"Exceedingly Vexed and Difficult": Games and the First Amendment

Weigand v. Village of Tinley Park, 114 F. Supp. 2d 734 (N.D. Ill. 2000).

The mayor of Tinley Park, Illinois, describes his village as a "dynamic, progressive community" of more than 45,000 people.[1] He claims it is a "great place to live, work and play."[2] Until September 22, 2000, however, the village was a "great" place to play only for those who didn't mind being ticketed and fined. Far from encouraging the "outdoor recreation and family oriented fun"[3] promised on its website, the village enforced a draconian ordinance making it unlawful to "play any games upon any street, alley, or sidewalk, or other public place except when a block party permit has been issued" by the village government.[4] The local code went on to define "public place" as including "any street, sidewalk, park, cemetery, school yard, [or] body of water."[5] On its face, the ordinance

> prohibit[ed] children from playing tag at recess in the schoolyard without a block party permit from the Village President and the Board of Trustees; likewise it would [have] apparently bar[red] a child from playing with his Gameboy on the sidewalk, or kids from playing in a pool or river—bodies of water—or skating in the park without obtaining a permit, and similar absurdities.[6]

During the summer of 2000, Karen Weigand and two other Tinley Park residents were charged with "parental irresponsibility," because their children violated the ordinance by "play[ing] baseball in the street of their cul-de-sac."[7] A Cook County judge upheld the measure, saying it "does not

1. Edward J. Zabrocki, Welcome!, *at* http://www.tinleypark.org/government.htm (last visited Sept. 4, 2002).
2. *Id.*
3. *Id.*
4. Weigand v. Vill. of Tinley Park, 114 F. Supp. 2d 734, 736 (N.D. Ill. 2000) (citing TINLEY PARK, ILL., CODE § 99.013 (repealed 2000)), *permanent injunction granted*, 129 F. Supp. 2d 1170 (N.D. Ill. 2001).
5. *Id.* (citing TINLEY PARK, ILL., CODE § 10.02).
6. *Id.*
7. Diana Strzalka, *Baseball in Street Lands 4 in Court*, CHI. TRIB., June 27, 2000, at 1.

seem to be beyond the scope of the legislative body of the city."[8] In response, Weigand and several other local parents challenged the law in federal court. U.S. District Judge Elaine Bucklo issued a preliminary injunction against its enforcement, ruling that the parents were likely to prevail at trial on the issue of the ordinance's constitutionality.[9] A month after the ruling, the ordinance was repealed.[10] In January 2001, Judge Bucklo made the injunction permanent, forever barring the village from reinstating the ordinance.[11]

In her initial ruling, Judge Bucklo noted that the ordinance was constitutionally flawed in three different ways. First, she held that the ordinance failed the rational basis test because the village lacked a legitimate reason for banning games in schoolyards, parks, and pools.[12] Second, she found that the ordinance implicated the First Amendment by infringing upon people's constitutional right to assemble for the purpose of engaging in a form of expressive conduct—namely, playing games.[13] The ordinance could not survive strict scrutiny, and so was unconstitutional.[14] Finally, citing philosopher Ludwig Wittgenstein, she ruled that "[t]he term 'game' is exceedingly vexed and difficult."[15] Because the ordinance did not define what a "game" was, it "fail[ed] to articulate with any specificity the conduct to be proscribed,"[16] and so was void for vagueness.

Although I believe Judge Bucklo was correct in invalidating the ordinance, I disagree with some of her constitutional analysis. This Comment concentrates on her second rationale for invalidating the ordinance, challenging the conclusion that games are a type of expressive

8. Lola Smallwood, *Tinley Park Parents Strike Out as Judge Bars Games in Street*, CHI. TRIB., June 30, 2000, at 5.

9. *Weigand*, 114 F. Supp. 2d at 739.

10. Charles Stanley, *Tinley Tosses Out Ban on Kids' Street Play*, CHI. TRIB., Oct. 5, 2000, at 1.

11. *Weigand*, 129 F. Supp. 2d 1170. This decision merely summarizes the court's earlier ruling on the preliminary injunction and focuses primarily on whether the case was moot due to the ordinance's repeal.

12. *Weigand*, 114 F. Supp. 2d at 737.

