THE COURT IS A FAN OF FANS: *JOHNSTON V. TAMPA SPORTS AUTHORITY* CORRECTLY REFUSED TO EXTEND THE SPECIAL NEEDS DOCTRINE TO PAT-DOWNS AT RAYMOND JAMES STADIUM

Introduction

On a Sunday afternoon in September 2006, during the Chicago Bears' first home game kickoff, a number of fans stood in long lines awaiting a mandatory pat-down.[1] The pat-downs, which cost "about $10,000 a game," were resumed at Soldier Field after a federal judge dismissed a suit filed by the Chicago Park District, the owner and operator of Soldier Field.[2] The lawsuit, which "alleged that the pat-downs were unconstitutional and violated the protection against unreasonable searches," was brought in response to security measures implemented in 2005 by the National Football League (NFL).[3]

After 9/11, stadiums performed a comprehensive threat assessment.[4] The NFL created a task force charged with advising NFL Commissioner Paul Tagliabue and all team owners on security measures regarding the perceived threat of terrorist attacks.[5] The task force issued a "Best Practices Guide" of recommended security measures, which included a "careful visual inspection of the patrons before they come in, as well as a touching or patting of the outer garments."[6] In 2005, Tagliabue and team owners decided that these pat-

1. *See Soldier Field Pat-Downs Delay Some Bears Fans*, Chi. Trib., Sept. 18, 2006, at 3 [hereinafter *Soldier Field Pat-Downs*].

2. Chicago Park Dist. v. The Chicago Bears Football Club, Inc., No. 06-C-3957, 2006 WL 2331099 (N.D. Ill. Aug. 8, 2006); Andrew Herrmann, *Bears Win Ruling, Fans to Get Frisked*, Chi. Sun-Times, Aug. 26, 2006, at 3; *see also Soldier Field Pat-Downs*, *supra* note 1, at 3.

3. *Soldier Field Pat-Downs*, *supra* note 1, at 3; *see also* Mary Adamski, *Pro Bowl Attendees to Undergo Pat-Downs*, StarBulletin.com, Feb. 4, 2006, http://starbulletin.com/2006/02/04/news/story05.html.

4. Richard H. Fallon, Jr. et al., *Panel I: Legal Issues in Sports Security*, 13 Fordham Intell. Prop. Media & Ent. L.J. 349, 352–53 (2003) (citing Nick Cafardo, *Patriots Plan to Play It Safe*, Boston Globe, Sept. 19, 2001, at E2; Bob Glauber, *NFL Will Beef Up Security*, Newsday, Sept. 18, 2001, at A42; Ronald E. Hurst et al., *American Sports As a Target of Terrorism: The Duty of Care After September 11th* (May 13, 2004), http://www.martindale.com/members/Article_Body.aspx?id=2342) [hereinafter *Sports Security Panel*].

5. *Sports Security Panel*, *supra* note 4, at 352. R

6. *Id.* at 355. The task force also recommended searches of bags or items brought into the stadiums. *Id.*

downs should be mandatory at every stadium.[7] While a number of stadiums have implemented pat-downs without any concern regarding their constitutionality, this result has not been universal.[8]

The most recent case, *Johnston v. Tampa Sports Authority*, was decided by a federal district court in Florida.[9] Specifically, the court considered whether the pat-downs were justified by the "special needs" exception to the Fourth Amendment.[10] It ultimately held that these searches were not justified and ordered an injunction prohibiting such searches at Florida's Raymond James Stadium.[11] In light of this decision and the possibility that subsequent lawsuits may challenge the constitutionality of these pat-downs, scholars should debate whether the government may conduct suspicionless searches at stadiums. In the current political climate, where every government action seems to be justified by the threat of a terrorist attack,[12] it is crucial that governmental intrusions upon the constitutional rights of citizens be thoroughly examined. This examination must be performed to determine whether the government's special need to protect the public authorizes it to eviscerate citizens' protection from unreasonable searches as guaranteed by the Fourth Amendment to the U.S. Constitution.[13]

This Note argues that *Johnston* was decided correctly. Part II explains the general requirements of the Fourth Amendment and the

7. *See NFL To Institute "Pat-Down" Policy at Its Games*, KANSASCITYCHIEFS.COM, Sept. 8, 2005, http://www.kcchiefs.com/news/2005/09/08/nfl_to_institute_patdown_policy_at_its_games2.

8. *See Fans Entering Giants Stadium to Be Subject to "Pat-Downs*,*"* GIANTS.COM, Aug. 26, 2005, http://www.giants.com/news/press_releases/story.asp?story_id=7972 ("All fans entering Giants Stadium will be subject to and should expect to be patted down by security personnel before going through stadium gates."); *Patron Screening and Prohibited Items*, GILLETTESTADIUM.COM, http://www.gillettestadium.com/stadium_information/index.cfm?ac=prohibited_items (last visited Feb. 13, 2008) ("Everyone who seeks admission into Gillette Stadium . . . must consent to a search of their person . . . .").

9. 442 F. Supp. 2d 1257 (M.D. Fla. 2006).

10. *Id.* at 1265.

11. *Id.* at 1273.

12. The World Org. for Human Rights U.S.A., *Torture, Arbitrary Detention, and Other Major Human Rights Abuses by the United States* (Feb. 2006), http://www.2.ohcr.org/english/bodies/hrc/docs/ngos/wofhr (discussing how the U.S. government used its efforts to combat terrorism to justify torturing detainees and indefinitely detaining prisoners); Nick Schwellenbach, *Keeping Tabs on the Peaceniks*, ALTERNET, Mar. 27, 2006, http://www.alternet.org/rights/33949 (discussing how the U.S. government justifies surveillance of political dissidents as a way to monitor terrorism).

13. *See* U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

special needs doctrine.[14] Part III discusses *Johnston*.[15] Part IV argues that *Johnston* was decided correctly, because the governmental interest does not outweigh the intrusion upon privacy interests that these pat-downs represent.[16] Part V explains *Johnston*'s impact upon civil liberties in this country and the security of stadium patrons.[17]

II. The Special Needs Exception

This Part explains what the Fourth Amendment generally requires of the government before a citizen may be searched.[18] It then focuses on the special needs exception, which permits suspicionless searches under certain circumstances.[19] Finally, this Part surveys the ways in which courts have applied the special needs doctrine to suspicionless searches performed at large public gatherings, such as rock concerts, public demonstrations, and sports events.[20]

A. Fourth Amendment Requirements and the Special Needs Exception

The Supreme Court has stated that "[t]he Fourth Amendment requires government to respect the right of the people to be secure in their persons . . . against unreasonable searches and seizures."[21] Generally, for a search to be reasonable, it "must be based on individualized suspicion of wrongdoing."[22] Courts have held that the individualized suspicion of wrongdoing may be satisfied by probable cause[23] or reasonable suspicion,[24] depending on the circumstances.[25] While courts have generally prohibited suspicionless searches that violate the Fourth Amendment, they have made exceptions where suspi-

14. *See infra* notes 18–81 and accompanying text. **R**
15. *See infra* notes 82–125 and accompanying text. **R**
16. *See infra* notes 126–240 and accompanying text. **R**
17. *See infra* notes 241–275 and accompanying text. **R**
18. *See infra* notes 21–26 and accompanying text. **R**
19. *See infra* notes 27–29 and accompanying text. **R**
20. *See infra* notes 30–81 and accompanying text. **R**
21. Chandler v. Miller, 520 U.S. 305, 308 (1997) (internal quotation marks omitted).
22. *Id.* at 313.
23. Probable cause "exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." Ornelas v. United States, 517 U.S. 690, 696 (1996).
24. Reasonable suspicion is an articulable and particularized belief that criminal activity is afoot. It must be more than a hunch. *Id.* at 695.
25. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971) (requiring evidence of probable cause before a search is held to be reasonable); Terry v. Ohio, 392 U.S. 1 (1968) (concluding that reasonable suspicion sufficiently justifies frisking, but not fully searching, a person).

cionless searches are implemented "to further special needs, beyond the normal need for law enforcement."[26]

The U.S. Supreme Court has held that, when "special needs . . . are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."[27] Thus, courts weigh the individual's privacy expectations against the government's interest in the search.[28] The balancing test applied in special needs cases is usually "broken down into the tripartate considerations of (1) the degree and nature of intrusion entailed by the search, (2) the public necessity for the search measured in terms of potential harm to the public, and (3) the efficacy of the search."[29]

B. Applying the Special Needs Doctrine to Large Public Gatherings

The special needs exception has been used to justify limited suspicionless searches based on the need to secure the safety of the public gathered[30] at places such as airports and courthouses.[31] However, as the Supreme Court of Washington categorically stated, this "special exemption from constitutional protections should [not] be made for

26. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (internal quotation marks omitted). The Supreme Court has found that the special needs doctrine justifies government conduct in certain circumstances. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (drug testing of railroad personnel involved in train accidents); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (random drug testing of federal customs officers who carry guns); Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (automobile checkpoints for illegal immigrants and intoxicated drivers); *Vernonia Sch. Dist. 47J*, 515 U.S. at 664 (random drug testing of students in athletics and other extracurricular activities); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (same). Additionally, various circuit courts have held that the special needs doctrine justifies suspicionless searches at airports and courthouses. *See* United States v. Edwards, 498 F.2d 496 (2d Cir. 1974) (airport); United States v. Moreno, 475 F.2d 44 (5th Cir. 1973) (airport); United States v. Bell, 457 F.2d 1231 (5th Cir. 1972) (courthouse); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) (courthouse).

27. *Chandler*, 520 U.S. at 314 (internal quotation marks omitted).

28. *Id.*; *see also Vernonia Sch. Dist. 47J*, 515 U.S. at 646; *Von Raab*, 489 U.S. at 665; *Skinner*, 489 U.S. at 619.

29. Ringe v. Romero, 624 F. Supp. 417, 420 (W.D. La. 1985); *accord* Wheaton v. Hagan, 435 F. Supp. 1134, 1145 (M.D.N.C. 1977); Jensen v. City of Pontiac, 317 N.W.2d 619, 622 (Mich. Ct. App. 1982).

30. While this Note focuses on large public gatherings, *Ringe* is also applicable to this discussion. 624 F. Supp. 417 (holding that suspicionless searches at a local bar could not be justified by the special needs exception). *Ringe* applied the special needs doctrine to a bar, which is a type of venue similar in purpose to a sports stadium—providing entertainment—even though the number of people gathering at a local bar is drastically lower than the number of people gathering at a professional sports stadium.

31. *See Edwards*, 498 F.2d 496; United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); *Moreno*, 475 F.2d 44; *Bell*, 457 F.2d 1231; *Downing*, 454 F.2d at 1233.

rock concerts or other gatherings in public arenas."[32] As illustrated in the cases below,[33] courts have generally rejected the special needs doctrine as justifying suspicionless searches at places of large public gatherings other than airports or courthouses.[34]

1. *Applying the Special Needs Doctrine to Rock Concerts*

Applying the special needs doctrine to suspicionless searches at rock concerts, courts have generally held that the intrusiveness of physically searching each attendee's person outweighed the minimal governmental need for the searches; thus, the searches fell outside of the special needs exception.[35] Courts first considered the nature of the governmental interest at stake by examining the seach's objective "in light of the nature of the threat involved and the likelihood that the threat will materialize."[36] In this line of cases, the courts found that the nature of the threat involved was potential injury posed by objects that may be thrown at other spectators or the entertainers from the stands.[37] Courts held that the nature of the threat was not great, because "dangers posed by the potential use of bottles and cans as projectiles pales in comparison to the dangers posed by a bomb or a gun used to facilitate a skyjacking or terrorize a courtroom."[38] As to the likelihood that the threat will materialize, courts looked at whether there was a past history of injury caused by thrown objects.[39] In two of the cases, there was no evidence that the threat had ever materialized,[40] but, in one case, the evidence showed that the threat

32. Jacobsen v. City of Seattle, 658 P.2d 653, 656 (Wash. 1983).

33. In many of these cases, courts have also considered whether other exceptions could justify suspicionless searches at large public gatherings, including the consent exception. *See* Gaioni v. Folmar, 460 F. Supp. 10, 14 (M.D. Ala. 1978); Stroeber v. Comm'n Veteran's Auditorium, 453 F. Supp. 926, 932 (S.D. Iowa 1977); *Wheaton*, 435 F. Supp. at 1144; Collier v. Miller, 414 F. Supp. 1357, 1365 (S.D. Tex. 1976); State v. Seglen, 700 N.W.2d 702, 708–09 (N.D. 2005). The other exception considered by the courts was the "stop-and-frisk" exception, set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). *See Stroeber*, 453 F. Supp. at 932; *Wheaton*, 435 F. Supp. at 1144.

