitution.[127] What this suggests is not a new rape law per se, but a law recognizing bodily integrity as a right that all people share and punishing those who violate this right. Therefore, this potential new legislation would still provide a remedy for the other crimes covered under 18 U.S.C.A. §242 such as abuse by prison guards[128] and excessive force by police officers;[129] however, it would more specifically cover rape and sexual abuse by public officials.

B. Constitutional Amendment

Another possible solution to the problem of rape or sexual assault by public officials is a constitutional amendment. However, given the difficulty of the amendment process,[130] this seems like a last resort to be pursued only if legislation is not created to protect bodily integrity or the courts find that bodily integrity is not a right secured by the Constitution.

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126. Because Section 242 requires only a showing of a deprivation of rights secured by the Constitution or laws of the United States, committed under color of law, victims would need to show only that the perpetrator was acting in his official capacity when he deprived her of her bodily integrity.

127. This solution was suggested by Sally Sutton in her article, *Medical Data Banks Threaten Privacy: Policy Makers and Health Care Providers Need to Take More Precautions to Protect Patient Information*, PORTLAND PRESS HERALD, Feb. 16, 1997, at A1. Although this article deals with privacy issues in medical records, the same solution would work for the issue of rape or sexual assault by public officials.

128. *See, e.g.*, United States v. Georvassilis, 498 F.2d 883 (6th Cir. 1974).

129. *See, e.g.*, U.S. v. Koon, 34 F.3d 1416 (1994).

130. The process to amend the Constitution is very difficult and has been done only four times. Specifically, a proposal requires two-thirds of both houses or two-thirds of the states, and ratification requires three-quarters of all states.

Several groups have already expressed interest in a constitutional amendment if the courts do not acknowledge a constitutional right to bodily integrity. For example, the National Organization for Women ("NOW") has already indicated that it will move forward in an attempt to amend the Constitution if such a right is not established.[131] The administrative head of NOW claims any constitutional amendment on this subject will "be broader than the Equal Rights Amendment of the 1970s. It [will] include the right to freedom of bodily integrity of [one's] person."[132]

V. CONCLUSION

In an era when police officers are raping women who call for help,[133] when border patrol agents are coercing sexual favors from illegal aliens,[134] the President of the United States has been charged with sexual assault,[135] and judges are demanding sexual favors from litigants or court employees, cases like the *Lanier* prosecution illustrate possible actions for victims of rape or sexual assault by public officials.

The Supreme Court has not yet extended the right to bodily integrity to include unwanted sex—and recently, the Court denied certiorari in *Lanier v. U.S.* Nevertheless, this issue will likely return to the High Court for resolution in a future case based on similar facts. When it does, the Court should extend the right to bodily integrity to encompass rape and sexual assault by public officials. Such an extension is consistent with substantive due process precedent and the rational continuum the Court has been creating for decades.

By extending the right to bodily integrity to cover rape by public officials, the courts could then use Section 242 to vindicate the strong federal interest in preventing assaults by state actors.[136] Moreover, application of Section 242 (via a constitutional right to bodily integrity) to rape by public

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131. *See* Catherine Trevison, *More Than a Matter of Molesting*, TENNESSEAN, Jan. 12, 1997, at 1D. The head of the National Organization for Women ("NOW") and NOW's communications director have already written and distributed a press release on the possibility of amending the Constitution to protect women's rights.

132. *Id.* (quoting Ms. Ireland, Head of NOW).

133. *See Two Police Officers Jailed in Rape Case*, S.D. UNION TRIBUNE, Sept. 21, 1997, at A6.

134. *See* United States v. Davila, 704 F.2d 749 (5th Cir. 1983).

135. Paula Jones brought a lawsuit against President Clinton in 1994, alleging that Clinton sexually assaulted her in 1991 while he was Governor of Arkansas. Although the case was dismissed on April 1, 1998, it illustrates the possible applications for the extension of the right to bodily integrity.

136. *See* Brief for the National Organization for Women at *3, n.33, U.S. v. Lanier, 73 F.3d 1380 (6th Cir. 1996) (No. 95-1717). Although this Comment focuses on the *Lanier* case, involving a judge, recognition of a right to bodily integrity would impose penalties on all types of state actors including police, border patrol, and customs officers; members of the armed services; and even the President, who would not be above the Constitution of the United States.

officials would have societal impact of great significance. First, criminally punishing state officials for rape would recognize the severity of the crime.[137] It would send a message to potential state officials that the crime of rape is of such magnitude that committing it is punishable as a violation of civil rights. It would also send a message to victims that they were deprived of a constitutional right, thus adding validity to the victims' claims.

Second, application of Section 242 to rape by state officials would further the federal interest in uniform application of the laws.[138] For the reasons discussed above, state laws may be inadequate to punish state officials for rape and sexual assault, or state officials may be hesitant to take action against one another. Accordingly, application of Section 242, by way of a constitutional right to bodily integrity, would ensure that public officials are punished regardless of limitations on state law remedies.[139]

Finally, because one of the primary purposes of the Constitution is to protect individual liberty, it is appropriate that it be invoked to protect victims of rape and sexual assault by state actors. Judge Martha Craig Daughtrey, who dissented from the Court of Appeals' decision in *U.S. v. Lanier*, argued that "personal security and bodily integrity [are] precious rights protected not only by the U.S. Constitution but by all free and civilized societies."[140] Thus, it follows that a civilized society such as ours would allow constitutional redress for victims of rape by officials who have used their positions of power to coerce and ultimately to scar people under their control.

Stephanie Weiler[*]

137. *See id.* at *4.

138. *See id.* at *25.

139. *See id.*

140. *Trevison, supra* note 131 (referring to U.S. v. Lanier, 117 S. Ct. 1219 (1997)).

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