No. 95-1717

In the
Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA, Petitioner,

v.

DAVID W. LANIER, Respondent.

On Writ of *Certiorari to the United States Court of Appeals for the Sixth Circuit*

Motion for Leave to File and Brief *Amicus Curiae of the American Civil Liberties Union and the ACLU of Tennessee in Support of Petitioner*

Motion of the American Civil Liberties Union and the ACLU of Tennessee for Leave to File Brief *Amicus Curiae*

Pursuant to Rule 37.4, the American Civil Liberties Union (ACLU) and the ACLU of Tennessee respectfully move this Court for leave to file the attached brief amicus curiae in support of petitioner. Counsel for petitioner has consented to this filing; counsel for respondents has refused to consent.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members committed to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Tennessee is one of its state affiliates.

This case involves issues of critical importance and longstanding interest to the ACLU and its members. The ACLU's Women's Rights Project has fought sex discrimination in the workplace for more than two decades; likewise, the ACLU's Reproductive Freedom Project has vigorously defended the constitutional right to individual autonomy in matters of sexuality, procreation, and family life. Since its inception, the ACLU has also defended the due process rights of criminal defendants, including the essential right to be given fair notice of what conduct is considered a crime.

Because the resolution of this case touches upon all of these issues, we respectfully request leave to file the attached amicus curiae brief supporting reversal of the judgment below.

Respectfully submitted,

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Dated:August 13, 1996

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INTEREST OF AMICI

The interest of amici is set forth in the accompanying motion for leave to file this brief amicus curiae.

STATEMENT OF THE CASE

Beginning in 1989, the defendant David Lanier, a Tennessee chancery court judge, engaged in a pattern of gross sexual abuse of female employees and litigants that involved a range of physical assaults, including two rapes. Although the Sixth Circuit was divided on its view of the governing law, it was united in its view of defendant's behavior. Chief Judge Merritt's majority opinion described it as "reprehensible." United States v. Lanier, 73 F.3d 1380, 1394 n.13 (6th Cir. 1996)(en banc). Judge Keith, dissenting, characterized this as "one of the most deplorable cases to come before the Court since I have served on the federal bench." Id. at 1399.

Even a brief review of the facts is sufficient to explain this reaction. Sandra Sanders was a youth services officer whom defendant had hired and who was required by her job to consult with defendant on a weekly basis. During one of those meetings in 1989 the defendant grabbed and squeezed Sanders' breasts. Sanders did not complain immediately; she did demand an apology shortly afterwards. In response, Lanier began to complain about her work, and eventually demoted her by removing her supervisory authority. Id. at 1404 (Daughtrey, J., dissenting).

In the fall of 1990, the defendant began to grab, touch, and squeeze his secretary, Patty Mahoney, on her breasts and buttocks. The assaults were a daily occurrence, and the defendant would not stop despite Mahoney's protests. On one occasion he offered job privileges if she would have sex with him. The day that Mahoney finally resigned, the defendant lifted her off the floor, slid her body against his, and pressed his pelvis against her. Id.

During 1990, the defendant twice orally raped Vivian Archie, who was involved in a custody case in his court. Both of these rapes were brutal and caused Archie physical pain and injury. Using his power over her custody situation and his ability to find her employment, he coerced Archie into returning to his chambers after the first rape. There he sexually assaulted her again by forcing his penis into her mouth, causing her to cry, gag, choke, and partially suffocate. Id. at 1405-06.

In March 1991, the defendant (while clothed in judicial robes) assaulted another secretary, Sandy Attaway, by pushing his erect penis against her buttocks in his judicial chambers. When Attaway shouted at him to stop, defendant told her to lower her voice because there were people in the courtroom. Three months later, Attaway was fired because "things were not working out." Id. at 1406. After firing her, defendant told Attaway that "they would have gotten along fine if she had liked to have oral sex." Id.

In the fall of 1991, the defendant sexually assaulted Fonda Bandy, an employee of a drug free housing initiative, who was meeting with him in the hope that he would refer clients to her program. He grabbed her breasts and crotch, then told her she "would have all the clients that she wanted" if she would return. Id. at 1407.

Two points are notable about these incidents. First, Lanier's actions were not ordinary assaults and batteries. His various touchings, grabbings, and rapes were not only physically abusive; they were also distinctly sexual. His assaults on these women thus invaded not only their bodily integrity -- but their sexual privacy and autonomy.

Second, these were not ordinary rapes and sexual assaults. All were committed not just under color of law, but by force of the particular authority of a judge demanding sexual favors in exchange for employment or fair treatment in his court -- essentially requiring that these women prostitute themselves or suffer severe adverse consequences.

The defendant was indicted in eleven counts for violating 18 U.S.C. §242, which makes criminal all willful deprivations of "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." The "right, privilege, or immunity" on which the government relied was the Fourteenth Amendment's substantive due process guarantee of bodily integrity -- specifically, the right to be free of sexual assault.