34. *See, e.g.*, *Stroeber*, 453 F. Supp. at 932 (holding that, based on precedent of the special needs exception in the context of searches at public auditoriums, the exception is inapplicable and cannot justify suspicionless searches at rock concerts); *but see Jensen*, 317 N.W.2d at 624 (holding that suspicionless searches at a professional football game were justified by the special needs exception; however, the case involved a visual search only and not a physical pat-down).

35. *See Gaioni*, 460 F. Supp. at 15; *Collier*, 414 F. Supp. at 1367; *Jacobsen*, 658 P.2d at 656; *see also Stroeber*, 453 F. Supp. at 932; *Wheaton*, 435 F. Supp. at 1136.

36. *Collier*, 414 F. Supp. at 1362; *accord Gaioni*, 460 F. Supp. at 13–14; *Jacobsen*, 658 P.2d at 656.

37. *See Gaioni*, 460 F. Supp. at 13–14; *Collier*, 414 F. Supp. at 1362; *Jacobsen*, 658 P.2d at 656.

38. *Collier*, 414 F. Supp. at 1362; *accord Gaioni*, 460 F. Supp. at 14; *Jacobsen*, 658 P.2d at 656.

39. *See Gaioni*, 460 F. Supp. at 14; *Collier*, 414 F. Supp. at 1362; *Jacobsen*, 658 P.2d at 656.

40. *See Gaioni*, 460 F. Supp. at 13–14 ("Indeed, violence inside the Civic Center has never been a problem at rock concerts."); *Collier*, 414 F. Supp. at 1362 ("In the present case the de-

had materialized before the searches were implemented.[41] Where the nature of the threat was not severe, and where there was no evidence that the threat was likely to materialize based on past history, the courts found that the governmental interest was minimal.[42] Yet, even where "the record clearly established a serious problem and a legitimate basis for the City's concerns," the court held that the governmental interest was minimal, because the nature of the threat was not severe.[43]

Courts also considered the degree and nature of the intrusion upon patrons' privacy rights.[44] They found that the pat-downs employed at the concerts have a "high degree of intrusion,"[45] specifically when compared with suspicionless searches with magnetometers,[46] which have been permitted at courthouses and airports.[47] Courts further examined whether the searches were conducted indiscriminately, that is, whether the people performing the searches had any discretion as to when or how the search was performed.[48] Finally, the courts focused on the fact that, unlike searches at airports and courthouses, which have been justified by the special needs exception, searches at concerts have been relatively ineffective.[49] The courts specifically noted that the searches were unlikely to achieve the purpose of completely eliminating the objects that may be thrown.[50]

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fendants produced absolutely no evidence of any history of disturbances or injuries caused by thrown cans or bottles before . . . implementation of the search policy.").

41. *See Jacobsen*, 658 P.2d at 654 ("There have been frequent violations of the law at various rock concerts held at the Seattle Center Coliseum, including the throwing of hard and dangerous objects by some of those attending the concerts.").

42. *See Gaioni*, 460 F. Supp. at 14; *Collier*, 414 F. Supp. at 1362–63.

43. *Jacobsen*, 658 P.2d at 656 (internal quotation marks omitted).

44. *See id.*; *see also Gaioni*, 460 F. Supp. at 14; *Collier*, 414 F. Supp. at 1364.

45. *Jacobsen*, 658 P.2d at 656.

46. A magnetometer is "a device that is activated by ferrous metal." United States v. Albarado, 495 F.2d 799, 802–03 n.3 (2d Cir. 1974). There are two basic types of magnetometers, a walk-through magnetometer and a hand-held magnetometer, which is usually used after the walk-through magnetometer is activated. *Id.*

47. *Jacobsen*, 658 P.2d at 656; *see also Gaioni*, 460 F. Supp. at 14 ("The evidence reflects that the Civic Center searches were very intrusive . . . ."). Security personnel asked attendees to open their coats, patted down any bulges, and examined the insides of pockets. *Gaioni*, 460 F. Supp. at 12.

48. *See Collier*, 414 F. Supp. at 1364.

49. *Gaioni*, 460 F. Supp. at 14.

50. *See id.* ("Although [in the course of the searches] defendants did seize some contraband, drug and alcohol use at the . . . concert was not eliminated."); *Collier*, 414 F. Supp. at 1363 ("[I]t is at least questionable whether random searches of the many thousands of patrons could achieve the valid purpose of excluding the objectionable items . . . .").

2. Applying the Special Needs Doctrine to Public Demonstrations

Courts have also considered the application of the special needs doctrine to suspicionless searches at public demonstrations.[51] *Bourgeois v. Peters* illustrates how one court handled the argument that the government has a special need to conduct suspicionless searches at large public gatherings because of a perceived terrorist threat.[52] The court examined the governmental interest and found that, while the nature of the threat was "omnipresent," there still had to be a likelihood that the threat would materialize.[53] The city argued that an elevated terrorist threat level at the time of the protest sufficiently proved that the threat was likely to materialize and justified the searches.[54] The court rejected this argument, holding instead that a general threat of a terrorist attack cannot be used to restrict civil liberties, because "the War on Terror is unlikely ever to be truly over."[55] Absent evidence indicating that there was a specific likelihood of a terrorist attack on the protest, the court held that the governmental interest lacked the immediacy that would justify a suspicionless search.[56] The court also discussed the intrusion upon the privacy rights of the protestors.[57] In determining whether the governmental interest at stake outweighed the protestors' privacy interest, it specifically considered whether the protestors had a diminished expectation of privacy.[58] Precedent, as the court noted, indicated that persons are protected by the Fourth Amendment even in public.[59] Therefore, the court found that protestors "retained a legitimate expectation of privacy in their person[s]" when they attended the public protest.[60] Ulti-

51. *See* Bourgeois v. Peters, 387 F.3d 1303 (11th Cir. 2004) (discussing the application of the special needs exception to searches at a protest against federal funding for the School of the Americas); Stauber v. City of New York, No. 03-Civ.-9162, 2004 WL 1593870, at *1 (S.D.N.Y. July 16, 2004) (discussing the application of the special needs exception to searches at numerous New York City political demonstrations); *see also* Wilkinson v. Forst, 832 F.2d 1330 (2d Cir. 1987) (discussing the application of the special needs exception to mass pat-down searches conducted at Ku Klux Klan rallies and holding that such searches violated the Fourth Amendment).

52. 387 F.3d at 1311 ("[T]he City contends that post September 11, 2001, this Court can determine that the preventive measure of a magnetometer at large gatherings is constitutional as a matter of law." (internal quotation marks omitted)).

53. *Id.* (holding that there must be "reason to believe that international terrorists would target or infiltrate this protest" to justify searches on the grounds of special need).

54. *Id.* at 1312.

55. *Id.*

56. *Id.* at 1311.

57. *Id.* at 1315–16.

58. *Bourgeois*, 387 F.3d at 1315–16.

59. *Id.* at 1315. "In their persons . . . individuals are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks." *Id.* (internal quotation marks omitted) (quoting Delaware v. Prouse, 440 U.S. 648, 662–63 (1979)).

60. *Id.* at 1316.

mately, the court held that the suspicionless magnetometer searches could not be justified under the special needs exception, because the governmental interest did not outweigh the protestors' legitimate Fourth Amendment privacy interests.[61]

Similarly, in *Stauber v. City of New York*, mere suspicionless searches of demonstrators' bags at a public demonstration could not be justified by vague threats of a terrorist attack.[62] The court focused on the lack of specific information concerning a terrorist attack at the New York City demonstrations and on the fact that there was no showing that these searches would be effective in eliminating or reducing the terrorist threat.[63]

3. *Applying the Special Needs Doctrine to Sports Events*

Beyond applying the special needs doctrine to suspicionless searches at rock concerts and public demonstrations, courts have also considered the doctrine's application to searches at sports events.[64] In at least one case challenging suspicionless searches at stadiums, the government has argued that "the security needs at large arenas and sporting events are similar to airports and courthouses, especially in recent years"; thus, the special needs exception should be extended to suspicionless searches at sports stadiums.[65] In *State v. Seglen*, however, the court refused to accept this argument.[66] Because "there was no history of injury or violence" at this particular stadium, the court found that there was no immediacy to the governmental interest of protecting patrons from terrorist attacks at that stadium.[67] The court noted another circuit's recent declaration that, while the general threat of a terrorist attack in the United States may be great, such a general threat cannot justify suspicionless searches at all places of large public gatherings.[68] Following suit, the *Seglen* court held that a

61. *Id.*

62. No. 03-Civ.-9162, 2004 WL 1593870, at *31 (S.D.N.Y. July 16, 2004) ("Accordingly, plaintiffs' request for injunctive relief with respect to the bag searches is granted.").

63. *Id.* ("Given the record before the Court, the defendants have not shown that the invasion of personal privacy entailed by the bag search policy is justified by general invocation of terrorist threats, without showing how searches will reduce the threat.").

64. *See* Jensen v. City of Pontiac, 317 N.W.2d 619, 619 (Mich. Ct. App. 1982); State v. Seglen, 700 N.W.2d 702, 702 (N.D. 2005).

65. *Seglen*, 700 N.W.2d at 707.

66. *Id.* at 708. The court noted that "[o]ther courts have rejected this argument when asked to extend the warrant exception to rock concerts." *Id.* at 707 (citing Collier v. Miller, 414 F. Supp. 1357 (S.D. Tex. 1976); Jacobsen v. City of Seattle, 658 P.2d 653 (Wash. 1983)).

67. *Id.* at 708.

68. *Id.* The court declared that, "[w]hile the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people . . . . September 11, 2001, already a day of immeasurable tragedy, cannot be

general threat of a terrorist attack, without any immediacy of such an attack on the specific stadium, could not justify suspicionless searches at that stadium.[69] Finally, it considered the nature of the intrusion and held that, "[b]ecause a pat-down is very intrusive,"[70] it cannot be considered a mere extension of a visual observation,[71] which has been held to be minimally invasive.[72]

In another recent case, a district court clarified that a substantial showing of a real threat of danger at a sports event—not just a general threat or a threat based on an anonymous tip—is required before suspicionless searches of all spectators may be justified.[73] However, the searches in this case were far more intrusive than traditional pat-downs.[74]

In contrast, a Michigan appellate court held that the special needs exception justified suspicionless visual bag searches at a professional football game.[75] Contrary to the trend developed in the case law discussed above, *Jensen* extended the special needs exception to searches at a place of large public gathering other than an airport or a courthouse.[76] The court first considered the nature of the governmental interest, which was the protection of patrons at the game from injuries caused by thrown objects.[77] There, the nature of the threat was serious, because "[t]he seating arrangement at football games creates a unique problem in that objects thrown from seats above gain poten-

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the day liberty perished in this country." *Id.* (quoting Bourgeois v. Peters, 387 F.3d 1303, 1311–12 (11th Cir. 2004)).

69. *Id.*

70. *Seglen*, Id. at 709 (citing Jensen v. City of Pontiac, 317 N.W.2d 619, 624 (Mich. Ct. App. 1982); State v. Zearley, 444 N.W.2d 353, 356 (N.D. 1989)).

71. *Seglen*, 700 N.W.2d. The state argued that a suspicionless pat-down is no more intrusive than a suspicionless visual observation search, which was justified by the special needs exception in *Jensen*, because a pat-down search is "but an extension of the visual observations, justified by patrons' ability to conceal items in oversized clothing . . . ." *Id.*

72. *Id.* (finding that the searches in *Jensen* were minimally invasive, because they involved only visual observations).

