ARTICLES

# The Constitutionality of Mass Searches of Sports Spectators

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Beginning with the 1976 Olympic Games in Munich, which became a venue for terrorism, major sports events have increasingly been viewed as likely terrorist targets, and event organizers have implemented heightened security measures. As terrorist activity has increased around the world, spectators at such events have been subjected to several types of searches, ranging from bag searches at the 1996 Atlanta Olympic Games, to wand searches at the 2002 Salt Lake City Winter Olympic Games, to the pat-down searches required at 2005-06 National Football League games, and to video surveillance at the 2001, 2002, and 2006 Super Bowl games.

This heightened security has had as its price a steady erosion in the scope of individual privacy, inasmuch as we have moved from limited visual inspections of bags for alcohol and projectiles, to physical searches of persons for weapons, and on to searches of persons for their identity and criminal status. The 2001 Super Bowl in Tampa, Florida earned the nickname "Snooper Bowl" after it was learned that all spectators entering the stadium had not only been subjected to video surveillance with face-recognition scanning technology, but that those images had been screened against a database of known criminals for the purpose of identifying possible terrorists that officers would then attempt to intercept (Elmore, 2001; Kappstatter, 2001). While signage outside the stadium informed fans that they were under video surveillance, many were unaware until afterwards of the simultaneous use of the images in what the American Civil Liberties Union (ACLU) called a "virtual police line-up," and public outrage at the privacy intrusion ensued (Kappstatter, 2001; Uncle Sam, 2001; Trigaux, 2001).

At the next year's Super Bowl in New Orleans, the city used similar video surveillance and screening with little public hue and cry, because the game took place just four months after the terrorist attacks of September 11, 2001,

and fear in the U.S. citizenry was running high. In fact, an October 2001 Harris poll reported that 86% of Americans were in favor of using such technology in public places to scan for terrorists (Balint, 2003). By the time the 2002 Winter Olympics were held in Salt Lake City, public fear had subsided somewhat, and officials there decided not to use a similar scanning system that had been installed in the ice hockey arena, giving as their reason that the manufacturer was not an official corporate sponsor of the Games. And when the 2003 Super Bowl was played in San Diego, city officials attributed their decision to forego the use of face-scanning technology to its high cost and proven inaccuracy (Balint, 2003). However, new three-dimensional holographic technology designed to enhance the capabilities of facial recognition searches led to the use of face-scanning in Detroit at the 2006 Super Bowl (Steinbach, 2006).

As the sophistication of surveillance and search technologies continues to develop, and as terrorism around the world continues to frighten people, questions as to the appropriateness and legality of spectator searches will continue to arise. In many European countries where citizens encounter terrorism with some regularity, routine use of such technologies has met with little challenge (Uncle Sam, 2001). Since 9/11 brought terrorism to the United States, where privacy is cherished as a fundamental freedom and has received constitutional protection, the question that arises is whether Americans will willingly trade a significant measure of that freedom for a heightened sense of security.

Privacy advocates worry that fear will outweigh the American passion for privacy, and that surveillance of citizens will suffer from "mission creep" as the comparison databases are broadened and become susceptible of other uses, like catching petty criminals (Uncle Sam, 2001). Other forms of citizen surveillance are also cause for concern. Already, microchip technology exists that can be implanted under the skin and used to track a person's location (Trigaux, 2001). Global positioning systems (GPS) technology installed in cell phones and vehicles is currently being used by businesses to monitor time on-the-clock and the location of their employees (Associated Press, 2004). Increasingly, companies track website usage of Internet surfers and consumers, and video surveillance technology is used by many businesses, as well as by the government in public intersections and public buildings. Federal and local government agencies currently use private data collectors to acquire personal information that would be illegal for them to obtain otherwise (The End of Privacy?, 2006). Surveillance by private businesses is troubling enough, but deliberate monitoring of citizens by their government poses a threat to freedoms we have long enjoyed.

As Benjamin Franklin stated, "they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety" (Franklin, 1759). And yet the government's ability to protect and provide for the well-being of the citizenry requires reasonable limits on liberty. In these times of high tech surveillance and increased fears of the terrorist threat, "Where should we draw the line?" has become a pressing question.

The specific question addressed in this paper is whether or not the line has already been crossed in the context of mass searches of spectators at sports events. Many sports venues regularly conduct visual searches of bags and wand searches of spectators, and some have implemented more intrusive pat-down and video surveillance searches. The ACLU questioned the constitutionality of the "Snooper Bowl" video surveillance and database comparisons as possible violations of the Fourth Amendment guarantee of freedom from unreasonable searches and seizures (Kappstatter, 2001). Are any of these types of spectator searches in fact unconstitutional? If not, should they be?

Section I of this paper examines whether the state action requirement for constitutional analysis is typically met in the spectator search context, followed by Section II which provides an overview of general principles of Fourth Amendment law. In Section III, visual bag inspections, and magnetometer and pat-down searches of spectators are analyzed based on courts' analyses from before the September 11, 2001 terrorist attacks on the United States. Section IV discusses post-9/11 judicial decisions regarding such searches. Section V examines legal doctrines that apply to public surveillance, and explores the adequacy of current law with regard to uses of surveillance with advanced technologies. This sets the stage for Section VI which analyzes the constitutionality of the advanced technology "Snooper Bowl" searches.

