ValpoScholar Valparaiso University Law Review

Volume 40
Number 3

pp.707-742

Summer 2006

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Recommended Citation
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 (2006).
Available at: http://scholar.valpo.edu/vulr/vol40/iss3/7

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Article

WHY THE AIRPORT AND COURTHOUSE EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT SHOULD BE EXTENDED TO SPORTING EVENTS

Benjamin T. Clark*

Attending sporting events is one of America's favorite pastimes.[1] Illegal alcohol consumption and drug use unfortunately are commonplace at these events.[2] Because collegiate games often draw tens of thousands of fans,[3] a greater concern is that one could become the target of a terrorist attack. Prior to September 11, 2001, courts repeatedly struck down warrantless searches of patrons entering sporting and other entertainment events.[4] In so holding, courts refused to draw an analogy between searches at sporting events and warrantless searches that have been upheld at airports and courthouses.

This Article revisits that analogy and argues that considering the magnitude and likelihood of the threat, searches of patrons at collegiate sporting events should be viewed in the same light as airport and courthouse searches. Stated differently, an exception to the search warrant requirement should be created for searches of patrons at sporting events. Part I of this Article explains that sporting events are an

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1 For example, during the 2004 college football season, a total of 4,591,722 fans attended Big 10 Conference games. Big 10 Home Page, http://bigten.collegesports.com/sports/m-footbl/spec-rel/010605aaa.html (last visited Mar. 31, 2006).

2 In the fall of 2000, the author attended all of the University of Iowa home football games. Fans swilling alcohol out of flasks or other devices during the games was commonplace.

3 In 2004, the University of Michigan alone averaged 111,025 patrons at its six home football games. Big 10 Home Page, *supra* note 1. As explained below, searches of patrons by public institutions will more likely trigger the state action requirement than searches of patrons at professional games. Therefore, this Article focuses primarily on collegiate sporting events.

4 Because case law is relatively sparse with respect to searches at sporting events, this Article also analyzes case law relating to similar events such as rock concerts. Therefore, the term "entertainment event" will be used throughout to describe not only sporting events, but also any other event where thousands of spectators could be present.

Produced by The Berkeley Electronic Press, 2006

attractive target for terrorists.[5] It further explains that because of the "state action" requirement, public stadiums are often more difficult to protect from terrorism than private stadiums.[6] Part II focuses on what constitutes a search under the Fourth Amendment, thereby triggering the warrant requirement.[7]

Although the Fourth Amendment generally requires a warrant in order to conduct a search, Part III explains that courts have tempered that requirement with narrow exceptions.[8] Part III also discusses three specific exceptions that could apply to warrantless searches of patrons attending entertainment events.[9] Part IV analyzes cases decided both before and after September 11, 2001, that address the similarities and differences between airports, courthouses, and sports stadiums.[10] Part V argues that the need for warrantless searches at stadiums is at least equally, if not more, compelling than warrantless searches at airports and courthouses.[11] Therefore, an exception to the warrant requirement should be created for stadium searches.

At the outset, it must be noted that the purpose of this Article is not to stir the emotional debate over an actual or perceived erosion of civil liberties after September 11, 2001.[12] Instead, it is focused on the more narrow issue of whether, as a matter of fact and law, stadium searches are sufficiently similar to airport and courthouse searches, such that an exception to the warrant requirement should be created for searches at sporting events.

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5 *See infra* Part I.
6 *See infra* Part I.
7 *See infra* Part II.
8 *See infra* Part III.
9 *See infra* Part III.
10 *See infra* Part IV.
11 *See infra* Part V.
12 *See* Bourgeosis v. Peters, 387 F.3d 1303, 1312 (11th Cir. 2004) (stating that "September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country"). To be sure, our civil liberties must be vigilantly protected. Rather than trigger an emotional debate, this Artcle is intended to create an intellectual discussion on the applicability of airport and courthouse searches to stadium searches. The discussion is particularly timely in light of the recently promulgated National Football League search policy, discussed below.

I. SPORTING EVENTS–IN THE CROSSHAIRS OF TERRORISTS

A. An Undeniable Threat

The Federal Bureau of Investigation ("FBI") defines terrorism as an act or acts dangerous to human life that are "intended to intimidate or coerce a civilian population, influence the policy of a government, or affect the conduct of a government."[13] According to the FBI, sporting events present a unique and attractive opportunity for both domestic and foreign terrorists.[14] The basis for this conclusion is simple.

To a terrorist, a major sporting event possesses all the desirable traits of a successful attack. These traits are (1) a soft target, (2) a large number of Americans, and (3) major media attention.[15] With respect to the first characteristic, a terrorist could surreptitiously smuggle a small amount of explosive material into a sporting event; indeed, merely 3.5 ounces of plutonium particles would be enough to kill "concentrations of people . . . ."[16] The number of casualties could be especially high at collegiate football games, where many schools average more than 100,000 spectators per contest.[17]

Moreover, it is "not just the huge crowds that gather for games in America, but the central place sports stands in our culture that makes the specter of terrorists targeting a major sports event all too alarmingly logical."[18] "[S]ports [are] a very symbolic target of terrorism because it is so associated with the globalization of the American economy and the American culture."[19] "Young kids . . . are wearing those jerseys, they are

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[13] *The Terrorist Threat Confronting the United States*, Testimony of Dale L. Watson, Executive Assistant Director, Counterterrorism/Counterintelligence Division, FBI, Before the Senate Select Committee on Intelligence (Mar. 31, 2006), http://www.fbi.gov/congress/congress02/watson020602.htm.

[14] Emergency Survival Program Home Page, ESP Bulletin, www.cert-la.com/ESP/Terrorism 2001.pdf (last visited Apr. 5, 2006).

[15] Robert Windrem, *Athens in the Crosshairs Questions and Answers About Terrorism at the Olympics* (2004), www.msnbc.msn.com/id/5674731/.