The trial court accordingly charged the jury that the right "not to be deprived of liberty without due process of law" includes the "right to be free from willful sexual assault," but that "not every unjustified touching or grabbing by a state official" violates the Constitution. The court instructed that "the physical abuse must be of a serious and substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's consci[ence]."[1]

The jury convicted Lanier of two felony and five misdemeanor violations of §242. A Sixth Circuit panel affirmed the convictions, but the full court of appeals reheard the case and reversed. United States v. Lanier, 73 F.3d 1380. The en banc majority, in an opinion by Chief Judge Merritt, ruled that the right to bodily integrity, including freedom from sexual assault, had not been made sufficiently definite by decisions of this Court to fall within the proscriptions of §242, as construed in Screws v. United States, 325 U.S. 91 (1945). Indeed, the majority read the history of §242 to reflect a legislative intent contrary to the broad language actually adopted by Congress when it enacted §242. Thus §242 refers on its face to the deprivation of "any rights" protected by the Constitution. Judge Merritt concluded, however, that Congress intended to criminalize only deprivations of "contract, property, and equal protection" rights. 73 F.3d at 1384-87.

Given the explicit holding of Screws, see §I, infra, the Sixth Circuit majority did acknowledge that §242 also covers rights "specifically stated in the Constitution" and "well-established procedural due process rights like the right to be tried before being punished by law enforcement officers." 73 F.3d at 1392. The majority did not explain how this concession, compelled by Screws, could be reconciled with its reading of the legislative history. Furthermore, the majority held the right to be free from sexual abuse by a judge acting in his official capacity had not been made sufficiently specific by prior Supreme Court decisions to support a conviction under §242. 73 F.3d at 1392. The majority thus read out of §242 any possibility that the constitutional rights to which it refers could include bodily integrity. Finally, the majority held that the trial court's reference to a "shocking to the conscience" standard in its jury instructions gave the jurors too much discretion to follow their personal predilections. Id. at 1389.

Judges Wellford and Nelson concurred in part and dissented in part. Id. at 1394, 1397. Contrary to the majority, they believed that the right to bodily integrity protected individuals against rapes committed by government officers using their governmental powers. As Judge Nelson noted, Vivian Archie "was so clearly deprived of her liberty" through psychological coercion and physical restraint "that the applicability of the statute strikes me as self-evident." Id. at 1398. With regard to the five misdemeanor convictions, however, Judges Wellford and Nelson did not believe that the defendant's conduct rose (or sank) to the level of constitutional harm.

Judges Keith, Jones, and Daughtrey dissented. Id. at 1399, 1400, 1403. They believed that previous Supreme Court and lower court decisions had sufficiently "made specific," within the meaning of Screws, "the right to be free from invasions of bodily integrity that shock the conscience." Id. at 1401 (Jones, J., dissenting). Judge Daughtrey argued, in fact, that "[s]exual assault . . . must be considered one of the most blatant and serious invasions of the protected right to bodily integrity." Id. at 1412. And she protested the majority's narrow reading of §242's legislative history, arguing that the court "would have us ignore the clear language of the statute." Id. at 1408.

SUMMARY OF ARGUMENT

The majority below erred in holding that deprivations of the constitutional right to bodily integrity can never be prosecuted under 18 U.S.C. §242. Moreover, its interpretation of the legislative history of §242 was inconsistent with this Court's decision in Screws. The language of §242 on its face reaches all willful deprivations of constitutional rights if accomplished under color of law. As construed in Screws, this means any right "made definite by decision or other rule of law," 325 U.S. at 103. By 1989, the right to be free of coerced sexual assaults by government officers had been made definite through a

series of Supreme Court and appellate decisions establishing the contours of sexual privacy and bodily integrity under the Fourteenth Amendment.

The substantive liberty protected by the Due Process Clause of the Fourteenth Amendment has long been understood to encompass bodily integrity and autonomous decisionmaking in the private sphere of family life. Central to the substantive due process concept has been the zone of intimate decisionmaking that encompasses choices about reproduction and sexuality. Accordingly, where the assault is sexual, and particularly where sexual favors are demanded by officers sufficiently powerful to coerce those under their control into submission, the right to bodily integrity is violated.

Here, as elsewhere, it is necessary to draw a line between the trivial and the nontrivial. As Judge Friendly said many years ago and, as this Court has repeated many times since, "[n]ot every push or shove" violates the Constitution. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). However, the necessity of line drawing is not unique to this context -- juries are often asked to decide whether force is excessive or unreasonable -- and does not, by itself, render a statute unconstitutionally vague.