## SECTION I: STATE ACTION AND SPECTATOR SEARCHES

Application of the Fourth Amendment to searches of sports spectators must be predicated on a finding of state action – that is, that the searches were conducted by a government actor. It is readily apparent that searches conducted by officials of public universities at publicly owned facilities constitute state action, since such universities are branches of state government. However, where sports facilities are privately owned, as with some professional sport venues, whether state action exists is less obvious.

If the search is conducted by or merely observed by the police, it may be considered state action even though the facility is privately owned (*Johnston v.*

*Tampa Sports Authority*, 2005; *State of North Dakota v. Seglen*, 2005). In cases where a city sports authority or regional sports commission is responsible for implementing a search policy, the fact that it is a public agency is relevant, as is whether the search is supported by taxpayer dollars (*Johnston*, 2005). Even if a public agency hires a private security company to actually conduct the search, the search may be construed as state action if it is being conducted pursuant to the public purpose of assisting law enforcement if contraband items are found (*Johnston*; *State of Iowa v. Carter*, 1978). Therefore, while it may be possible to construct a search policy for a privately owned and operated sports facility that might avoid state action, spectator searches at an overwhelming number of arenas and stadiums will likely be considered state action.

## SECTION II: OVERVIEW OF FOURTH AMENDMENT PRINCIPLES

The Fourth Amendment to the United States Constitution protects the right of the people to be free from unreasonable searches and seizures, and includes the right to be secure in their "persons, houses, papers, and effects" (U.S. CONST. amend. IV). The general rule with regard to searches is that the Fourth Amendment requires evidence of probable cause to search before a search can be considered reasonable (*Coolidge v. New Hampshire*, 1971).

The Supreme Court has recognized a limited set of specific exceptions to the probable cause requirement, which include: exigent circumstances demanding immediate action that render obtaining a search warrant futile (such as danger to police or destruction of evidence – see *Arkansas v. Sanders*, 1979; *Terry v. Ohio*, 1968); circumstances establishing a "special need" to search that is beyond the need for normal law enforcement (such as airport searches based on a history of bombings and hijackings – see *Wheaton v. Hagan*, 1977); and certain situations that the Court has identified in which individuals have a diminished expectation of privacy (such as border searches and searches of open fields – see *Bourgeois v. Peters*, 2004). General, suspicionless, "dragnet" types of searches that do not fall within these narrow exceptions are precisely what the Fourth Amendment was designed to prevent. The question is, do the various types of suspicionless searches imposed on sports spectators fall within any of the recognized exceptions to the probable cause requirement?

## SECTION III: VISUAL BAG INSPECTIONS, MAGNETOMETERS, AND PAT-DOWNS (TRADITIONAL PRE-9/11 ANALYSIS)

The most common types of searches of sports spectators are visual bag inspections, magnetometer (wand) searches, and pat-downs (Steinbach, 2006). This section discusses the judicial analysis traditionally applied to these types of searches prior to the September 11, 2001 tragedy.

A visual inspection of the contents of spectators' bags was held reasonable when balanced against the need to exclude dangerous projectiles from professional football games (*Jensen v. Pontiac*, 1982). In *Jensen*, a Michigan appellate court applied the three-part balancing test used in airport search and other "special needs" types of cases in order to determine the reasonableness of the search procedure used at the publicly owned Silverdome. This test requires a balancing of the public necessity for the search and the efficacy of the search procedures, against the nature and intrusiveness of the search (*Jensen*, 1982).

The court found that there was a history of widespread injuries to patrons as a result of thrown objects, and that spectator violence occurs with some regularity at football games; thus, there was a sound public necessity to implement a bag search (*Jensen*, 1982, pp. 623-624). It also found evidence that the number of projectile-related injuries had substantially decreased since implementation of the search policy (*Jensen*, p. 624). Weighing these factors against the minimal intrusiveness of the visual inspection of the contents of spectators' bags, which the security guards were not allowed to touch, the court found the search procedure reasonable under the Fourth Amendment (p. 624). An additional factor minimizing the intrusiveness was the fact that the bags of all spectators were searched, removing any potential stigma from being selected to be searched while others were not. Finally, the court thought it important that the policy required the guards to inform the spectators that they could dispose of any prohibited items and then be admitted, or they could refuse to be searched and receive a refund for their admission ticket (p. 624). These notifications also served to minimize the invasive potential of the search.

Since *Jensen* was decided in 1982, similar visual inspection bag searches have been instituted at many sports venues based on the same justification of protecting patrons from injury, and have now become a commonly accepted practice at, for example, college and professional football games (Schaarsmith, 2005; Seattle Seahawks, 2005; Steinbach, 2006). However, the *Jensen* case was decided by a state appellate court and thus has limited value as precedent. Moreover, subsequent cases have generally rejected the *Jensen* court's view

that stadium spectator searches are analogous to airport searches because the latter were justified by several bombing and hijacking incidents, whereas there is no such track record of large-scale violence at sports events (*Jacobsen v. City of Seattle*, 1983; *State of North Dakota v. Seglen*, 2005). Nevertheless, the *Jensen* case is at least on point and can serve as persuasive precedent for the idea that very minimal searches like visual bag inspections might be reasonable. Indeed, when the court in *State of North Dakota v. Seglen* (2005) struck down a pat-down spectator search, it took care to distinguish *Jensen* by recognizing its cautious approval of the most minimal type of search (a visual-only bag inspection) combined with a careful consent process.

