Essay

UNITED STATES V. LANIER: SECURING THE FREEDOM TO CHOOSE

Johanna R. Shargel*

> What the law owes us is a celebration of our autonomy, and an end at long last to the distrust and suspicion of women victims of simple rape that has been the most dominant and continuing theme in the cases and the commentary.[1]

I. INTRODUCTION

United States v. Lanier[2] presents an opportunity for the law to afford rape victims what Susan Estrich calls a celebration of autonomy. The case involves a Tennessee chancery court judge who sexually assaulted five women, including a litigant appearing before him and several of his own court employees. Judge Lanier lured one woman to his chambers by threatening to remove her custody of her daughter; he ensnared another woman, a local coordinator for a federal public housing program, by offering to cooperate with the program's goal of providing education for publicly housed parents of juvenile delinquents. Literally "clothed with the authority of state law,"[3] Judge Lanier abused his power by raping these

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* Law Clerk, Judge Dorothy W. Nelson, United States Court of Appeals for the Ninth Circuit; J.D., Yale University, 1997; B.A., *summa cum laude*, Phi Beta Kappa, Yale University, 1993.

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1. SUSAN ESTRICH, REAL RAPE 102 (1987).

2. 117 S. Ct. 1219 (1997).

3. United States v. Classic, 313 U.S. 299, 326 (1941). The *Classic* Court established the following widely cited definition of action taken under color of state law: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* Although the Court did not resolve whether Judge Lanier's actions were taken under color of state law, leaving the issue for the Sixth Circuit's consideration on remand, *see Lanier*, 117 S. Ct. at 1222 n.2, Justice Souter's brief recounting of the facts of the case suggests that the sexual assaults were indeed committed under color of state law. Justice Souter wrote:

> The two most serious assaults were against a woman whose divorce proceedings had come before Lanier and whose daughter's custody remained subject to his

women in his chambers, once even while wearing his judicial robe.

Born to a politically prominent family, Judge Lanier served as alderman and mayor of Dyersburg, Tennessee before being elected to the bench in 1982.[4] As one of the judges of the Sixth Circuit observed, "It was clear that Judge David W. Lanier was not going to be called into account for his misdeeds and judicial misconduct by local or county officeholders who had been beholden to the longstanding sway of the Lanier dynasty."[5] In fact, Judge Lanier's brother was district attorney during the events in question.[6] It is not surprising, therefore, that although the sexual assaults were committed between 1989 and 1991, no state charges had been brought by the time federal prosecutors intervened in 1992.

The federal prosecutors indicted Judge Lanier under 18 U.S.C. § 242,[7] a Reconstruction Era civil rights statute providing for criminal penalties. The indictment alleged that he had willfully and under color of state law deprived his victims of the "rights and privileges which are secured and protected by the Constitution and the laws of the United States, namely the right not to be deprived of liberty without due process of law, including the right to be free from wilful sexual assault."[8] The trial judge instructed the jury that the liberty interest embodied in the Fourteenth Amendment:

> provides that no person shall be subject to physical or bodily abuse without lawful justification by a state official acting or claiming to act under the color of the laws of any state of the United States when that official's conduct is so demeaning and harmful under all the circumstances as to shock one's conscience. Freedom from such

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jurisdiction. When the woman applied for a secretarial job at Lanier's courthouse, Lanier interviewed her and suggested that he might have to reexamine the daughter's custody. When the woman got up to leave, Lanier grabbed her, sexually assaulted her, and finally committed oral rape. A few weeks later, Lanier inveigled the woman into returning to the courthouse again to get information about another job opportunity, and again sexually assaulted and orally raped her.

Id. at 1222–23. This factual summary unmistakably highlights what the *Classic* Court called "misuse of power": Judge Lanier would not have been in a position to commit the sexual assaults but for his judicial authority. In the view of the Sixth Circuit panel opinion in *Lanier*, "all of the assaults took place in defendant's chambers during working hours, and during each assault, there was at least an aura of official authority and power." United States v. Lanier, 33 F.3d 639, 653 (6th Cir. 1994), *vacated*, 43 F.3d 1033 (6th Cir. 1995), *reh'g en banc*, 73 F.3d 1380 (6th Cir. 1996).

4. *Lanier*, 33 F.3d at 646.

5. United States v. Lanier, 73 F.3d 1380, 1394 (6th Cir. 1996) (en banc) (Wellford, J., concurring in part and dissenting in part), *vacated*, 117 S. Ct. 1219 (1997); *see also id.* at 1400 ("It is undeniable that Judge Lanier wielded tremendous power and influence in the Dyersburg, Tennessee community.") (Keith, J., dissenting).

6. DARCY O'BRIEN, THE POWER TO HURT 40 (1996).

7. 18 U.S.C. § 242 (1994) provides, "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person...to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States...shall be fined under this title, or imprisoned...."

8. United States v. Lanier, 117 S. Ct. at 1223 (citation omitted).

> physical abuse includes the right to be free from certain sexually motivated physical assaults and coerced sexual battery.[9]

A jury found Judge Lanier guilty of violating section 242 and a panel of the Sixth Circuit Court of Appeals affirmed the conviction.[10] On rehearing en banc, however, the Sixth Circuit reversed the section 242 conviction, holding that sexual assault by a state actor is not a federal crime.[11] Further, the court held that Judge Lanier had not received fair warning that his conduct violated federal law, because the Supreme Court had neither specifically identified sexual assault as a due process violation nor applied due process "to a factual situation fundamentally similar to the one at bar."[12]

The Supreme Court unanimously vacated the Sixth Circuit's en banc opinion.[13] The Court's decision, however, failed to address the core issue—whether sexual assault can be prosecuted as a constitutional violation—instead focusing exclusively on issues of notice and fair warning. In a curiously brief opinion, the Court held that the Sixth Circuit had erred in requiring notice from a prior decision "fundamentally similar" to the case being prosecuted.[14] The Court explained that the correct notice standard to be applied in cases brought under section 242 is the same standard that attaches to cases prosecuted under the civil analogue of section 242, 42 U.S.C. § 1983.[15] The necessary question under both statutes is whether decisions interpreting the Constitution have "clearly established" that liability may be imposed under given circumstances[16]—whether "in the light of pre-existing law the unlawfulness [under the Constitution] is apparent."[17]

The Court remanded the case to the Sixth Circuit "for application of the proper standard."[18] But because the heart of the matter—the constitutional status of sexual assault—remains undecided, there is a significant chance that the Supreme Court will hear the case a second time. As Linda Greenhouse of the *New York Times* predicted, "It is possible, even likely, that the case will come before the

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9. *Id.* (citation omitted).

10. United States v. Lanier, 33 F.3d 639 (6th Cir. 1994), *vacated*, 43 F.3d 1033 (6th Cir. 1995), *reh'g en banc*, 73 F.3d 1380 (6th Cir. 1996).

11. *See* United States v. Lanier, 73 F.3d 1380, 1388–89 (6th Cir. 1996) (en banc), *vacated*, 117 S. Ct. 1219 (1997).

12. *Id.* at 1393.

13. *Lanier*, 117 S. Ct. at 1228.

14. *Id.* at 1226.

15. Section 1983 provides a civil rights cause of action against any person who, acting under color of state law, deprives a citizen of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1994).