Once a defendant's conduct has been shown to be serious and substantial, however, the right to be free of sexual acts coerced by government officers should not depend upon whether the officer's conduct "shocks the conscience." Under these circumstances, sexual privacy and bodily integrity are necessarily invaded when a government official makes acquiescence to his grabbings, gropings, or rapes the price of employment or fair treatment in court. Thus, in this case the "shocks the conscience" language in the jury instructions, if anything, imposed an unduly rigorous burden on the prosecution, and helped the defendant. Although "conscience-shocking," standing alone as a legal test, would be troublesome in its vagueness and subjectivity, in this instance the instructions taken as a whole were both specific and accurate, informing the jury that the assaults must be "of a serious and substantial nature" for criminal liability to attach, and enumerating several objective factors for the jury to consider. Like the majority below, this brief focuses on the legal issues and does not take any position on the sufficiency of the evidence.

In addition to violating his victims' sexual privacy and bodily integrity, the defendant also deprived them of their rights under the Equal Protection Clause. That is, Lanier's crimes violated both due process and equal protection guarantees. Although the Justice Department chose to go forward only on a substantive due process theory, this Court should make clear that a pattern of coercive and physically abusive, quid pro quo sexual harassment by government officials violates equal protection rights under both 18 U.S.C. §242, if done with specific intent, and 42 U.S.C. §1983.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY NARROWED THE SCOPE OF §242

In Screws v. United States, 325 U.S. 91, this Court rejected a vagueness challenge to criminal convictions under 18 U.S.C. §242. It ruled that the statute's broad terms, criminalizing all willful deprivations of "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," were not unduly vague for two reasons: First, the "rights, privileges, or immunities" in question must be "made definite by decision or other rule of law" before criminal liability can attach, 325 U.S. at 103; second, §242's specific intent or willfulness requirement precluded the statute's being used as "a trap for law enforcement agencies acting in good faith." Id. at 104. In other words, the specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.

Id.[2]

For fifty years, therefore, Screws has been understood to mean that the broad reach of §242 is adequately cabined, for purposes of fair notice to criminal defendants, by the requirements that they must have specifically intended to deprive their victims of constitutional rights, and that those rights must have been "made definite" by express constitutional language or judicial exposition. As the Sixth Circuit itself explained in United States v. Epley, 52 F.3d 571, 576 (6th Cir. 1995), "`[o]nce a due process right has been defined and made specific by court decisions, that right is encompassed by §242'" (quoting United States v. Stokes, 506 F.2d 771, 774-75 (5th Cir. 1975)). See also Williams v. United States, 341 U.S. 97, 101-02 (1951)(Screws construed §242 closely to avoid vagueness; detectives' coercion of confession was plainly unconstitutional "[w]hatever the school of thought concerning the scope and meaning of the Due Process Clause"); United States v. Reese, 2 F.3d at 880-81 (explaining Screws in course of affirming §242 convictions of police officers who used excessive force).

The court below implicitly assumed that the notion of evolving constitutional rights is necessarily at odds with the due process requirement that a defendant have notice of what conduct is criminally proscribed. As Screws makes clear, however,

the vagueness concern under §242 is whether a right has been made sufficiently definite prior to defendant's action. If so, it does not matter whether our understanding of that right has evolved since §242 was enacted. On this latter issue, Screws merely embodies a theory of constitutional interpretation that this Court has embraced at least since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). That is, although the fundamental principles set out in the Constitution and Bill of Rights do not change, our understanding of how those principles apply necessarily evolves with changing social conditions:

> [I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men those fundamental purposes which the instrument itself discloses.

United States v. Classic, 313 U.S. 299, 316 (1941). Just as the right to participate in a primary election, at issue in Classic, may not have been specifically envisioned by the framers, so in Screws, as in the present case, the concept of bodily integrity may have been little developed a century ago but today is understood as a fulcrum of personhood and liberty.

Even more to the point, this Court in Screws decidedly did not limit the broad reach of §242, as the court of appeals majority apparently thought it should have, to encompass only contract, property, and equal protection rights, or only rights "specifically stated in the Constitution." The Sixth Circuit majority ignored both the holding and reasoning of Screws, as well as the plain language of §242, when it read bodily integrity and freedom from sexual assault out of the statute's reach. Instead, the court mistakenly imposed a rigidly narrow interpretation on §242 that essentially negates any evolution in judicial understanding of the "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." This approach is not only inconsistent with Screws and United States v. Price, 383 U.S. 787, 793, 803 (1966), but it violates the first rule of statutory construction: fidelity to the actual language of a law. See, e.g., Bourjaily v. United States, 483 U.S. 171, 178-79 (1987); Norman J. Singer, 2A Sutherland Statutory Construction §46.01 (5th ed. 1992); Lanier, 73 F.3d at 1408 (Daughtrey, J., dissenting)(citing United States v. Winters, 33 F.3d 720, 721 (6th Cir. 1994)(Merritt, C.J.), cert. denied, 115 S.Ct. 1148 (1995)). If, as the Sixth Circuit majority thought, Congress passed §242 inadvertently and really only intended the law to apply to property, contract, and equal protection rights, Congress has had more than 100 years in which to amend the statute to correct its "error."