Less limited searches, with less carefully crafted and less closely followed notice provisions, have met with a markedly different result. Magnetometer (wand) searches are considered to create a minimal invasion of privacy (*Collier v. Miller*, 1976), and were used extensively at the Salt Lake City Winter Olympic Games in 2002. However, in *Bourgeois v. Peters* (2005) (discussed more fully in Section IV), the Eleventh Circuit struck down mass magnetometer searches of attendees at a political rally. According to the *Bourgeois* (2005) court, a magnetometer search is potentially as intrusive as a pat-down search because detection of hidden metallic objects would result in a more invasive physical search of spectators and their belongings (p. 1314).

Physical searches of persons and their property are considered to be invasive. In a line of rock concert spectator search cases, physical searches of bags and pat-down searches of spectators had been conducted. Additionally, spectators were not notified that they would be searched except by the occasional sign or public address announcement, and many claimed they never saw or heard those messages. In all of these cases, the intrusiveness of the search was found to out-weigh the need for the search (*Collier v. Miller*, 1976; *Gaioni v. Folmar*, 1978; *Jacobsen v. City of Seattle*, 1983; *State of Iowa v. Carter*, 1978; *Stroeber v. Commission Veteran's Auditorium*, 1977; *Wheaton v. Hagan*, 1977). With specific regard to pat-down searches, the *Stroeber* court stated that the Supreme Court had made it clear in several decisions that it was authorizing this type of search for the protection of police officers in pursuit of suspects, and not for the less compelling purpose of discovering incriminating evidence (*Stroeber*, 1977). In order to conduct a pat-down search, a police officer must be able to articulate specific facts that give rise to a reasonable individualized suspicion that the individual searched has a weapon (*Terry v. Ohio*, 1968).

In contrast, an anonymous tip that alerted the police to a threat of danger at a basketball game would not justify a pat-down search of all the spectators (*Williams v. Brown*, 2003). In this case, the plaintiffs alleged that police

searched all the spectators and participants, resulting in the discovery of two illegal firearms. Relying on *Terry* (1968), the *Williams* court stated that "an anonymous tip. . .would not, by itself, justify the wholesale invasive search of large groups of people. . ." (2003, p. 991).

Spectator consent to be searched was also discussed in the rock concert cases discussed above. A search that is consented to is considered a reasonable search (*Schneckloth v. Bustamonte*, 1973). One commentator has suggested that sports spectators give their implied consent to be searched when they choose to attend a game (Williams, 2005). However, in the rock concert cases, the courts all found that spectator "consent" did not meet the Fourth Amendment standard for being freely and voluntarily given (*Collier v. Miller*, 1976; *Gaioni v. Folmar*, 1978; *State of Iowa v. Carter*, 1978; *Stroeber v. Commission Veteran's Auditorium*, 1977; *Wheaton v. Hagan*, 1977). The courts ruled that the existence of conspicuously posted signs providing notice that patrons are subject to search is not enough to establish that a spectator who enters has consented to be searched (*State of North Dakota v. Seglen*, 2005). Rather, the patron must demonstrate affirmative conduct, not mere silence and failure to object, that she or he has given unequivocal consent to be searched.

The issue of consent also implicates the doctrine of unconstitutional conditions, which holds that the state may not condition receipt of a benefit or privilege on the relinquishment of one's constitutional rights (*United States v. Chicago, Milwaukee, St. Paul, & Pacific Railroad Co.*, 1931). The courts have repeatedly held that facility operators may refuse admission to spectators who violate the law or rules designed to promote a safe and enjoyable entertainment experience; however, in so doing they must not abridge individuals' constitutional rights. When public access is conditioned on submission to a search, it is deemed to be coerced unless the totality of the circumstances shows that patrons have given free and unconstrained consent (*Collier v. Miller*, 1976; *Gaioni v. Folmar*, 1978; *State of Iowa v. Carter*, 1978; *Bourgeois v. Peters*, 2005). Thus, the doctrine of unconstitutional conditions would operate in conjunction with the requirement of affirmative consent to refute the legitimacy of the notion that consent to be searched is implied by a spectator's attendance at an event, even where signs notifying of a search policy are present. In contrast, the search policy implemented in the *Jensen* case required affirmative consent to be expressed by patrons to the security guards, and required the patrons to be told they could refuse to be searched and their ticket price would be refunded.

Taken together, *Jensen*, *Williams*, and the rock concert cases indicate that limited bag searches of sports spectators for dangerous possessions that are

justified by real concerns about patron and performer safety and that are accompanied by adequate consent provisions might be upheld by the courts. Wand searches and pat-downs, however, will most likely be struck down. Some have contended, however, that the world is a different place since the 9/11 terrorist attacks, and that the post-9/11 terrorist threat should change what is considered a reasonable search at major spectator sports events.