73. Williams v. Brown, 269 F. Supp. 2d 987, 991 (N.D. Ill. 2003). The lawsuit, brought by spectators at a basketball tournament, alleged that searches of all spectators' bodies, pockets, coats, and bags, based on an anonymous tip concerning a threat of danger at the basketball game, violated the Fourth Amendment. *Id.*

74. The police "thoroughly searched the plaintiffs' bodies, pockets, coats, and bags, a process that took more than an hour." *Id.* at 990. The searches extended to children, as well as "the bodies of basketball players clad only in shorts and tank tops . . . ." *Id.* at 991.

75. *Jensen*, 317 N.W.2d at 624.

76. One commentator has stated that *Jensen* is a minimal departure from the trend of not extending the special needs exception to places of large public gatherings other than courthouses and airports, because it is merely a "cautious approval of the most minimal type of search (a visual-only bag inspection)." Cathryn L. Claussen, *The Constitutionality of Mass Searches of Sports Spectators*, 16 J. LEGAL ASPECTS SPORT 153, 158 (2006).

77. *Jensen*, 317 N.W.2d at 623–24.

tially fatal velocity and nearly always strike an unsuspecting patron in the head or shoulder region."[78] The court also found that there was immediacy to the governmental interest, because the evidence showed that there had been "widespread injuries to patrons which occurred as a result of thrown objects" at football games at the specific stadium where the searches had been implemented.[79] Further, the court determined that the searches were effective, because evidence showed that "injuries caused by thrown objects [were] substantially reduced since the implementation of the policy."[80] Finally, because the searches included only visual observations and not pat-downs, which the court stated were "more intrusive than a limited visual search," it concluded that the nature and degree of intrusion was minimal.[81]

III. *Johnston v. Tampa Sports Authority*: Rejection of the Special Needs Justification for Suspicionless Pat-Downs at Raymond James Stadium

First, this Part sets out *Johnston*'s facts, issues, and procedural history.[82] Then, it describes the court's special needs analysis and explores the court's reasoning,[83] detailing the court's examination of the governmental interest, the plaintiff's privacy interest, and the effectiveness of the pat-downs.[84] Finally, it examines how the court balanced the competing interests in reaching its final decision.[85]

A. *Factual and Procedural History*

Beginning in August 2005, the NFL required physical searches of all attendees before entering stadiums.[86] The pat-downs were implemented in response to the risk of a terrorist attack implementing an "improvised explosive device."[87] Then, in September 2005, the Tampa Sports Authority (TSA) authorized pat-down searches of fans entering Florida's Raymond James Stadium ("Stadium") to attend football

78. *Id.* at 623.
79. *Id.* (internal quotation marks omitted).
80. *Id.* at 624.
81. *Id.* The search "procedure requires the guards to inspect only visually the patrons and their property. Guards are specifically instructed not to place their hands in patrons' containers." *Id.*
82. *See infra* notes 86–97 and accompanying text. R
83. *See infra* notes 98–125 and accompanying text. R
84. *See infra* notes 98–121 and accompanying text. R
85. *See infra* notes 122–125 and accompanying text. R
86. Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1260 (M.D. Fla. 2006).
87. *Id.* The court provided examples of improvised explosive devices, including "'suicide bomber' belts and vests." *Id.* at 1260 n.4.

games.[88] The TSA hired screeners to conduct the pat-downs, which were generally "performed above the patron's waist."[89] The pat-down searches consisted of a visual inspection of a patron's "wrists and arms for switches, wires, or push-button devices" and a physical inspection by "touching, patting, or lightly rubbing the person's torso, around his waist, along the belt line" and "back along the spine from the belt line to the collar line."[90]

In *Johnston*, the court addressed whether it should affirm a preliminary injunction prohibiting mandatory pat-downs performed by the TSA at the Stadium, because of the alleged unconstitutionality of the pat-downs.[91] The plaintiff, a Tampa Bay Buccaneers[92] season ticket holder, filed a lawsuit against the TSA,[93] seeking declaratory and injunctive relief on the basis that the pat-downs violated his state constitutional rights.[94] The trial court granted an injunction prohibiting the pat-downs.[95] In November 2005, the plaintiff amended his complaint to include a claim that the "searches violate the Fourth Amendment to the United States Constitution."[96] Following the amended complaint, the defendants successfully sought removal of the case to federal district court based on federal question jurisdiction.[97]

B. The Court's Special Needs Analysis

The majority opinion addressed the defendants' argument that the preliminary injunction should be reversed, because the plaintiff had failed to prove that he was likely to prevail on the merits of his claims.[98] The defendants argued that the balancing of interests in this case weighed against the issuance of an injunction, because the TSA demonstrated a special need and "the Plaintiff [had] no reasonable

88. *Id.* at 1260.

89. *Id.*

90. *Id.*

91. *Id.* at 1261.

92. The Tampa Bay Buccaneers, an NFL franchise, "plays its home football games at the Stadium pursuant to the Buccaneer's Stadium Agreement with the TSA." *Johnston*, 442 F. Supp. 2d at 1260.

93. *Id.* at 1260–61. "The TSA is a public entity created by the Florida legislature . . . [which] operates the publicly-owned Stadium." *Id.* at 1260.

94. *Id.* at 1261.

95. *Id.*

96. *Id.*

97. *Id.* Federal question jurisdiction permits federal courts to have original jurisdiction of all civil cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000).

98. *Johnston*, 442 F. Supp. 2d at 1262.

expectation of privacy at the NFL games."[99] First, the court considered the governmental interest of protecting patrons from the risk of a potential terrorist attack.[100] To justify the special needs exception, precedent dictates that the risk of a terrorist attack on the stadium must not only be substantial but must also be real.[101] The court found that the special need to prevent terrorist attacks is substantial, because no one could dispute the "magnitude of the threat of terrorism to this country" or "the potential harm that would result from a terrorist attack at the Stadium."[102]

However, as to the determination of whether the risk of a terrorist attack on an NFL stadium was real, the court noted that the evidence consisted of only the following four sources: a relatively dated news report of a possible terrorist attack on NFL stadiums, which was discredited by the FBI;[103] a report by the U.S. Department of State describing a disruption of terrorist plans to bomb a soccer stadium in Spain;[104] a bulletin identifying tourist facilities as attractive terrorist

99. *Id.* The opinion also addressed two other arguments presented by the defendants. The first was that "the pat-downs were not performed by state actors because the TSA was not acting in governmental capacity and was not performing a governmental function." *Id.* (internal quotation marks omitted). The defendants argued that the Fourth Amendment could not be violated, because it applies only where the search is performed by a government agent. *Id.* The court rejected this first argument, holding that the pat-down searches constituted state action, because the TSA, acting as a public entity fulfilling its public purpose (maintaining the Stadium), implemented the pat-down policy, hired and supervised the security personnel, and paid for the searches with public funds. *Id.* at 1263. This author would like to point out that, based on the above-described analysis, the pat-down searches at Soldier Field, performed by the Chicago Park District, would also constitute state action, because the Chicago Park District is a public entity (a sister agency of the City of Chicago government agencies). *See* City of Chicago Website, Local Government, Other Governmental Units & Sister Agencies, http://www.CityofChicago.org (last visited Feb. 13, 2008). Defendants' second argument was that the pat-downs were constitutional, because "[p]laintiff consented to the search by repeatedly attending NFL games" with the knowledge that he would be subjected to a search or denied entry. *Johnston*, 442 F. Supp. 2d at 1271. The court also rejected this argument, holding that this implied consent was not free from constraint and voluntarily given, because the Plaintiff stood to lose the value of his tickets, parking pass, seat deposit, and opportunity to attend the games if he failed to consent to the search. *Id.* at 1272.

100. *Johnston*, 442 F. Supp. 2d at 1265.

101. *Id.* at 1266. While the threat must be real and not merely hypothetical, the court noted that the TSA was not required to "establish that an attack on an NFL stadium is certain or imminent." *Id.* at 1269 n.18.

102. *Id.* at 1266.

103. *Id.* at 1267. The report was "a CBS news report from July 2002 that persons associated with terrorist groups had downloaded images from the internet of NFL stadiums in Indianapolis and St. Louis." *Id.* "However, according to the report, the FBI investigated that incident and determined that it presented no threat, not even a perceived or implied threat." *Id.* (internal quotation marks omitted).

104. *Id.*

targets;[105] and testimony of a "general concern that public events at which large crowds gather could be potential targets of terrorism."[106] Based on such evidence, the court found that, "[a]lthough the record demonstrates a generalized threat of terrorism to large gatherings, the [defendants have] not met [their] burden of establishing a substantial and real risk of a terrorist attack on a NFL stadium."[107] Thus, the special needs exception could not be justified solely on the governmental interest in the case, because the defendants failed to prove that the risk of a terrorist attack on an NFL stadium was real.[108]

Next, the court explored whether the plaintiff had a diminished expectation of privacy when he attended a football game and what degree of intrusion the pat-down search imposed.[109] Based on U.S. Supreme Court[110] and Eleventh Circuit[111] precedent,[112] the court held that a person's expectation of privacy in her body is not diminished when she attends a public gathering, such as a football game.[113] Further, the degree of intrusion imposed by the pat-downs in *Johnston* was great, because pat-down searches "have been regarded as far more intrusive than container searches, sniff searches performed by canines, and magnetometer searches applied to the public at large," all of which have been held constitutional.[114] Thus, the court held that

105. *Id.* at 1267–68. The bulletin was issued in October of 2005 by the Department of Homeland Security (DHS). *Id.* However, the court noted that the "DHS expressly stated that there [was] currently no credible or specific intelligence regarding the possibility of such an attack in the United States" on a sports stadium, nor did the bulletin suggest that patrons of these identified tourist facilities be subjected to suspicionless pat-downs. *Id.* at 1268 (internal quotation marks omitted).

106. *Johnston*, 442 F. Supp. 2d at 1268. One expert from the commercial explosives industry testified that NFL games "could be a very attractive target for terrorists, as could any large venue or venue where people gather in great numbers." *Id.* (emphasis omitted).

107. *Id.* at 1266 (internal quotation marks omitted).

108. *Id.* at 1269.

109. *Id.*

110. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 9 (1968) (holding that "wherever an individual may harbor a reasonable expectation of privacy . . . he is entitled to be free from unreasonable governmental intrusion" (internal quotation marks omitted))).

111. The Eleventh Circuit has jurisdiction over federal cases originating in Alabama, Florida, and Georgia. *See* Official Website of the United States Court of Appeals for the Eleventh Circuit, About the Court, http://www.ca11.uscourts.gov/about/index.php (last visited Feb. 13, 2008).

112. Bourgeois v. Peters, 387 F.3d 1303, 1315 (11th Cir. 2004) (holding that "[i]n their persons and property . . . individuals are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks" (citations and quotation marks omitted)).

113. *Johnston*, 442 F. Supp. 2d at 1270.

114. *Id.* (citing Wilkinson v. Forst, 832 F.2d 1330, 1337–38 (2d Cir. 1987) (upholding mass-suspicionless magnetometer searches as reasonable and less intrusive than pat-downs)); Jensen v. City of Pontiac, 317 N.W.2d 619, 624 (Mich. Ct. App. 1982) (recognizing that "[a] physical pat-down is more intrusive than a limited visual search"); U.S. v. Cintron-Segarra, No. 92-306, 1993 WL 150307, at *3 (D.P.R. Apr. 5, 1993) (recognizing that hand-held magnetometer searches are "a much less intrusive alternative than a pat-down or frisk").

the special needs exception could not be justified by a diminished expectation of privacy in this case.[115]

Next, the court examined the effectiveness of the pat-downs and concluded that the defendants failed to establish that the governmental interest at stake would be jeopardized if the searches were prohibited.[116] Although there was expert testimony "that the pat-down searches are the most effective means of detecting [improvised explosive devices]," the court found that the circumstances surrounding the implementation of these searches, including the timing of the implementation,[117] the motivation for the implementation,[118] and the application of the implementation,[119] suggested that the pat-downs were not "an essential aspect of terrorism protection."[120] All of these factors suggested that the overriding concern in implementing the pat-downs was fulfillment of a contract between the TSA, the NFL, and the Tampa Bay Buccaneers—not protection against terrorist attacks.[121]

Finally, the court balanced the governmental interest against the privacy interest of individuals to determine whether a special needs exception could be applied to the suspicionless pat-downs.[122] The government had a compelling interest in preventing terrorist attacks, but the court noted that the public also had "a compelling interest in preserving the constitutional right to be free from unreasonable governmental intrusion."[123] The court found that the privacy interest implicated by the searches was great, the threat of a terrorist attack on a stadium—while substantial—was not real, and the prevention of a terrorist attack would not be jeopardized by prohibiting these searches. Thus, the special needs exception did not apply to these searches,[124] and the plaintiff was likely to succeed on his claims that the searches were unconstitutional. Therefore, the court affirmed the preliminary injunction prohibiting these searches.[125]

115. *Johnston*, 442 F. Supp. 2d at 1271.

