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PRIVACY IN SPORTS: RECENT DEVELOPMENTS IN THE FEDERAL COURTS

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Privacy is a contentious legal topic in large part because it defines the boundaries between the individual and the community and pits the right to know against the right to be let alone. The world of sports is a particularly interesting arena for privacy issues. Sports often operate at the intersection between the individual and the group, the lone athlete and the team, and the self-absorbed actor and the role model. When athletes step forward to perform, they often do so in a public setting that attracts considerable public attention. This is true even when the athletes are children, whose privacy we usually respect above all others.[1]

This article discusses four different types of privacy cases that have arisen recently in the context of sports. The first type, drug testing of student-athletes, is a fitting place to begin because the cases in this area have expressly considered whether athletes are entitled to less privacy than others. The second area involves coaches disclosing information about team members and the extent to which such disclosures may constitute actionable privacy infringements. The third topic is perhaps sui generis: It involves an effort by the University of Illinois to inhibit direct contact with prospective student-athletes by students and faculty who oppose the use of the Chief Illiniwek mascot. The privacy dimension of the Illinois case is the University's assertion that its policy was justified, in part, by the goal of protecting the privacy of athletic recruits. The fourth topic involves police searches of spectators at a sports event.

These topics suggest the fairly wide range of privacy issues indigenous to sports.[2] The courts' analyses of these issues suggest considerable

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1. The elevated privacy of children can be seen by such illustrations as the closing of judicial proceedings involving children and the self-restraint of the press in not naming children who are the subject of news reports. On the other hand, children receive little privacy protection vis-à-vis their parents and diminished privacy when attending school.

2. Another recurring type of case brought by professional athletes involves the right of publicity, which is closely related to the privacy right of appropriation. *See generally* J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195 (2001); Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23 (1999).

uncertainty about whether privacy rights are altered in a sports context. Indeed, in the cases discussed below, one of the recurring themes is whether the sports context leads to a diminished expectation of privacy. The verdict of the courts is far from clear on this point.

DRUG TESTING AND STUDENT-ATHLETES

In *Vernonia School District 47J v. Acton*,[3] the United States Supreme Court held that a public school district could require "random urinalysis drug test[s] of students who participate in . . . athletic[ ] programs."[4] Although this requirement applied only to students in sports programs and applied irrespective of any particularized suspicion that a student was using drugs, the Court found no Fourth Amendment violation.[5] The affected students suffered a loss of privacy, but the privacy interference was found to be reasonable, in part because student-athletes have diminished privacy expectations:

> Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation."[6]
>
> There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James [Acton, respondent,] testified that his included the giving of a urine sample, App. 17), they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director

3. 515 U.S. 646 (1995).
4. *Id.* at 648.
5. *Id.* at 665.
6. *Id.* at 657 (citing Schaill by Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (1988)).

> with the principal's approval." Record, Exh. 2, p. 30, ¶ 8. Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.[7]

This description by the Court of participation in athletic programs sounds almost militaristic, yet regimentation well beyond the sidelines or the walls of the gym is accepted as a routine feature of school sports, and bodily privacy is compromised. Indeed, the athletic regimen spills over into the student-athlete's academic program, dress, and general conduct.

There is reason to be wary of such an uncritical acceptance of these wholesale impositions on personal autonomy and dignity. This regimental model must certainly discourage athletic participation by students who are freer spirits, or perhaps simply culturally different. Our objective should be to widely extend to children the benefits of athletic competition, such as discipline, cooperation, perseverance, and goal-setting. Students should not be discouraged from athletic programs by an overreaching regimen that extends beyond the necessities of sports to impose a single model of proper appearance and behavior.

The diminished expectation of privacy by student-athletes was only one basis for the Court's holding in *Vernonia*. The invasion of the student-athletes' privacy was further justified by evidence that athletes were the "leaders" of the school's harmful and disruptive drug culture, and that use of drugs by athletes increased their risk of "sports-related injury."[8] With respect to the relation among sports, drugs, and injuries, the Court noted that drugs impaired an athlete's judgment, reaction time, and perception of pain, all of which could contribute to injury. Given the facts of the case, the Court's decision, thus, seemed to stand on three principal footings: athletes expect less privacy, they serve as (negative) role models, and drugs place them at special risk.[9]

Courts have been required to determine in subsequent cases whether the holding in *Vernonia* is specially limited to the drug testing of students in sports programs. For example, in *Earls by Earls v. Board of Education*,[10] the Tenth Circuit struck down, on Fourth Amendment grounds, a drug testing policy affecting all students who participate in extra-curricular activities, including the choir and Future Farmers of America, as well

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7. *Id.* at 657 (citing Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 627 (1989); United States v. Biswell, 406 U.S. 311, 316 (1972)).