## SECTION IV: WANDS AND PAT-DOWNS AND THE POST-9/11 TERRORIST THREAT ARGUMENT

The Eleventh Circuit recently decided a case that addressed the terrorist threat issue with respect to a search that was somewhat analogous to the context of searches of sport spectators. In *Bourgeois v. Peters* (2004), the court was faced with determining the constitutionality of magnetometer (metal detector) searches of participants in a large political demonstration in a public place. 15,000 protestors had engaged in a thirteenth annual non-violent political demonstration on property open to the public outside Fort Benning, Georgia, to express their opposition to the School of the Americas combat and counter-insurgency training program for foreign military leaders. In the thirteen years of protests, there had been no history of weapons or violence, and yet all attendees were now subjected to a magnetometer search. If metal was identified, the individual would then be subjected to a physical search of their person and possessions.

The constitutionality of this mass search was challenged, and the Eleventh Circuit held that it violated the Fourth Amendment (*Bourgeois*, 2004). According to the court, the city of Columbus had not established probable cause to conduct a search because there was no evidence that anyone had targeted this particular event for a terrorist attack (*Bourgeois*, p. 1311). Neither were there any exigent circumstances presented by people walking to a political rally that would necessitate an immediate warrantless search (p. 1316). Nor did the "special needs" doctrine apply. The city had argued that, because of the elevated terrorist threat level, it had a special need, apart from its regular law enforcement goals, to search for weapons and contraband in order to keep the protestors safe (p. 1312). The court found this argument disingenuous, seeing no real distinction between the city's newly articulated need to protect the public safety and its normal goal of enforcing existing laws designed to protect the public (p. 1312-1313).

The law enforcement interests in being able to conduct quick, warrantless searches would be well-enough served, according to the court, by the normal means available to the police: "stop and frisks" based on reasonable suspicion

that an individual was carrying a weapon; full searches if the belief that someone possessed a weapon created exigent circumstances requiring an immediate search; and full searches incident to an arrest for unlawful activity (*Bourgeois*, 2004, p. 1316). "Armed with these alternatives," said the court, "the City cannot plausibly claim that it has no alternative but to accost innocent people who show no indication of possessing contraband or weapons" (*Bourgeois*, p. 1316).

The city also argued that large gatherings were likely targets for terrorist attacks, and that therefore the elevated terrorist threat level justified the need for the court to create a "large gathering" exception to the probable cause requirement. The court disagreed, finding that while attendees at a large public gathering might have a lesser expectation of privacy in their conversations (which could be expected to be overheard), they do not have a substantially diminished expectation of privacy in their persons or property simply by virtue of their presence in a large public group (*Bourgeois*, 2004, pp. 1315-1316). A short-coming of this decision is that the court provided no analysis in support of this conclusion, other than citing *Delaware v. Prouse* (1979, p. 663) for the proposition that people "are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks" (*Bourgeois*, p. 1315).

The court went on to say that the country had been under an elevated threat level (yellow alert) for over two and half years which was so long that the elevated threat level had become the "normal" state of affairs. Furthermore, according to the court:

> [I]t is quite possible that [we] would be safer if the City were permitted to engage in mass, warrantless, suspicionless searches. . . . Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence – rather than potentially effective, broad, prophylactic dragnets – as the constitutional norm. . . . We cannot simply restrict civil liberties until the War on Terror is over, because [it] is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country (*Bourgeois*, 2004, pp. 1311-1312).

Additionally, the court was persuaded that to allow the government room to circumvent the probable cause requirement simply by raising the threat level would be to allow too much arbitrariness into decision making about searches, resulting in a decreased ability to sustain the Fourth Amendment

principle of general protection from unreasonable searches and seizures (*Bourgeois*, 2004). Finally, in addition to the problem of determining what size group would be large enough to qualify, the court reasoned that a "large gathering" exception would be susceptible to viewpoint discrimination under the First Amendment if officials began selectively applying it to public concerts in the park or Fourth of July parades or marathon races, but not to high school graduations or church picnics or fundraising walks (*Bourgeois*, p. 1311).

Because major sports events are also large public gatherings, the facts of *Bourgeois* seem sufficiently similar to spectator sports events to apply the Eleventh Circuit's rationale in that context as well. The normalized elevated terror threat level and the threat of arbitrary and/or selective application of a proposed "large gathering" exception to the probable cause requirement are also relevant to sports events. Applying the *Bourgeois* court's position on these two factors, minimally intrusive searches of sports spectators based on deterring terrorism should be considered to violate the Fourth Amendment. However, the public necessity of protecting patrons from thrown projectiles was not an issue in the *Bourgeois* scenario, and that is the difference that makes the difference in justifying minimally intrusive mass searches for concealed dangerous possessions in sport spectator cases. That is, visual bag inspections may be legitimate, but only when the government's need is justified by the specific goal of excluding dangerous projectiles as articulated in *Jensen*, and not by the general terrorist threat.

Therefore, the real importance of the *Bourgeois* case for the sport context is its renunciation of the general threat of terrorism as a legitimate justification for using governmental power to conduct mass suspicionless searches of people at large gatherings. Attempts by sport organizations to use the terrorist threat to justify the addition of more highly intrusive types of mass searches for dangerous possessions at sports events, such as physical searches of bags and pat-downs of spectators, would be disfavored under *Bourgeois*.