16. *Lanier*, 117 S. Ct. at 1223. The *Lanier* Court was careful to note that "the universe of relevant decisions" is not confined to Supreme Court opinions: "[T]he Court has specifically referred to Court of Appeals decisions in defining the established scope of a constitutional right." *Id.* at 1226.

17. *Id.* at 1228.

18. *Id.* at 1228.

Supreme Court again no matter which side prevails before the appeals court."[19]

The argument that the Constitution safeguards the right to freedom from sexual assault by a state actor was articulated at many different stages of the *Lanier* case, and by many different voices. Yet the theory driving these various formulations of the argument has remained constant. The trial judge,[20] the appeals panel,[21] the en banc dissents,[22] the Justice Department,[23] and several amicus briefs[24] all adopted the view that the right to be free from sexual assault by a state actor stems from the broader due process protection of bodily integrity. Relying primarily on *Rochin v. California*,[25] *Ingraham v. Wright*, [26] and several other *procedural* due process cases, these arguments emphasize that the right to personal security is rooted in the well-established "liberty interest" protected by the Due Process Clause.[27]

This Essay offers a related yet alternative basis for recognizing sexual

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19. Linda Greenhouse, *Prosecutors Can Try Again to Convict State Judge in Sexual Assault Case*, N.Y. TIMES, Apr. 1, 1997, at A20.

20. *See Lanier*, 117 S. Ct. at 1223 (quoting trial judge's instructions explaining existence of right to be free from "physical or bodily abuse without lawful justification").

21. *See* United States v. Lanier, 33 F.3d 639, 651–52 (6th Cir. 1994) (recognizing that individuals have a "'historic liberty interest...encompass[ing] freedom from bodily restraint and punishment'" (alteration in original) (quoting Ingraham v. Wright, 430 U.S. 651, 673–74 (1977))), *vacated*, 43 F.3d 1033 (6th Cr. 1995), *reh'g en banc*, 73 F.3d 1390 (6th Cir. 1996).

22. *See* United States v. Lanier, 73 F.3d 1380, 1396 (6th Cir. 1996) (en banc) (Wellford, J., concurring in part and dissenting in part) ("The Supreme Court has recognized that persons, especially females, have a constitutional right to bodily integrity."), *vacated*, 117 S. Ct. 1219 (1997); *id.* at 1410–13 (Daughtrey, J., dissenting) ("[T]he Supreme Court has clearly and consistently proclaimed that the Constitution's due process clause protects an individual from interference with bodily integrity under color of law under circumstances that would shock the conscience of the court."); *see also id.* at 1398–99 (Nelson, J., concurring in part and dissenting in part); *id.* at 1400 (Keith, J., dissenting); *id.* at 1401 (Jones, J., dissenting).

23. *See* Petitioner's Brief at 35–46, *Lanier*, 73 F.3d 1380 (No. 95–1717).

24. *See, e.g.*, NOW Legal Defense and Education Fund Amicus Brief for Petitioner at 4–12, *Lanier*, 73 F.3d 1380 (No. 95–1717).

25. 342 U.S. 165 (1952) (holding that forcibly pumping criminal suspect's stomach to obtain conviction for illegal possession of morphine violates suspect's bodily integrity).

26. 430 U.S. 651 (1977) (holding that disciplinary corporal punishment in public schools constitutes violation of due process right to bodily integrity).

27. *See Lanier*, 73 F.3d at 1410 (Daughtrey, J., dissenting) (citing the Magna Carta, quoted in *Ingraham*, 430 U.S. at 673 n.41, for proposition that "an individual could not be deprived of this right of personal security 'except by the legal judgment of his peers or by the law of the land'"); Petitioner's Brief at 38, *Lanier*, 73 F.3d 1380 (No. 95–1717) (citing *Botsford*, *Ingraham*, and *Rochin* as support for argument that Due Process Clause protects right to be free from wholly unjustified intrusions on bodily integrity). Note that although the government's brief and the *Lanier* dissents cite *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), they do not focus their attention on issues involving autonomy and freedom of choice.

assault by a state actor as a constitutional crime. In addition to violating the victim's right to bodily integrity, sexual assault violates the victim's right to autonomy and free choice. It has been well recognized in contexts other than sexual assault that the due process right to privacy includes both spatial and decisional aspects.[28] For example, Stephen J. Schulhofer has written:

> Two elements of autonomy are relevant. First is the capacity to choose, unconstrained by impermissible pressures and limitations.... The capacity to choose, free of impermissible constraint, is a kind of moral or intellectual autonomy, a structural protection for the formulation and expression of personal preferences and goals.
>
> A second dimension of autonomy is also important. The core concept of personhood inherent in the common law, long protected by the law of tort, implies a physical boundary, the bodily integrity of the individual.[29]

Sexual assault by a state actor implicates both the spatial and decisional elements of autonomy.

The spatial aspect of the right to privacy, the central focus of the *Lanier* briefs, is rooted in the deprivation of bodily integrity without due process of law. It highlights a problem with process, rather than a problem with the nature of the crime itself. The foundational procedural due process case establishing the right to bodily integrity is *Union Pacific Railway Co. v. Botsford*,[30] a nineteenth-century Supreme Court decision. In *Botsford*, the Court upheld the trial court's refusal to order a surgical examination of a woman injured in a railway accident. The Court explained, "No 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*."[31] Similarly, in *Rochin*, a case involving stomach pumping by local sheriffs, the Court objected to state officials "[*i*]*llegally* breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents."[32] The *Rochin* Court largely reacted to the procedures by which the conviction was obtained, analogizing the state officials' conduct to the use of a coerced confession.[33] The Court upheld "the general requirement that States in their prosecutions respect

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28. *See* Whalen v. Roe, 429 U.S. 589 (1977). Writing for a unanimous Court, Justice Stevens explained, "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598–600 (citations omitted). *See also* James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 10–14 (1995).

29. Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 75 (1992).

30. 141 U.S. 250 (1891).

31. *Id.* at 251 (emphasis added).

32. Rochin v. California, 342 U.S. 165, 172 (1952) (emphasis added).

33. *See id.* at 173–74.

certain decencies of civilized conduct."[34] Likewise, in *Ingraham*, the Court held that corporal punishment of children in public schools constitutes a due process violation in the absence of "procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification."[35]

Together, *Botsford*, *Rochin*, and *Ingraham* establish that the state cannot punish or invade the bodies of its citizens without affording them due process of law. All three cases were invoked frequently in the *Lanier* dissents and in the government's brief.[36] The issue raised by *Lanier*, however, does not fit neatly within the framework established by these procedural due process cases. Quite simply, sexual assault can *never* be committed in accordance with due process of law. The trial judge's instruction to the jury in *Lanier* that "no person shall be subject to physical or bodily abuse without lawful justification"[37] was inapt given the facts of the case. There is never a "lawful justification" for sexual assault; there are no imaginable circumstances under which sexual assault would be sanctioned as a means of investigation, prosecution, or punishment.

