FOURTH AMENDMENT — POLICE SEXUAL MISCONDUCT — FIFTH CIRCUIT HOLDS THAT SEXUAL ASSAULT PERPETRATED BY POLICE IS FOURTEENTH AMENDMENT VIOLATION, NOT FOURTH AMENDMENT SEIZURE. — *Tyson v. Sabine*, 42 F.4th 508 (5th Cir. 2022).

Victims of sexual predation perpetrated by the police are often betrayed at both ends of law and order. Amidst widespread reports of sexual assault inflicted upon vulnerable populations by law enforcement,[1] significant confusion about what constitutes a cognizable claim under the Fourth Amendment remains.[2] With multiple states lacking statewide mechanisms to revoke perpetrators' licenses,[3] victims of such abuses should, at the very least, be able to turn to robust avenues of legal redress. In this context, the Fifth Circuit's recognition of one victim's substantive due process right to bodily integrity in *Tyson v. Sabine*[4] rings hollow. The facial victory is shadowed by the court's simultaneous rejection of the victim's Fourth Amendment seizure claim,[5] which may serve to undercut Fourth Amendment protections for future victims. This comes at a time when the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*[6] signals an uncertain future for the body of substantive due process rights,[7] rendering the Fourth Amendment as a means of obtaining justice ever more critical.

On September 18, 2018, Melissa Tyson's husband requested for the Sheriff's Department of Sabine County, Texas, to conduct a welfare check on Tyson, reporting that she was home alone and "distressed."[8] The next morning, Deputy David Boyd arrived at the Tyson residence, donning a t-shirt that read "Sheriff."[9] During the next two hours, Boyd proceeded to subject Tyson to a series of sexual statements, questions, and commands of escalating severity.[10] He made comments such as "what [he and his fellow officers] would like to do to [her] if they could,"[11] while further compelling Tyson to "answer invasive questions about her sex life."[12]

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[1] *See* Matt Sedensky & Nomaan Merchant, *Hundreds of Officers Lose Licenses over Sex Misconduct*, AP NEWS (Nov. 1, 2015), https://apnews.com/article/oklahoma-police-archive-oklahoma-city-fd1d4d05e561462a85abe50e7eaed4ec [https://perma.cc/KVT4-TNF6].

[2] *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–58 (1994) (describing the state of Fourth Amendment jurisprudence as an embarrassment).

[3] Sedensky & Merchant, *supra* note 1.

[4] 42 F.4th 508 (5th Cir. 2022).

[5] *Id.* at 517.

[6] 142 S. Ct. 2228 (2022).

[7] *See id.* at 2301 (Thomas, J., concurring) ("[T]he Due Process Clause does not secure *any* substantive rights . . . . [W]e should reconsider all . . . substantive due process precedents . . . .").

[8] *Tyson*, 42 F.4th at 512.

[9] *Id.* at 513.

[10] *See id.* at 513–14.

[11] *Id.* at 513 (second alteration in original).

[12] *Id.*

Sometime during the encounter, Boyd looked to the window where Tyson claimed marijuana paraphernalia belonging to her could be seen.[13] Unsolicited, he then began to speak of issuing tickets for marijuana possession, asserting that it was his duty.[14] Boyd then ordered Tyson, "[l]et me see your breasts."[15] Tyson testified that "[b]ased on the 'frequency of [the marijuana-related anecdotes] coming up,'" she had perceived Boyd's statements as threats of prosecution unless she submitted.[16] She also felt "forced to submit . . . because she was isolated and alone," and was frightened his actions would further escalate if she did not comply.[17] Tyson proceeded to strip.[18] Boyd then commanded her to "[s]how me your p***y" and to "show [me your] c**t."[19] Tyson, after "a prolonged hesitation," complied, upon which Boyd proceeded to masturbate to ejaculation in front of her before leaving.[20]

Subsequently, Tyson reported the incident to the Texas Rangers.[21] In April 2019, Boyd was indicted by the State of Texas and charged with sexual assault, indecent exposure, and official oppression.[22] Tyson then sued Deputy Boyd, the County of Sabine, and the County Sheriff under 42 U.S.C. § 1983, alleging violations of her Fourth, Eighth, and Fourteenth Amendment rights.[23]

Following a series of stays for criminal proceedings, the United States District Court for the Eastern District of Texas granted the defendants' motions for summary judgment against all three claims.[24] First, it ruled against a Fourth Amendment violation, deeming that no unlawful seizure had occurred,[25] as "a reasonable person would have felt free to walk away."[26] Next, the court ruled that Tyson's Eighth Amendment claim also failed as a matter of law, as Tyson was "not convicted of a crime."[27] Finally, the court rejected Tyson's substantive due process claim under the Fourteenth Amendment, as Boyd's actions did

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[13] *Id.* at 513–14.