116. *Id.* at 1270.

117. *Id.* at 1270–71. "TSA did not institute pat-down searches until two years after it received the only specific threat to the Stadium . . . ." *Id.* at 1271.

118. *Id.* at 1271 ("The evidence suggests that the TSA decided to implement the policy in large part, if not exclusively, because of its perceived contractual obligation to do so.").

119. *Id.* ("[The TSA] chose to apply the policy only to Buccaneers games.").

120. *Id.*

121. *Johnston*, 442 F. Supp. 2d at 1271.

122. *Id.* at 1272.

123. *Id.*

124. *Id.*

125. *Id.* at 1272–73.

IV. Application of the Balancing Test Used in Special Needs Cases Reveals that *Johnston* Was Correctly Decided

This Part explores the *Johnston* opinion. First, it analyzes whether the governmental interest of protecting stadium patrons from a terrorist attack is compelling and immediate.[126] It considers the possible consequences of such an attack to determine its gravity and the likelihood of such an attack occurring to determine its immediacy. Second, this Part examines whether the NFL's mandatory pat-downs violate reasonable expectations of privacy.[127] It considers whether patrons entering football stadiums have diminished expectations of privacy because they are in public. Third, this Part discusses the degree and nature of the intrusion upon the privacy interest.[128] It examines precedent to determine whether pat-downs have been viewed as intrusive, and it considers the emotional effects of pat-downs. Fourth, this Part analyzes the efficacy of the pat-downs.[129] It considers factors such as duration of the pat-downs, the competence of those performing the pat-downs, the possible negative consequences of the pat-down policy, and alternative motivations by the NFL in implementing the pat-downs. Finally, this Part balances the governmental interest with the privacy interest and concludes that the former does not outweigh the latter.[130]

A. *Examination of the Governmental Interest*

In examining the governmental interest, courts must evaluate "the nature of the threat to public safety involved and the likelihood that such a threat will materialize."[131] Thus, the *Johnston* court followed precedent when it analyzed the gravity of the threat of a terrorist attack on an NFL stadium and the likelihood that such an attack would occur.[132] As one commentator stated, in determining whether the governmental interest is compelling in light of the nature of the threat, courts look at whether the threat involves possible "death or serious injury to a substantial number of persons."[133] In examining the grav-

126. *See infra* notes 131–158 and accompanying text. **R**
127. *See infra* notes 159–167 and accompanying text. **R**
128. *See infra* notes 168–205 and accompanying text. **R**
129. *See infra* notes 206–231 and accompanying text. **R**
130. *See infra* notes 232–240 and accompanying text. **R**
131. Wheaton v. Hagan, 435 F. Supp. 1134, 1145 (M.D.N.C. 1977); *accord* Chandler v. Miller, 520 U.S. 305, 318 (1997); Collier v. Miller, 414 F. Supp. 1357, 1362 (S.D. Tex. 1976).
132. Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1265 (M.D. Fla. 2006).
133. Benjamin T. Clark, *Why the Airport and Courthouse Exceptions to the Search Warrant Requirement Should be Extended to Sporting Events*, 40 Val. U. L. Rev. 707, 721 (2006).

ity of the threat, the *Johnston* court could have concluded that the nature of the threat of a terrorist attack on a stadium was not great, and, therefore, the governmental interest was not compelling. Instead, the *Johnston* court found that "[o]ne cannot seriously dispute the magnitude of the threat of terrorism to this country" and "the potential harm that would result from a terrorist attack at the Stadium."[134] The gravity of the threat posed by a terrorist attack on a stadium is much more severe than the gravity of the threat posed by objects thrown from stands, a threat implicated in a number of cases involving searches at large public gatherings.[135]

As to the number of persons at risk, stadiums, rock concerts, and public rallies present similar difficulties, because "tens of thousands of fans . . . pack sports stadiums,"[136] and, similarly, thousands of patrons attend rock concerts[137] and public demonstrations.[138] However, the threat of a terrorist attack on a stadium presents a number of problems exacerbating the gravity of the threat that are not implicated by the threat of thrown objects. A terrorist attack on a stadium would likely cause a high number of casualties both directly and collaterally. Those unharmed would "frantically [flee] the stadium," and those seriously injured would possibly fail to receive proper medical treatment, because "local hospitals would likely struggle to treat tens of thousands of suddenly wounded persons."[139] Further, as one commentator observed, the gravity of a terrorist attack on a stadium is great even if the casualty toll would be relatively small, because such an attack "could bring the nation to its psychic knees."[140] Thus, be-

134. *Johnston*, 442 F. Supp. 2d at 1266.

135. *See* Gaioni v. Folmar, 460 F. Supp. 10, 14 (M.D. Ala. 1978) (holding that dangers posed by thrown objects at rock concerts are slight in comparison to dangers posed by a gun or bomb used as a means of carrying out a terrorist attack); *Collier*, 414 F. Supp. at 1362; Jacobsen v. City of Seattle, 658 P.2d 653, 656 (Wash. 1983); *but see* Jensen v. City of Pontiac, 317 N.W.2d 619, 623 (Mich. Ct. App. 1982) (holding that dangers posed by thrown objects at sports events are grave, because they can cause serious injury or even death).

136. Clark, *supra* note 133, at 735.

137. *See* Brooke Friley, *Rolling Stones Rock the Race Track*, THE LOUISVILLE CARDINAL, Oct. 3, 2006 (reporting that 40,000 individuals attended the Rolling Stones concert at Kentucky's Churchill Downs).

138. *See Cities Jammed in Worldwide Protest of War in Iraq*, Feb. 16, 2003, http://www.cnn.com/2003/US/02/15/sprj.irq.protests.main/index.html (reporting that organizers of a political public protest against the Iraq war estimated that 375,000 individuals attended the protest).

139. Michael A. McCann, *Social Psychology, Calamities, and Sports Law*, 42 WILLAMETTE L. REV. 585, 603 (2006) (citing B. Tilman Jolly & Ricardo Martinez, *Heart-stopping Action: Whether it's A Sporting Event or A Rock Concert, Medical Emergencies can Spoil the Fun and Create Liability Unless Management Plans Ahead*, 4 SECURITY MGMT. 94 (2004)).

140. CLARK KENT ERVIN, OPEN TARGET: WHERE AMERICA IS VULNERABLE TO ATTACK 158 (2006) (discussing how a terrorist attack on a target such as a sports stadium would be psychologically devastating to American citizens); *see also* McCann, *supra* note 139, at 604.

cause a terrorist attack on a stadium would endanger tens of thousands of people and psychologically harm the nation, the government has a compelling interest in preventing such an attack.

While protecting stadium patrons from terrorist attacks is a compelling governmental interest, the inquiry cannot end there. The *Johnston* court examined whether the threat of such an attack was real and not merely a general threat.[141] It could have accepted the generalized threat of a terrorist attack in the country, or even places of large public gatherings, as sufficient evidence of the immediacy of a terrorist attack on a stadium.[142] However, when a court is faced with the special needs exception as justification for governmental intrusion, every step in its analysis must be analyzed in a context-specific manner.[143] Thus, the *Johnston* court was correct in not relying on a general threat of terrorism but rather looking at whether there was a real threat of a terrorist attack on the Stadium.[144]

Commentators have stated that there is a real threat of a terrorist attack on an NFL stadium, because sports stadiums, and NFL stadiums specifically, are likely targets, and sports occupy a symbolic place in American culture.[145] Further, the Bush Administration has designated sport stadiums as key assets, which are defined as potential terrorist targets, because they are critical to "the psychic well-being and stability of the nation."[146] However, while the Congressional Research Service—which prepares nonpartisan research reports for

141. Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1266 (M.D. Fla. 2006); *see also* Chandler v. Miller, 520 U.S. 305, 318–19 (1997); Bourgeois v. Peters, 387 F.3d 1303, 1311 (11th Cir. 2004); Ringe v. Romero, 624 F. Supp. 417, 422 (W.D. La. 1985); Collier v. Miller, 414 F. Supp. 1357, 1362 (S.D. Tex. 1976).

142. *Johnston*, 442 F. Supp. 2d at 1266, 1268. The court noted that there can be no dispute regarding the magnitude of the threat of terrorist attacks on the country. Further, testimony by the President of the Institute of Makers of Explosives indicated that "any large venue or venue where people gather in great numbers" could be an attractive target for terrorists. *Id.* at 1268 (emphasis omitted); *see also Bourgeois*, 387 F.3d at 1311. There, the city argued that, because of the constant threat of terrorism the country has faced since 9/11, suspicionless searches at large gatherings should be constitutional as a matter of law. *Johnston*, 442 F. Supp. 2d at 1268. The court rejected this argument. *Id.*

143. *See supra* note 27 and accompanying text.

144. *Johnston*, 442 F. Supp. 2d at 1266; *see also Bourgeois*, 387 F.3d at 1311 (rejecting a generalized threat of a terrorist attack as sufficient evidence to justify suspicionless searches: "In the absence of some reason to believe that . . . terrorists would target or infiltrate this protest, there is no basis for using 9/11 as an excuse for searching the protestors."); State v. Seglen, 700 N.W.2d 702, 708 (N.D. 2005) (adopting *Bourgeois*'s analysis and holding that an increased possibility of a terrorist attack following 9/11 is insufficient to justify suspicionless searches at a hockey arena without a specific threat to that arena).

145. *See* Clark, *supra* note 133, at 709; McCann, *supra* note 139, at 603–04.

146. Ervin, *supra* note 140, at 145 (citing The National Strategy For the Physical Protection of Critical Infrastructures and Key Assets 71 (Feb. 2003), *available at* http://www.whitehouse.gov/pcipb/physical_strategy.pdf).

members of Congress—and university research centers have prepared reports on potential terrorist targets in the nation's infrastructure, they have yet to prepare a report on the terrorist threat to stadiums.[147] If the threat of a terrorist attack on a stadium was substantial in the government's eyes, it is likely that a research report on such a threat would be prepared for Congress so that the government, through legislation, could help the private sector ensure citizens' safety at such places.[148] The lack of reports indicates that the possibility of terrorists targeting stadiums is low and that the government has decided to err on the side of caution in reporting stadiums as potential targets based on a general threat of terrorist attacks on American soil.

While one could argue that stadiums, especially NFL stadiums, fit the criteria terrorists look for in their targets, the likelihood that they will be chosen as targets, based on recent terrorist attack patterns[149] and predictions about future terrorist attack patterns, is low.[150] From 1970 until 2005, out of 207 worldwide terrorist attacks, only thirty-two were executed at venues and events where there was a large public gathering.[151] In comparison, there have been fifty-five terrorist at-

147. *See* Claudia Copeland & Betsy Cody, *Terrorism and Security Issues Facing the Water Infrastructure Sector*, CRS REPORT FOR CONGRESS RS21026 (May 21, 2003); Jonathan Medalia, *Terrorist "Dirty Bombs": A Brief Primer*, CRS REPORT FOR CONGRESS RS21528 (Oct. 29, 2003); Jonathan Medalia, *Terrorist Nuclear Attacks on Seaports: Threat and Response*, CRS REPORT FOR CONGRESS RS21293 (Jan. 24, 2005); David Randall Peterman, *Passenger Rail Security: Overview of Issues*, CRS REPORT FOR CONGRESS RL32625 (Jan. 20, 2006); Clinton H. Whitehurst, Jr., *Special Report: Transportation and the Terrorist Threat* (Strom Thurmond Inst. 2003).