This Essay argues that sexual assault by a state actor fits more appropriately within the structure of the Court's substantive due process cases, what Schulhofer referred to as the decisional dimension of the right to privacy. In keeping with other substantive due process violations, rape is fundamentally a violation of the victim's decision-making capacity, her personal autonomy.[38] Part II of this Essay demonstrates that rape has been and is most accurately characterized as a crime that destroys freedom of choice at the most basic level. Rape can be distinguished from other types of assault because it violates the victim's autonomy. Drawing on this core characteristic of rape, Part III of this Essay places sexual assault within the framework of the Court's substantive due process jurisprudence. Part IV posits that sexual assault by a state actor should constitute a civil rights violation in order to debunk traditional stereotypes and assumptions about women's free choice on matters relating to sex. If the courts were to construe sexual assault as a violation of substantive due process, they would focus needed and deserved attention on the core element of rape: the destruction of the victim's

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34. *Id.* at 173.

35. Ingraham v. Wright, 430 U.S. 651, 676 (1977).

36. *See supra* notes 22–24; *see also* United States v. Lanier, 73 F.3d 1380, 1396 (6th Cir. 1996) (en banc) (Wellford, J., concurring in part and dissenting in part) (citing Ingraham v. Wright, 430 U.S. 651), *vacated*, 117 S. Ct. 1219 (1997); *id.* at 1398–99 (Nelson, J., concurring in part and dissenting in part) (relying on *Botsford*, 141 U.S. at 251, 252); United States v. Lanier, 33 F.3d 639, 651–52 (6th Cir. 1994) (citing *Ingraham*, 430 U.S. at 673–74), *vacated*, 43 F.3d 1033 (6th Cir. 1995), *reh'g en banc*, 73 F.3d 1380 (6th Cir. 1996).

37. United States v. Lanier, 117 S. Ct. 1219, 1223 (1997).

38. Throughout this Essay, I assume a female victim and a male perpetrator. Although the majority of rapes are consistent with this paradigm, men are also victims of rape. Male/male rapes constitute five percent of reported rapes, and "are believed to be underreported even more than male/female rapes because the stigma is even more extreme." LYNN HECHT SCHAFRAN & DANIELLE BEN-JEHUDA, UNDERSTANDING SEXUAL VIOLENCE 6 (1994).

autonomy. Finally, Part V responds to anticipated criticisms of the argument set forth in this Essay and explains why the proposed constitutional analysis is a feasible and contained solution to the issues presented in *United States v. Lanier.*

II. THE GRAVAMEN OF SEXUAL ASSAULT: A VIOLATION OF AUTONOMY

Sexual assault differs from other forms of assault in that sexual assault turns on the presence or absence of consent. As Sakthi Murphy explained, "Rape is not unique in requiring nonconsent, but its inordinate focus on consent distinguishes it from other areas of the criminal law."[39] The victim's free choice is ruthlessly ignored, and her sense of personal integrity is consequently shattered. Indeed, the comment to the Model Penal Code section on rape presses the point that rape is in its barest essence a violation of autonomy. The comment states, "The law of rape protects the female's freedom of choice and punishes unwanted and coerced intimacy."[40]

The Supreme Court itself has recognized that sexual assault is uniquely damaging because of its violent disregard for the victim's control over her own body and sexuality. In *Coker v. Georgia*,[41] for example, the Court characterized rape's destructiveness in terms of autonomy and personhood. The Court explained:

> 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 for 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."[42]

The *Coker* dissent, written by then Chief Justice Burger and Justice Rehnquist, explicitly stated that rape and simple assault are fundamentally different crimes because of rape's effect on personal integrity. The dissent explained, "The long range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results.... Rape is not a mere physical attack—it is destructive of the human personality."[43]

Many experts and legal academics characterize the essential element of rape as a violation of the victim's deliberative autonomy. According to Susan Griffin, "[r]ape is an act of aggression in which the victim is denied her self-determination."[44] In addition, many experts who focus on recovery from sexual assault acknowledge that the most severe and long-lasting harm produced by rape

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39. Sakthi Murphy, Comment, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 CAL. L. REV. 541, 545–46 (1991) (citations omitted).

40. MODEL PENAL CODE § 213.1 cmt. 4, at 301 (1980).

41. 433 U.S. 584 (1977) (holding that death penalty for rape is disproportionate and excessive punishment violating Eighth Amendment).

42. *Id.* at 597 (citation omitted).

43. *Id.* at 611–12 (Burger, C.J. dissenting).

44. Susan Griffin, *Rape: The All-American Crime*, RAMPARTS, Sept. 1971, at 26.

stems from the violation of autonomy.[45] The rapist's total disregard of the victim's free choice completely destroys the victim's sense of selfhood. Julie A. Allison and Lawrence S. Wrightsman describe the regression to a state of helplessness or dependence that often follows a rape:

> The feeling that one is no longer an independent person is a common one. Former senses of autonomy and competence are replaced by self-doubt. Victims report being confronted with feelings that they no longer have control over their lives and what happens to them. They may have to rely on those close to them to make even the most insignificant decisions.[46]

Findings like these led the Court in *Coker* to determine that rape is "the ultimate violation of self,"[47] distinct from a "mere physical attack."[48] Because rape is fundamentally different from simple assault, and because its harm stems from a denial of self-determination, freedom from sexual assault by a state actor belongs within the category of rights protected by substantive due process.

III. SEXUAL ASSAULT BY A STATE ACTOR AND SUBSTANTIVE DUE PROCESS JURISPRUDENCE

As explained in Part II, sexual assault violates autonomy and free choice. Consequently, protection against rape by a state actor logically falls within the scope of guarantees provided by the Court's substantive due process decisions. As a general principle, these decisions safeguard rights of personhood and individual liberty.[49] This Part argues that because the Constitution and Supreme Court precedent protect against state interference into decisions about whom to marry, whether to terminate a pregnancy, and whether to conceive a child, then certainly the law should protect against state intrusion into the decision about whether and

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45. *See, e.g.*, JUDITH HERMAN, TRAUMA AND RECOVERY 134–35 (1992); Ann Wolbert Burgess, *Rape Trauma Syndrome*, BEHAV. SCI & L., Summer 1983, at 97, 101; Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103 (1993) (arguing that harm of rape is denial of freedom to refuse sex).

46. JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, RAPE: THE MISUNDERSTOOD CRIME 155 (1993).

47. 433 U.S. at 597.

48. *Id.* at 612 (Burger, C.J., dissenting).

49. Although a number of cases and commentators argue that the substantive due process approach was permanently invalidated by the Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), the modern substantive due process cases, involving personal rather than economic liberty, seem to stand on firm ground. Constitutional law scholar Gerald Gunther explains, "Griswold and Roe were not sudden revivals of substantive due process: in one sense, they built on an aspect of the Lochner tradition that never wholly died.... [S]ome of the Lochner era decisions did protect personal rights; and the modern Court has had no qualms about citing those decisions." GERALD GUNTHER, CONSTITUTIONAL LAW 491 (12th ed. 1991). For a less optimistic view of the continuing vitality of substantive due process, see *infra* note 72.

with whom to engage in sexual relations.[50]

In substantive due process decisions since 1967,[51] the Court has described the liberty interest that inheres in the Due Process Clause as serving an autonomy-protecting function—what James E. Fleming has called "deliberative autonomy."[52] In a foundational substantive due process case, *Loving v. Virginia*,[53] the Court invalidated a state ban on interracial marriage, explaining that the Due Process Clause guards free choice with respect to the most personal decisions:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.... The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.[54]

The *Loving* Court succinctly described what serves as the core of substantive due process: the protection of autonomous decision making vis-à-vis "vital personal rights."