The Sixth Circuit went on to rule that, even assuming a right to bodily integrity was potentially within the broad terms of §242, it had not been "made definite" within the meaning of Screws because no Supreme Court decisions on fundamentally similar facts could be found. 73 F.3d at 1392, 1393 ("[a]s we interpret the `make specific' requirement, the Supreme Court must not only enunciate the existence of a right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar"). The majority erroneously rejected the dissenters' contentions that Screws permits consideration of lower court precedents, and that a right has been made definite when its contours and underlying principles are judicially articulated even if no judge has yet penned a decision that is "on all fours" factually (or close to it) with the case at hand.

Regarding the level of judicial authority needed to "make definite" a constitutional right, there is some force to the majority's contention that relying on lower court decisions risks different rules in different circuits. But the alternative -refusing to remedy constitutional violations of criminal magnitude until the Supreme Court has ruled in a case with similar facts -- creates a far more serious problem of underenforcement. And this is especially so in egregious cases. For, as Judge Nelson explained, requiring a Supreme Court decision on "fundamentally similar" facts would lead to the anomalous result that, for example, government officials "could acquire by prescription a right to make sex slaves of litigants or prospective litigants," 73 F.3d at 1399, simply because the Supreme Court had not been presented with that fact situation.[3]

More importantly, however, existing Supreme Court precedents have established the contours of the substantive due process right to sexual privacy and bodily integrity, and appellate decisions from a variety of circuits have specified that the right encompasses freedom from sexual coercion by government officers. See §II, infra. Screws' "made definite" standard does not demand factual identity so long as a reasonable state actor would be on notice that his conduct invaded constitutional rights as explicated in relevant precedents. Cf. Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("clearly established" standard for 42 U.S.C. §1983 qualified immunity determinations does not require that "the very act in question has previously been held unlawful," but only that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . . [I]n the light of pre-existing law the unlawfulness must be apparent"). Here, Supreme Court and appellate decisions prior to 1989 put Lanier on notice that his grossly oppressive practice of forcing himself sexually on employees and litigants subject to his official powers violated their constitutional rights to bodily integrity and sexual privacy.

II. THE FOURTEENTH AMENDMENT RIGHT TO BODILY INTEGRITY, "MADE DEFINITE" WELL BEFORE 1989, INCLUDES THE RIGHT TO BE FREE OF SEXUAL ASSAULT AND RAPE

COERCED BY GOVERNMENT OFFICIALS AS THE PRICE OF A JOB OR THE CUSTODY OF ONE'S CHILD

This Court recognized as early as Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), that the "liberty" protected by the Due Process Clause has substantive as well as procedural elements. Meyer and Pierce established that fundamental decisions about childrearing and family life were part of that substantive liberty. In Rochin v. California, 342 U.S. 165 (1951), the Court added the right of bodily integrity or autonomy to the concept of substantive due process. Although Rochin itself involved the use of unconstitutionally obtained evidence in a criminal trial, its substantive due process/ bodily integrity holding has formed the basis for civil rights actions at least since Johnson v. Glick, 481 F.2d 1028. See, e.g., Wilson v. Northcutt, 987 F.2d 719, 722 (11th Cir. 1993); Maldonado v. Josey, 975 F.2d 727, 730-31 (10th Cir. 1992), cert. denied, 113 S.Ct. 1266 (1993); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 726-27 (3d Cir. 1989)(en banc), cert. denied, 493 U.S. 1044 (1990)("Stoneking II"); Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981).[4]

This Court's more recent decisions have emphasized that the substantive liberty protected by the Fourteenth Amendment embraces both bodily integrity and sexual self-determination. These cases have established protection for decisionmaking about intimate aspects of private life, including reproduction, marriage, and living choices. See Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965); id. at 499-500 (Harlan J., concurring)(marital privacy); Loving v. Virginia, 388 U.S. 1, 12 (1967) (choice of mate); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)(sexual privacy for individuals, married or single); Roe v. Wade, 410 U.S. 113 (1973)(reproductive choice); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)(living arrangements; sanctity of extended family); Carey v. Population Services, Int'l, 431 U.S. 678, 684-86 (1977)(reproductive autonomy). As the Court summarized the doctrine in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847-51 (1992), there is a "realm of personal liberty which the government may not enter"; this encompasses "basic decisions about family and parenthood . . . as well as bodily integrity," and "intimate and personal choices . . . central to personal dignity and autonomy."[5] See also Albright v. Oliver, 510 U.S. , , 114 S.Ct. 807, 812 (1994)(substantive due process embraces matters relating to "marriage, family, procreation, and the right to bodily integrity").[6]

As Casey and Albright make clear, the core of substantive due process as it has developed since Meyer and Pierce is the set of privacy rights revolving around marriage, family, reproduction, bodily integrity, and sexuality. It follows that when "serious and substantial" physical assaults by government officers are explicitly sexual (whether the grabbing be of female breasts, male genitals, or the buttocks of either sex), the Fourteenth Amendment's substantive liberty is doubly implicated. That is, the invasion of bodily integrity is compounded by the violation of sexual autonomy. Moreover, unlike nonsexual coercion, which may sometimes be justified by dangerous circumstances or unruly suspects, there is never a justification for a government officer to force himself sexually on individuals subject to his official power and control.