8. *Vernonia*, 515 U.S. at 649.

9. *Id.* at 657, 663.

10. 242 F.3d 1264 (10th Cir. 2001), *cert. granted*, 2001 U.S. LEXIS 10302 (Nov. 8, 2001).

as athletic teams. The court distinguished *Vernonia* on the basis that the Vernonia school district established a compelling need to address the drug problem, while the Tecumseh school district did not. Thus, the case did not expressly turn on the distinction between athletic programs and other extra-curricular activities. Indeed, the Tenth Circuit was hesitant to find that any of the *Vernonia* Court's characterizations about athletics (such as diminished privacy expectations, role modeling, risk of injury) was dispositive of the case before it.

Particularly with respect to athletes' diminished expectations of privacy, the *Earls* court held:

> The District argues that participants in the extracurricular activities subject to testing under the Policy, like athletes, have a reduced expectation of privacy because: (1) they voluntarily participate; (2) they occasionally travel out of town on trips where they must sleep together in communal settings and use communal bathrooms; and (3) they agree to abide by "the higher degree of academic and out-of-school rules and regulations of both the District and the OSSAA." Appellees' Brief in Chief at 17. While it is probably true that the degree of "communal undress" associated with most of the extracurricular activities in this case is different from the level of "communal undress" among athletes envisioned by the Supreme Court in Vernonia [sic], we decline to give that difference, whatever it may be, much weight in our analysis. We doubt that the Court intends that the level of privacy expectation depends upon the degree to which particular students, or groups of students, dress or shower together or, on occasion, share sleeping or bathroom facilities while on occasional out-of-town trips.[11]

This conclusion should be compared with a recent decision from the Seventh Circuit in which the court stressed that student-athletes have a diminished expectation of privacy when compared with students in other extra-curricular activities, all of whom were subject to the drug-testing policy at issue in that case.[12] The Seventh Circuit found that the diminished expectation of privacy by student-athletes related particularly to bodily privacy, such as communal undress, required physical examinations, and the like. Although the court felt required by Seventh Circuit precedents to uphold the drug testing policy at issue, it did so with obvi-

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11. *Id.* at 1275.

12. Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1063 (7th Cir. 2000) ("Overall, the expectation of privacy for students in extracurricular activities or with parking permits, although less than the general public, is still greater than the expectation of privacy for athletes.").

ous reservations about whether Fourth Amendment privacy protections were being properly safeguarded, at least as to non-athlete students.[13] Thus, the implication seems to be that student-athletes do have diminished privacy protections, at least in relation to bodily privacy.

One additional bodily privacy case involving student-athletes, but not relating to drug testing, warrants at least passing mention. In *Does v. Franco Productions,*[14] intercollegiate athletes at Illinois State University were videotaped, without their knowledge, in various states of undress in school restrooms, locker rooms, and showers. The videotapes were subsequently available for sale on the Internet. Although the case is still pending, claims against those responsible for the videotaping presumably have a reasonable likelihood of success. Two classes of defendants, however, have already been dismissed. The Internet service providers and web site hosts, whose services were used to market the videotapes, were found to be immune from suit under the Communications Decency Act, which protects computer services providers from liability for information originating from a third party.[15]

The other defendants dismissed in *Franco* were University officials, including the President, Athletic Director, and Assistant Athletic Director, who allegedly were aware that copies of the videotapes were being offered for sale but did nothing to stop it, including not even informing the students whose images were being shown.[16] The district court found that the defendants' inaction did not support a claim for invasion of the athletes' right to privacy. Some more affirmative, intrusive conduct beyond a mere failure to act would have to be established.

While this holding generally comports with well-established principles,[17] it is probable that more would be expected of school personnel at the elementary and secondary levels. College students are on their own for the most part, but students in the lower grades are usually not regarded that way. Courts would be more likely to find an affirmative duty to protect younger children whose privacy is being invaded.[18]

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13. *Id.* at 1066 ("As the previous sections make clear, the judges of this panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity. Nevertheless, we are bound by this court's recent precedent in *Todd.*").