13. *See id.* Judge Bucklo implicitly recognized that the right to assemble applied only if games were expressive conduct. *See* Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (holding that the right to associate protects only "certain intimate human relationships" and groups of people "engaging in those activities protected by the First Amendment"). Where an activity is not sufficiently expressive to be subject to First Amendment protection, there is no constitutional right to gather for the purpose of engaging in that activity. *See* City of Dallas v. Stanglin, 490 U.S. 19 (1989) (holding that because patrons' dancing in a nightclub is not expressive conduct, they have no constitutional right to assemble there); Malden Amusement Co. v. City of Malden, 582 F. Supp. 297, 299 (D. Mass. 1983) (holding that because video games are not protected by the First Amendment, it is not a "violation of the freedom to associate" to restrict the use of video game machines).

14. *Weigand*, 114 F. Supp. 2d at 737 (noting that the village's interest in regulating the use of its streets and sidewalks was not "compelling").

15. *Id.* at 738.

16. *Id.* (quoting Wiemerslage v. Maine Township High Sch. Dist. 207, 29 F.3d 1149, 1151 (7th Cir. 1994)).

conduct that gives rise to the right of assembly. Part I of this Comment argues that games in general, including certain types of video games, do not constitute a form of expressive conduct protected by the First Amendment. Part II considers the special case of sporting events meant to be watched by an audience. Part III concludes.

I

Judge Bucklo all but assumed that games were a form of constitutionally protected expressive conduct, noting, "If 'nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so,' surely innocent game playing may be protectable expressive conduct as well."[17] This type of reasoning sets a dangerous precedent. Granting First Amendment protection to anything more "innocent" than nude dancing would extend the Constitution's penumbra to nearly all forms of noncriminal human activity. Moreover, the Supreme Court has recognized that nude dancing is itself a borderline case.[18] Game playing seems to lack the inherently communicative features of most other forms of expressive conduct, such as wearing black armbands,[19] flag burning,[20] sit-ins,[21] and picketing.[22]

Most importantly, however, Judge Bucklo's approach is inconsistent with the doctrine underlying the concept of expressive conduct. As the Supreme Court has recognized, "it is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[23] In determining whether conduct is sufficiently expressive to invoke First Amendment protection, the Court looks to whether "[a]n intent to convey a particularized message was present, and in

17. *Id.* at 737 (quoting Barnes v. Glen Theatre, 501 U.S. 560, 566 (1991) (internal citation omitted)).

18. *See Barnes*, 501 U.S. at 566 ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment."); *see also* Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975).

19. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

20. Texas v. Johnson, 491 U.S. 397 (1989).

21. Brown v. Louisiana, 383 U.S. 131 (1966).

22. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

23. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989); *see also* United States v. O'Brien, 391 U.S. 367, 376 (1968) (rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[24]

The Court later liberalized the first prong of this test, emphasizing that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll."[25] In considering the second factor, courts may consider "whether the activity in question is commonly associated with expression."[26] The *Weigand* opinion failed to mention these standards.

Game playing fails both prongs of this test. First, children (or adults) playing games in the street or on a sidewalk generally do so for their personal enjoyment, not to convey any sort of message.[27] An audience is by no means a necessary part of their play, as it would be if their actions were truly meant to be communicative;[28] most people would play even if no one were watching. Second, passersby observing such play do not "commonly associate[]" game playing with expression, nor would they interpret it as conveying any sort of meaningful message, except perhaps that the participants thought the game was fun.[29] To allow incidental inferences from conduct to render such conduct expressive would be to eviscerate the boundary between expressive and nonexpressive behavior.

For these reasons, games in general are not "sufficiently imbued with elements of communication to fall within the scope of the First and

24. Spence v. Washington, 418 U.S. 405, 410-11 (1974) (holding that an ordinance prohibiting the display of the American flag with symbols superimposed on it was an unconstitutional abridgement of free speech).

25. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995).

26. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 769 (1988).

27. Judge Bucklo noted that "[a] game might be a part of a political protest, to take the clearest case ('Bean the "capitalist" with a cream pie!')." *Weigand*, 114 F. Supp. 2d at 737. The game at issue in *Weigand*, however, was street baseball played by children; it was not intended to express a political idea. Of course, even if, as I argue, games are *not* by their nature expressive conduct, courts can still find particular games to be expressive on a case-by-case basis. *See, e.g.*, *infra* notes 31-32, 38-39 and accompanying text.

28. At least one Justice has found this to be a constitutionally relevant factor in determining whether conduct is expressive. *See* Barnes v. Glen Theatre, 501 U.S. 560, 581 (1991) (Souter, J., concurring) ("[D]ancing as aerobic exercise would likewise be outside the First Amendment's concern. But dancing as a performance directed to an actual or hypothetical audience [is constitutionally protected].").