In *Eisenstadt v. Baird*,[55] the Court broadened the scope of substantive due process to include decisions beyond marriage. Whereas in *Griswold v. Connecticut*, the Court held that a state law forbidding the distribution of contraceptives to married people invaded the constitutionally protected zone of marital privacy,[56] the *Eisenstadt* Court extended the same rule and logic to unmarried persons. Rather than focusing on a zone of privacy inherent in the marital relationship, the *Eisenstadt* Court emphasized the right of individuals to make autonomous decisions. The Court explained:

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50. Purely on the level of subject matter categorization, the right to be free from sexual assault belongs naturally in a category with the rights currently protected by the Supreme Court's substantive due process jurisprudence. As the Court recently announced in *Albright v. Oliver*, 510 U.S. 266 (1994), "[P]rotections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Id.* at 272. For a further discussion of rape's relation to marriage, family, and procreation, see *infra* note 83.

51. In the leading substantive due process case before 1967, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court struck down a state statute forbidding the use of contraceptives. The court avoided an individual autonomy approach, reasoning instead that a law prohibiting contraceptive use would have a "maximum destructive impact" upon the marriage relationship, which lies within a "zone of privacy." *Id.* at 485.

52. *See* Fleming, *supra* note 28.

53. 388 U.S. 1 (1967).

54. *Id.* at 12.

55. 405 U.S. 438 (1972).

56. *See Griswold*, 381 U.S. at 485. As mentioned *supra* note 51, the *Griswold* Court focused exclusively on the sanctity of the marital relationship, rather than on issues of autonomy and individual decision making. *See Griswold*, 381 U.S. at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[57]

A year later, in *Roe v. Wade*,[58] the Court continued its focus on personal decision making in the area of substantive due process. In *Roe* it acknowledged that "the Fourteenth Amendment's concept of personal liberty...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[59] The Court affirmed this principle more recently in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[60] There, the Court stated that the decision whether or not to bear a child is an intimate, self-defining choice that an individual should be permitted to make free of state interference. The Court explained:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[61]

In a separate opinion, Justice Stevens sharpened the concept of deliberative autonomy. He wrote:

> The woman's constitutional liberty interest...involves her freedom to decide matters of the highest privacy and the most personal nature.... Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences...but it must respect the individual's freedom to make such judgments.[62]

Continuing the course of granting autonomy to individuals with respect to fundamental life decisions, the Court in *Cruzan v. Director, Missouri Department of Health*[63] held that substantive due process encompasses the right to refuse unwanted medical treatment.[64] If, as the above cases establish, a person's substantive due process right involves the "freedom to decide matters of the

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57. *Eisenstadt*, 405 U.S. at 453.
58. 410 U.S. 113 (1973).
59. *Id.* at 153.
60. 505 U.S. 833 (1992).
61. *Id.* at 851 (citations omitted).
62. *Id. at* 915–16 (Stevens, J., concurring in part and dissenting in part).
63. 497 U.S. 261 (1990).
64. *See id.* at 278–79.

highest privacy and the most personal nature,"[65] then certainly the same constitutional liberty interest encompasses a person's right to make choices about her own sexual conduct.

These substantive due process cases also stand for the proposition that whether a constitutional right has been violated is determined by balancing the liberty interest at stake against relevant state interests that are inconsistent with the individual interest. For example, in *Cruzan*, the Court explained:

> "[W]hether [an individual's] constitutional rights have been violated must be determined by balancing [her] liberty interests against the relevant state interests."
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> ....
>
> ...Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest....
>
> But...a State has more particular interests at stake. The choice between life and death is a deeply personal decision.... We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements.[66]

Similarly, in *Casey*, the Court held that a woman's freedom to terminate a pregnancy may in some circumstances be compromised by a state's valid interest in protecting fetal life:

> The woman's liberty is not so unlimited...that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.[67]

In *Lanier*, in contrast, there are no competing state interests to be considered: Clearly, the state can have no possible legitimate interest in sexually assaulting its citizens. As the Sixth Circuit itself stated in a section 1983 case involving the

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65. *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part).

66. *Cruzan*, 497 U.S. at 279–81 (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

67. *Casey*, 505 U.S. at 869. The *Casey* Court established the following standard for determining the proper balance between the state's interest in protecting unborn life and the woman's privacy interest: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* at 874. Applying this "undue burden" standard, the Court upheld the informed consent provision of Pennsylvania's abortion statute, which required the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks of abortion and childbirth, and the probable gestational age of the fetus. *See id.* at 883. The Court also upheld the statute's 24-hour waiting period, *see id.* at 887, but invalidated the statute's spousal notification provision, *see id.* at 895.

sexual abuse of schoolchildren by publicly employed teachers, "This conduct is so contrary to fundamental notions of liberty and *so lacking of any redeeming social value*, that no rational individual could believe that sexual abuse by a state actor is constitutionally permissible under the Due Process Clause."[68] Although there are some rights protected by substantive due process about which "[m]en and women of good conscience can disagree"[69] and which the state can reasonably and legitimately limit, freedom from sexual assault by a state actor is not one of those rights. Therefore the Court's substantive due process jurisprudence, which safeguards autonomy and free choice, should provide blanket constitutional protection against sexual assault by a state actor.

Consistent with the model of analysis presented in this Essay, academic commentators have characterized the Court's substantive due process jurisprudence as fundamentally concerned with the right to deliberative autonomy. According to David A.J. Richards:

> The right to privacy was recognized because it is associated with and intended to facilitate the exercise of autonomy in certain basic kinds of choice that bear upon the coherent rationality of a person's life plan.... Certain choices in life are taken to bear fundamentally on the entire design of one's life, for these choices determine the basic decisions of work and love, which in turn order many of the subsidiary choices of human life.... From the earliest life of the infant to quite old age, the development and exercise of autonomous choice underlies the deepening individuation of the person.[70]

Of course, the Due Process Clause does not protect the exercise of autonomy in every decision bearing on a person's "life plan." However, the Constitution does seem to protect those decisions that are most personal, those that are most self-defining: choices about whom to marry, the use of birth control, and the termination of pregnancy. Former Chief Justice Burger characterized the category of protected decisions as those "implicit in the concept of ordered liberty."[71] This frequently cited standard has been criticized for its vagueness, and many have questioned the validity and extent of substantive due process as

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68. Doe v. Claiborne County, 103 F.3d 495, 507 (6th Cir. 1996) (emphasis added). It is worth noting that the *Doe* dissent posited that the majority opinion contradicted its earlier ruling in *Lanier*. *See* 103 F.3d at 516.

69. *Casey*, 505 U.S. at 850.

70. David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy*, 30 HASTINGS L.J. 957, 999–1000 (1979) (citations omitted).

71. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)). Recently, in a separately reported concurring opinion to *Vacco v. Quill*, 117 S. Ct. 2293 (1997), a case upholding New York's ban on physician assisted suicide, Justice Stevens wrote that "the outer limits of the substantive sphere of liberty...have never been precisely defined. They are generally identified by the importance and character of the decision confronted by the individual." Vacco v. Quill, 117 S. Ct. 2302, 2307 (1997) (Stevens, J. concurring).

manifested in the modern privacy cases.[72] But however substantive due process is ultimately shaped and defined, it clearly encompasses the most basic, most intimate decisions: choices that control, rather than simply affect, the definition of self. As Joel Feinberg explains:

> It is not simply in virtue of being primarily self-regarding that decisions involving marital sex and family planning fall within the zone of constitutional privacy. If that were all, then decisions whether or not to wear protective helmets, seat belts, and life preservers would be similarly protected. Rather, the Court, in its various ways, has circumscribed as "private" those decisions that involve the most *basic* of the self-regarding decisions.... The boundary line, in short, tends to follow, however erratically, the line of those liberties which are most fecund, those exercised in the pivotally central life decisions and thereby underlying and supporting all the others.[73]

If the decision whether or not to use birth control is a "pivotally central life decision," then certainly the decision whether or not to be sexually intimate in a particular situation is as well. Consequently, the decision whether or not to be sexually intimate should also be protected by the due process guarantee of deliberative autonomy.

It is worth noting, however, that some feminist scholars, Catharine A. MacKinnon, for example, argue that the concept of deliberative autonomy should not be invoked to defend women's rights because the same principle historically has been used to oppress women.[74] It seems that MacKinnon and others conflate deliberative autonomy and the "right of men to be let alone to oppress women."[75] They fail to recognize that the two types of privacy rights are actually entirely distinct. While it is true that courts in the past have employed the rhetoric of privacy to deny women protection from domestic violence,[76] courts have not invoked substantive due process cases to defend marital rape exemptions or to

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72. *See, e.g.*, JOHN T. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 189 (1979) ("The liberty established by *The Abortion Cases* has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitimate and unprincipled, the imposition of the personal beliefs of seven justices...."); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 239 (1990) ("The current Court's reliance on its judgments of traditionally fundamental forms of privacy to decide which claims merit strict scrutiny is inarguably unpredictable.").

73. Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 489–90 (1983).

74. *See* CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED 93, 102 (1987). Other feminist scholars have espoused a similar view. *See, e.g.*, Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights,"* 59 U. CHI. L. REV. 453, 453–55 (1992); Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 454–61 (1992).

75. MACKINNON, *supra* note 74, at 103 (footnote omitted).

76. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

shield domestic violence from state intervention.[77] James E. Fleming writes, "Deliberative autonomy is an antitotalitarian principle of liberty that works in tandem with, rather than as a shield against, an antisubordination or anticaste principle of equality."[78]

Others who reject the idea of deliberative autonomy and its application to sexual assault by a state actor will undoubtedly point to *Bowers v. Hardwick*.[79] In *Bowers*, the Supreme Court held that there is no substantive due process right to engage in homosexual sodomy.[80] Of course, many academics have maintained that *Bowers* is inconsistent with the series of substantive due process cases discussed above, that the Court's substantive due process jurisprudence logically must include the right to engage in homosexual acts.[81] As Richards argues, "If the right to privacy extends to sex among unmarried couples or even to autoeroticism in the home, it is difficult to understand how in a principled way the Court could decline to consider fully the application of this right to private, consensual, deviant sexual acts."[82]

But assuming arguendo that *Bowers* is consistent with the Court's autonomy-protecting cases, the right to engage in homosexual conduct is readily distinguishable from the right to be free from sexual assault by a state actor. First, whereas the *Bowers* Court objected to the fact that "[n]o connection between family, marriage, or procreation...and homosexual activity...has been demonstrated,"[83] there is an obvious and direct link between sexual assault and issues surrounding family, marriage, and procreation.[84] Second, the *Bowers* Court

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77. *See* Fleming, *supra* note 28, at 47; Linda C. McClain, *Inviolability and Privacy*, 7 YALE J.L. & HUMAN. 195, 207–20 (1995).

78. Fleming, *supra* note 28, at 47.

79. 478 U.S. 186 (1986).

80. *See id.* at 192.

81. *See, e.g.*, David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 862 (1986) ("Justice White's claims of constitutional illegitimacy cannot be sustained, and indeed...paradoxically mask an argument that is itself unprincipled, and therefore illegitimate."); Thomas B. Stoddard, Bowers v. Hardwick*: Precedent by Predilection*, 54 U. CHI. L. REV. 648, 649, 653 (1987) (arguing that *Bowers* is "difficult to square" with the Court's previous privacy decisions and therefore "rests upon nothing more substantial than the collective distaste of the five justices in the majority"); Brett J. Williamson, Note, *The Constitutional Privacy Doctrine After* Bowers v. Hardwick, 62 S. CAL. L. REV. 1297 (maintaining that *Bowers* should be overruled and therefore removed from the Court's substantive due process jurisprudence). Some commentators have taken the opposite tack. Rather than insisting that *Bowers* should be overruled, they argue that *Bowers* severely undermined the Court's modern substantive due process jurisprudence. *See, e.g.*, Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 242 (1987) ("*Bowers* itself represents the death of substantive due process as a principled doctrine of law.").

82. Richards, *supra* note 70, at 981 (citations omitted).

83. *Bowers*, 478 U.S. at 191.

84. Ann Burgess and Linda Holmstrom, who coined the phrase "Rape Trauma Syndrome" (RTS), found that rape profoundly impacts victims' sexual relationships, which in turn affect their marriages and chances for procreation. *See* Ann Wolbert Burgess & Linda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 984 (1974).

opinion addressed private sexual conduct between *consenting* adults;[85] sexual assault, of course, is nonconsensual conduct. Third, the *Bowers* opinion focused largely on the fact that "[p]roscriptions against [sodomy] have ancient roots."[86] In stark contrast, proscriptions against rape span countless cultures and centuries.[87]

Lower courts also have refused to recognize the existence of a liberty interest protected by the Due Process Clause in the related context of same-sex marriage. Although the Hawaii Supreme Court recently became the first court to invalidate a state statute restricting gay marriage,[88] the court based its holding exclusively on equal protection grounds, blatantly rejecting the possibility of a due process claim.[89] The court acknowledged that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause,"[90] but concluded that "the federal construct of the fundamental right to marry...presently contemplates unions between men and women."[91] The court relied on a number of Supreme Court decisions that couple the right to marry with procreation and child rearing.[92] Like the Hawaii court, many academic commentators have also noted the Court's repeated linking of marriage and

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RTS symptoms related to sexual activity include decreased sexual activity and termination of primary relationships. One victim reported five months after her rape, "There are times I get hysterical with my boyfriend. I don't want him near me." *Id.* at 984. One 72-year-old woman reported living a nonsexual lifestyle, never marrying, and remaining at home until she was the last living member of her family, all because she was raped when she was 22 years old. *See* Burgess, *supra* note 45, at 108. Many other sources confirm Burgess' and Holmstrom's findings. *See, e.g., In re* Pittsburgh Action Against Rape, 428 A.2d 126, 138 (Pa. 1981) (Larsen, J., dissenting) (recounting the following RTS experience: "I experienced so much during those first two months: hurt, anxiety, anger, frustration, humiliation, and worst of all, the sense that I was having a nervous breakdown.... I couldn't even sleep with my husband."); Kenneth M. Gordon, *Rape Trauma Syndrome in Sexual Assault Cases*, 20 COLO. LAW. 2509, 2509 (1991) ("It is common to see women who have been sexually assaulted...become sexually frigid. They may avoid all men or men who look like the rapist.").