14. No. 99 C 7885, 2000 U.S. Dist. LEXIS 9848 (N.D. Ill. July 12, 2000).

15. John Does v. Franco Prods., No. 99 C 7885, 2000 U.S. Dist. LEXIS 8645, at *11 (N.D. Ill. June 8, 2000) (citing 47 U.S.C. § 230(c)(1) (2000)).

16. *Id.* at *3, *10.

17. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

18. *See, e.g.*, Child Online Protection Act, 47 U.S.C. § 231 (Supp. V 1999).

PUBLIC DISCLOSURE OF PRIVATE FACTS

The Supreme Court has recognized a constitutionally protected privacy right against disclosure of personal information.[19] Tort principles also protect some private information from public disclosure.[20] In addition, the Family Education Rights and Privacy Act ("the Buckley Amendment") protects against improper disclosure of information in records maintained by educational institutions.[21] Thus, the privacy of personal information is protected in a number of ways, particularly from disclosure by public school officials, such as coaches.

A recent decision by the Court of Appeals for the Third Circuit, *Gruenke v. Seip*,[22] arose from facts that may reflect a common dynamic on school athletic teams. Sports teams can be like families, and in *Gruenke*, this may have been carried to an extreme.

Leah Gruenke was a member of the high school varsity swim team coached by Michael Seip. During practices, Coach Seip noted Leah's low energy level, and that she often complained of nausea and made frequent trips to the bathroom. He also observed changes in her appearance. He suspected Leah was pregnant. So far, so good, but what should a public high school coach do under the circumstances?

This is what Coach Seip allegedly did:[23] Seip asked the assistant coach to speak with Leah about whether she was pregnant. When Leah rebuffed this approach, Seip "attempted to discuss sex and pregnancy with her" directly.[24] Next, Seip sent the school guidance counselor and school nurse to talk to Leah. Leah rejected all these efforts.

Leah's possible pregnancy became the talk of the team. One of the swimmers' mothers purchased a pregnancy test and gave it to Coach

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19. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

20. RESTATEMENT (SECOND) OF TORTS § 652D (1977) provides:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

21. 20 U.S.C. § 1232g(b)(1) (1994 & Supp. V 1999) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information) of students without the written consent of their parents to any individual, agency, or organization. . . .").

22. 225 F.3d 290 (3d Cir. 2000).

23. *Id.* at 296. The case was on appeal from summary judgment in favor of the defendant, Coach Seip. *Id.* at 295. The court's recitation of the facts does not carefully distinguish which facts are uncontested and which are not. The facts from the court's decision presented here are cast in the terms most favorable to the plaintiff's claims.

24. *Id.*

Seip, who encouraged two team members to talk Leah into taking the test. These two said that Coach Seip would take Leah off the relay team unless she took the test. Under this pressure, Leah eventually took this and three subsequent pregnancy tests, the first of which was positive and the next three were negative.[25] In the meantime, a physician who served as an assistant coach informed Coach Seip that swimming while pregnant would pose no health risk to Leah.[26]

In *Gruenke*, the Third Circuit found that the facts alleged constituted an unreasonable search in violation of Leah's right to privacy under the Fourth Amendment:

> We believe that the standard set forth in Vernonia [sic] clearly establishes that a school official's alleged administration to a student athlete of the pregnancy tests would constitute an unreasonable search under the Fourth Amendment. Although student athletes have a very limited expectation of privacy, a school cannot compel a student to take a pregnancy test absent a legitimate health concern about a possible pregnancy and the exercise of some discretion. This is not to say that a student, athlete or not, cannot be required to take a pregnancy test. There may be unusual instances where a school nurse or another appropriate school official has legitimate concerns about the health of the student or her unborn child. An official cannot, however, require a student to submit to this intrusion merely to satisfy his curiosity. While it might be shown at trial that the facts are more favorable to Seip, we cannot say, as a matter of law, that his conduct as alleged by the Gruenkes did not violate a clearly established constitutional right.
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> . . .
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> Here, the swim coach, an individual without any medical background, allegedly forced Leah to take a pregnancy test. His responsibilities can be reasonably construed to include activities related to teaching and training. They cannot be extended to requiring a pregnancy test. Moreover, a reasonable swim coach would recognize that his student swimmer's condition was not suitable for public speculation. He would have exercised some discretion in how he handled the problem. Seip, however, has offered no explanation that could justify his failure to respect the boundaries of reasonableness.[27]

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25. *Id.* at 296-97.