29. *See* Allendale Leasing, Inc. v. Stone, 614 F. Supp. 1440, 1454 (D.R.I. 1985) ("[Any communication in bingo] is singularly in furtherance of the game; it is totally divorced from a purpose of expressing ideas, impressions, feelings, or information unrelated to the game itself."). Nude dancing, in contrast, has been found by the Court to convey a message of sensuality and "eroticism." *See Barnes*, 501 U.S. at 581 (Souter, J., concurring) ("[Dancing] gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. Such is the expressive content [of nude dancing].").

Fourteenth Amendments."[30] Of course, when a game expressly conveys a particular idea, the First Amendment applies. For instance, in *Hammerhead Enterprises. v. Brezenoff*,[31] the Second Circuit considered a game called "Public Assistance," which sought to "present a striking contrast between the easy life enjoyed by recipients of public funds, and the numerous obstacles purportedly confronting employed citizens."[32] "Public Assistance" represents a clearly identifiable exception, however. Such a game, pervasively imbued with social commentary, is communicative (and so entitled to constitutional protection) in a way that bingo, for instance, is not.[33]

This approach is also applicable to video games,[34] which Judge Bucklo identified as falling within Tinley Park's prohibition.[35] Many courts in the early 1980s had no problem finding video games to be outside the First Amendment's sphere. Starting from the premise that for "entertainment [to be] accorded First Amendment protection there must be some element of information or some idea being communicated,"[36] these courts concluded:

> In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element. . . . [Because] they "contain so little in the way of

30. Spence v. Washington, 418 U.S. 405, 409 (1974).

31. 707 F.2d 33 (2d Cir. 1983).

32. *Id*. at 35. The court went on to describe how "[t]he game's working people are made to appear burdened by oppressive taxes, strangled by government regulations, and victimized by reverse discrimination. Conversely, those receiving welfare benefits are portrayed as lazy [and] dishonest . . . ." *Id*.

33. *See Allendale Leasing*, 614 F. Supp. at 1454 ("In order to be accorded constitutional protection, however, entertainment must be designed to communicate or express some idea or information. . . . I do not hesitate to hold that a Bingo game in itself is wholly devoid of the requisite communicative and informative elements." (citations omitted)).

34. The three primary works on video games and the First Amendment are all student-written; two of them are extremely dated. *See* David C. Kiernan, Note, *Shall the Sins of the Son Be Visited upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207 (2000) (arguing that video game manufacturers should be held to a negligence standard for violent acts committed by minors influenced by their games); *see also* David B. Goroff, Note, *The First Amendment and the Side Effects of Curing Pac-Man Fever*, 84 COLUM. L. REV. 744 (1984) (arguing that regulations of video games and gaming establishments should be subject to strict scrutiny under the First Amendment); John E. Sullivan, Note, *First Amendment Protection of Artistic Entertainment: Toward Reasonable Municipal Regulation of Video Games*, 36 VAND. L. REV. 1223 (1983) (same).

35. Weigand v. Vill. of Tinley Park, 114 F. Supp. 2d 734, 736 (N.D. Ill. 2000) (noting that the ordinance would "apparently bar a child from playing with his Gameboy on the sidewalk").

36. Am.'s Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170, 173 (E.D.N.Y. 1982); *see also* Kaye v. Planning & Zoning Comm'n, 472 A.2d 809, 810-11 (Conn. Super. Ct. 1983).

> particularized form of expression" [they] cannot be fairly characterized as a form of [protected] speech . . . .[37]

Recently, however, due to developments in video game technology, several courts have rejected this blanket approach, choosing instead to consider the First Amendment status of each individual game.[38] The modern strategy is: "While video games that are merely digitized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment."[39]

The courts' treatment of video games offers an interesting insight into the constitutional status of traditional games. Those video games that are essentially "digitized" versions of traditional games have been ruled to lack sufficient communicative features to warrant constitutional protection, precisely because the underlying traditional games they represent are not forms of expression. On the other hand, video games with story lines that convey information or ideas are closely akin to constitutionally protected books and movies—media that are inherently communicative—and so fall under the First Amendment. Simply being a game is not sufficient to bring either traditional games, or video games, under the Constitution's protection.