[16] Barry L. Rothberg, *Averting Armageddon: Preventing Nuclear Terrorism in the United States*, 8 DUKE COMP. & INT'L L. 79, 110 (1997).

[17] Big 10 Home Page, *supra* note 1.

[18] Windrem, *supra* note 15; *see also* Tampa Sports Auth. v. Johnston, 914 So. 2d 1076, 1080 (Fla. Dist. Ct. App. 2005) (recognizing the "logical, concern that public events at which large crowds gather might be targets of unidentified terrorists").

[19] Richard H. Fallon, Jr., *Legal Issues in Sports Security*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 349, 366 (2003).

wearing their Nike shirts, their Nike shoes, and the terrorists are looking for a symbol to target."[20]

For all these reasons, it should come as no surprise that Al-Qaida has expressed an interest in attacking "World Cup venues and U.S. sporting events—big football games."[21] For these reasons, a successful terrorist attack at such an event would be the crown jewel of any fanatical individual or group.

B. Stadium Operators Respond to the Threat

Cognizant that sporting events are fertile ground for terrorist acts, operators of professional[22] and collegiate games[23] implemented more rigorous search policies at their events following September 11, 2001. For example, in August of 2005, the National Football League ("NFL") determined that hand searches of all patrons should be required at all stadiums hosting NFL games during the 2005 season.[24] The policy generally provided that each patron would be subject to a physical pat-down as she enters the stadium.[25] Any patron that refuses the pat-down would be denied admittance to the game. The primary intent behind the NFL pat-down policy was to "prevent terrorists from carrying explosives into the stadiums."[26] Not surprisingly, the NFL pat-down policy has

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[20] *Id.*

[21] *Id.*

[22] The National Football League's recently promulgated "pat-down" policy is discussed in greater detail below.

[23] *See* University at Albany, Ongoing Commitment to Campus Security, http://www.albany.edu/main/security/questions.htm (last visited Mar. 31, 2006) (stating that security would be increased at public events, including the implementation of metal detectors, pat-downs, and the prohibition of bags); *see also* Graham B. Spanier, President's Report to The Pennsylvania State University Board of Trustees, http://www.psu.edu/ur/2001/bot16novspanier.html (last visited Mar. 31, 2006) (stating new security changes at college football games, including "no re-entry to the stadium, changed parking and traffic patterns, barring of knapsacks and bags at games, and a 'no fly zone'" around the stadium).

[24] Tampa Bay Sports Auth. v. Johnston, 914 So. 2d 1076, 1078 (Fla. Dist. Ct. App. 2005).

[25] *Id.*; *see also* Kansas City Chiefs Home Page, NFL To Institute 'Pat-Down' Policy At Its Games, http://www.kcchiefs.com/news/2005/09/08/nfl_to_institute_patdown_policy_at_its_games2/ (last visited Apr. 5, 2006) ("All persons entering Arrowhead [Stadium] will be subject to and should expect to be patted down by security personnel as they proceed through the gates.").

[26] *Tampa Bay Sports Auth.*, 914 So. 2d at 1078; Kansas City Chiefs Home Page, *supra* note 25 (recognizing that the NFL pat-down policy "is in recognition of the significant additional security that 'pat downs' offer, as well as the favorable experience that [NFL] clubs and fans have had using 'pat-downs' as part of a comprehensive stadium security plan").

recently been challenged as unconstitutional.[27] Those challenges, which have found initial success, are discussed in greater detail below.

Importantly, Fourth Amendment's prohibition on unreasonable searches is aimed "exclusively at state action . . . ."[28] Stated differently, the conduct of private parties does not generally implicate the Fourth Amendment; "only activity by government agents implicates a person's Fourth Amendment rights."[29] The constitutionality of the NFL or similar pat-down policy will therefore often depend on whether a public or private party is conducting the search.

As a result of the state action requirement, it is often easier for private entities to conduct warrantless searches without running afoul of the Fourth Amendment.[30] In sharp contrast, public entities generally cannot conduct searches of patrons unless a warrant is obtained or the search is deemed reasonable.[31] This may leave public stadiums at a decided disadvantage in protecting its patrons from a terrorist attack.

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[27] *See Tampa Bay Sports Auth.*, 914 So. 2d at 1078; Sheehan v. San Francisco 49ers, Ltd., No. CGC 05447679, Verified Complaint for Injunctive and Declaratory Relief (Superior Court for the County of San Francisco, Cal., filed Dec. 15, 2005).

[28] United States v. Ellyson, 326 F.3d 522, 528 (4th Cir. 2003). Whether conduct constitutes state action is highly dependent on the specific facts at hand. *See* Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1448 (10th Cir. 1995) (stating that "[a]s is the case with all of the various tests for state action, the required inquiry is fact-specific"). The requirements of the Fourth Amendment are discussed in greater detail below.

[29] United States v. Barth, 26 F. Supp. 2d 929, 935 (W.D. Tex. 1998).

[30] The contours of the "state action" requirement have been extensively examined by courts and commentators alike. This Article does not delve into that murky area of law. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974) (stating that application of the state action doctrine "frequently admits of no easy answer"). Instead, the Article will assume for the purpose of analysis that a search of patrons at a collegiate sporting event would constitute state action. *See* Stroeber v. Comm'n Veteran's Auditorium, 453 F. Supp. 926, 931 (S.D. Iowa. 1977) (holding that because defendants were "acting to provide security for a public facility financed by pubic monies, the requisite 'state action' is present"). It should be noted that under certain circumstances, and as explained below, a search conducted by a private professional franchise could also constitute state action. Ludtke v. Kuhn, 461 F. Supp. 86, 93–96 (S.D.N.Y. 1978) (finding state action between New York City and the New York Yankees for many reasons, including the fact that New York City had paid approximately fifty million dollars to renovate the Yankees' stadium and retained the power to approve ticket prices and authorize other entities to use the stadium when it was not being used by the Yankees); *see also Tampa Sports Auth.*, 914 So. 2d at 1078; Lawrence A. Israeloff, *The Sports Fan v. The Sports Team Owner: Does a Franchise's Prohibition of Spectators' Banners Violate the First Amendment?*, 24 COLUM. J.L. & SOC. PROBS. 419 (1991) (discussing the state action doctrine with respect to private sports franchises).