Thus, in Doe v. Taylor Independent School Dist., 15 F.3d at 455, the court of appeals found that sexual misconduct by a public school teacher violated his student's due process rights "to be free from sexual abuse and violations of her bodily integrity" and, furthermore, that those rights were clearly established in 1987. As the Fifth Circuit explained: "No reasonable public school official in 1987 would have assumed that he could, with constitutional immunity, sexually molest a minor student." Id. Unlike corporal punishment, which invades bodily integrity but does not always amount to a constitutional violation (or even a tort), there is no legitimate basis for a state actor to inflict physical sexual injury on a child, and never has been. Id. at 461 (Higginbotham, J., concurring).

Similarly, Stoneking II, 882 F.2d at 726-27, upheld a due process claim against a public school teacher and supervisory officials for repeated sexual assaults on a student.[7] Like the Fifth Circuit in Doe, the Third Circuit in Stoneking II held that the plaintiff's constitutional right to "freedom from invasion of her personal security through sexual abuse, was well-established at the time the assaults upon her occurred" in 1980-85. Id. at 726. Indeed, given that sexual molestation of a student is never justified, the court found that her due process right was established under the bodily integrity standard of Rochin -- well before Ingraham v. Wright, 430 U.S. 651, announced that corporal punishment of public school students also implicated the Fourteenth Amendment. Stoneking II, 882 F.2d at 727. See also Searles v. Septa, 990 F.2d 789, 794 (4th Cir. 1993)(unlike claim based on governmental negligence, right to be free of sexual coercion was well-established by 1980s); Maldonado v. Josey, 975 F.2d at 730-31 (same).

There is no reason to believe that the right recognized in these cases for public school students is not equally applicable to victims of sexual coercion by law enforcement officers or judges. Although minors are generally more vulnerable than adults, the coercive effect may in fact be greater in some circumstances where the target of sexual demands by government officers is an adult. A police officer's or prison guard's physical ability to overpower a victim, or a judge or other government

officer's power to control employment, entitlements, or legal outcomes, may -- as the present case makes clear -produce an effect even more dramatic and intimidating than a public school officer's sexual victimization of a pupil.

In any event, the due process right to be free of sexual coercion by state actors other than teachers seemed sufficiently self-evident by the 1980s that the appellate courts simply assumed it in United States v. Davila, 704 F.2d 749 (5th Cir. 1983) (affirming the criminal conviction of immigration officers for coercing sexual favors), and United States v. Brummett, 786 F.2d 720 (6th Cir. 1986)(affirming sentence on conviction for conspiracy to commit sexual assault). See also United States v. Contreras, 950 F.2d 232 (5th Cir. 1991), cert. denied, 504 U.S. 941 (1992)(affirming §242 conviction of police officer for sexual assault and other crimes); Bennett v. Pippin, 74 F.3d 578, 589 (5th Cir. 1996), cert. pending on other grounds, U.S. , 65 U.S.L.W. 3088 (Aug. 6, 1996)(assuming, based on United States v. Classic, 313 U.S. 299, and Doe v. Taylor Independent School Dist., 15 F.3d 443, that district court correctly ruled that sheriff's rape of criminal suspect violated suspect's "substantive due process right to bodily integrity").

In other nonschool contexts, appellate courts have specifically recognized freedom from sexual coercion as the basis for constitutional claims under 42 U.S.C. §1983, the civil analog to §242. Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476, 479 (9th Cir. 1991), affirmed a §1983 judgment against a state official who used his governmental powers to coerce sexual favors from immigrants and thus violated "their constitutional right to be free from sexual assault." In Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994), the court of appeals held that a male inmate had stated a §1983 claim for invasion of privacy and bodily integrity based on strip searches by female guards. See also Gilson v. Cox, 711 F.Supp. 354, 356 (E.D.Mich. 1989)(male prisoner stated due process/bodily integrity claim against female guard who allegedly grabbed his genitals and buttocks on several occasions).

In sum, coerced sex under color of official authority, whether amounting to oral rape as in the case of Vivian Archie, or to required submission to sexual assaults as a condition of employment, as in the case of Lanier's other victims, was by 1989-91 a well-established violation of the constitutional rights of sexual autonomy and bodily integrity.