148. The mission of the Congressional Research Service is to provide Congress with objective and timely analysis and research on all legislative issues, thereby "supporting an informed national legislature." Congressional Research Service Employment Home Page, http://www.loc.gov/crsinfo (last visited Feb. 13, 2008).

149. NAT'L COUNTERTERRORISM CTR., 2006 COUNTERTERRORISM CALENDAR (2006), *available at* http://www.nctc.gov/docs/ct_calendar_2006.pdf (reporting terrorist attacks—including both planned attacks that were thwarted and attacks that were eventually carried out—around the world from 1970 until 2002 by terrorist organizations such as Al-Qai'da, HAMAS, PIRA, ELN, LRA, MILF, FARC, ETA, RIRA, GRAPO, Al-aqsa Martyrs Brigade, Revenge Falcons of Apo, Hizballah, and Islamic Jihad Group).

150. PETER CHALK ET AL., TRENDS IN TERRORISM: THREATS TO THE UNITED STATES AND THE FUTURE OF THE TERRORISM RISK INSURANCE ACT (2005); Raphael F. Perl, *Terrorism and National Security: Issues and Trends*, CRS ISSUE BRIEF FOR CONGRESS IB10119, at 4 (Apr. 21, 2006), *available at* http://fpc.state.gov/documents/organization/67848.pdf.

151. This author has used data from the National Counterterrorism Center's Counterterrorism Calendar, *supra* note 149, to calculate this statistic by taking the number of terrorist attacks, both planned and carried out, where two or more people have been killed or seriously injured to compile a net total of terrorist attacks from 1970 until 2005. The author then used terrorist attacks on the following venues or events to compile a net total of attacks on venues or events where there was a large public gathering: parades, cafes, political meetings or rallies, protests, shopping centers, marketplaces, hotels, discos, bars, pubs, and sports events.

tacks on transportation targets.[152] More specifically, only three out of the thirty-two attacks on large public gatherings took place at sports stadiums or sports events, and only one occurred inside the United States.[153] Based on these terrorist patterns, the threat of an attack on a stadium is minimal both in itself and when compared with the threat of an attack on other targets. Further, commentators predicting future terrorist attack patterns have stated that "terrorism is becoming less U.S.-focused and more global in scope"[154] and terrorists will continue to focus on attacking hard targets, "such as embassies and military installations," and "economic targets," such as "prominent financial institutions."[155] Some commentators have pointed to a recent tragedy in which a young college student detonated a bomb one hundred yards away from a college football stadium as evidence of "possible domestic terrorism and an indication of the vulnerability of sporting events."[156] However, the authorities ruled it an isolated incident.[157] Further, while the FBI and the Homeland Security Department have issued warnings concerning threats against stadiums, authorities have viewed these threats with great skepticism, and the warnings were issued "out of an abundance of caution."[158]

152. This author has used data from the National Counterterrorism Center's Counterterrorism Calendar, *supra* note 149, to calculate this statistic by taking the number of terrorist attacks on the following targets to compile a net total of attacks on transportation targets: airplanes, airports, buses, bus terminals, commuter trains, underground railway systems, boats, and ports.

153. This author has used data from the National Counterterrorism Center's Counterterrorism Calendar, *supra* note 149, to calculate this statistic. The three attacks on sports stadiums or sports events were the following: the 2004 attack on a sports stadium in Russia while a celebration of V-Day was taking place; the 1996 bombing of the Atlanta Olympics; and the 1972 terrorist attack on the Olympics in Munich, Germany, in which members of the Israeli Olympic team were taken hostage.

154. Perl, *supra* note 150, at 4; *accord* Jon Basil Utley, *Thoughts on Terrorist Targets*, ANTI-WAR.COM, Jan. 6, 2004, http://antiwar.com/utley/?articleid=1900 (arguing that American targets and civilians overseas are easier targets for terrorists than any structures inside the U.S.).

155. CHALK ET AL., *supra* note 150, at 16, 23–24; *see also* Utley, *supra* note 154 (stating that past terrorist attacks have all "been against U.S. military or government [structures] . . . or major economic targets").

156. McCann, *supra* note 139, at 605.

157. *Id.*

158. Associated Press, *Officials Skeptical of Threat Against Stadiums*, Oct. 18, 2006, http://www.intellnet.org/news/2006/10/18/24740-2.html (internal quotation marks omitted); *accord* Brian Montopoli, *On Basketball, Terrorism, and Hype*, CBS NEWS PUBLIC EYE, Mar. 13, 2006, http://www.cbsnews.com/blogs/2006/03/13/publiceye/entry1397574.shtml (discussing the same 2006 FBI warning); Brian Ross, *Exclusive: FBI Warns of Possible Terror Threat at Sporting Events*, ABC News, Mar. 10, 2006, http://abcnews.go.com/WNT/story?id-1711158&page=1 (discussing a warning the FBI issued in 2006 concerning a possible terrorist attack based on an extremist message board, which encouraged suicide bombings at sports events as a way to kill a large number of Americans with little costs involved; however, the FBI and the Department of Homeland Security could not confirm the threat's credibility).

B. Examination of the Privacy Interest

In examining the privacy interest at stake, courts must look at whether the individuals subjected to the search have a reasonable expectation of privacy,[159] as well as the "degree and nature of the intrusion entailed by the search."[160] The *Johnston* court was correct in considering the intrusiveness of the pat-downs and whether patrons have "a diminished expectation of privacy" while attending a football game.[161]

Whether an individual's expectation of privacy will be deemed legitimate depends in part on whether the individual "asserting the privacy interest is at home, at work . . . or in a public [place]."[162] Because patrons entering an NFL stadium are in public, they arguably have a diminished expectation of privacy.[163] However, while individuals in public places may have a diminished expectation of privacy in some instances, they do not lose all of their constitutional rights when they leave their homes.[164] A person who attends a public event assumes the risk that her conversations will be overheard or that a stranger may accidentally brush up against her, but it does not follow that such a person assumes the risk of a stranger intentionally touching her body during a pat-down.[165] While a person in public clearly exposes her body and outer garments to a visual examination by others, that

159. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995); Ringe v. Romero, 624 F. Supp. 417, 420 (W.D. La. 1985).

160. *Ringe*, 634 F. Supp. at 420; *accord* Wheaton v. Hagan, 435 F. Supp. 1134, 1145 (M.D.N.C. 1977); Collier v. Miller, 414 F. Supp. 1357, 1364 (S.D. Tex. 1976); Jensen v. City of Pontiac, 317 N.W.2d 619, 622 (Mich. Ct. App. 1982).

161. Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1269 (M.D. Fla. 2006).

162. *Vernonia Sch. Dist 47J*, 515 U.S. at 654.

163. Courts have long held that individuals are entitled to the highest expectation of privacy in their homes. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))). In contrast, courts have held that individuals are entitled to a diminished expectation of privacy while in public. *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976) (holding that an arrest warrant is not required for an arrest in a public place even though such a warrant is required to arrest an individual in her home); *see also Sports Security Panel*, *supra* note 4, at 375 ("I think that the expectation of privacy is very low at a public event." (remarks by panelist Norman Siegel)).

164. Bourgeois v. Peters, 387 F.3d 1303, 1315–16 (11th Cir. 2004). "Conversations in the open would not be protected against being overheard, for the expectations of privacy under the circumstances would be unreasonable." *Id.* at 1315 (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). "In their persons and property, however, individuals 'are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks.'" *Id.* (quoting Delaware v. Prouse, 440 U.S. 648, 662–63 (1979)).

165. *See Bourgeois*, 387 F.3d at 1315; *Ringe*, 624 F. Supp. at 420; Claussen, *supra* note 76, at 165.

person does not expose her body and outer garments to physical examination by others.[166] Thus, the *Johnston* court was correct in finding that stadium patrons do not have a diminished expectation of privacy as to their persons.[167]

In examining the privacy interest in special needs cases, courts also look at the degree and nature of the intrusion upon that privacy interest.[168] Proponents of mandatory pat-downs argue that these searches are not highly intrusive, because they are brief, involve merely the touching of outer garments,[169] and do not rise to the level of a full search of the person,[170] a strip search,[171] or a body cavity search.[172] However, the U.S. Supreme Court has held that, while a pat-down may be brief, it is still an invasive intrusion upon one's privacy rights and may often be a humiliating and frightening experience for the subject of the pat-down.[173] As the *Johnston* court noted, other courts have followed the Supreme Court's lead in concluding that pat-downs are a highly invasive intrusion upon one's privacy.[174] Further, pat-downs have been viewed as more intrusive than searches that have

166. *See Ringe*, 624 F. Supp. at 420 ("Society certainly recognizes that individuals entering a public . . . establishment retain a legitimate expectation of privacy as to their persons, as well as to their possessions, that excludes the possibility of a personal search."); *see also Bourgeois*, 387 F.3d at 1315–16.

167. *Johnston*, 442 F. Supp. 2d at 1270.

168. *See supra* note 160 and accompanying text. **R**

169. McCann, *supra* note 139, at 586, 606.

170. A full search of a person—which includes not only touching the outer garments but also touching underneath the garments—has been permitted by the court only in instances of a search incident to an arrest. United States v. Robinson, 414 U.S. 218 (1973).

171. Strip search "generally refers to an inspection of a naked individual, without any scrutiny of the subject's body cavities." United States v. Barnes, 443 F. Supp. 2d 248, 252 (D.R.I. 2006) (quoting Blackburn v. Snow, 771 F.2d 556, 561 n.3 (1st Cir. 1985)). Such searches are permitted pursuant to an arrest or in a prison setting only where there is individualized suspicion that the arrestee or inmate harbors contraband. *Id.*

172. Body cavity searches can be either visual (a "visual inspection of the anal or genital areas") or manual ("some degree of touching or probing of body cavities"). *Id.* (quoting Blackburn v. Snow, 771 F.2d 556, 561 n.3 (1st Cir. 1985)). Similar to strip searches, body cavity searches are permitted in a prison setting or following an arrest only where there is individualized suspicion that the arrestee or inmate harbors contraband. *Id.*

173. Terry v. Ohio, 392 U.S. 1, 17 (1968) ("[A pat-down] is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.").

174. Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1270 (M.D. Fla. 2006) (quoting United States v. Albarado, 495 F.2d 799, 807 (2d Cir. 1974) ("[A] frisk is considered a gross invasion of one's privacy.")).

been justified by a special need, such as visual inspections[175] and magnetometer searches.[176]

Although the *Johnston* court failed to address this issue fully, the emotional effects of pat-downs on their subjects should also be considered in determining their intrusiveness. One of the main reasons pat-downs should be deemed highly intrusive is the humiliation that many individuals—especially women—experience when subjected to a pat-down.[177] One woman who was subjected to a pat-down at Heinz Field[178] commented, "I'm just very uncomfortable with somebody feeling me up," and described the pat-downs as "more like unnecessary roughness."[179] There are some who scoff at women's complaints about the embarrassing nature of pat-downs, stating that "a physical pat-down [is] a small price to pay for security."[180] However, as one woman noted, "[m]en don't know how offensive it is to be touched by anyone when you don't want to be touched."[181] Yet, despite dismissal of the humiliation complaints concerning pat-downs, it is not just women who have felt humiliated by these searches. One commentator stated that "a guy [she] know[s] said a male screener . . . recently stuck a hand down the front of his pants, making him feel 'totally manhandled.'"[182]

Pat-downs are highly intrusive not only because of the potential humiliation involved, but also because there is a danger that some security personnel will perform the pat-downs in an inappropriate

175. *See* Bond v. United States, 529 U.S. 334, 337 (2000) ("Physically invasive inspection is simply more intrusive than purely visual inspection."); *Jensen*, 317 N.W.2d at 624 ("A physical pat-down search by a guard is more intrusive than a limited visual search.").