[14] *Id.* at 514.

[15] Tyson v. County of Sabine, No. 19-CV-00140, 2021 WL 3519294, at *2 (E.D. Tex. July 14, 2021) (alteration in original).

[16] *Tyson*, 42 F.4th at 514.

[17] *Id.* at 513.

[18] *Tyson*, 2021 WL 3519294, at *2.

[19] *Id.* (alterations in original).

[20] *Tyson*, 42 F.4th at 514.

[21] *Id.*

[22] *Id.* On November 10, 2022, Boyd pleaded guilty to charges of Attempted Aggravated Assault, Indecent Exposure, and Official Oppression. Steve W. Stewart, *Boyd Sentenced to 75 Days in Jail to Be Served on Weekend*, KJAS (Nov. 10, 2022), https://www.kjas.com/news/local_news/article_8067a1d4-612e-11ed-8cda-c71927ddf12a.html [https://perma.cc/SGF3-3DDU]. Texas State District Judge James A. Payne, Jr. sentenced him to seventy-five days in the county jail to be served on weekends, as well as ten years of probation. *Id.*

[23] *Tyson*, 42 F.4th at 514.

[24] *Tyson*, 2021 WL 3519294, at *1–2.

[25] *Id.* at *2–3.

[26] *Id.* at *4.

[27] *Id.* at *5.

not "shock the contemporary conscience."[28] Tyson appealed the dismissals of her Fourth and Fourteenth Amendment claims.[29]

The Fifth Circuit affirmed in part and reversed in part. Writing for the panel, Judge Clement, joined by Judges Graves and Costa, held that the district court had correctly dismissed Tyson's Fourth Amendment claim, as no seizure had occurred, but had erred in dismissing her Fourteenth Amendment claim, as Tyson's substantive due process right to bodily integrity was violated.[30] The court analyzed Boyd's qualified immunity defense in the context of each claim, asking (1) whether he violated a constitutional or statutory right, and (2) whether the right was clearly established at the time of the violation.[31]

On Tyson's Fourth Amendment claim, the court ruled that Tyson failed to establish that a cognizable search or a seizure had taken place.[32] Neither party had claimed the assault was a search.[33] And the court rejected that Tyson had been seized on the basis that an "objectively reasonable person" in her circumstances would have felt "free to leave."[34] While acknowledging that "no per se rules govern [what] constitutes a seizure,"[35] the court listed certain indications that they deemed absent, including the threatening presence of several officers, displays of weapons, physical contact, or the use of language or tone that might compel obedience.[36] Alternatively, the court noted that implicit constraints, such as statements suggesting that the individual is suspected of illegal activity, may also qualify.[37] Ultimately, the court deemed that Boyd's actions were not a seizure because Tyson had made a mere *assumption* that Boyd had suspected her of marijuana possession.[38] Boyd never directly accused Tyson of possession, nor did he make his awareness of Tyson's drug paraphernalia explicit.[39] Hence, the statements in which he alluded to ticketing others "would not have indicated to an objectively reasonable, innocent person that they were suspected of wrongdoing."[40] Having found no Fourth Amendment violation, the court did not determine whether the right was established during the encounter, consequently affirming the district court's dismissal.[41]

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[28] *Id.* at *5–7 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)).
[29] *Tyson*, 42 F.4th at 515.
[30] *Id.* at 515, 519.
[31] *Id.* at 515.
[32] *Id.* at 517.
[33] *Id.* at 516.
[34] *Id.*
[35] *Id.* (citing Florida v. Royer, 460 U.S. 491, 506 (1983)).
[36] *Id.* (citing United States v. Mask, 330 F.3d 330, 337 (5th Cir. 2003)).
[37] *Id.* (citing United States v. Berry, 670 F.2d 583, 597 (5th Cir. Unit B 1982)).
[38] *Id.* at 517.
[39] *Id.*
[40] *Id.*
[41] *Id.*