III. ALTHOUGH A "SHOCKING TO THE CONSCIENCE" INSTRUCTION, STANDING ALONE, WOULD BE TOO VAGUE TO SUPPORT A CRIMINAL CONVICTION, THE TRIAL COURT'S CHARGE ON THE RIGHT TO BODILY INTEGRITY WAS SUFFICIENTLY SPECIFIC AND DETAILED TO GUIDE THE JURY'S DELIBERATIONS

This Court and others have sometimes described deprivations of the right to bodily integrity in terms of conduct that is "arbitrary or conscience-shocking," Collins v. Harker Heights, 503 U.S. 115, 128 (1992); see also Rochin, 342 U.S. at 172, or that sufficiently "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples . . ." Id. at 169. In 1973, Judge Friendly adopted the Rochin "shocks the conscience" language as a standard that "points the way" toward determining when excessive force by government officers amounts to a due process violation, Johnson v. Glick, 481 F.2d at 1033, although he also articulated specific factors to guide a court or jury in making the judgment.[8] Courts have used these Johnson factors, or variants, in excessive force cases ever since -- though less frequently since Graham v. Connor and Whitley v. Albers held that many such claims would now be adjudicated under the Fourth or Eighth Amendments rather than the Fourteenth. See n.4, supra.

In Collins v. Harker Heights, this Court referred interchangeably to conduct that is "conscience-shocking" or "arbitrary in a constitutional sense" in rejecting a substantive due process claim based on negligent maintenance of municipal facilities, 503 U.S. at 128. But the Court's unanimous opinion did not make clear whether government conduct must necessarily "shock the conscience" in order to violate any aspect of the Due Process Clause. See the debate between the Third Circuit majority and dissent on this point in Fagan v. City of Vineland, 22 F.3d 1296, 1303-05 (3d Cir. 1994)(en banc)(maintaining that Collins explicitly adopted a "shocks the conscience" test for substantive due process claims, or at least those involving physical injuries); id. at 1309-13 (Cowen, Becker, Scirica & Lewis, JJ., dissenting)(arguing that the Supreme Court has never established the Rochin "shocks the conscience" "catch phrase" as a necessary element of substantive due process violations). Certainly, though, for claims arising out of the Fourteenth Amendment liberty interests in marriage, sexual privacy, and reproductive freedom, there has never been a "shocks the conscience" limitation on the scope of substantive due process rights.[9]

There can be little question that a legal standard that allowed juries to impose criminal liability based solely on whether the defendant's conduct "shocks the conscience" would raise very serious constitutional issues. In a case where that was the sum total of the jury's instructions, there would be much force to Judge Merritt's concern that the standard is too vague and subjective to provide individuals with fair notice, or juries with sufficient guidance, as to where the lines of criminal liability should be drawn under §242. See Graham v. Connor, 490 U.S. at 392-94; Gumz v. Morrissette, 772 F.2d 1395, 1407 (7th

Cir. 1985), cert. denied, 475 U.S. 1123 (1986)(Easterbrook, J., concurring) ("`shocks the conscience' . . . is a vague standard -- if it can be called a `standard' at all -- inviting decisionmakers to consult their sensibilities rather than objective circumstances");[10] Lanier, 73 F.3d at 1389 ("`[s]hocks the conscience' is too indefinite to give notice of a crime").[11]

Indeed, in Rochin itself, two justices, while agreeing that the state's conduct in the case was unconstitutional, criticized the looseness of the language used by the majority. See 342 U.S. at 174 (Black, J., concurring); id. at 177 (Douglas, J., concurring).

But in this case, the "shocks the conscience" language in the jury instruction is not a basis to reverse the convictions, for two reasons. First, it did not stand alone; it merely modified in two places a charge that was otherwise sufficiently detailed and objective to guide the jury. The instruction, taken as a whole as it must be,[12] adequately charged the jurors that not "every unjustified touching or grabbing by a state official" violates the Constitution, and that they could not convict unless they found the defendant's abuse to be "of a serious and substantial nature that involves physical force, mental coercion, bodily injury, or emotional damage . . ." See n.1, supra. Moreover, the court enumerated five objective factors (some of them variants on the factors set out in Johnson v. Glick) for the jurors to consider in deciding whether Lanier's sexual assaults were indeed "of a serious and substantial nature."[13] Id.

This type of instruction is typical in constitutional cases, and is no more vague than instructions that delineate for juries the standards and factors to consider in determining whether a search or seizure is "reasonable" or whether prison officials' actions violate "contemporary standards of decency"; see Hudson v. McMillian, 503 U.S. 1, 8 (1992) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). The fact that juries must draw lines in virtually all cases involving constitutional rights does not invalidate their judgments so long as the instructions as a whole give them accurate and sufficient guidance with respect to the essential elements of the crime.[14] See Baker v. Delo, 38 F.3d 1024, 1026 (8th Cir. 1994)(no plain error in jury instruction on excessive force); United States v. Reese, 2 F.3d at 880-87 (upholding specific intent and excessive force instructions); United States v. Bigham, 812 F.2d 943, 948-49 (5th Cir. 1987)(rejecting challenge to jury charge in §242 assault prosecution where excessiveness was not an issue because no force was justified under the circumstances); United States v. Dise, 763 F.2d at 589-92 (affirming sufficiency of §242 charge on willfulness and freedom from bodily restraint). Compare Romano v. Howarth, 998 F.2d 101, 106 (2d Cir. 1993)(instruction on defendants' state of mind in Eighth Amendment excessive force case which simply told jury to "look to all the surrounding circumstances" did not give adequate guidance).[15]