[31] Wheaton v. Hagan, 435 F. Supp. 1134, 1144 (M.D.N.C. 1977). The warrant requirement is discussed in greater detail below.

The following examines the requirements imposed on colleges and other state actors under the Fourth Amendment.

II. THE FOURTH AMENDMENT'S PROHIBITION ON WARRANTLESS SEARCHES

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures of persons, papers, and effects. Specifically, it provides:

> 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 person or things to be seized.[32]

The purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[33]

In the seminal case of *Katz v. United States*,[34] Justice Harlan articulated a two-prong test to determine whether governmental conduct constitutes a search. He recognized a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[35] This test has become the standard by which most alleged searches are judged.[36]

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[32] U.S. CONST. amend. IV. The Fourth Amendment prohibition against unreasonable searches applies to states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961). Most states have adopted a constitutional provision that is analogous to the Fourth Amendment. *See, e.g.*, People v. Saurini, 607 N.Y.S.2d 518, 519 (N.Y. App. Div. 1994) (recognizing that the New York Constitution contains an analogous provision to the Fourth Amendment of the Federal Constitution).

[33] United States v. Kincade, 379 F.3d 813, 851 (9th Cir. 2004). As the text itself demonstrates, the Fourth Amendment regulates only governmental "searches" and "seizures." Of course, a search could also involve a seizure of a person. United States v. Aleman, No. CRIM.A. 05-261, 2006 WL 91777, at *2 (E.D. La. Jan. 13, 2006). For the purpose of consistency, this Article focuses exclusively on "searches."

[34] 389 U.S. 347 (1967).

[35] *Id.* at 361 (Harlan, J., concurring).

[36] *See* Smith v. Maryland, 442 U.S. 736, 740 (1979) (recognizing that to determine whether a search has occurred under the Fourth Amendment, "our lodestar is *Katz* . . . ").

A brief discussion of a well-known case illustrates how the *Katz* test is applied. In *Florida v. Riley*,[37] Riley lived in a mobile home located on five acres of rural property.[38] Approximately ten to twenty feet behind the mobile home was a greenhouse.[39] Two sides of the greenhouse were not enclosed, although the contents in the greenhouse were covered from view from surrounding properties by trees, shrubs, and the mobile home itself.[40] The greenhouse was covered by corrugated roofing panels; some of the panels were translucent, others opaque.[41] Two of the panels, which constituted approximately ten percent of the roof area, were missing.[42] The mobile home and greenhouse were surrounded by a wire fence, and a "DO NOT ENTER" sign was posted on the property.[43]

An anonymous tip to the county sheriff's office indicated that marijuana was being grown on Riley's property.[44] However, an investigating officer could not see the contents of the greenhouse from the road.[45] Not to be deterred, the officer circled twice over the property in a helicopter at the height of 400 feet.[46] With his naked eye, the officer could see through the openings in the roof and through the open sides of the greenhouse.[47] The officer thought he identified marijuana growing in the greenhouse.[48]

Based on the officer's observations from the helicopter, a search warrant was issued and a subsequent search confirmed that marijuana was growing in the greenhouse.[49] Riley was charged with possession of marijuana under Florida law.[50] He then filed a motion to suppress, arguing that the aerial surveillance of his greenhouse constituted a search.[51] Therefore, a search warrant should have first been obtained.[52]

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37 488 U.S. 445 (1989).
38 *Id.* at 448.
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.* at 448–49.
50 *Id.* at 449.
51 *Id.*
52 *Id.*

The United States Supreme Court rejected that argument. Citing *Katz*, the Court first ruled that Riley "no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation."[53] As a result, Riley had a subjective expectation of privacy and therefore satisfied the first *Katz* prong. Yet, according to the *Riley* Court, society was not prepared to recognize his expectation of privacy as reasonable. Because "'private and commercial flight [by helicopter] in the public airways is routine' . . . Riley could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter."[54] Therefore, because the officer's actions did not constitute a search under the Fourth Amendment, the *Riley* Court held that a warrant was not required prior to the aerial surveillance.[55]

Courts have universally recognized, often with little analysis, that under *Katz* and its progeny, patrons at entertainment events have a reasonable expectation of privacy in their persons and in items such as handbags, purses, and coats.[56] The lack of analysis is not surprising. It is beyond dispute that a reasonable expectation of privacy exists with respect to such items. As a result, any physical inspection of such objects triggers the protection of the Fourth Amendment.[57]

III. EXCEPTIONS TO THE WARRANT REQUIREMENT

If the *Katz* prongs are satisfied, then a search is constitutionally permissible only if: (1) a search warrant is properly obtained[58] or (2) the

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[53] *Id.* at 450. As discussed above, these precautions included a wire fence surrounding the mobile home and greenhouse, along with a "DO NOT ENTER" sign that was posted on the property.

[54] *Id.* at 450–51 (quoting California v. Ciraolo, 476 U.S. 207, 215 (1986)).

[55] *Riley*, 488 U.S. at 449.

[56] *See, e.g.*, Nakamoto v. Fasi, 635 P.2d 946, 948 (Haw. 1981) (striking down a search policy that inspected handbags, coats, jackets, and shoulderbags).

[57] State v. Carter, 267 N.W.2d 385, 386 (Iowa 1978); *see also* United States v. Barth, 26 F. Supp. 2d 929, 936 (W.D. Tex. 1998) (recognizing that "a warrant is usually required to search the contents of a closed container, because the owner's expectation of privacy relates to the contents of that container rather than to the container itself").