Indeed, the Supreme Court of North Dakota reached just such a conclusion in *State of North Dakota v. Seglen* (2005). In this case, a student was subjected to a pat-down search when he attended a college ice hockey game. Although the game was played in a privately owned and operated arena, the court found that the search was state action because it was conducted by a police officer (*Seglen*, 2005, p. 706). Signs were posted inside the arena warning patrons that they were subject to search, but the court followed the rock concert cases discussed above in finding that this could not establish implied consent to be searched (*Seglen*, p. 709). The court also found that the pat-down search did not fall within the exigent circumstances exception (*Terry v. Ohio* "stop and

frisks") nor the special needs exception (airport searches) to the warrant requirement (pp. 706-708).

However, the state attempted to argue that there is a greater need for such searches at spectator sports events since the terrorist events of 9/11. The court rejected that argument, indicating its agreement with the *Bourgeois* court that the general threat of terrorism should not be used as the basis for restricting Fourth Amendment protections at large public gatherings (*Seglen*, 2005, p. 708). The court went on to state that there was no evidence of a history of violence or injury at hockey games in that arena, and so nothing in the record supported a mass suspicionless search of the spectators; therefore, the pat-down search was thus held to be unconstitutional (*Seglen*, p. 708).

A Florida court has also recently applied the *Bourgeois* decision to a sport spectator search case. In August 2005, the National Football League (NFL) implemented a new rule requiring pat-down searches of spectators at all NFL professional football games, beginning with the 2005-06 season (Fans will be subject, 2005). NFL Commissioner Paul Tagliabue stated, "This new requirement is not a result of any specific threat information. It is in recognition of the significant additional security that pat-downs offer, as well as the favorable experience that our clubs and fans have had using pat-downs as part of a comprehensive stadium security plan" (Fans will be subject, p. E06). When the Tampa Sports Authority sought to implement the NFL's new rule at Tampa Bay Buccaneers football games, plaintiff Gordon Johnston, a season ticket holder, sued claiming his Fourth Amendment rights would be violated if he was forced to be searched in order to attend.

In *Johnston v. Tampa Sports Authority* (2005), the judge issued a preliminary injunction finding that Johnston was likely to succeed on the merits of his claim that the search was unconstitutional. State action existed because the Tampa Sports Authority (TSA) is a public agency created by the state of Florida to maintain a complex of sports facilities, including Raymond James Stadium in which the Buccaneers play. Even though the TSA hired a private security company to conduct the searches, the court found that that company operated under the direction of the TSA and followed the TSA search policy (*Johnston*, 2005, pp. 3-4). Additionally, the searches were paid for with taxpayer dollars, and were overseen by the police. Finally, the searches fulfilled the public purpose of informing law enforcement personnel if contraband was found on a person, and the policy would subject said person to arrest.

The TSA attempted to argue that Johnston impliedly consented to be searched because email notices, posted signs, and public address announcements at the stadium provided notice that attendance was conditioned

on being searched. However, the court found that season ticket holders had not been notified of the policy before they purchased their tickets, and the Buccaneers had told Johnston they would refuse to give him a refund when he complained about the search policy (*Johnston*, 2005, p. 6). Furthermore, said the court, Johnston was being coerced to "consent" to the search or relinquish his rights as a ticket-holder (*Johnston*, p. 7). Finally, Johnston had expressed his lack of consent to the search, but was patted down anyway. The court concluded that there was no genuine consent, and that the doctrine of unconstitutional conditions had also been violated (p. 7).

The TSA attempted to argue that the general threat of terrorism constitutes special circumstances justifying pat-downs of all spectators at Buccaneers football games. The court, quoting from the *Bourgeois* opinion, refused to "eviscerate the Fourth Amendment" by restricting fundamental freedoms in order to assuage generalized fear (*Johnston*, 2005, p. 8). Instead, it required evidence of a particularized threat at that stadium, and found only two unsubstantial pieces of evidence. One was a two-year-old phone call that had been investigated and determined to have been a false alarm. Another was a two-year-old press report that mention of two other football stadiums was discovered in files on computers linked to possible terrorists, which the FBI had investigated and determined there was no threat. The only other argument by the TSA was that NFL games would be appealing targets to terrorists because they are important symbols of American culture. The court concluded that there was no evidence of any real threat to events held in this particular stadium, and issued a preliminary injunction requiring that the TSA refrain from implementing the NFL's pat-down rule in its search policy (*Johnston*, pp. 5-6, 8).

In conclusion, the cases discussed in this section demonstrate a clear unanimity in the courts that, despite the increased general threat of terrorism with which we now must live, mass suspicionless pat-down searches of sports spectators are unconstitutional. Under *Bourgeois*, suspicionless wand searches are also unconstitutional, although they are initially less intrusive. Following *Jensen*, visual bag inspections (but probably not physical searches of bags) may be upheld if this type of search is justified by evidence of particularized danger to patrons and performers in a given facility and if adequate notice and consent procedures are followed.

Each court that has addressed the issue of whether the new era of terrorism should be allowed to justify mass suspicionless invasion of individual spectators' privacy has passionately rejected the idea. One court explicitly recognized that even if most attendees do not object to being searched, "the damage to the understanding of constitutional guaranties of freedom from

unreasonable searches on the part of. . .young persons is incalculable" (*Jacobsen v. City of Seattle*, 1983, p. 657). In other words, the courts seem to be of the view that by characterizing such spectator searches as negligible intrusions and allowing them to become commonplace, we are damaging the ability of America's youth to appreciate the critical importance of preserving our constitutional freedoms.