26. *Gruenke*, 225 F.3d at 297.

27. *Id.* at 301-02.

Thus, the *Gruenke* court interpreted *Vernonia* as establishing that student-athletes have a "very limited" expectation of personal privacy. In addition to finding an unreasonable search, the court found that Coach Seip violated Leah's right to privacy of information by the numerous disclosures he allegedly made, including the disclosure of the results of her pregnancy tests.[28] In effect, the court found that the coach might have invaded the swimmer's privacy by gossiping about her condition.

The desire of a coach to get involved in the lives of members of his team can be a positive value that facilitates the learning and character growth thought to be at the core of school athletics. The way that the team, as a team, addressed the issue of Leah's pregnancy, along with the involvement of a number of parents, could also be considered positive steps.

In this connection, though, one startling fact stands out: Leah's parents were not contacted as this drama played out.[29] This remarkable oversight, given the active involvement of other parents, formed the basis for an additional privacy claim, invasion of familial privacy. The United States Supreme Court has recently noted that the parental interest in "the care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court."[30] The court in *Gruenke* held that while schools have some power and responsibility to supervise and control the behavior of children in their custody, their authority has limits:

> It is not unforeseeable, therefore, that a school's policies might come into conflict with the fundamental right of parents to raise and nurture their child. But when such collisions occur, the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest.[31]

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28. *Id.* at 302-03

> (Leah's claim not only falls squarely within the contours of the recognized right of one to be free from disclosure of personal matters, . . . but also concerns medical information, which we have previously held is entitled to this very protection. If, as Leah alleges, the information about her pregnancy tests was confidential, and Seip compelled Leah to take the tests, his alleged failure to take appropriate steps to keep that information confidential, by Seip's having Leah's teammates administer the test and by his discussing the test results with his assistant coaches, could infringe Leah's right to privacy under the substantive due process clause.).

(citing *Whalen*, 429 U.S. at 599-600; United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980)).

29. *Id.* at 306.

30. Troxel v. Granville, 530 U.S. 57, 65 (2000).

31. *Gruenke*, 225 F.3d at 305.

The Gruenkes asserted that Leah's teenage pregnancy was a family matter in which the State had no right to interfere. The court agreed, holding that Coach Seip's alleged conduct amounted to an "arrogation of the parental role by [the] school."[32] Nevertheless, the court upheld dismissal of the claim for invasion of familial privacy on the basis that, due to the unique circumstances of this case, the right was not clearly established by prior law. Therefore, Coach Seip was entitled to qualified immunity.

Gruenke is the most compelling recent example of information privacy as the basis for a suit by student-athletes, but it is not the only example. In *Doe v. Woodford County Board of Education*,[33] an action was brought for violation of the Buckley Amendment[34] when a middle school principal alerted the basketball coach to the plaintiff's health problems, allegedly within earshot of the plaintiff's teammates.[35] The Sixth Circuit affirmed dismissal of the claim on the basis that disclosure to the coach was permissible due to a genuine health or safety concern, and that the plaintiff failed to prove that nearby teammates, to whom disclosure would not have been permissible, had, in fact, heard any unauthorized disclosure.[36]

In *Wooten v. Pleasant Hope R-VI School District*,[37] a student brought a state tort privacy claim for public disclosure of private facts, because her coach told her teammates and others that she was kicked off the team for missing a game in order to attend another school's homecoming. In fact, the student was running an errand for her mother. The court dismissed the claim, finding that Wooten's failure to attend the game was a matter of public interest, and that the coach's statement that Wooten missed the game to attend another school's homecoming would not subject a person of ordinary sensibilities to shame or humiliation.[38] The public interest point is particularly interesting. The court found that Wooten's absence "affected her teammates and, potentially, the success and reputation of Wooten's team."[39] The court did not elaborate on this conclusion.