Next, on Tyson's Fourteenth Amendment claim, the court reversed and found a violation of Tyson's substantive due process right to bodily integrity.[42] In doing so, it found that the assault was an egregious abuse of power that "shock[ed] the contemporary conscience."[43] First noting the lack of state interest in sexually assaulting citizens, the court also rejected the argument that the lack of physical force meant that the incident was not truly shocking. It instead reasoned that the mental coercion effectuating the assault met the standard just the same.[44] In the same vein, it dismissed the notion that Boyd's conduct was merely verbal harassment, as the coerced "[n]onconsensual stripping, prolonged nudity, and manual manipulation of the privates . . . [were] abusive sex acts that physically affected Tyson's body."[45] And affirming that Tyson's substantive due process right to bodily integrity was established during the time of the assault, thus defeating Boyd's qualified immunity defense, the court reversed the district court's summary judgment.[46]

Even as the reversal of the district court decision in *Tyson* via the Fourteenth Amendment rectified the immediate injustice, the Fifth Circuit's rejection of the Fourth Amendment seizure claim relied on a flawed factual analysis and augured troubling implications for future victims of police predation. First, the court's application of the "reasonable, innocent person" standard attempted, but ultimately failed, to account for the entirety of the coercive circumstances under which Tyson submitted to Boyd's orders. Moreover, the court's reasoning diverged from other circuit courts' applications of the Fourth Amendment in this context.[47] Scrutinizing this rejection despite the larger "win" is not merely a matter of critiquing the court's reasoning. Rather, it means to bring into relief the larger consequence of *Tyson* — its undercutting of Fourth Amendment protections in an era where the future of substantive due process rights as a viable means of redress is becoming increasingly unstable.[48]

While purporting to account for the totality of the circumstances in applying the "reasonable, innocent person" standard, the *Tyson* court rejected the Fourth Amendment claim with a less-than-complete reckoning of the circumstantial factors. A seizure of a person under the Fourth Amendment occurs when a police officer, "'by means of physical

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[42] *Id.* at 519.

[43] *Id.* at 517 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)); *id.* at 519.

[44] *Id.* at 518.

[45] *Id.* at 519.

[46] *Id.* at 521, 523. Finally, the court dismissed Boyd's claim that he could not be held liable notwithstanding violations of Tyson's constitutional rights, because he did not act under color of law. *Id.* at 521. The court reasoned that, as the incident arose out of a "legitimate police activity," the record supported a nexus between his actions and abuse of official authority. *Id.* at 522.

[47] *See* cases cited *infra* note 66.

[48] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("[T]he Due Process Clause does not secure *any* substantive rights . . . . [W]e should reconsider all of this Court's substantive due process precedents . . . .").

force or show of authority,' terminates or restrains [a person's] freedom of movement . . . '*through means intentionally applied*.'"[49] A cognizable seizure is deemed to have occurred only if, "in view of *all the circumstances surrounding the incident*, a reasonable person would . . . believe[] that he [is] not free to leave."[50] When gauging the rationality of Tyson's reaction, the court discounted or disregarded critical elements of the two hours leading up to the assault. Considering that Boyd had made multiple unsolicited and out-of-context references to marijuana while emphasizing his "duty to issue a ticket" only *after* sitting down where Tyson's drug paraphernalia was visible,[51] the totality of the circumstances strains the court's characterization of Tyson's fear as a mere "assumption."[52]