## SECTION V: ADVANCED TECHNOLOGIES AND MASS SEARCHES

Despite the fact that identity searches with advanced technology are more intrusive than bag, wand, and pat-down searches, the constitutionality of the "Snooper Bowl" facial-recognition type of surveillance is less clear. On one hand, facial-recognition scanning and screening is inherently more intrusive than limited searches for contraband possessions, because the former reveals, records, and uses information about one's personal identity to check for a criminal record. Thus, the case law discussed previously should support a holding that these more intrusive searches are clearly unconstitutional. However, under the "open fields" and "plain view" doctrines found in Fourth Amendment jurisprudence (discussed more fully below), an "identity search" is also arguably less intrusive than a search for concealed contraband. The latter argument would be that a spectator who has chosen to attend a sports event has knowingly exposed herself to the public, and under these doctrines may have a diminished expectation of privacy with respect to being observed. As noted above, the *Bourgeois* court summarily dismissed this argument, and therefore did not discuss these two doctrines. However, legal commentators have found them relevant in the context of surveillance in public places (Aronov, 2004; Kearns, 1999).

### Searches of People in Public Places

The Supreme Court's treatment of searches in public places has been less than coherent. The landmark case of *Katz v. United States* (1967) established a two-pronged test for determining whether a reasonable expectation of privacy exists: 1) the government's conduct breached a subjective expectation of privacy; and 2) that expectation of privacy was one that society would find objectively reasonable (*Katz*, p. 361, Harlan, J., concurring). In a string of aerial surveillance cases, the Court enunciated its "open fields" doctrine, under which it permitted warrantless searches that included a homeowner's backyard and a backyard greenhouse. These aerial searches were considered reasonable on the grounds that the government was legally present in navigable air space, and the property owners failed to demonstrate a subjective expectation of

privacy – even though they had erected fences and a partial roof over the greenhouse – because any member of the public could have flown over and seen the contents of the area (*California v. Ciraolo*, 1986; *Dow Chemical v. United States*, 1986; *Florida v. Riley*, 1989). In fact, in *Riley*, a police helicopter hovered closely over the opening in the backyard greenhouse roof in order to scrutinize the area inside for marijuana, and this was held to be a reasonable search.

In contrast, in a separate line of cases enunciating the "plain view" doctrine, the Supreme Court has distinguished between casual observation of objects in plain view (permissible) and scrutiny of plain view objects for more information (impermissible) (*Arizona v. Hicks*, 1987; *Coolidge v. New Hampshire*, 1971). In *Hicks*, a police officer, lawfully present to investigate a shooting, closely examined stereo equipment that was in plain view in order to record the serial numbers so he could check on whether the equipment was stolen. The Court found that this scrutiny, without a search warrant, violated the "plain view" doctrine, saying that "[t]he distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment" (*Arizona v. Hicks*, 1987, p. 325). Thus, the "plain view" precedent draws a clear distinction between inadvertent discovery and an intentional search.

Reconciling the "open fields" line of cases with the "plain view" cases is difficult. However, some elucidation may be found in a case that concerns tracking the movements of individuals who have knowingly entered public places. In *United States v. Knotts* (1983), the Court held that persons suspected of criminal activity who were traveling in a car on public streets had put themselves in public view and had no reasonable expectation of privacy in their movements along those streets, so that warrantless use of beeper technology to monitor their progress was acceptable. This ruling on the acceptable use of tracking devices was limited to public places in *United States v. Karo* (1983) in which the Court held that the warrantless use of similar beeper technology inside a private residence, where more intimate information might be gleaned, was an unreasonable search.

Thus, at first glance, it appears that people in public places do indeed have a diminished expectation of privacy. However, it must be kept in mind that the monitoring of the driver in *Knotts* was based on particularized suspicion that the defendants were engaged in illegal narcotics activities, which is very different from general street surveillance of random law-abiding citizens. The latter is more closely akin to the generalized searches the Fourth Amendment was intended to prevent. Furthermore, the *Knotts* Court acknowledged the possibility that even if such dragnet type searches of people in public places

came to be considered reasonable under the Fourth Amendment in future decisions, "different constitutional principles may be applicable" to prevent them (*Knotts*, 1983, p. 284).

Following the lead of the Court in *Knotts*, Aronov (2004) makes a reasonable argument that street surveillance of ordinary citizens constitutes excessive monitoring and represents an unauthorized intrusion into their habits, associations, and transactions, and that these invasions of privacy implicate liberty interests under the Due Process Clause. Aronov argues that the purpose of surveillance is not only to detect but to deter illegal behavior, and that therefore observation is inherently intrusive because it alters conduct. Another commentator has asserted that the Supreme Court has recognized at least a weak constitutional right to information privacy when it acknowledged in *Whalen v. Roe* (1977), for example, that confidentiality of personal medical information was an important, though regulable, privacy interest (Kearns, 1999). Combining the arguments made by Kearns and Aronov, it is arguable that there is a due process liberty interest in protecting one's dignity and expectation of privacy in personal information.