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32. *Id.* at 306.
33. 213 F.3d 921 (6th Cir. 2000).
34. 20 U.S.C. § 1232g (1998). The text of the Buckley Amendment is discussed *supra* note 21.
35. *Woodford*, 213 F.3d at 923.
36. *Id.* at 926-27.
37. 139 F. Supp. 2d 835 (W.D. Mo. 2000).
38. *Wooten*, 139 F. Supp. 2d at 845.
39. *Id.*

It seems sensible to allow coaches to tell their players whether a person is still on the team. It is quite another matter, however, to provide the reason for a student leaving a team. The reason may be very personal. For example, it may involve family, health, or educational circumstances. Even here, the reason given—that Wooten was attending another school's homecoming—certainly placed Wooten in a very unfavorable light with her teammates (one of whom was the coach's source for the erroneous explanation).

Taken together, *Gruenke*, *Doe*, and *Wooten* suggest a set of information principles that may sometimes conflict. Coaches should not pry into their players' private lives nor gossip about them. On the other hand, there is nothing wrong with coaches acquiring relevant information about their players and sharing information with team members when circumstances warrant. Sound judgment may be all that separates prying and gossiping, on the one hand, from knowing your players and keeping them adequately informed, on the other. Privacy standards often seem to involve judgments of this sort.

THE CHIEF ILLINIWEK CASE

The controversy concerning the use of Native American symbols as mascots and nicknames for sports teams led to an interesting case involving the University of Illinois. Although privacy issues take a back seat to free speech concerns in *Crue v. Aiken*,[40] they are nevertheless worth noting.

In *Crue*, plaintiffs challenged a University policy that required prior approval by the Director of Athletics of communications by members of the University community with prospective student-athletes. The University justified this "Preclearance Directive" on the basis of National Collegiate Athletic Association (NCAA) rules regulating contacts with prospective athletes and as a means of protecting the privacy of prospective student-athletes.[41]

Students and faculty challenged the Directive on First Amendment grounds as a prior restraint on speech and as an impediment to anonymous speech. The court agreed, finding that the University's reliance on NCAA rules was misplaced. As to students, the court held that NCAA

40. 137 F. Supp. 2d 1076 (C.D. Ill. 2001).

41. *Id.* at 1086 ("The University's asserted interest is in complying with its obligations as part of the NCAA, including rules regulating recruitment contact with prospective student athletes, as well as in protecting the educational and privacy interests of prospective student athletes.").

rules prohibit student contact with prospective athletes only "at the direction of a coaching staff member" or if "financed by the institution or a representative of its athletics interests."[42] As to faculty contacts, the court held that the rules "are focused on regulating the conduct of those individuals who are acting on behalf of the University's athletic interests with respect to matters related to the recruitment of student-athletes."[43] The contacts at issue here relate to a public concern involving the University mascot, a subject "only tangentially related to athletics."[44] If the NCAA rules were interpreted so broadly as to apply to such contacts, the court expressed its doubt as to whether they would pass constitutional muster, at least when enforced by a public college or university.[45]

As to the claim that the Preclearance Directive was necessary to protect the privacy of prospective student-athletes, the court found that "[t]here has been no showing that prospective students either have been or will likely be disrupted in their educational pursuits or subjected to undue pressure by virtue of the limited contact proposed in this case."[46]

Some critics of college sports might find it ironic that the athletic department at a major university is concerned about the privacy of potential athletic recruits and wants to protect them from various forms of harassment. The public perception of the recruiting scene in big time college sports is that athletic departments and coaches are the problem and not the cure. Indeed, the court in *Crue* understood the NCAA rules to be an effort to curtail privacy infringements and harassment by athletic departments and their cronies, not by students and faculty anxious to discuss policy issues on campus.

The court granted the plaintiffs' motion for a temporary restraining order enjoining the University from requiring prior approval of communications by students and faculty with athletic recruits concerning the

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42. *Id.* at 1084 (citing NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2001-02 NCAA DIVISION I MANUAL, art. 13.1.3.5.2 (2001-02)).

43. *Id.* at 1087.

44. *Id.*

45. As an interesting sidelight, the court expressed considerable empathy for individuals charged with assuring their schools' compliance with NCAA rules:

> After listening to Mr. Ille describe the nature of his duties as Compliance Officer with respect to the NCAA and Big Ten rules, and what is involved in performing those duties (such as, numerous requests for opinions on a daily basis and over 500 pages of NCAA rules, often differing in content based on the gender of the athlete and the particular sport involved), it is clear that he has one of the most demanding jobs that any University employee could have.