[58] The process for obtaining a search warrant is beyond the scope of this Article. Generally, if a police officer seeks a search warrant, she must establish probable cause to a magistrate judge. *See* BLACK'S LAW DICTIONARY 1201 (6th ed. 1990) (defining probable cause as "[r]easonable grounds for belief that a person should be arrested or searched"). At that time, the officer must sign an affidavit explaining the basis for her suspicion. Assuming that the magistrate finds the affidavit persuasive, the search warrant must outline the specific person or location that may be searched. *See generally* Rebecca Strauss, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 879–80 (2002) (describing the process of obtaining a search warrant).

search is reasonable.[59] As one court stated: "The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable."[60] Therefore, "warrantless searches and seizures are *per se* unreasonable."[61] This *per se* rule is "subject only to a few specifically established and well-delineated exceptions,"[62] which "provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate."[63]

In carving out exceptions to the warrant requirement, courts generally engage in a tripartite weighing of public necessity, efficacy of the search, and degree of the intrusion.[64] A non-exhaustive list of warrantless searches that courts have deemed reasonable include: consensual searches,[65] stop and frisk searches,[66] airport and courthouse searches,[67] hot pursuit searches,[68] border searches,[69] searches incident to arrest,[70] and random drug testing of high school athletes.[71]

With respect to sporting events, three exceptions to the warrant requirement could apply that might justify warrantless searches. These exceptions are: (1) consensual searches, (2) the *Terry* stop and frisk search, and most importantly, (3) airport and courthouse searches. These exceptions are discussed in turn.

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59 Coolidge v. New Hampshire, 403 U.S. 443, 509 (1971) (Burger, C.J., dissenting).

60 Florida v. Jimeno, 500 U.S. 248, 250 (1991).

61 *Id.*; Mincey v. Arizona, 437 U.S. 385, 390 (1978).

62 Katz v. United States, 389 U.S. 347, 357 (1967).

63 Arkansas v. Sanders, 442 U.S. 753, 759 (1979).

64 *See* Camara v. Municipal Court, 387 U.S. 523, 534–35 (1967) (balancing the need to search against the invasion that the search entails); Collier v. Miller, 414 F. Supp. 1357, 1362–64 (S.D. Tex. 1976) (stating that to determine the reasonableness of a search, a court should weigh public necessity, effectiveness of the search, and degree of the intrusion). These three factors are discussed in greater detail below. In all cases, the government bears the burden of proving that a warrantless search falls within an exception. Jacobsen v. City of Seattle, 658 P.2d 653, 655 (Wash. 1983) (en banc).

65 Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

66 Terry v. Ohio, 392 U.S. 1 (1968).

67 United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973).

68 Warden v. Hayden, 387 U.S. 294 (1967).

69 United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

70 Chimel v. California, 395 U.S. 752 (1969).

71 Veronia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

A. Conditional Entry and Implied Consent

If voluntary consent is obtained, the lack of a search warrant is of no consequence.[72] The question of voluntariness depends upon the "totality of all the surrounding circumstances."[73] Such relevant circumstances fall into two categories: the external coercion placed upon the individual and the internal, subjective strength of the individual.[74] The external coercion inquiry focuses on factors such as the number of officers present, whether the officers are in uniform, and whether the officers display a weapon.[75] The subjective strength of an individual to confer consent turns on intelligence, age, prior experience with law enforcement, and knowledge of the right to refuse to give consent.[76]

Several courts have considered whether a patron consented to a warrantless search at sporting[77] and other entertainment events.[78] Two issues frequently arise in those cases. The first issue is whether spectators can be required to submit to a search for alcohol, drugs, or weapons as a condition for entry into the event. The second issue is whether a patron impliedly consents to a search by seeking admittance to a sporting event when she is previously notified that she may be searched prior to entry.

It appears well settled that, standing alone, conditioning public access on submission to a search is unconstitutional.[79] For example, in *Gaioni v. Folmar*,[80] the city of Montgomery, Alabama, opened its civic center to host various public events, such as professional wrestling

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72 Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973).

73 *Id.* at 226.

74 *Id.* at 229 (finding that consent was achieved through subtly coercive police questions and the vulnerable subjective state of the person).

75 *See* Nakamoto v. Fasi, 635 P.2d 948, 951 (Haw. 1981) (finding lack of consent where a patron was approached by a uniformed security guard who stated that he had to inspect patron's handbag for bottles or cans).

76 *Schneckloth*, 412 U.S. at 226.

77 Jeffers v. Heavrin, 932 F.2d 1160, 1161 (6th Cir. 1991) (examining the policy of searching racetrack patrons); Jensen v. City of Pontiac, 317 N.W.2d 619, 620 (Mich. Ct. App. 1982) (examining the policy of searching patrons at professional football games).

78 Gaioni v. Folmar, 460 F. Supp. 10, 14–15 (M.D. Ala. 1978) (examining the policy of searching patrons attending rock concerts); Stroeber v. Comm'n Veteran's Auditorium, 453 F. Supp. 926, 933 (S.D. Iowa 1977) (also examining the policy of searching patrons attending rock concerts); Florida v. Iaccarino, 767 So. 2d 470, 476 (Fla. Ct. App. 2000) (examining the policy of searching patrons at music festivals).