85. *See Bowers*, 478 U.S. at 190–91.

86. *Id.* at 192.

87. *See* Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1780–85 (1992) (surveying various legal systems' proscription of rape over many centuries).

88. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). Prior to the Hawaii court's decision, a number of courts had reviewed the issue and denied the right to gay marriage. Some courts relied on the Due Process Clause in rejecting challenges to state statutes banning gay marriage. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). As the Minnesota court explained in *Baker*, "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.... The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation." *Id.* at 186 (citations omitted).

89. *See Baehr*, 852 P.2d at 57.

90. *Id.* at 55 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

91. *Id.* at 56.

92. *See, e.g., id.* (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)) (marriage and procreation are "fundamental to the very existence and survival of the race"); *id.* (quoting Zablocki v. Redhail, 434 U.S. 374, 384–386 (1978)).

procreation.[93]

Here again, applying substantive due process in *Lanier* differs considerably from applying it to same-sex marriage. Courts and commentators have identified at least four viable state interests that support the ban on same sex marriage: The ban fosters procreation, encourages morality, preserves traditional family stability, and supports laws against homosexual acts.[94] Again, no comparable state interests weigh against the right to make autonomous decisions about sex.[95] No imaginable countervailing state interest exists that could support denying women's free choice in this matter. Indeed, protecting women's right to make decisions about sex is entirely consonant with state interests in safeguarding procreation, marriage, moral order, and the structure of currently existing laws against rape. In sum, neither *Bowers* nor state courts' decisions regarding same-sex marriage preclude a finding that substantive due process protects the right to freedom from sexual assault by a state actor.

IV. CELEBRATING AUTONOMY: WHY SEXUAL ASSAULT BY A STATE ACTOR SHOULD BE RECOGNIZED AS A CIVIL RIGHTS VIOLATION

Parts II and III of this Essay explain why the right to be free from sexual assault by a state actor is able to fit within the framework of the Court's current substantive due process jurisprudence. This Part addresses a more subjective question: why state interference with sexual autonomy *should* be deemed a constitutional crime.

From a historical perspective, the law has never truly respected or honored women's sexual autonomy. Although laws against rape have long existed, these laws were not devised or intended to protect women's free choice. Rather, rape laws were originally enacted to protect men's proprietary interest in their daughters or wives; the punishment of rape was conditioned on the victim's relationship with a father or husband.[96] As one legal academic explains, "[E]very

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93. *See, e.g.*, Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379, 1414 (1993) (stating that Supreme Court continually links procreation and marriage); Mary N. Cameli, Note, *Extending Family Benefits to Gay Men and Lesbian Women*, 68 CHI.-KENT L. REV. 447, 448 (1992) (indicating that Supreme Court continually views marriage through procreation spectrum).

94. For a discussion of the various state interests offered for outlawing same-sex marriage, see, for example, John Dwight Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—Or Mary and Alice at the Same Time?*, 10 J. CONTEMP. L. 33, 46–50 (1984); Kevin Aloysius Zambrowicz, Comment, *"To Love and Honor All the Days of Your Life": A Constitutional Right to Same-Sex Marriage?*, 43 CATH. U. L. REV. 907, 943–48 (1994); Lisa M. Farabee, Note, *Marriage, Equal Protection, and the New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237, 271–73 (1996).

95. *See supra* text accompanying notes 68–69.

96. *See* LORENNE M.G. CLARK & DEBRA L. LEWIS, RAPE: THE PRICE OF

society has punished rape, but only to the end of reinforcing the interests of males in controlling sexual access to females.... [T]hese crimes were not punished to secure the freedom or security of women as individuals."[97] Describing the common-law refusal to acknowledge women's decisions with regard to sex, Susan Estrich writes, "In matters of sex, the common law tradition views women ambivalently at best: Even when not intentionally dishonest, they simply cannot be trusted to know what they want or to mean what they say."[98]

Vestiges of these historical attitudes toward women and rape still exist. For example, many states currently have laws that deny the sexual autonomy of married women. Although most states no longer have marital rape exemptions, four states—Kentucky, Louisiana, Oklahoma, and South Carolina—have retained them.[99] Moreover, many states that have abolished the marital rape exemption still treat marital rape differently from nonmarital rape, either by imposing less severe penalties on perpetrators of marital rape[100] or by creating higher legal standards for proving marital rape than for proving nonmarital rape.[101] As the persistence of some form of marital rape exemption or leniency indicates, rape law still does not ensure women's individual autonomy and free choice in matters of sex; rather, the law is structured to secure and maintain men's property interests in their wives' sexuality. If the Sixth Circuit or the Supreme Court in *Lanier* were to hold that the Due Process Clause guarantees women's right to be free from sexual assault by a state actor, thereby vindicating women's choices concerning their own sexual conduct, the decision would contribute significantly to dissolving deeply rooted barriers to women's autonomy.[102] Applying the substantive due process rhetoric

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COERCIVE SEXUALITY (1977). Clark and Lewis argue that women's sexuality has historically been a form of private property over which women had virtually no control. Marriage, which facilitated the transference of property from father to husband, gave the husband "an absolute right to exclusive sexual access to his wife.... It denied the wife any right to sexual or reproductive autonomy." *Id.* at 115; *see also* Dripps, *supra* note 87, at 1780–85.

97. Dripps, *supra* note 87, at 1780–81.

98. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1122 (1986).

99. *See* KY. REV. STAT. ANN. § 510.035 (Michie Supp. 1996); LA. REV. STAT. ANN. § 14.43 (West Supp. 1997); OKLA. STAT. ANN. tit. 21, § 1111(B) (West Supp. 1997); S.C. CODE ANN. § 16–3–658 (Law. Co-op. Supp. 1996).

100. *Compare, e.g.*, W. VA. CODE § 61–8B–3 (1992 & Supp. 1996) (first degree sexual assault is punishable by imprisonment of not less than 15 nor more than 35 years), *with id.* § 61–8B–6 (sexual assault of a spouse, while still a felony, is punishable by imprisonment of not less than two nor more than 10 years).

101. *Compare, e.g.*, MISS. CODE ANN. § 97–3–95(1)(a) (1972 & Supp. 1996) (defining sexual battery as penetration of another person without his or her consent), *with id.* § 97–3–99 (providing that spouse of alleged victim may only be found guilty of sexual battery if spouse engaged in forcible sexual penetration without consent of alleged victim).

102. The recently enacted federal rape shield statute represents one significant step toward eradicating historically based cultural assumptions that deny women's autonomy. Federal Rule of Evidence 412 prohibits the introduction at trial of reputation or opinion evidence of a rape victim's sexual history. FED. R. EVID. 412. Several legal academics have noted that one of the purposes behind the statute was to safeguard women's free decision making in matters of sex. As Sakthi Murphy explains, "[A] woman's freedom to choose her sexual partners is not thwarted by the assumption that if she consents to sex

regarding deliberative autonomy to sexual assault by a state actor would bring new and sharper focus to women's decision making in matters of sex.