Second, the "shocks the conscience" language added to the instruction in this case helped rather than hurt the defendant by narrowing the range of bodily invasions or sexual assaults for which he could be convicted. Read in context, as it must be, the "shocks the conscience" reference was plainly intended to reinforce the notion, stated earlier in the same sentence, that defendant's conduct was required to be "serious and substantial" in order to violate the right of bodily integrity, and that this requirement was not to be taken lightly. Because the "shocking to one's conscience" modifier at the end of the instruction on bodily integrity reduced rather than expanded the likelihood of conviction, Lanier cannot credibly complain about it; indeed, he did not even object to the instruction at trial, perhaps for precisely this reason. For the future, trial courts might be well advised to avoid the "conscience-shocking" language altogether in jury instructions, certainly where sexual coercion is involved; but in this case, its inclusion is hardly grounds for reversal.[16]

IV. THE DEFENDANT'S ACTIONS ALSO VIOLATED THE EQUAL PROTECTION CLAUSE

Although the Justice Department prosecuted Lanier only on substantive due process grounds, and cannot change its theoretical horses in midstream, this Court should make clear that on the facts as found by the jury, Lanier's conduct also constituted sexual harassment in violation of the Equal Protection Clause. Physically abusive, quid pro quo sexual harassment, particularly of the repellent and persistent nature manifested in this case, undoubtedly constitutes sex discrimination. See Harris v. Forklift Systems, Inc., 510 U.S. , , 114 S.Ct. 367, 370-71 (1993); Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986). Putting aside differences not relevant here, the standard for sex discrimination is fundamentally the same whether under 42 U.S.C. §2000e, the statute at issue in Harris and Vinson, or under the Equal Protection Clause.[17]

This Court has repeatedly recognized that constitutional rights are not limited to one per customer. See Soldal v. Cook County, 506 U.S. 56, 70 (1992)("[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands"); United States v. James Daniel Good Real Property, 510 U.S. , , 114 S.Ct. 492, 499 (1993)("[w]e have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another"). The only exception to this principle appears to be where, as in Graham v. Connor, 490 U.S. 386, a specific

constitutional provision sets an objective standard of conduct (there, "reasonableness") to guide government officials, which is preferable to the less definitive and objective standard underlying substantive due process. See Albright v. Oliver, 114 S.Ct. at 820 (Souter, J., concurring).

In the present case, however, in contrast to Graham, two wholly separate constitutional principles give rise to two wholly separate types of constitutional harm. Lanier's assaults and demands for sex as a condition of employment or fair treatment in court violated the women's personal autonomy in the most intimate part of their lives, see §II, supra, but they also deprived the women of their ability to work or otherwise interact with government officials free of sex-discriminatory hostility and abuse. The latter rights are dignitary rather than physical; they relate to fairness, equality, and economic opportunity rather than sexual privacy and bodily harm. They have fundamentally different constitutional roots and thus form a separate ground for liability under equal protection principles.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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NOTES

1. The entire charge, in relevant part, read:

> Each count in this indictment charges the defendant deprived the victim named in that count of her right not to be deprived of liberty without due process of law, specifically her right to be free from willful sexual assault. The Fourteenth Amendment to the Constitution guarantees that no person can be deprived of liberty by the government without due process of law. Included in the liberty protected by the Fourteenth Amendment is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion. Thus, this protected right of liberty 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 conscious [sic]. Freedom from such physical abuse includes the right to be free from certain sexually motivated physical assaults and coerced sexual battery. It is not, however, every unjustified touching or grabbing by a state official that constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious and substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's conscious [sic].
>
> In making this determination, you should consider the nature and the duration of the alleged abuse, the reason or motivation for any physical contact, the context in which the alleged events occurred, intimidation or force, the extent of any injuries and the effect of the defendant's alleged action.

Tr. 1876-77.

2. Specific intent under Screws does not mean that the defendant must have had in mind the precise constitutional provision[s] that he was infringing, but that he "at least act[ed] in reckless disregard of constitutional prohibitions or guarantees." 325 U.S. at 106. See United States v. Reese, 2 F.3d 870, 881, 885 (9th Cir. 1993), cert. denied, 114 S.Ct. 928 (1994)(citing United States v. Ehrlichman, 546 F.2d 910, 921 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977)); United States v. Dise, 763 F.2d 586, 588-89 (3d Cir.), cert. denied, 474 U.S. 982 (1985).

3. See also Doe v. Taylor Independent School Dist., 15 F.3d 443, 455 (5th Cir.)(en banc), cert. denied, 115 S.Ct. 70 (1994) ("`[t]here has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability'")(quoting K.H. ex rel. Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990)).