The opinion also failed to completely explain why the two hours during which Boyd subjected Tyson to escalating acts of sexual predation did not qualify as such "circumstances indicative of a seizure."[53] It implied that a "reasonable, innocent person," unlike Tyson, could have refused Boyd, stressing that Boyd never said Tyson could not leave nor "physically prevent[ed] her from terminating the encounter."[54] But the court did not address that Tyson was home alone without neighbors in a secluded location,[55] a total isolation that further adds to conditions indicative of a seizure.[56] It also failed to note that Boyd, wearing a shirt reading "Sheriff," *commanded*, rather than asked, Tyson to "[s]how [her] p***y" and to "show [her] c**t."[57] Nor did the court explain why Boyd's verbal harassment and orders to strip did not qualify as the type of "use of language or tone . . . indicating that compliance with an officer's request might be compelled."[58] The perfunctory rejection seems almost inconsistent with the analysis of Tyson's Fourteenth Amendment claim, where the court found Boyd's actions to be obviously and unambiguously coercive.[59] In sum, the court's characterization of Tyson as "unreasonable" is both conflicting and unsatisfactory, failing to grapple with

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[49] Brendlin v. California, 551 U.S. 249, 254 (2007) (citations omitted) (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991); Brower v. County of Inyo, 489 U.S. 593, 597 (1989)); *see also* California v. Hodari D., 499 U.S. 621, 626 (1991) (noting that a seizure may occur with submission reacting to a show of authority).

[50] *Hodari D.*, 499 U.S. at 628 (emphasis added) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

[51] *Tyson*, 42 F.4th at 516.

[52] *Id.* at 517.

[53] *Id.* at 516.

[54] *Id.* at 517.

[55] *Id.* at 512–13, 520.

[56] *Cf.* Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion) ("[O]fficers do not violate the Fourth Amendment by merely approaching an individual . . . [in a] public place . . . .").

[57] Tyson v. County of Sabine, No. 19-CV-00140, 2021 WL 3519294, *2 (E.D. Tex. July 14, 2021) (first alteration in original).

[58] United States v. Mendenhall, 446 U.S. 544, 554 (1980).

[59] *See Tyson*, 42 F.4th at 519.

the entirety of the circumstances under which she felt compelled to submit. But why?

One explanation for this could be the well-established male bias in defining the "reasonable person"[60] influencing the court's conclusion. The common legal understanding of the reasonable person standard has long disregarded the idea that women fundamentally experience life differently than men.[61] Critically, this difference impacts what women view as threatening, which in turn influences how they react to authority, including when they feel free to exit an encounter.[62] This bias may illuminate why the *Tyson* court did not rule Boyd's actions to be fundamentally threatening. It likewise explains the court's conclusion that a "reasonable person" should have felt at liberty to simply refuse Boyd's orders and leave, citing no other reason except that leaving would be the response of an "objectively reasonable person."[63] The court's "reasonable person" was likely dominated by male perspectives on how one should normally react in any given situation.[64] And even if a female judge writes for the court, as in *Tyson*, the issue is that male bias is embedded within the standard itself and entrenched in the relevant precedents, not the person applying it.[65] Certainly, a man in the same situation might have refused Boyd and left. But Tyson's submission under duress makes it no less reasonable given her circumstances.

While the Supreme Court has not offered guidance on this issue, other circuit courts have recognized Fourth Amendment claims with similar factual circumstances. The Second, Ninth, and Eleventh Circuits have either vindicated sexual-predation claims via the Fourth Amendment seizure doctrine or recognized the doctrine's capacity to do

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[60] *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 695 (1996) (describing Fourth Amendment reasonable suspicion as a "commonsense" notion "on which reasonable and prudent *men* . . . act" (emphasis added) (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983))).

[61] *See* Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 187–88 (2008) (noting the "deep gender bias in the concept of reasonableness," *id.* at 187, where "women are viewed as inherently unreasonable," *id.* at 188); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161–62 (1989) ("[T]he law sees and treats women the way men see and treat women.").

[62] *See* Raigrodski, *supra* note 61, at 193 ("[M]ultiple realities shaped by gender . . . produce different understandings of what is abusive or intrusive.").

[63] *Tyson*, 42 F.4th at 517.

[64] *See, e.g.*, Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32 (1987) (arguing that individual experiences and attributes, including gender, contribute to a different understanding of who and what is "normal").

[65] *See* Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 210–12 (2001) (arguing that male bias in the "reasonable person" is inherent to the standard).

so.[66] The absence of on-point precedent cited in the *Tyson* opinion[67] indicates that the conceptualization of sexual misconduct as a type of seizure is novel for the Fifth Circuit. And how the court treated this issue will guide future victims' claims. But this did not have to be the case. If the *Tyson* court had ruled that a Fourth Amendment seizure had indeed taken place, the analysis would have turned to reasonableness, "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[68] Given the *Tyson* court's acknowledgement that there is never a state interest to commit sexual assault,[69] it is likely that Tyson's Fourth Amendment claim would have been recognized.