176. *Albarado*, 495 F.2d at 806 ("The passing through a magnetometer has none of the indignities involved in . . . a frisk. The use of the device does not annoy, frighten or humiliate those who pass through it."); *see also Symposium Panel*, *supra* note 4, at 397 ("The pat-down is . . . more intrusive than walking through a door that has some X-ray capacity . . . ." (remarks by panelist Norman Siegel)).

177. *See* Maureen Dowd, *Hiding Breast Bombs*, N.Y. TIMES, Nov. 25, 2004, at A35; Dorren Klausnitzer, *Are Airport Security Pat-Downs Too Personal?*, TENNESSEAN.COM, Nov. 25, 2004, www.tennessean.com/local/archives/04/11/61998018.shtml; Jessica D. Lew, *Secondary Screening Procedures for Airports: Putdowns for Pat-Downs*, LAWORLD, Nov. 2005, at 1–2; Joe Sharkey, *Many Women Say Airport Pat-Downs Are a Humiliation*, N.Y. TIMES, Nov. 23, 2004, at A1.

178. Heinz Field is the stadium where the NFL's Pittsburgh Steelers plays its home games. Moustafa Ayad, *New Era Dawns at Heinz Field as Pat-Down Searches Begin*, PITTSBURGH POST-GAZETTE, Aug. 16, 2005, at A1, A3, *available at* http://www.postgazette.com/pg/05228/554642.stm.

179. *Id.*

180. Sharkey, *supra* note 177. R

181. *Id.* (quoting Betty Spence, President of the National Association for Female Executives).

182. Dowd, *supra* note 177.

manner.[183] This results in the security personnel subjecting women[184] not only to humiliation, but also to fear of sexual harassment, abuse, or painful recollection of previous experiences of such harassment or abuse.[185] Numerous women and commentators have described pat-downs by security personnel as sexual harassment and not just mere security measures.[186] One commentator stated that "[i]t is ironic that what would normally be considered 'assault' on the street is often the standard practice of screeners at . . . security checkpoints."[187]

Even government officials, such as former Representative Helen Chenoweth, have expressed outrage at pat-downs and commented that these searches conflict with what our society has deemed acceptable and appropriate bodily contact between strangers.[188] Chenoweth stated that "[w]e have programs teaching children that these areas are private and yet we have our government patting us down [in those areas]. There's something wrong with that."[189] Those who have experienced inappropriate pat-downs have reported it to consist of the following:

> [R]ough, rude, and humiliating manhandling and groping of their breasts and crotch areas, demeaning sexual comments, and being forced to remove business jackets in full view of crowds, despite the

183. *See* Audrey Hudson, *TSA 'Pat-Downs' Cross the Line for Some Fliers*, WASH. TIMES, Nov. 25, 2004, at A3; Klausnitzer, *supra* note 177; Sharkey, *supra* note 177.

184. This author does not mean to suggest that men do not experience fear of sexual harassment or abuse or that men are not victims of such abuse. However, the author concentrates on women as the more likely gender to experience such fear and recollections during inappropriate pat-downs, because, as some reports have suggested, women are far more likely to experience sexual abuse or harassment than men. *See, e.g.*, Patricia Tjaden & Nancy Thoennes, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey*, Nov. 1998, at 3, 11 (reporting that, while "nearly one-fifth [of women] reported being raped at some time in their lives," only "1 of 33 U.S. men has experienced an attempted or completed rape as a child and/or an adult").

185. *See* Hudson, *supra* note 183; Klausnitzer, *supra* note 177; Sharkey, *supra* note 177.

186. *See* Hudson, *supra* note 183 (stating that "some say [a pat-down by government officials] amounts to sexual groping"); Klausnitzer, *supra* note 177 ("What they're doing is subjecting women to very aggressive, intrusive searches [and we are] worried that this is, in fact, sexual harassment." (quoting Barry Steinhardt, of the ACLU's New York office, concerning pat-downs)); Sharkey, *supra* note 177 ("Routinely, my breasts are being cupped, my behind is being felt . . . [a]nd I feel I can't fight it." (quoting Lu Chekowsky, an advertising executive from Portland, Oregon)).

187. Lew, *supra* note 177.

188. Hudson, *supra* note 183; *see also Suspicionless Searches Make Fans Less Free But Not Any Safer*, Oct. 13, 2005, http://www.aclu.org/crimjustice/searchseizure/21144prs20051013.html [hereinafter *Suspicionless Searches*] (noting that Patrick Manteiga, the Chair of the TSA, has publicly criticized the pat-downs as being intrusive).

189. Hudson, *supra* note 183.

> fact that it is a widespread convention in our society for women to wear only bras or other undergarments underneath such jackets.[190]

Commentators have reported that the number of complaints alleging sexual harassment or abuse by security personnel in the course of performing pat-downs has been significant.[191] The existence of these complaints has been acknowledged by the authorities, such as the TSA, which reported that, in the period from October 1, 2004 through February 28, 2005, it received 1,471 pat-down complaints.[192] Although the TSA emphasized that the number of complaints received comprised only .003% of the pat-downs performed during that period,[193] in December 2004, it responded by making adjustments to its pat-down procedures.[194] Because the adjustment came "after [TSA] officials met . . . to discuss the large number of complaints from travelers," it suggests that the dangers of abuse and harassment by security personnel conducting the pat-downs were real.[195] In response to the dangers pat-downs present to the emotional and physical well-being of women, at least one feminist website has encouraged women to take action against pat-downs.[196] The website suggests that women simply should not allow security personnel to touch them in an inappropriate manner in the name of security, but rather should report it to local and state police for what it is: a crime.[197]

Beyond the short-term emotional effects of pat-downs, the experience of such a highly intrusive action may have long-term negative effects on some women. Women who have experienced sexual assault, sexist remarks, or sexist environments "report increases in negative emotions, including depression, anxiety, and anger" that persist beyond the initial experience.[198] Thus, it is likely that a fear of sexual

190. ACLU, *TSA Pat-Down Search Abuse*, Dec. 21, 2004, http://www.aclu.org/privacy/gen/15777res20041221.html [hereinafter *Pat-Down Search Abuse*]; Lew, *supra* note 177 ("Many women have reported rough, rude, and humiliating manhandling, and sometimes even overtly sexual groping by security officials.").

191. *Pat-Down Search Abuse, supra* note 190.

192. DEP'T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GEN., REVIEW OF THE TRANSPORTATION SECURITY ADMINISTRATION'S USE OF PAT-DOWNS IN SCREENING PROCEDURES, OIG-06-10, Nov. 2005, at 3.

193. *Id.* at 2.

194. Sara Kehaulani Goo, *TSA Modifies Airport Pat-Downs*, WASH. POST, Dec. 10, 2004, at A13.

195. *Id.*

196. Matthew Reed, *How to Fight Back Against Pat-Downs by Airport Security Screeners,* Feb. 1, 2006, http://www.ifeminists.net/introduction/deitorials/2006/0201reed.html.

197. *Id.*

198. Lori E. Ross & Brenda Toner, *Sexism & Women's Mental Health*, WOMEN & ENVIRONMENTS, Fall 2003, at 34 (reporting on studies of "the impact of explicitly sexist environments and experiences on women's physical and mental health"); *see also* WORLD HEALTH ORG., WOMEN'S MENTAL HEALTH: AN EVIDENCE BASED REVIEW 65–81 (2000), *available at* http://whqlibdoc.

harassment or recollection of such an experience brought on by a pat-down search would also increase these negative emotions in women. The danger of pat-downs resulting in negative, long-lasting emotional effects is especially significant in the United States where "[e]very year approximately 132,000 women report that they have been victims of rape or attempted rape"[199] and "every two and a half minutes . . . someone is sexually assaulted."[200] These statistics suggest that a large percentage of American women have experienced sexual abuse or harassment and, thus, a large portion of those who may be subjected to a pat-down may experience recollection of this abuse or harassment or may fear that it will happen again.

Some commentators have argued that the emotional effects of pat-downs should not be considered when determining whether these searches are intrusive, because the NFL pat-down policy is indiscriminate in nature.[201] The argument is that, when a search policy is not selective and, as in the case of the NFL policy, applies to every patron entering the stadium, the search subjects are "much less likely to be frightened or annoyed by the intrusion," and, thus, the emotional effects of the pat-downs are slight or nonexistent.[202] One commentator criticized the *Johnston* court for not addressing the indiscriminate nature of the pat-down policy in its analysis.[203] While this omission is contrary to the precedent of examining the indiscriminate or discriminate nature of the search in determining its invasiveness,[204] the indis-

who.int/hq/2000/WHO_MSD_MDP_00.1.pdf (stating that "[v]iolence against women . . . is probably the most prevalent and certainly, the most emblematic gender based cause of depression in women"); Richard F. Geist, *Sexually Related Trauma*, 6 EMERGENCY MED. CLINICS N. AM. 439, 462 (1988) (stating that "[a] post-traumatic psychological syndrome, with both short-term and long-term dysfunctional elements, almost uniformly follows [a sexual assault]"); Paul E. Mullen et al., *Impact of Sexual and Physical Abuse on Women's Mental Health*, LANCET, Apr. 16, 1988, at 8590 (stating that domestic violence, which can include physical and sexual violence against a woman, has an even stronger association with mental disorders than does sexual abuse in childhood).

199. Nat'l Org. for Women, Violence Against Women in the United States, http://www.now.org/issues/violence/stats.html (last visited Feb. 13, 2008).

200. Rape, Abuse & Incest Nat'l Network, http://www.RAINN.org (follow "Statistics") (last visited Feb. 13, 2008).

201. Clark, *supra* note 133, at 740 ("[C]ourts have held that when a search policy is applied indiscriminately, and therefore not directed at isolated spectators, no stigma attaches to embarrass the individual subjected to the search.").

202. *Id.* (quoting Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 452 (1990)).

203. *Id.* ("The [*Johnston*] court completely ignored the indiscriminate nature of the NFL pat-down policy; other courts should not duplicate that mistake.").

204. *See* Collier v. Miller, 414 F. Supp. 1357, 1364 (S.D. Tex. 1976). The court was concerned with the fact that the searches in question were "not applied indiscriminately to all persons entering the respective facilities. Instead, the record reflects that the decision to search, as well as degree of the ensuing search, are left entirely to the discretion of the searching guard." *Id.*; *accord* Ringe v. Romero, 624 F. Supp. 417, 420 (W.D. La. 1985) ("The courts have held that

criminate nature of a search is not the only—or the most significant—factor in determining whether the search is intrusive. As Justice O'Connor pointed out, there is as substantial a danger of great intrusion upon a person's privacy rights in an even-handed search as there is in a search that singles out only certain individuals.[205] Thus, while the *Johnston* court should have addressed the indiscriminate nature of the NFL pat-down policy, it is unlikely that the court would have found the pat-downs less intrusive solely because they were indiscriminate, because the same dangers of humiliation, fright, annoyance, and resentment of the government were still present.

C. The Efficacy of Pat-Downs

After balancing the governmental and privacy interests at stake, courts must also consider the search's efficacy, focusing on whether the search can eliminate or reduce the risk to the public.[206] Thus, the *Johnston* court followed precedent in examining whether the pat-downs were an essential part of terrorism protection.[207] Supporters of the NFL pat-down policy point out that pat-downs can be effective in preventing or deterring a terrorist attack, because they allow the security personnel to detect suicide bombs made from material other than metal, such as plastic.[208] However, the mere possibility that a pat-down could detect a suicide bomb does not render it an effective search. There should also be an evaluation of how the search is implemented, who is carrying it out, and what problems it may cause in order to determine the true efficacy of the search. Thus, the *Johnston*

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where the decision to search is left entirely to the discretion of the searching officers, the intrusion can be particularly great.").

205. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 670 (1995) (O'Connor J., dissenting):

> [T]here is no indication in the historical material that the Framers' opposition to general searches stemmed solely from the fact that they allowed officials to single out individuals for arbitrary reasons, and thus that officials could render them reasonable simply by making sure to extend their search to *every* house in a given area or to *every* person in a given group.

Id. (emphasis in original).

206. *See* Wilkinson v. Forst, 832 F.2d 1330, 1338 (2d Cir. 1987); *Ringe*, 624 F. Supp. at 423; Gaioni v. Folmar, 460 F. Supp. 10, 14 (M.D. Ala. 1978); *Collier*, 414 F. Supp. at 1363; Jensen v. City of Pontiac, 317 N.W.2d 619, 623–24 (Mich. Ct. App. 1982).