79 Wheaton v. Hagan, 435 F. Supp. 1134, 1149 (M.D.N.C. 1977); *Nakamoto*, 635 P.2d at 951–52.

80 460 F. Supp. at 10.

matches and rock concerts.[81] To curb the illegal use of marijuana and alcohol by spectators, the city initiated a program to search patrons.[82] As patrons passed through the turnstiles, approximately sixty to seventy percent were stopped by police.[83] The selected ticket holders were ordered to open their coats, bulging pockets were patted down, and the contents of pocketbooks were also inspected.[84]

At one particular rock concert, twenty-two adults were arrested for drug offenses and twenty juveniles were arrested for possession of alcohol or marijuana.[85] Several individuals subjected to a search filed suit, alleging that the search policy violated the Fourth Amendment.[86] The *Gaioni* court agreed and struck down the search policy as unconstitutional.[87]

The defendants argued that the patrons voluntarily consented to the search because signs were posted at the entrances warning patrons that they could be searched.[88] The district court flatly rejected this argument, holding:

> [D]efendants cannot condition public access . . . on submission to a search and then claim those subjected to the searches voluntarily consented. . . . Any consent obtained under such circumstances was an inherent product of coercion, since people undoubtedly felt if they refused to be searched they would forfeit their right to attend the concert."[89]

Based on *Giaoni* and similar cases, it appears that a stadium operator cannot condition a spectator's admission to a sporting event on consent to a search. [90]

Similarly, courts have skeptically viewed the doctrine of implied consent as a justification for warrantless searches. To determine whether patrons impliedly consent to a search, courts generally examine several

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81 *Id.* at 11.
82 *Id.* at 11–12.
83 *Id.* at 12 n.6.
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.* at 15.
88 *Id.* at 14.
89 *Id.*
90 *See id*.

factors: (1) whether the patron was aware that her conduct would subject her to a search,[91] (2) whether the search was supported by a "vital interest,"[92] (3) whether the officer possessed apparent authority to conduct the search,[93] (4) whether the patron was advised of her right to refuse the search,[94] and (5) whether refusal would result in a deprivation of a benefit or a right.[95]

Applying these factors, courts have repeatedly refused to find implied consent at entertainment events.[96] For example, in *Stroeber v. Commission Veteran's Auditorium*,[97] the plaintiffs brought suit alleging that search procedures conducted at Veteran's Memorial Auditorium ("Auditorium") in Des Moines, Iowa, were unconstitutional.[98] Prior to entering the Auditorium, patrons were not informed that they could be searched for contraband or other items.[99] However, a warning sign was posted near the doors between the lobby, where tickets were sold, and the inside foyer, where tickets were taken.[100] The sign stated: "It is illegal to bring a controlled substance or any alcoholic beverages onto these premises. All persons must be seated in the chairs provided. Violators will be prosecuted."[101] In addition, a tape recording ran through the loudspeakers in the lobby area.[102] The taped message was less than one minute long, and it warned patrons that they could be checked for contraband.[103]

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91 McGann v. Ne. Ill. Reg'l Commuter R.R. Corp., 8 F.3d 1174, 1181 (7th Cir. 1993) (en banc).

92 *Id.*

93 Wheaton v. Hagan, 435 F. Supp. 1134, 1147 (M.D.N.C. 1977).

94 Gaioni v. Folmar, 460 F. Supp. 10, 15 (M.D. Ala. 1978).

95 *Id.*

96 Stroeber v. Comm'n Veteran's Auditorium, 453 F. Supp. 926, 933 (S.D. Iowa 1977); Collier v. Miller, 414 F. Supp. 1357, 1366 (S.D. Tex. 1976); State v. Carter, 267 N.W.2d 385, 387 (Iowa 1978).

97 453 F. Supp. 926 (S.D. Iowa 1977).

98 *Id.* at 928.

99 *Id.* at 929.

100 *Id.*

101 *Id.* at 929 n.1.

102 *Id.*

103 *Id.* In its entirety, the tape recording warned the following:

> No alcoholic beverages, pop or controlled drug substances are permitted to be in the auditorium. No smoking is allowed in the seating area. Smoking is permitted only in the hallways or restrooms. For the safety of those admitted to the seating area, you may be checked to see that these auditorium rules are complied with.

Id. at 930 n.2.

The defendants argued that patrons impliedly consented to be searched if they voluntarily entered the Auditorium in spite of the sign and tape-recorded warning.[104] The *Stroeber* court disagreed, ruling that "a sign and a tape recording in a crowed and noisy lobby, are inadequate."[105] The court noted that the sign did not mention a search, and the tape recording merely mentioned a "check."[106] Also, the sign and tape recording did not inform patrons that a search could be refused and that they could, upon refusal, obtain a refund of their ticket price.[107] As the policy was applied, "a random number of patrons are suddenly confronted by armed uniform police officers and told that their admission to the concert is conditioned upon their submission to a physical search of their person and personal effects."[108] The court concluded that "[u]nder the circumstances, which are marked by coercion and duress, the Court cannot possibly conclude that any ensuing consent to search was of a voluntary nature."[109]

B. Terry *Stop and Frisks*

On a more limited basis, the *Terry* stop-and-frisk exception could also apply to sporting events. In *Terry v. Ohio*,[110] the United States Supreme Court adopted a flexible standard of reasonableness to searches. Specifically, the Court held that under the Fourth Amendment:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[111]

Under *Terry*, an officer need not establish probable cause but must be able "to point to specific and articulable facts which, taken together with

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104 *Id.* at 933.
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.* Although not expressly stated, it appears the *Stroeber* court would have rejected any consent given as coerced, whether express or implied.
110 392 U.S. 1 (1968).
111 *Id.* at 30.

rational inferences from those facts, reasonably warrant that intrusion."[112] However, to justify a stop-and-frisk search, the search must focus on a particular individual, and the officer must demonstrate that there was specific cause for the officer to fear bodily harm.[113]

Terry has been frequently offered as a justification for warrantless searches at sporting and similar events. Yet, just as frequently courts have rejected that justification for two primary reasons.[114] First, prior to the search, the officer lacked an articulable suspicion that the patron was "armed and presently dangerous."[115] Second, the search policies were not limited to uncovering lethal weapons.[116]

For example, in *Collier v. Miller*,[117] the defendants enacted a search policy to "promote the health and safety of all those involved in any way with the special events held in Hofheinz Pavillion and Jeppesen Stadium" on the University of Houston ("University") campus.[118] The policy prohibited patrons from entering either facility with containers or packages that could conceal alcoholic beverages, cans, or bottles, unless the patron allowed the package to be opened and examined.[119] If the patron refused, the University could deny admittance.[120] The search policy was challenged as unconstitutional, and the defendants relied, in part, on the *Terry* doctrine.[121]