4. Many post-Johnson v. Glick cases would now be litigated under the Fourth Amendment's "reasonableness" standard (for pre-arrest investigatory seizures), or the Eighth Amendment's Cruel and Unusual Punishment Clause (for post-conviction excessive force claims). See Graham v. Connor, 490 U.S. 386, 396 & n.10 (1989); Whitley v. Albers, 475 U.S. 312, 327 (1986). Post-arrest but pre-conviction brutality claims continue to be analyzed under the Due Process Clause, see Graham, 490 U.S. at 396 n.10, as do excessive force claims where the government officers' pre-arrest conduct does not amount to a seizure. See Bella v. Chamberlain, 24 F.3d 1251, 1257 (10th Cir. 1994), cert. denied, 115 S.Ct. 898 (1995); Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 796 (1st Cir. 1990); Wilson v. Northcutt, 987 F.2d at 722.

5. Even under the view of substantive due process articulated by this Court in Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986), the right to be free from serious sexual abuse committed by government officials is surely "implicit in the concept of ordered liberty," and "deeply rooted in the Nation's history and tradition."

6. The Court meanwhile has continued to recognize that physical brutality, excessive confinement, and forced medical interventions, whether or not sexual in nature, may also violate substantive due process. See Graham v. Connor, 490 U.S. at 396 n.10 (excessive force in non-seizure or post-seizure situations remains subject to Due Process Clause); Ingraham v. Wright, 430 U.S. 651, 673 (1977)(corporal punishment implicates due process); Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (involuntary confinement); Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278 (1990)(medical self-determination); Washington v. Harper, 494 U.S. 210, 221-22 (1990)(forced drug treatment).

7. The teacher allegedly "fondled and kissed [a student's] breasts, inserted his fingers into her vagina, exposed himself to her and forced her to handle his genitals, and occasionally compelled her to have oral sex." Stoneking v. Bradford Area School Dist., 856 F.2d 594, 599 n.8 (3d Cir. 1988)("Stoneking I"), vacated on other grounds, 489 U.S.1062 (1989).

8. The oft-quoted language from Johnson reads: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." 481 F.2d at 1033.

9. The same is true of the Fourteenth Amendment liberty interests in medical autonomy and freedom from involuntary confinement. See n.6, supra.

10. Gumz, which applied a variant of the Johnson v. Glick factors to an excessive force/arrest claim, was overruled on the basis of Graham v. Connor in Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987).

11. See also Kolender v. Lawson, 461 U.S. 352, 358 (1983); Bouie v. City of Columbia, 378 U.S. 347, 362-63 (1964).

12. See Cupp v. Naughten, 414 U.S. 141, 146-47 (1973); United States v. Reese, 2 F.3d at 883 ("the district court's formulation of [the elements of a statutory crime] is reviewed for abuse of discretion . . . . An abuse of discretion in this context occurs where the jury instructions taken as a whole are misleading or inadequate to guide the jury's deliberations"); Martin v. Thomas, 973 F.2d 449, 454 (5th Cir. 1992)("[o]n appeal, we review the charge as a whole and reverse only if the jury is misled as to the substantive law").

13. The jurors were told to consider "the nature and the duration of the alleged abuse, the reason or motivation for any physical contact, the context in which the alleged events occurred, intimidation or force, the extent of any injuries and the effect of the defendant's alleged action." Tr. 1877.

14. This does not mean, of course, that in some cases a judgment could not be reversed for insufficient evidence -- a decidedly different matter than invalidating a jury charge or the constitutional standard it articulates. Because the majority below rejected the prosecution's reliance on a substantive due process theory, it never addressed the sufficiency of the evidence. Nor does this brief. However, if the jury charge in this case is sustained, then it is also fair to assume that the jury found that defendant's conduct was both willful, and sufficiently serious and substantial, to justify conviction on 7 out of 11 counts in the indictment.

15. For typical jury instructions in civil rights cases, see 2 Devitt, Blackmar & O'Malley, Federal Jury Practice and Instructions §27.07 (4th ed. 1987 & Supp. 1996)(criminal cases); and 3 Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions §§103.01-.08 (4th ed. 1987 & Supp. 1996)(civil cases). As the Court in Reese points out, constitutional standards articulated in §1983 civil suits may appropriately be used in §242 criminal cases, 2 F.3d at 884; see also United

States v. Bigham, 812 F.2d at 948 (though level of culpable intent varies, same substantive standard applies to deprivation of rights under §1983 and §242).

16. If the Court believes that the instruction, taken as a whole, does require reversal, then remand for a new trial rather than dismissal of the charges is the appropriate remedy.

17. See, e.g., Annis v. County of Westchester, 36 F.3d 251, 254 (2d Cir. 1994); Andrews v. City of Philadelphia, 895 F.2d 1469, 1478-79, 1483 & n.4 (3d Cir. 1990); Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989). For 42 U.S.C. §1983 sexual harassment cases before 1989, see Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988); Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986); and other cases cited in Starrett, 876 F.2d at 814.

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