## Advanced Technology Searches Involving Personal Information

Regardless of the ultimate success of these arguments under a Due Process Clause analysis, the issue of information privacy can be addressed in the context of the Fourth Amendment. Aronov (2004) argues that, taken together, the *Knotts* and *Karo* cases show that the Supreme Court has recognized the relevance of the use of surveillance data in determining the reasonableness of a search. Whereas beeper technology to monitor a driver's behavior in public streets was permissible in *Knotts*, in *Karo* the use of similar technology to gather information about evidence inside a home was ruled unconstitutional. This distinction was reinforced in *Kyllo v. United States* (2001) when the Court ruled that the use of thermal imaging to conduct a warrantless search for excessive heat emanating from within a constitutionally protected area (a home) was an impermissible search. According to the Court, thermal imaging is non-invasive technology because it does not penetrate into the home, but using it to search heat emanations from the home renders private, within-the-home information accessible (*Kyllo*, 2001, p. 35, n.2 & p. 38). Aronov concludes that a reasonableness inquiry need not be limited to the intrusiveness of the type of technology utilized in the search, but should extend to the intrusiveness of the *use* of that technology as well (Aronov, 2004).

A recent decision lends support to Aronov's argument that the use of search technology is an important element of intrusiveness. In *In re Pen Register* (2005), an intrusive use of advanced technology to acquire personal information was considered relevant to the reasonableness of a search. In this case, a U.S. District Court magistrate judge denied the government permission for a warrantless use of cell phone Global Positioning Systems (GPS) technology to track an individual's location. This denial was based on a federal communications statute that expressly prohibits the use of such tracing technology to provide information to the government that identifies the physical location of the user (Communications Assistance for Law Enforcement Act, 2006). Magistrate Judge Orenstein relied on the legislative history of this statute to demonstrate Congressional intent that, in addition to the ban on being a passive recipient of such information, the government could not actively seek to acquire location information through the use of this technology without obtaining a search warrant.

The judge quoted the House Judiciary Committee's statement in support of the bill as follows:

> . . .[A]s the potential intrusiveness of technology increases, it is necessary to ensure that government surveillance authority is clearly defined and appropriately limited (*In re Pen Register*, 2005, p. *8).

And he quoted the FBI Director's testimony that the bill:

> Expressly provides that the authority for pen registers and trap and trace devices cannot be used to obtain tracking or location information, other than that which can be determined from the phone number. Currently, in some cellular systems, transactional data that could be obtained by a pen register may include location information (*In re Pen Register*, pp. *8-9).

In Judge Orenstein's words, "It is thus clear that Congress intended to regulate not only what telecommunications providers could give, but also what law enforcement agencies could 'obtain'" (p. 9). In sum, he concluded that there was clear Congressional intent, as evidenced by the language of the statute and the legislative history, to limit the use of advanced technology to acquire private information.

Due, then, to the potentially high intrusiveness of advanced surveillance technology, there may be increasing support in the federal courts for considering the relevance of the use of such technology in determining the reasonableness of a search. In fact, recent developments in high tech surveillance methods and information technology are creating a functional merger of types of searches with their use. Kearns (1999) makes a compelling

argument that this merger of technologies enables governmental uses of private information that are potentially so intrusive that a reconceptualization of the *Katz* two-pronged reasonableness analysis (requiring both subjective and objective expectations of privacy) is necessary.

In support of his argument, Kearns describes high tech search methods that are likely to leave individuals completely unaware that they have been monitored, or at least unaware of the extent to which they have been monitored (Kearns, 1999). Examples include: computer matching that draws from disparate databases to create a mosaic data image of a person; intelligent roadways; real-time comparison of financial transactions with criminal activity databases; satellite imaging; technologies that can show objects on the body, such as passive millimeter wave imaging and magnetic gradient measuring; technologies that can produce relatively clear images of the naked body, such as radar skin-scanning and back-scattered X-ray imaging; and "smart" cards that can store vast amounts of information heretofore stored separately by entities in different industries, such as health, spending, communications, credit, and location information. According to Kearns, lack of awareness of being monitored by such invisible merged uses of information and surveillance technologies renders individuals unable to take measures to protect their privacy, and thus less able to demonstrate a subjective expectation of privacy in order to satisfy the first prong of the *Katz* test (Kearns).

## The Need for an Updated Reasonableness Analysis for High Tech Identity Searches

On that basis, Kearns convincingly argues the need for reconceptualizing the subjective inquiry requirement of *Katz*; however, his solution seems too simplistic. Kearns proposes that courts should simply imply that individuals have a subjective expectation of privacy in their personal information, instead of requiring evidence of the same (Kearns, 1999). But implying a subjective expectation seems to contradict the purpose of requiring evidence of an actual expectation of privacy, which is to allow the search to be considered reasonable if the searched individual has no objection to it. One might as well eliminate the subjective prong altogether, and simply analyze the objective reasonableness of the search. The weakness of doing so is that courts could then identify their view of what society would consider reasonable, and then justify that view as objective, without having to acknowledge a counter-balancing element anchored in an actual person's subjective reality. Nevertheless, eliminating the subjective prong would avoid placing courts in

the disingenuous position of implying something so fact-specific as a person's subjective expectation of privacy.