Rejecting that argument, the *Collier* court ruled that in contrast to *Terry*, the search policy was not limited to searches for inherently lethal weapons.[122] Instead, "it [sought] to exclude items which could pose a danger to the public only if misused."[123] The court concluded by refusing to read *Terry* to "sanction wholesale searches of the general

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112 *Id.* at 21.
113 *Stroeber*, 453 F. Supp. at 932.
114 *Id.*; Wheaton v. Hagan, 435 F. Supp. 1134, 1146 (M.D.N.C. 1977); Collier v. Miller, 414 F. Supp. 1357, 1365 (S.D. Tex. 1977).
115 *Collier*, 414 F.Supp. at 1365 (noting that the stadium searches were "conducted without any basis for suspicion").
116 *Wheaton*, 435 F.Supp. at 1146 (noting that "the policy in force at the coliseum is not limited to searches for inherently lethal weapons").
117 414 F. Supp. 1357.
118 *Id.* at 1360.
119 *Id.*
120 *Id.*
121 *Id.* at 1364.
122 *Id.* at 1365.
123 *Id.* These items included bottles and cans.

public in the absence of exigent circumstances, regardless of the searching official's valid interest in preventing potential injuries."[124]

The case law discussed above demonstrates that courts have uniformly struck down searches of patrons that were based on consent or conducted under *Terry*. However, the airport and courthouse exception provides more hope in protecting patrons at sporting events. This exception is discussed below.

C. The Airport and Courthouse Exceptions

In the late 1960s and early 1970s, there was a "wake of unprecedented airport bombings, aircraft piracy and courtroom violence."[125] To help curb this violence, courts created an exception to the warrant requirement that allowed warrantless searches at airports and courthouses.[126] In creating this exception, courts balanced the three factors of public necessity, efficacy of the search, and the degree and nature of the intrusion.[127] These factors, and how they applied to airports and courthouses, are discussed in turn.

1. Public Necessity

The public necessity inquiry examines the nature of the threat to public safety along with the likelihood that such threat will transpire.[128] In airports and courthouses, the nature of the threat to public safety was significant—death or serious injury to a substantial number of persons by a bomb or other explosive were distinct possibilities.[129] The likelihood of that threat was also high. In the early 1970s, when the airport exception was recognized, over 387 attempts were made to hijack aircrafts.[130] Courthouses were also not safe. One court took judicial

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124 *Id.*

125 *Id.* at 1362.

126 *Id.*; *see also* United States v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973); Downing v. Kunzig, 454 F.2d 1230, 1233 (6th Cir. 1972).

127 *Skipwith*, 482 F.2d at 1275.

128 *See, e.g.*, United States v. Edwards, 498 F.2d 496 (2d Cir. 1974) (considering the constitutionality of airport searches). The United States Supreme Court has considered the "public necessity" for a warrantless search in several contexts. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451, 453 (1990) (holding that because a temporary checkpoint was enacted to combat drunken driving, a "serious public danger" of considerable "magnitude," it was thus constitutional).

129 *Collier*, 414 F. Supp. at 1362.

130 United States v. Moreno, 475 F.2d 44, 48 (5th Cir. 1973).

notice[131] of widespread violence in courtrooms.[132] The threat of death or serious injury, in conjunction with a high likelihood of its occurrence, weighed in favor of creating a warrant exception at airports and courthouses.

2. The Efficacy of the Search

The efficacy of the search inquiry considers "the likelihood that the search procedure will be effective in averting the potential harm."[133] In both airport and courthouse searches, a magnetometer is often used to detect the presence of metal,[134] which suggests that an individual could be carrying a bomb, knife, gun, or other weapon.[135] Further, no particular individual is singled out for a magnetometer search. Instead, the magnetometer casts a wide net by indiscriminately searching all persons. In addition, courts have repeatedly recognized that "the overwhelming majority of weapons will respond to [the] magnetometer."[136] For all these reasons, courts uniformly found that magnetometer searches at airports and courthouses were highly effective in averting physical injuries or death.

3. The Degree and Nature of the Intrusion

Lastly, the degree and nature of the intrusion on an individual's privacy interests are considered.[137] This inquiry has a subjective and an objective component. Subjectively, at airports and courthouses, each individual must undergo a magnetometer search. Because all persons are searched, no stigma attaches to embarrass the individual.[138] In other words, no individual is singled out and treated differently based on color, national origin, appearance, or mannerisms. Moreover, courts

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131 A judicially noticed fact is one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FED. R. EVID. 201.

132 *Downing*, 454 F.2d at 1231 n.1 (taking judicial notice of "violent outbreaks across the country and the consequent dangers and hazards to public property and the Government's officers and employees").

133 *Skipwith*, 482 F.2d at 1275.

134 Courts have repeatedly held that the use of a magnetometer constitutes a search under the Fourth Amendment. United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972) (recognizing that "the very purpose and function of a magnetometer" is to "search for metal and disclose its presence in areas where there is a normal expectation of privacy").

135 United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974).

136 United States v. Albarado, 495 F.2d 799, 804 (2d Cir. 1974).

137 *See Skipwith*, 482 F.2d at 1275.

138 Wheaton v. Hagan, 435 F. Supp. 1134, 1146 (M.D.N.C. 1977).

have ruled that a magnetometer "does not annoy, frighten or humiliate those who pass through it."[139] Therefore, the nature of the intrusion is minimal.