V. A RESPONSE TO OVERFEDERALIZATION OBJECTIONS

There are two anticipated objections to extending the reach of 18 U.S.C. § 242 to sexual assault by a state actor, and both objections involve issues of federalism. First, some may argue that state law adequately vindicates women's autonomy interests vis-à-vis sexual assault. Thus, expanding section 242 to encompass sexual assaults by state actors would be an unwarranted federalization of rape law, traditionally a matter of state jurisdiction. The second objection posits that extending section 242 would in effect create a slippery slope: Once sexual assault by a state actor is brought within the scope of federal civil rights law, the set of constitutional crimes will expand indefinitely. The concern is that if the substantive due process analysis presented in this Essay is adopted by the courts, every crime would be deemed to affect the victim's free choice and therefore be brought within the scope of federal control when a state actor is responsible. This Part addresses both potential objections in turn.

In response to the first line of attack, that extending section 242 to sexual assault by a state actor would unjustifiably federalize the law of rape, I would argue that the expansion is an appropriate and narrowly tailored solution to existing problems with state enforcement of laws against sexual assault. Recently gathered evidence indicates that state criminal justice systems do not adequately protect rape victims.[103] For example, at legislative hearings on the Violence Against Women Act of 1994 (VAWA), witnesses and experts, as well as studies and reports, documented the widespread failure of state systems to enforce laws against rape. As Senator Joseph Biden summarized on introducing the civil rights provision of the VAWA to Congress: "[I]t is easier to convict a car thief than a rapist; authorities are more likely to arrest a man for parking tickets than for beating his wife."[104] Apparently, gender bias contaminates every level of the state system; insensitive and unresponsive treatment by police,[105] prosecutors,[106] and judges[107] often results in low

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once, she loses her legal right to say no." Murphy, *supra* note 39, at 552; *see also* Garth E. Hire, Note, *Holding Husbands and Lovers Accountable for Rape*, 5 S. CAL. REV. L. & WOMEN'S STUD. 591, 608 (1996) (stating that goal of federal and state rape shield laws is to enhance women's autonomy).

103. *See generally Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1530–43 (1993) [hereinafter *Developments in the Law*] (indicating insufficiency of recent state reforms of domestic violence laws, arrest and prosecution policies, and sentencing and treatment programs); W.H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 595–99 (1993) (describing formal and informal barriers to gender equality in state criminal justice systems).

104. 137 CONG. REC. S598 (daily ed. Jan. 14, 1991) (statement of Senator Biden).

105. *See, e.g., Crimes of Violence Motivated by Gender: Hearings on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 116, 118 (1993) (statement of the Fund for the Feminist Majority) (reporting that "23% of women who decline from reporting their being raped to the police

reporting and conviction rates.

Of course, it would be unacceptable for Congress to remedy these state problems by instituting a comprehensive federal law of rape. It is well established that the criminal law traditionally has been reserved for state definition and regulation.[108] Extending section 242 to sexual assaults committed by state actors, however, would not alter this basic allocation of jurisdiction. Section 242 would cover only the small and distinct subset of sexual assaults committed by state officials acting under color of state law.[109]

Although extending section 242 to cover rape would only address a relatively small piece of the very large problem of state failure to protect against sexual assault, there is a reason why this is a critical and appropriate area for federal regulation. The problem of state failure to enforce laws against rape is obviously compounded when the offender himself is a state administrator. The facts of the *Lanier* case offer a striking illustration of this phenomenon. Judge Lanier's brother was the county prosecutor and his family had "occupied positions of power and political authority in Dyersburg, Dyer County, Tennessee, for several generations."[110] It is therefore doubtful that his criminal conduct would ever have been prosecuted in state court. In the end, Judge Lanier's sexual assaults were exposed and federally prosecuted only because of an unrelated federal investigation into suspected political corruption involving Judge Lanier and his brother.[111] Were it not for these unusual circumstances, Judge Lanier probably would never have been held accountable for his crimes. Considering the problems

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do so because they thought the police would be inefficient, ineffective, or insensitive").

106. As Victoria Nourse, one of the drafters of the VAWA, explained:

> Witnesses told of counties in which no acquaintance rape prosecutions had been brought.... They quoted from Justice Department studies showing that most domestic violence cases caused injuries as serious as most felonies and, yet, experience demonstrated that most domestic violence crimes were charged as misdemeanors. They testified about threats to witnesses routinely prosecuted in drug cases but ignored in domestic abuse cases.

Victoria F. Nourse, *The Violence Against Women Act: A Legislative History*, *in* VIOLENCE AGAINST WOMEN: LAW & PRACTICE (forthcoming 1997).

107. *See, e.g.*, S. REP. NO. 197, 102d Cong., 1st Sess., at 47 n.63 (1991) (reporting that nearly "a quarter of [Washington state judges] believed that rape victims 'sometimes' or 'frequently' precipitate their sexual assaults because of what they wear and/or actions preceding the incidents").

108. For a recent statement of this well-founded proposition, see *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)) ("States possess primary authority for defining and enforcing the criminal law.").

109. To illustrate how narrow the set of rapes covered by section 242 would be, recall that if Judge Lanier had raped a woman he met in a bar at night, or had sexually assaulted his wife at home, those acts would not fall within the scope of section 242, because the judge would not have been acting under color of state law. *See supra* note 3.

110. *United States v. Lanier*, 73 F.3d 1380, 1394 (6th Cir. 1996) (en banc) (Wellford, J., concurring in part and dissenting in part), *vacated*, 117 S. Ct. 1219 (1997); *see supra* notes 5–6 and accompanying text.

111. *See* O'BRIEN, *supra* note 6 (documenting entire history of investigation and prosecution of *Lanier* case).

and pitfalls of state enforcement in the area of rape, federal intervention seems clearly appropriate where a state official has allegedly violated a law that is not being fairly administered by other state officials in the first place.

As with the first potential objection to the extension of section 242, the second objection is also driven by fear of overfederalization. The concern is that if section 242 were to cover sexual assaults committed by state actors, every crime would be brought within the reach of section 242. According to this argument, virtually every crime could be considered destructive of autonomy and therefore a constitutional violation when committed by a state actor. Enlarging the scope of section 242 in *Lanier* would tip the federal-state balance away from the states and flood the already overburdened federal courts. This second overfederalization concern is as unfounded as the first.

Bringing sexual assault within the reach of section 242 would not necessitate the inclusion of a host of other crimes because the set of crimes that warrant substantive due process protection when a state actor is responsible is extremely narrow. In fact, only two crimes decimate free choice and deliberative autonomy—what the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* described as "the heart of liberty...the right to define one's own concept of existence, of meaning, of the universe."[112] One, as Part II of this Essay described, is rape. Common sense instructs that the other crime is murder. In fact, in *Coker v. Georgia*, the Supreme Court itself analogized the destruction caused by rape to that caused by murder. A plurality of the *Coker* Court stated, "Short of homicide, rape is the ultimate violation of self."[113] Moreover, the then Chief Justice Burger and Justice Rehnquist wrote in their dissenting opinion in *Coker* that rape "is not a crime 'light years' removed from murder in the degree of its heinousness."[114] The dissent explained:

> The long-range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results.... Victims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery.[115]

As the *Coker* opinions indicate, rape and murder comprise a unique set of crimes whose harm is "irreparable." They are so destructive of personhood that when inflicted by a state official acting under color of state law, they demand constitutional protection and federal remedy.

Unlike rape, however, our laws sanction murder by a state official acting under color of state law where procedural due process is afforded. In a foundational section 242 case decided in 1945, *Screws v. United States*,[116] the

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112. 505 U.S. 833, 851 (1992).