A better approach might be for the courts to interpret the filing of a lawsuit related to personal information privacy as an affirmative attempt by the plaintiff to protect his/her privacy after becoming aware of the surveillance. The complaint itself would thus be construed as evidence of an actual, subjective expectation of privacy. Such a construction could operate as a rebuttable presumption, with the burden shifting to the government to provide evidence that the individual recklessly or intentionally took steps to disaffirm any expectation of privacy related to their personal information. This would preserve the *Katz* idea that a person could be unconcerned about or undeserving of their privacy in certain contexts, and thus not due any constitutional protection. But it would simultaneously recognize the increasingly impossible burden placed on plaintiffs to demonstrate a subjective expectation of privacy in the new era of high tech surveillance.

The second aspect of Kearns' (1999) proposal for re-thinking the reasonableness analysis is that the Supreme Court should recognize an expanded right to information privacy, building on the start it made in *Whalen v. Roe* (1977). In his words:

> While surveillance and information technologies each create privacy concerns in their own right, recent technological advances have blurred the distinction between these two formerly separate categories. Surveillance technology can now generate personal information, while personal information can now be used for surveillance-like purposes. Merging these two fields of technology heightens privacy concerns beyond the point that either category invokes separately (Kearns, 1999, p. 995).

And further:

> As the amount and uses of personal information increases, such information becomes more revealing about a person's activities and lifestyle. When information networks generate personal information to such an extent that the information can be used for surveillance purposes, either in retrospective analysis or in real-time tracking, analyzing such information effectively becomes a search (p. 1006).

With the invasive potential of new information and surveillance technologies, Kearns has made a timely and well-reasoned call for a strengthened constitutional right of privacy relative to information about personal identity.

In conclusion, at least in the context of personal identity information searches, courts should recognize a strengthened right to privacy combined with a revamped *Katz* test that utilizes a rebuttable presumption that individuals have a subjective expectation of privacy in personal information. This would result in an updated Fourth Amendment reasonableness analysis that should provide the courts with the tools necessary to maintain an appropriate balance between privacy and security concerns in the new technological era.

## SECTION VI: CONSTITUTIONALITY OF THE ADVANCED TECHNOLOGY "SNOOPER BOWL" SEARCHES

In considering whether video surveillance at major sports events might be justified, Aronov (2004) expressed concerns about the use of the data gathered, as follows:

> A public stadium on Super Bowl Sunday presumably qualifies for the installation of surveillance cameras, because all three risk factors. . .are present at that event – crowds, high probability of crime, and a chance of terrorist attack. What is problematic, however, is how the images recorded there are stored, distributed, processed, and where they will eventually end up. As noted, the Constitution is implicated not only by the use of cameras in and of itself, but also by the use of the information thus collected (Aronov, 2004, p. 804, n. 196).

The facial-recognition surveillance technology used in the "Snooper Bowl" searches, in combination with the near-instantaneous results provided by the information technology used to screen spectators' images against a database of known criminals, is exactly the sort of use of merged technology described by Kearns that justifies an updated Fourth Amendment reasonableness analysis. While some spectators may have noticed the stadium signage informing them that they were being subjected to video surveillance, most were unaware (at least at the 2001 Super Bowl game) that their personal identity information was simultaneously being used to subject them to "digital frisking" (Uncle Sam, 2001).

In that scenario, the lack of spectator awareness of the extent of the search rendered the spectators unable to demonstrate a subjective expectation of privacy in the information acquired about their personal identity. Applying the updated reasonableness analysis proposed above (utilizing an expanded constitutional right to privacy in one's personal identity information, combined with a rebuttable presumption that filing a constitutional challenge to such a search is evidence of a subjective expectation of privacy) would render

"Snooper Bowl" searches unreasonable under the Fourth Amendment. Absent such a revised analysis, however, it is conceivable that a court might feel compelled to apply *Katz* and the public place doctrines to find such searches reasonable, even though in reality they are inherently more intrusive than the magnetometer search struck down in *Bourgeois*.

## CONCLUSION

Minimally intrusive visual bag inspections for concealed possessions based on the established threat they pose to patron and performer safety may be reasonable under the Fourth Amendment. But organizers of spectator sports events in the United States should think twice before implementing expanded search policies that include mass suspicionless wand searches, pat-downs, and physical searches of bags. The *Bourgeois*, *Seglen*, and *Johnston* cases support the proposition that the threat of terrorism at large gathering events should not be considered sufficient justification to deviate from the value judgment embedded in the Constitution that freedom from the privacy invasion of unreasonable searches is worth protecting, despite the concomitant limits on governmental ability to provide greater security. If other courts continue to find the Eleventh Circuit's decision in the *Bourgeois* case persuasive, attempts to justify these more intrusive types of searches based on their ability to serve as a deterrent to and as a means of responding to terrorist activity are likely to be struck down.

Incongruously, at present, more highly intrusive searches of personal identity information that utilize merged high tech surveillance and information technologies might survive a constitutional challenge. However, if and when a court is presented with a case similar to the facial recognition scanning searches conducted in recent "Snooper Bowl" games, it might decide it is high time to adopt an updated reasonableness analysis along the lines suggested herein. Such an analysis, particularly when combined with the rationale articulated in *Bourgeois* for disallowing general terrorist threat justifications for searches, would most likely result in such searches also being ruled unconstitutional under the Fourth Amendment.

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