Objectively, a magnetometer search is limited in both its scope and purpose.[140] Passing through a metal detector normally takes a matter of seconds. Unless the metal detector is triggered, the individual is not detained.[141] In addition, the sole purpose of the search is to determine whether an individual might be carrying a dangerous weapon or similar object.[142] Due to the "absolutely minimal invasion of privacy involved," courts repeatedly held that this final factor also weighed in favor of an exception to the search warrant at airports and courthouses.[143]

IV. CASE LAW ADDRESSING THE SIMILARITIES AND DIFFERENCES BETWEEN AIRPORTS, COURTHOUSES, AND STADIUMS

Governmental entities and other state actors have often argued that warrantless searches at stadiums are analogous to warrantless searches at airports and courthouses.[144] To date, that argument has not been well-received. Indeed, courts have "uniformly rejected" that analogy.[145] However, the vast majority of these cases were decided prior to the terrorist attacks on September 11, 2001. The threat of terrorism is now always present, and an attack on a sporting event is an unfortunate possibility.[146]

Part IV.A examines two cases that were brought prior to September 11, 2001, and that examined a potential analogy between airports, courthouses, and stadiums.[147] The first case is representative of most in

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139 *Albarado*, 495 F.2d at 806.
140 *Epperson*, 454 F.2d at 771.
141 *Albarado*, 495 F.2d at 806.
142 *Id.*
143 *Id.*
144 *Wheaton*, 435 F. Supp. at 1145; Collier v. Miller, 414 F. Supp. 1357, 1362 (S.D. Tex. 1976); Nakamoto v. Fasi, 635 P.2d 948, 953 (Haw. 1981); Jensen v. City of Pontiac, 317 N.W.2d 619, 620 (Mich. Ct. App. 1982); Jacobsen v. City of Seattle, 658 P.2d 653, 656 (Wash. 1983) (en banc).
145 WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS & CONFESSIONS ch. 16, § 16.18 (2005).
146 *See* North Dakota v. Segler, 700 N.W.2d 702, 708 (N.D. 2005) (stating that the State of North Dakota argued that cases prior to September 11, 2001, are no longer persuasive with respect to stadium searches because "the country has a greater need for security now than when [those] cases were decided . . .").
147 *See infra* Part IV.A.

that it rejects such an analogy.[148] The second, an outlier case, recognized that stadiums are similar to airports and courthouses.[149] Consequently, that court recognized an exception to the warrant requirement at professional football games.[150] Part IV.B examines a recently decided case that enjoined the NFL pat-down policy from being applied at one NFL stadium.[151] That case is important because it demonstrates that courts remain reluctant to create an exception for warrantless stadium searches.[152]

A. Case Law Addressing the Analogy Prior to September 11, 2001

Jacobsen v. City of Seattle[153] is representative of many cases that refused to extend the airport and courthouse exception to entertainment events.[154] In *Jacobsen*, there were "frequent violations of the law" at the Seattle Center Coliseum ("Coliseum") during rock concerts.[155] These violations included the "throwing of hard and dangerous objects by some of those attending the concerts."[156] In response, the Seattle Police Department began conducting warrantless pat-down searches of rock concert patrons at the Coliseum.[157] The searches were designed to prevent patrons from carrying alcoholic beverages, explosive devices, weapons, and other dangerous objects.[158]

At a Grateful Dead concert, the *Jacobsen* plaintiffs were searched for contraband.[159] They filed suit for declaratory and injunctive relief and civil damages, alleging that the warrantless searches were unconstitutional.[160] In response, the defendants did not claim that the searches were conducted pursuant to *Terry* or that the patrons consented to the search.[161] Instead, they claimed a "new" exception for rock

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148 *See infra* Part IV.A.
149 *See infra* Part IV.A.
150 *See infra* Part IV.A.
151 *See infra* Part IV.B.
152 *See infra* Part IV.B.
153 658 P.2d 653 (Wash. 1983) (en banc).
154 Gaioni v. Folmar, 460 F. Supp. 10, 13–14 (M.D. Ala. 1978); Wheaton v. Hagan, 435 F. Supp. 1134, 1145–46 (M.D.N.C. 1977); Collier v. Miller, 414 F. Supp. 1357, 1362–64 (S.D. Tex. 1976); Nakamoto v. Fasi, 635 P.2d 948, 953 (Haw. 1981).
155 *Jacobsen*, 658 P.2d at 654.
156 *Id.*
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.* at 655.
161 *Id.* at 656.

concerts, "asserting that warrantless searches at rock concerts are analogous to those at courthouses and at airports."[162]

The court began its analysis by recognizing that "[t]o determine the constitutionality of airport and courthouse searches, courts have considered three factors of public security: efficacy of the search and the degree and nature of the intrusion involved."[163] With respect to public security, the court found that although there were serious security concerns at the Coliseum, "the situations at a rock concert are not comparable to the dangers posed at airports and courthouses."[164] The court then quoted *Wheaton v. Hagan*:[165]

> [T]errorist efforts to bomb courthouses threatened to undermine the rule of law, while the attempts to blow up airplanes were often linked to aircraft hijackings. As unruly as patrons at the Coliseum might have been and as great a show of violence as might have occurred with the throwing of a bottle at a performer and the successful attempt to prevent a policeman from making an arrest, the dangers posed by these actions are substantially less than those which justified suspending the warrant requirement in courthouse and airport searches. This does not mean that the disruption of Coliseum events is not a cause for alarm or concern, but rather to suggest that other less constitutionally questionable actions should be employed to control the behavior of those attending activities at the Coliseum.[166]

Inexplicably, the *Jacobsen* court failed to analyze the efficacy of the search. Namely, the court did not discuss whether violence or illegal acts were curtailed as a result of searches at the Coliseum. Instead, the court focused on the degree and nature of the search. The court ruled that "in contrast to the high degree of intrusion in the pat-down frisk employed by the Seattle police, both airport searches which are conducted with a magnetometer and courtroom searches which employ

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162 *Id.*
163 *Id.*
164 *Id.*
165 435 F. Supp. 1134, 1134 (M.D.N.C. 1977).
166 *Jacobsen*, 658 P.2d at 656.

a brief stop and a visual examination of packages, pocketbooks, and briefcases are far less intrusive."[167]

After making these findings, the court struck down the searches as unconstitutional.[168] In so holding, the court found that the searches "are not analogous to airport or courthouse searches nor do they come under any other exception to the warrant requirement . . . ."[169] "No special exemption from constitutional protections should be made for rock concerts or other gatherings in public arenas."[170]