207. 442 F. Supp. 2d 1257, 1270–71 (M.D. Fla. 2006).

208. *See* McCann, *supra* note 139, at 607 ("Israeli security and military personnel, for instance, routinely use [pat-downs] because suicide vests may be obscured underneath terrorists' clothing." (citing to Joel Mowbray, *Florida Judge Shockingly Halts Security Searches at Games*, Oct. 31, 2005)); Clark, *supra* note 133, at 739 ("[A] pat-down search may be the most effective and efficient way to ferret out plastic explosives."); *Sports Security Panel*, *supra* note 4, at 397 ("That is why [the NFL] also employed the pat-down, because we were concerned about individuals bringing in large amounts of C4 plastic strapped to their bodies." (remarks by panelist Milton Ahlerich)).

court correctly examined factors such as the true motivation for implementing the search and the manner in which the search was implemented.[209] Further, the *Johnston* court correctly determined that the pat-downs were ineffective in preventing a terrorist attack[210] in light of the fact that the pat-downs were brief,[211] performed by untrained personnel,[212] easy to deceive,[213] and more likely used by the NFL to provide patrons with a false sense of security than to provide them with effective security measures,[214] because their effectiveness has not been tested.[215]

The pat-downs at NFL stadiums are ineffective, because they are too brief to allow any meaningful opportunity to detect suicide bombs. As one commentator pointed out, stadium security personnel face the "situational pressure of impatient fans seeking to enter the stadium, as well as . . . the practical necessity of preventing long and slow-moving entrance lines."[216] Thus, because of the need to move lines quickly, security personnel conduct brief pat-downs that will likely not give them an opportunity to actually feel the person's garment for any small bulges or wires that may be concealed underneath.[217] Also, as some experts have pointed out, the pat-downs are ineffective, because they are performed by personnel who "seldom possess sufficient anti-terrorist training."[218] If anti-terrorism security measures are to be effective, the personnel implementing those measures must be properly trained.[219] Without such training, the probability of a pat-down actually detecting materials that can be used in a terrorist attack disappears. Some critics have noted that, besides being "less than well-trained," stadium security personnel are also "less than engaged."[220] Further, the pat-downs are ineffective, because, as one commentator pointed out, "terrorist[s] can still conceal material below the waist or otherwise bypass questionably-trained security," because pat-downs

209. 442 F. Supp. 2d at 1265.

210. *Id.*

211. McCann, *supra* note 139, at 610 (noting that the pat-downs take three to five seconds).

212. *Id.* at 604.

213. *Id.* at 607.

214. *See Suspicionless Searches*, *supra* note 188; McCann, *supra* note 139, at 609; Andrew Potter, *If Security Fails, There is Always a Scapegoat: Freedom*, MACLEAN'S, Sept. 12, 2006, *available at* http://www.macleans.ca (search by article title). R

215. McCann, supra note 139, at 608. R

216. *Id.* at 604.

217. *Id.* at 604, 610.

218. *Id.* at 604.

219. Benjamin D. Goss et al., *Primary Principles of Post-9/11 Stadium Security in the United States: Transatlantic Implications from British Practices*, *available at* http://www.iaam.org/cvms/Post%20911%20Stadium%20Security.doc (last visited Feb. 13, 2008).

220. McCann, *supra* note 139, at 609.

are usually performed above the waist.[221] Additionally, because the pat-downs are performed on every patron entering the stadium, terrorists have the opportunity to observe exactly how the pat-downs are being conducted. They can then adjust the location of their explosive materials to areas that are either not patted down or are subject to a light pat-down. Another significant factor rendering pat-downs ineffective as a method of reducing or eliminating the threat of a terrorist attack is the fact that pat-downs create a public environment with a high concentration of people that is an even more accessible target to potential terrorists than a stadium, because there are no security measures for screening those who are on public streets.[222] One observer has stated that the NFL's pat-down policy may in fact "expose those gathering at stadiums entrances to a greater danger."[223]

Yet the three most telling facts concerning the ineffectiveness of the pat-downs are that the NFL has not tested their efficacy,[224] the NFL waited until 2005 to implement such measures, and no other sports leagues have implemented pat-down searches as anti-terrorist measures.[225] Some commentators have puzzled at "why the NFL, unlike other pro sports leagues, would utilize [the pat-downs] and whether the NFL trusts its fans less than [other sports leagues], or [if it] is just more paranoid."[226] One commentator even asserted that pat-downs at football stadiums "have not led to the discovery of a single item of contraband, let alone terrorist material."[227] In light of these circumstances, it is doubtful that the pat-downs are effective. Further, if they were, it is likely that other sports leagues would also utilize them. Critics would likely respond that, unless these measures were effective in protecting the patrons, the NFL would not waste its resources on such measures. However, the NFL employed pat-downs regardless of their effectiveness, because they create the illusion that the NFL is

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221. *Id.* at 607; Sally Kalson, *What Will We Endure for the Sake of Security?*, PITTSBURGH POST-GAZETTE, Aug. 17, 2005, at A2.

222. McCann, *supra* note 139, at 607, 609.

223. ACLU, *Florida Judge Stops Pat-Down Searches at Buccaneers Games*, Oct. 28, 2005, *available at* http://www.aclu.org/crimjustice/searchseizure/21185prs20051028.html (last visited Feb. 13, 2008) (remarks by Rebecca Steele, ACLU's West Florida Regional Director and the lead attorney in *Johnston*).

224. McCann, supra note 139, at 608. R

225. Richard Rhodes, *Judge Stands Up For Civil Liberties*, July 31, 2006, http://www.watchblog.com/thirdparty/archives/004036.html (stating that the pat-down measures are unique to the NFL, as the NBA, MLB, and NHL have no such policies); *see also* McCann, *supra* note 139, at 607, 609.

226. McCann, *supra* note 139, at 609 (internal quotation marks omitted).

227. *Id.* at 608.

concerned with fans' safety.[228] Even authorities charged with implementing the NFL policy have "publicly criticized the pat-down searches as . . . providing a false sense of security."[229] Based on these suggestions, it is likely that the concern in implementing such measures is not the effectiveness in protecting the fans, but merely the visibility of the NFL's security measures to protect fans. A pat-down of every fan entering the stadium is a highly visible showing of security measures, and it tends to make the fans feel that security is being taken seriously. This is likely the exact response that the NFL hopes to generate. Ultimately, the NFL is a business. As such, it is concerned with the possible loss of customers due to fears of an attack.[230] Thus, it wants to implement the security measures that are most visible to patrons and most effective in alleviating their fears, even though they may not be the most effective in actually preventing terrorism.[231] These pat-downs are not really meant to protect patrons but merely to convey a message that they should continue to spend their money on attending sports events, because visible security measures are clearly in place to protect them.

D. Balancing of the Interests

After examining the privacy interest at stake, the governmental interest at stake, and the efficacy of the means chosen to achieve the governmental interest, courts must balance these competing interests to determine whether the special needs doctrine justifies the governmental intrusion.[232] Only "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy" if the intrusion were prohibited, can a special need justify a suspicionless search.[233] The *Johnston* court, therefore, correctly balanced the threat

228. *Id.* at 609 (stating that the pat-downs "merely manifest a 'feel good' measure that deludes fans into overestimating the NFL's concern for their safety"); *see* Potter, *supra* note 214, at 7 ("[A] great deal of what passes for security in our society is symbolic, a device for convincing the public that it is okay to go to a hockey game or take a trip to see relatives.").

229. *See Suspicionless Searches*, *supra* note 188. **R**

230. Angelo Bruscas, *Extra Security Hounding Sports Fans Everywhere*, SEATTLE POST-INTELLIGENCER REP., Mar. 26, 2003, http://seattlepi.com/othersports/114258_security26.shtml (stating that, besides providing security, teams also face the concern of driving fans away because of a lack of security measures or an overabundance of security measures).

231. *See Suspicionless Searches*, *supra* note 188. **R**

232. Chandler v. Miller, 520 U.S. 305, 314 (1997); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 646 (1995); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989); Ringe v. Romero, 624 F. Supp. 417, 420 (W.D. La. 1985); Wheaton v. Hagan, 435 F. Supp. 1134, 1145 (M.D.N.C. 1977); Jensen v. City of Pontiac, 317 N.W.2d 619, 624 (Mich. Ct. App. 1982).

233. *Chandler*, 520 U.S. at 314 (quoting *Skinner*, 489 U.S. at 624).

of a terrorist attack on a stadium with patrons' privacy interests.[234] Further, the court rightly concluded that the privacy interest was not outweighed by the governmental interest and, therefore, the special needs doctrine could not justify the pat-down policy.[235]

As discussed above, patrons' privacy interest in their persons was not diminished by the fact that they were at a public gathering.[236] Additionally, the intrusion of the pat-down search upon the privacy interest at stake was great.[237] However, while the governmental interest was compelling, it had little immediacy.[238] Finally, the governmental interest was not furthered by the intrusion, because the pat-downs were not effective.[239] Thus, the privacy interest implicated by the pat-downs was not minimal, and the governmental interest, though important, was not placed in jeopardy if the suspicionless pat-downs were prohibited. As one commentator cautioned, "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."[240] Unless the government can prove that there is a real and substantial threat to NFL stadiums and that implementation of security measures other than pat-downs would jeopardize the public safety, patrons' constitutional rights must be given the highest priority.

V. *JOHNSTON*'S IMPACT UPON CIVIL LIBERTIES AND PATRONS' SAFETY

This Part explores *Johnston*'s likely impact upon the constitutional rights of citizens and the ability of the NFL and other sports leagues to protect their patrons during sports events.[241] It discusses how the decision will likely help safeguard constitutional rights protected by the Fourth Amendment and, in turn, prevent terrorists from achieving their goals.[242] Further, it surveys a number of alternative avenues that

234. Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1272 (M.D. Fla. 2006).

235. *Id.*

236. *See Ringe*, 624 F. Supp. at 420; Bourgeois v. Peters, 387 F.3d 1303, 1315–16 (11th Cir. 2004).

237. *See* Terry v. Ohio, 392 U.S. 1, 17, 25 (1968).

238. *See Johnston*, 442 F. Supp. 2d at 1269.

239. *See* McCann, *supra* note 139, at 608.

240. Claussen, *supra* note 76, at 172.

241. *See infra* notes 244–275 and accompanying text. R

242. *See infra* notes 244–255 and accompanying text. R

do not involve suspicionless pat-downs, but continue to be open to the NFL following *Johnston*.[243]

A. The Road from Suspicionless Pat-Downs to the Abandonment of Constitutional Rights

Proponents of pat-downs argue that the *Johnston* court should have erred on the side of caution and extended the special needs exception to suspicionless searches at NFL stadiums; however, such an extension would likely lead to a "slippery slope."[244] The slippery slope theory states that, initially, in the name of national security, the government "trims some rights, which raises little alarm at the time," and then curbs other, more important rights until, gradually, citizens are stripped of all rights, and it is too late to stop the evisceration of constitutional guarantees.[245] Therefore, it could be argued that, if the *Johnston* court had allowed the government to conduct suspicionless pat-downs at NFL stadiums, it would lead to suspicionless pat-downs at other public gatherings until nearly every time a person left her home she would be searched by the government without any suspicion.[246] Instead, *Johnston* greatly protects constitutional rights guaranteed by the Fourth Amendment, which one commentator has described as rights that should be protected most fiercely.[247] That commentator argued that courts should be extremely protective of the Fourth Amendment, because it is "more susceptible to the changing fortunes of public opinion than any other constitutional provision. It prohibits 'unreasonable' searches and seizures [and] [i]n a society drenched in fear and fighting terror, my sense is that almost anything necessary to make us feel safe will be deemed reasonable by most."[248]

One writer pointed out that, unlike people in countries such as Israel—where metal detectors, bomb-sniffing dogs, and undercover surveillance teams are part of daily life—the "American people simply won't tolerate the kinds of draconian countermeasures that Israelis accept without complaint."[249] "One of the reasons we do not do

243. *See infra* notes 256–275 and accompanying text. **R**

244. Amitai Etzioni, How Patriotic is the Patriot Act? Freedom Versus Security in the Age of Terrorism 11 (2004).

245. *Id.*

246. *See* Catherine Yang et al., *The State Of Surveillance*, BusinessWeek, Aug. 8, 2005, http://www.businessweek.com/magazine/content/05_32/b3946001_mz001.htm (describing a possible future United States where surveillance technology is used to monitor citizens and search their belongings and citizens themselves when they are out in the public).