Crue, 137 F. Supp. 2d at 1082.

46. *Id.* at 1090.

mascot issue. Free speech won out, and college athletic recruits will have to wait until another day for privacy protection from political activists on campus.

SEARCHES OF SPECTATORS

Surveillance is common at major public events in order to avoid terrorist actions and other forms of crime. A recent example of the use of surveillance for a sports event was at Super Bowl XXXV in Tampa, where local authorities used a biometric identification system that relied on facial recognition. Here is how the system worked:

> Specifically, surveillance cameras surreptitiously scanned spectators' faces to capture images. Algorithms then measured facial features from these images—such as the distances and angles between geometric points on the face like the mouth extremities, nostrils, and eye corners—to produce a "faceprint." This faceprint was then instantly searched against a computerized database of suspected terrorists and known criminals to recognize a specific individual.[47]

No known or suspected terrorists were arrested as a result of the surveillance at the Super Bowl, but there is every reason to expect that these efforts to avert tragedy will continue.[48]

Surveillance in public places does not generally infringe protected privacy interests under the Fourth Amendment. The rationale is simple, almost to the point of being tautological: There is no reasonable expectation of privacy for that which one does in public.

Surveillance, however, is legally distinguishable from searches. Although wholesale searches remain common in contexts such as airports and courthouses, courts are hesitant to extend the contexts in which routine searches are permitted.[49] This aversion to suspicionless searches was illustrated by a recent decision involving a sports event.

Local police at a charity motorcycle rally held in Spartanburg, South Carolina engaged in warrantless stops and physical searches of the personal property of motorcycle riders seeking admission to the event.[50]

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47. JOHN D. WOODWARD, JR., SUPER BOWL SURVEILLANCE: FACING UP TO BIOMETRICS 3 (May 2001), *available at* http://www.rand.org/publications/IP/IP209/IP209.pdf.

48. *Id.* at 10.

49. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (Fourth Amendment prohibited city from operating vehicle checkpoints on its roads in an effort to "interdict unlawful drugs," *id.* at 34, where the "primary purpose [of the checkpoints] was to detect evidence of ordinary criminal wrongdoing." *Id.* at 40.).

50. Norwood v. Bain, 166 F.3d 243, 244 (4th Cir. 1999) (en banc) (per curiam), *cert. denied*, 527 U.S. 1005 (1999).

The police were prompted to make the searches by warnings that rival motorcycle gangs, with a history of violent confrontations, would be attending the rally. The searches were limited to persons entering on motorcycle (for example, spectators could avoid being searched by parking their motorcycles off the grounds and entering on foot), and only saddlebags and unworn clothing was searched. Police were searching for weapons, and—given the warm temperatures and the tight clothing that the crowd in attendance was wearing—police believed that these limits on the searches would still be useful under the circumstances.

On these facts, the Court of Appeals for the Fourth Circuit had a devil of a time determining whether a Fourth Amendment violation occurred. In *Norwood*, the court, hearing the case en banc, divided equally on whether the search of saddlebags and unworn clothing was reasonable under the relevant factors, which included the government interest involved, the degree to which the intrusion reasonably advanced those interests, and the magnitude of the intrusion.[51] The per curiam opinion of the court, which resulted in an affirmance of the district court's finding that the search did not violate the Fourth Amendment rights of spectators, contained no analysis on the issue.[52] Instead, we are left to conclude that a law enforcement decision to search spectators at a sporting event (or in any other context) is highly judgmental, based on the evidence of the risk and the nature of the search conducted.

The security of a sports event will sometimes allow invasions of the privacy of spectators. A firm basis for these invasions will be required, however, and the search must be carefully tailored to the risk.

CONCLUSION

Privacy issues have proven difficult to resolve in contemporary American law and society. It is no surprise, then, that the sports field draws its share of privacy disputes. Some peculiarities of sports, particularly the extent of public interest and the emphasis on team, have proven to complicate privacy issues that arise in the sports world. Courts are grappling with these problems and providing useful guidance for players, coaches, sponsors, and spectators.

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51. *Id.* at 247-51. For a further analysis of the decision, see Ronald J. Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law*, 37 HOUS. L. REV. 1421, 1444-50 (2000).

52. *Norwood*, 166 F.3d at 245.