Yet does it matter how the Fifth Circuit handles Fourth Amendment claims if courts will readily recognize the substantive due process right to bodily integrity under the Fourteenth Amendment?[70] There are reasons to believe it does. First, the Fourth Amendment's broadly read rights against unreasonable intrusions of privacy[71] may be more protective than the Fourteenth Amendment in cases of police predation. Critics argue that the Fourteenth Amendment's "shocking the contemporary conscience" standard is a far higher threshold than the Fourth Amendment's "reasonable person" standard.[72] Moreover, the Supreme Court has suggested that in cases where the textually explicit protections of the Fourth Amendment can apply, it should displace the more general notion of substantive due process rights.[73] And, at a minimum, parallel protections would provide victims a greater chance of redress.

The far more pressing issue driving the need to protect the Fourth Amendment as a means of redress is the context of *Dobbs* and its

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[66] *See* United States v. Langer, 958 F.2d 522, 524 (2d Cir. 1992) ("[W]hether [the officer] planned on sexually assaulting [his victims], his conduct was a severe infraction of the Fourth Amendment."); Fontana v. Haskin, 262 F.3d 871, 878–79 (9th Cir. 2001) (ruling that police officer's sexual predation against an individual was a Fourth Amendment seizure); Hicks v. Moore, 422 F.3d 1246, 1253–54 (11th Cir. 2005) (acknowledging that harassment and abusive behavior may sometimes rise to a Fourth Amendment violation).

[67] *See generally Tyson*, 42 F.4th 508.

[68] Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

[69] *Tyson*, 42 F.4th at 518.

[70] *See* Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILL. L. REV. 1059, 1068–69.

[71] *See, e.g.*, Winston v. Lee, 470 U.S. 753, 767 (1985) ("The Fourth Amendment is a vital safeguard . . . from unreasonable governmental intrusions into any area in which he has a reasonable expectation of privacy.").

[72] *See* Irene M. Baker, Comment, Wilson v. Spain*: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 ST. JOHN'S L. REV. 449, 478–79 (2001); *see also* Jonathan Ostrowsky, *#MeToo's Unseen Frontier: Law Enforcement Sexual Misconduct and the Fourth Amendment Response*, 67 UCLA L. REV. 258, 290–92 (2020).

[73] *See Graham*, 490 U.S. at 395 (suggesting that when the Fourth Amendment applies, the generalized notion of substantive due process should be displaced).

destabilization of the entire notion of substantive due process rights.[74] A Fourteenth Amendment claim is viable only when the police officer's action violates an established right. In Tyson's case, it was the substantive due process right to bodily integrity.[75] But given certain Justices' stated intention and the Supreme Court's demonstrated capacity to reconsider the entire body of substantive due process precedent,[76] future victims may soon find this avenue closed to them. The Fourth Amendment, in contrast, maintains an express mandate to protect "[t]he right of the people to be secure in their persons,"[77] encompassing a wide breadth of conduct by law enforcement.[78] And with this textual anchor, the Fourth Amendment is perhaps the most, if not the only, reliable vindicator of victims' bodily security against sexual predation perpetrated by the police. At this moment in time, at least.

Ultimately, *Tyson* and *Dobbs* together portend that claims of sexual predation inflicted by the police will continue to escape redress under current doctrine. And such claims will demand a far more rigorous and careful examination of victims' claims than demonstrated by the *Tyson* court to ensure that the Fourth Amendment remains viable as a critical avenue of justice in the age of *Dobbs* and the uncertain future of substantive due process.

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[74] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

[75] *Tyson*, 42 F.4th at 520.

[76] *See Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' . . . ." (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring); Gamble v. United States, 139 S. Ct. 1960, 1984–85 (2019) (Thomas, J., concurring))).

[77] U.S. CONST. amend. IV.

[78] *See, e.g.*, Winston v. Lee, 470 U.S. 753, 767 (1985).