II

The trickiest case is games that are expressly meant to be watched. The clearest example of this is televised sports, though this category can include everything down to a Little League game. Broadcasts of such events are clearly covered by the First Amendment; a broadcast is a form of communication, constitutionally protected even if its only purpose is to entertain.[40]

37. *Am.'s Best Family Showplace*, 536 F. Supp. at 174 (quoting Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 857 (2d Cir. 1982)); *see also* Malden Amusement Co. v. City of Malden, 582 F. Supp. 297, 299 (D. Mass. 1983); People v. Walker, 354 N.W.2d 312, 316-17 (Mich. Ct. App. 1984); City of St. Louis v. Kiely, 652 S.W.2d 694 (Mo. Ct. App. 1983); Tommy & Tina, Inc. v. Dep't of Consumer Affairs, 459 N.Y.S.2d 220, 227 (Sup. Ct. 1983).

38. *See* Rothner v. City of Chicago, 929 F.2d 297, 303 (7th Cir. 1991).

39. Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 181 (D. Conn. 2002); *see also* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) (holding that certain video games are protected because they "are stories"); *Rothner*, 929 F.2d at 303.

40. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) ("[B]roadcasting is clearly a medium affected by a First Amendment interest . . . .").

The issue of whether the players themselves are engaged in expressive conduct is more complicated, however. It may seem odd to maintain that the broadcast of certain images is a form of communication, but that the actors creating those images are not themselves engaged in communication. Moreover, it may seem inconsistent to deny constitutional protection to sporting events, while extending it to other forms of live entertainment performed before audiences.[41] "First Amendment principles governing live entertainment are relatively clear: short of obscenity, it is generally protected."[42]

Sporting events clearly differ from much live theater, however. First, "theater usually is the acting out—or singing out—of the written word, and frequently mixes speech with live action or conduct."[43] In sports, the players generally don't speak to the audience at all; the only communication, if any, is by their moves on the field. This is not to suggest that pantomime acts fall outside the First Amendment, but merely to support the claim that in watching a sporting event, an audience would be unlikely to discern a message.

A second, closely related point is that unlike most theatrical performances, just about everything an athlete does can be explained by something *other* than an attempt to convey an idea to the audience. The athlete's main focus is winning; his main concern is his competitors. Even sports that do not involve direct interaction between competitors often lack communicative aspects,[44] requiring merely the continuous (as in long-distance running or swimming) or periodic (as in golf or bowling) repetition of a wholly functional motion meant to help the athlete achieve a particular goal.

Finally, it is important to recognize that the Court's rationale for extending First Amendment protection to *all* nonobscene movies, theatrical performances, and magazines does not extend to most sporting events. For instance, regarding magazines, the Court has ruled, "The line between the informing and the entertaining is too elusive for the protection of that basic [First Amendment] right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's

41. *See* Schacht v. United States, 398 U.S. 58, 63 (1970) ("An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right to openly criticize the Government during a dramatic performance.").

42. Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 389 (4th Cir. 1993).

43. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (holding that preventing the musical *Hair* from being performed in a public forum violated the First Amendment).

44. *See* Caswell v. Licensing Comm'n, 444 N.E.2d 922, 925 (Mass. 1983) ("[N]o case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, at least in the absence of some element of communicating or advancing ideas or beliefs." (quoting Sunset Amusement Co. v. Bd. of Police Comm'rs, 496 P.2d 840, 845-46 (Cal. 1972))).

doctrine."[45] Similarly, the Court has held that "motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."[46] In light of these other features, "[t]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."[47]

In short, the Court seeks to err on the side of freedom from censorship by deeming *all* movies, plays, and written works within the scope of the First Amendment, because these media can all be used either for entertainment or expression, and often the two aims are intertwined. In most sports, the entertainment aspect is all there is; there are no elements of expression or ideas that might be suppressed.[48] It seems that athletes in only a few sports, such as diving, gymnastics, and figure skating, are sufficiently close to being theatrical performers or dancers to merit constitutional protection. Self-expression, creativity, and artistic influence permeate such sports because the athletes' motions are influenced largely by aesthetic considerations and directed toward producing an image of grace and beauty; they are not primarily controlled by functional, nonexpressive concerns such as catching a pass or kicking a goal.[49]

III

Judge Bucklo erred in ruling that games are a form of expression. While her conclusion yields appealing results in the instant case, it represents a bold excursion into a little-explored area of First Amendment jurisprudence and is unsupported by precedent or adequate explanation. Most games are not expressive, and whatever protection they receive must come from either the prohibition on overbroad laws established by the Due Process Clause[50] or the democratic process.

—Michael T. Morley

45. Winters v. New York, 333 U.S. 507, 510 (1948).
46. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).
47. *Id*.
48. *See* Am.'s Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) ("[A] pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element.").
49. This distinction can be understood by comparing an exhibition of the Harlem Globetrotters, for instance, to a basketball team's performance during a traditional game.
50. U.S. CONST. amend XIV, § 1.