113. Coker v. Georgia, 433 U.S. 584, 597 (1977) (citation omitted).

114. *Id.* at 620 (Burger, C.J., dissenting).

115. *Id.* at 611–12 (Burger, C.J., dissenting).

116. 325 U.S. 91 (1945) (rejecting vagueness challenge to 18 U.S.C. § 242 (1994)).

Supreme Court plainly stated that in an assault or murder case, section 242 is not violated if the act is inflicted in accordance with due process. The Court explained, "The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States."[117] The facts of *Screws* involved a sheriff, a policeman, and a special deputy who arrested an African-American man for theft and then beat him to death. The Court held that the murder rose to the level of a procedural due process violation because the theft suspect had received a "trial by ordeal instead of a trial in a court of law."[118] The Court's opinion focused on the absence of process, introducing the facts by stating, "This case involves a shocking and revolting episode in law enforcement."[119] The Court continued:

> Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him.... Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed.[120]

Unlike murder or assault, there are no circumstances under which rape could be conceived as a deviant "episode in law enforcement." Whereas procedurally correct assault or murder can be distinguished from procedurally incorrect assault or murder, there is no such thing as procedurally correct rape.

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117. *Id.* at 108–09. The *Screws* Court was deeply concerned with issues of federalism. It cautioned, "The Fourteenth Amendment did not alter the basic relations between the States and the national government.... Thus Congress in [section 242] did not undertake to make all torts of state officials federal crimes." *Id.* at 109.

118. *United States v. Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1996) (en banc) (quoting *Screws*, 325 U.S. at 106), *vacated*, 117 S. Ct. 1219 (1997). The Sixth Circuit's en banc opinion in *Lanier* interpreted *Screws* to mean that murder and rape cannot constitute constitutional violations in and of themselves. There must be an aspect or circumstance of the crime that brings the act to the level of a constitutional violation. In *Screws*, the "trial by ordeal" created a procedural due process violation. The Sixth Circuit noted that in certain situations, sexual assault could also potentially rise to the level of a constitutional violation: "For example, a sexual assault raising an equal protection gender discrimination claim may present an entirely different case." *Id.* at 1393. The court suggested in a footnote that such an equal protection claim could derive from state and local officials' failure to enforce laws against sexual assault. *Id.* at 1393 n.12. Although this kind of failure is all too common, as discussed *supra* in text accompanying notes 96–100, it is extremely difficult to bring an equal protection claim against state officials for this type of violation. The near impossibility of bringing civil rights actions against state officials or policies that deny equal protection to victims of sexual assault is due to the fact that the Supreme Court requires a showing of deliberate intent to discriminate on the part of the state. *See* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979). On account of this extremely high standard of proof, gender-based equal protection challenges to the actions and policies of state law enforcement officials have generally been unsuccessful. *See generally Developments in the Law, supra* note 103, at 1567–71.

119. *Screws*, 325 U.S. at 92.

120. *Id.* at 106–07.

Therefore, although the principles of substantive due process apply to murder and rape alike, the law sanctions murder by state actors where constitutional guarantees of procedure have been satisfied.[121] In contrast, rape could never be a legitimate means of enforcing the law or punishing offenders.

The intuitive notion that rape could never be used as a form of punishment or law enforcement is well illustrated in the prison context. In a number of Eighth Amendment cases, various courts have established that the rape of a prisoner either by another inmate[122] or by a state-employed corrections officer[123] serves no legitimate penological purpose. In contrast, physical force is permitted in prisons under circumstances where it is perceived as a necessary means of maintaining prison security. When state prison officials are accused of using brute force in violation of the Eighth Amendment, the core judicial inquiry as stated by the Court in *Hudson v. MacMillian*, is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[124] In one Sixth Circuit case, an inmate alleged "that he was punched, kicked, and dragged from his cell and that his penis was pulled."[125] The court decided that this use of force, even with its sexual element, was an acceptable effort to restore discipline under the *Hudson* standard because the inmate had refused to come out of his cell and be searched. A lower standard is applied in cases not involving force, where courts review the constitutionality of certain conditions of prison confinement, such as cross-gender clothed body searches. In *Jordan v. Gardner*,[126] for example, a case involving pat-down searches, the Ninth Circuit announced that when faced with challenges to prison regulations, courts must "first consider whether there is an 'infliction of pain,' and, if so, whether that infliction is 'unnecessary and wanton.'"[127] Forms of conduct that might be labeled sexual harassment may be permissible, therefore, if they are deemed necessary.

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121. *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (holding that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it"). The *Gregg* Court set forth certain guidelines for states to follow in constructing their death penalty laws so as to conform with the requirements of due process. Most centrally, the Court recommended "a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Id.* at 195.

122. *See* Farmer v. Brennan, 511 U.S. 825, 833 (1994).

123. *See* Boddie v. Schneider, 105 F.3d 857, 861 (2d Cir. 1997).

124. Hudson v. MacMillian, 503 U.S. 1, 7 (1992).

125. Cooper v. Vidor, No. 93–1239, 1993 WL 402890, at *1 (6th Cir. Oct. 7, 1993).

126. 986 F.2d 1521 (9th Cir. 1993).

127. *Id.* at 1525, 1526 (concluding from facts of case that prison security "is not dependent upon cross-gender clothed body searches"); *cf.* Green v. Elias, 9 F.3d 1551, No. 93–15733, 1993 WL 472641, at *3 (9th Cir. Oct. 26, 1993) (holding pat-down search did not violate Eighth Amendment because search "was conducted while [inmate] was fully clothed," "did not involve unusual force," and "was justified by the prison's need to insure that no contraband left the dining area").

Clearly, an act of rape by a prison official would never pass muster under either the *Hudson* or the *Jordan* standard. Rape could never be considered a "good-faith effort to maintain or restore discipline," or a necessary means of maintaining prison security. Unlike sexual harassment, assault, and even murder, there are no conceivable circumstances that could justify a rape, since rape serves no legitimate penological or security purpose.

Because there is never a procedural justification for rape, its commission by a state actor is sui generis. By its nature, the substantive due process analysis involved in bringing rape within the scope of section 242 could not apply to any other type of conduct. The dreaded slippery slope would never materialize because the logic profferred in this Essay applies to rape and rape alone. While, as I have argued, rape is best analyzed as a substantive due process violation when committed by a state actor, other types of alleged section 242 violations must be decided in accordance with other constitutional standards and principles. Therefore, because rape stands apart from every other actual or potential section 242 violation, extending section 242 to include rape will not create the danger of opening a Pandora's box. In sum, the expansion called for in *Lanier*—based on substantive due process—would be neatly contained. Overfederalization arguments, therefore, are entirely unconvincing.

VI. CONCLUSION

The Supreme Court in *United States v. Lanier* chose not to address whether sexual assault is a constitutional crime, thereby deferring the chance to provide victims of rape with a "celebration of autonomy." This Essay has argued that because the right to be free from sexual assault by a state actor falls easily within the set of rights safeguarded by the Court's substantive due process jurisprudence, and because treating rape as a substantive due process violation would dissolve traditional stereotypes that still prevail, courts should openly recognize this seemingly axiomatic right. The final resolution of this case should vindicate women's free choice with respect to decisions about sex. The constitutional protection is long overdue.