247. Norm Pattis, *The Shrinking Fourth Amendment*, Jan. 17, 2006, http://federalism.typepad.com/crime_federalism/2006/01/the_shrinking_f.html.

248. *Id.*

249. Ervin, *supra* note 140, at 158.

some of [the] things [that other countries do to prevent terrorism] is because it is not in our tradition."[250] Therefore, the *Johnston* court's refusal to extend the special needs doctrine to searches at NFL stadiums protects American rights and traditions. Further, "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."[251] If the government is permitted presently to minimize or extinguish citizens' right to be free from suspicionless searches based on the fear of a terrorist attack, then future generations will either be unaware that such a right exists or will not place great importance on it. In either scenario, the right may be lost. Thus, *Johnston* will likely impact future generations by preserving the Fourth Amendment right.

Finally, *Johnston* is likely to prevent terrorism from disrupting the democratic freedoms guaranteed by the U.S. Constitution. As one writer points out, there are those who "seek to suspend major parts of the Constitution and its Bill of Rights until we win the war against terrorism."[252] Yet, according to the writer, the Bill of Rights is "the rule of law that makes us what we are."[253]

More importantly, as one commentator stated, when we suspend our rights in response to terrorism, "we erode and violate the very freedoms and liberties that the authors of terrorism themselves want to destroy."[254] Therefore, if *Johnston* had instead permitted suspicionless pat-downs at NFL stadiums, it could have been seen as a decision that enabled terrorism to accomplish its task of disrupting democratic governments like that of United States and the freedoms those governments bestow upon their citizens. As Senator Leahy said, "we don't protect ourselves by bending or even shredding our Constitution. We protect ourselves by upholding our Constitution and demonstrating to the rest of the world we will defend ourselves, but we will do it also by defending our core values."[255] Thus, *Johnston* will likely protect Americans from terrorism by defending the Consti-

250. *Sports Security Panel*, *supra* note 4, at 399 (commenting on why, unlike the national airline of Israel, U.S. airlines are not required to seal the cockpit before any passengers board planes).

251. Claussen, *supra* note 76, at 165.

252. ETZIONI, *supra* note 244, at 1.

253. *Id.*

254. Amanda Ripley, *How Much Risk Will We Take?*, TIME, Aug. 13, 2006, *available at* http://www.time.com/time/magazine/article/0,9171,1226170,00.html.

255. Amitai Etzioni, *Rights and Responsibilities After 9/11*, *available at* http://www.gwu.edu/~ccps/documents/2003After9-11.pdf (last visited Feb. 13, 2008).

tution and not allowing terrorism to scare courts into abandoning the constitutional requirements for searches by the government.

B. Ensuring the Governmental Interest without Violating Patrons' Rights: Other Avenues the NFL Can Pursue

Proponents of the NFL pat-down policy argue that *Johnston* is a blow to stadium security and that it places the lives of millions of patrons entering NFL stadiums each week in jeopardy.[256] However, *Johnston*'s impact is not the triumph of freedom over security, because security would not have been served by these suspicionless pat-downs. "The NFL's suspicionless search policy will not make fans any safer, but it will make us all less free."[257] More importantly, suspicionless pat-downs are not the only means to ensure the safety of its patrons entering stadiums. Rather, the NFL has at its disposal ample means of protecting its patrons without violating constitutional requirements. In fact, the *Bourgeois* court stated that police could conduct pat-downs if they had reasonable suspicion that a person had a weapon and could conduct a full-fledged search if they had probable cause to believe she was carrying a weapon.[258] Similarly, government agencies handling security at NFL stadiums could still conduct pat-downs as long as they have reasonable suspicion that a patron could be carrying improvised explosives.

The NFL could also use technology to protect patrons without violating their privacy. One commentator in the technology industry stated that, "[i]f you want to reduce risk, video is the way to do it."[259] Thus, the NFL could use video surveillance as a means of protection, especially because "searches of personal identity information that utilize merged high tech surveillance and information technologies might survive a constitutional challenge."[260] Further, at least one court has stated that "[t]he right of [government] to observe patrons entering [a stadium] is clearly permissible."[261] Thus, it is likely that courts would permit the use of more extensive video surveillance security systems or the use of forthcoming technologies, such as video cameras that

256. Mowbray, *supra* note 208. **R**

257. *See Suspicionless Searches*, *supra* note 188 (quoting Rebecca Harrison Steele, ACLU's West Florida Regional Director and the lead attorney in *Johnston v. Tampa Sports Authority*). **R**

258. Bourgeois v. Peters, 387 F.3d 1303, 1316 (11th Cir. 2004).

259. *30 Million Surveillance Cameras in U.S.*, Aug. 8, 2006, *available at* http://archive.newsmax.com/archives/ic/2006/8/8/63102.shtml (quoting Peter Tu, scientist at GE).

260. Claussen, *supra* note 76, at 172.

261. Wheaton v. Hagan, 435 F. Supp. 1134, 1144 (M.D.N.C. 1977).

may help detect terrorists.[262] Beyond the advantage of such security measures passing constitutional muster, video surveillance has proven successful. For example, in Great Britain, "the installation of closed-circuit television cameras at British soccer stadiums during the mid-1980's proved to be a vital component in hooligan policing."[263]

Additionally, the NFL could continue to use security measures already in place that have not raised constitutional questions. One such measure is the use of metal detectors and scanners. Although the Eleventh Circuit recently held that the suspicionless magnetometer searches at a public protest could not be justified under the special needs exception,[264] other circuits have upheld suspicionless magnetometer searches at large public gatherings. For example, in *Wilkinson*, the Second Circuit held that mass pat-down searches of persons entering a public rally violated the Fourth Amendment, but that police could conduct general magnetometer searches at rallies without reasonable suspicion or probable cause.[265] Further, metal detectors and scanners were used in such high-profile sports events as the 2001 World Series opening game at Yankee Stadium, the 2002 New Orleans Super Bowl, and the 2002 Salt Lake City Olympics without raising any constitutional questions.[266] Another measure is the use of a "no pass" policy, which provides that ticket holders are not allowed to leave the stadium and return during a game.[267] Further, the NFL can continue to ban certain items inside stadiums—including backpacks, umbrellas, containers, and coolers[268]—because, in *Wheaton*, the United States District Court for the Middle District of North Carolina stated that "nothing in the Constitution forbids . . . authorities from making reasonable rules and regulations concerning what may be brought into the [stadium] or from enforcing such rules by normal police procedures."[269]

Finally, the NFL could spend the money currently being used to conduct pat-downs—which reportedly averages "$10,000 a game"[270]—to strengthen and add commonsense security measures.

262. *30 Million Surveillance Cameras in U.S.*, *supra* note 259 (discussing video cameras that can detect explosives by recognizing electromagnetic waves given off by objects and cameras that pinpoint distress in a crowd by recognizing erratic body movements).

263. Goss et al., *supra* note 219, at 15. **R**

264. Bourgeois v. Peters, 387 F.3d 1303, 1316 (11th Cir. 2004).

265. 832 F.2d 1330, 1341 (2d Cir. 1987).

266. *Sports Security Panel*, *supra* note 4, at 370. **R**

267. *U. Va. Enacts New Security Measures at Stadium*, INSIDE UVA ONLINE, Sept. 28–Oct. 4, 2001, http://www.virginia.edu/insideuva/2001/30/security.html.

268. *Id.*

269. Wheaton v. Hagan, 435 F. Supp. 1134, 1144 (M.D.N.C. 1977).

270. Hermann, *supra* note 2. **R**

One such measure could include additional training for security personnel. As one commentator stated, "[t]o be ready to effectively preempt or react to terror strikes, [stadium] workers at every level must receive timely [and effective] security training."[271] Another commentator pointed out that, "[a]ccording to some experts, stadium security personnel seldom possess sufficient anti-terrorist training . . . ."[272] Therefore, the money now used to conduct pat-downs could be better spent on training security personnel, because security training of venue workers is the "best-kept secret" for ensuring patrons' safety.[273] Further, the NFL could use the money spent on conducting pat-downs to launch media campaigns emphasizing greater patron awareness and reporting of suspicious activity to security personnel. Public awareness is one of the most important means of fighting terrorism.[274] Finally, the money can be used to better protect the physical areas around the stadiums. For example, one security agency recommended increasing perimeter lighting, maintaining vegetation around the perimeters, and installing special locking devices on manhole covers in and around facilities.[275]

VI. Conclusion

While the governmental interest in protecting the public from a terrorist attack is compelling, it is not immediate. A terrorist attack on a stadium would likely cause a very high number of casualties because of the high concentration of spectators in an enclosed space. Further, such an attack would have an enormous effect on the American psyche, because sports constitute such a big part of American culture. Yet the likelihood of a terrorist attack on a stadium is relatively small based on recent trends, including only three attacks on sporting arenas in the last thirty-five years. Further, authorities have viewed recent warnings concerning threats against stadiums with skepticism, indicating that such threats, while substantial, are not concrete.

Pat-downs at entrances to NFL stadiums are significant intrusions upon reasonable expectations of privacy. Individuals entering NFL stadiums do not have a diminished expectation of privacy in their persons. While they may expose their body and outer garments to visual

271. Goss et al., *supra* note 219, at 15. **R**
272. McCann, *supra* note 139, at 604. **R**
273. Goss et al., *supra* note 219, at 15. **R**
274. Oussama Damaj, *The Problem of Responding to Terrorism*, *in* Terrorism and International Law: Challenges and Responses 147, 152 (2002).
275. ASIS Int'l, *Anti-Terror Security Measures*, http://www.asisonline.org/newsroom/crisisResponse/antiterrorMeasures.xml (last visited Feb. 13, 2008).

observation by others, they do not expose their body and outer garments to physical examination by others. As precedent suggests, a pat-down is a highly invasive intrusion upon this reasonable expectation of privacy. Further, pat-downs subject the persons being searched to great humiliation, possible sexual harassment and abuse, or recollections of past harassment and abuse.

Finally, pat-downs instituted at entrances to NFL stadiums are ineffective in advancing the governmental interest, because they fail to reduce or eliminate the threat of a terrorist attack. Because security personnel at NFL stadiums are faced with the pressure of quickly moving spectators, they perform very brief pat-downs, which are unlikely to allow them to detect any small bulges or wires. Additionally, because the personnel performing these pat-downs do not have anti-terrorist training, they are unlikely to know what should raise their suspicion. Further, the pat-downs are easy to deceive, because any terrorist could adjust the location of her explosive materials based on her observations of how the pat-downs are performed. Finally, the pat-downs could actually create a more dangerous situation at the entrances to stadiums, because they concentrate a large number of people in one an space that is easily accessible to terrorists. Thus, while the pat-downs create an illusion of protection at stadiums, they are ineffective at truly protecting patrons.

As the above analysis illustrates, the governmental interest in protecting NFL patrons from terrorist attacks, while compelling, is not immediate. Further, the privacy interest at stake and the nature and degree of intrusion are great. Therefore, the governmental interest does not outweigh the privacy interest. Unless the government can establish that there is a specific threat to a specified game at a specified stadium, courts should not allow suspicionless searches at stadiums. Only in the circumstances described above—where there is a real and substantial threat of a terrorist attack—does the governmental interest outweigh the intrusion upon privacy interests caused by ineffective and invasive pat-downs. The special needs exception requires that the government can articulate a need in concrete terms and not in vague generalities. If the government is permitted to use the general fear of a terrorist attack to curtail citizens' constitutional rights, every large social gathering turns into a display of the govern-

ment's ability to intrude upon citizens' lives and their fundamental right to privacy.

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