In contrast, one outlier case prior to September 11, 2001, did recognize an analogy between airport and courthouse searches and stadium searches. In *Jensen v. City of Pontiac*,[171] Jolynne Jensen attended a professional football game at the Pontiac Silverdome ("Silverdome"). Before she passed through the turnstile at the entrance of the stadium, she was stopped by a uniformed stadium security guard.[172] The guard requested that Jensen open her purse, and she complied.[173] The guard then visually inspected the contents of her purse; however, the guard did not physically touch Jensen or her purse.[174]

The search of Jensen's purse was conducted pursuant to a search procedure initiated for all events at the Silverdome. The procedure was primarily designed to protect both spectators and performers from injury due to thrown projectiles.[175] Prior to entering the turnstile, a guard could stop any person carrying a container large enough to carry bottles, cans, or "other missile-like objects of similar size."[176] If stopped, the guard would ask the patron for permission to visually inspect the container.[177] The patron would be informed that she could refuse inspection.[178] If permission was refused, the patron was given the option of disposing of the container, after which admission would be allowed.[179] If the patron refused to allow visual inspection or refused to dispose of the container,

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167 *Id.* (internal citations omitted).
168 *Id.*
169 *Id.*
170 *Id.*
171 317 N.W.2d 619 (Mich. Ct. App. 1982).
172 *Id.* at 620.
173 *Id.*
174 *Id.*
175 *Id.* A secondary purpose was to comply with a Michigan law, which required that only alcoholic beverages bought on the premises could be consumed there. *Id.*
176 *Id.*
177 *Id.*
178 *Id.* at 620.
179 *Id.*

admission to the event was denied.[180] The patron could then receive a refund of her ticket price.[181]

A four-foot by four-foot sign was posted at each gate into the stadium.[182] The sign stated:

> NOTICE: FOR YOUR PROTECTION BOTTLES, CANS, LIQUOR CONTAINERS, HORNS OR OTHER MISSLE [sic]-LIKE OBJECTS ARE NOT PERMITTED IN STADIUM. PLEAS [sic] RETURN SUCH ITEMS TO YOUR VEHICLE. PATRONS SUBJECT TO VISUAL INSPECTION OF PERSON, PARCELS, BAGS AND CONTAINERS OR CLOTHING CAPABLE OF CARRYING SUCH ITEMS. PATRONS MAY REFUSE INSPECTION. IF SO, MANAGEMENT MAY REFUSE ENTRY.[183]

Jensen did not allege mistreatment during her search.[184] Instead, she sought a declaratory ruling that the Silverdome's search policy was unconstitutional.[185] The Michigan Court of Appeals did not oblige, and it upheld the warrantless search policy.[186]

The court began its analysis by considering the "three factors which courts have relied upon in determining that warrantless searches in airports and courthouses are constitutional: (1) the public necessity, (2) the efficacy of the search and (3) the degree and nature of the intrusion involved."[187] With respect to public necessity, the evidence established that football games at the Silverdome encouraged violence in the stands and that the violence varied with the team's performance.[188] Moreover, the search policy was enacted in response to "widespread injuries to patrons which occurred as a result of thrown objects."[189] In that regard, the court recognized that the "seating arrangement at football games"

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180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.* at 624.
187 *Id.* at 622.
188 *Id.* at 623. In limiting its holding to football games, the court specifically noted that there was a lack of public necessity to justify warrantless searches at other events, "such as antique car shows, tractor pulls and dog shows." *Id.* at 623 n.3.
189 *Id.* at 623.

created a "unique problem in that objects thrown from seats above gain potentially fatal velocity and nearly always strike an unsuspecting patron in the head or shoulder region."[190] Although the "injury being protected against occurs to individual patrons one at a time rather than the spectacular catastrophes possible in airplane bombings . . . the injury is still potentially fatal and always as unexpected."[191] Consequently, "[t]here is then a necessity, recognized by this [c]ourt and we believe the general public, to protect patrons at a public stadium from the harm inflicted by unknown assailants throwing container-type objects."[192]

The court next examined the efficacy of the search policy. Here, the plaintiff admitted that after the policy's implementation, the number of injuries declined.[193] Further, the policy required every patron to be searched.[194] The court ruled that this "nondiscretionary procedure should be very effective in stopping the flow of missile-like containers into the Silverdome."[195]

Finally, the court balanced the public necessity and efficacy of the search with the degree and nature of the intrusion involved. In terms of the degree of the invasion, the patrons were told that they did not have to submit to the search and could instead obtain a refund of their ticket price.[196] Moreover, the policy only called for guards to visually inspect the patrons and their property.[197] Although the patrons could be asked to move items within their containers to facilitate inspection, the guards were specifically instructed not to physically touch patrons or their belongings.[198] Under these facts, the court found the degree of the invasion minor, especially when compared with other search policies where patrons were physically patted down.[199]

The court similarly found that the nature of the search was insignificant.[200] As all patrons were subject to a search, the

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190 *Id.*
191 *Id.* at 623–24.
192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.* (citing several cases, including *Wheaton v. Hagan*, 435 F. Supp. 1134, 1146 (M.D.N.C. 1977), where the searches were struck down as unconstitutional).
200 *Jensen*, 317 N.W.2d at 624.

"objectionable discretion element is thereby removed . . . ."[201] Because no individual was singled out, no stigma would attach to the searched individual.[202] After balancing all three factors, the court held that the search policy was "constitutional as applied to professional football games."[203]

B. Case Law Revisiting the Analogy After September 11, 2001

After September 11, 2001, few reported cases have revisited the analogy between searches at stadiums and airports and courthouses. The cases that have been reported were decided very recently and address the newly promulgated NFL pat-down policy described above. One such case is *Tampa Sports Authority v. Johnston*.[204]

In *Tampa Sports Authority*, the plaintiff Gordon Johnston was a Tampa Bay Buccaneers ("Buccaneers") season ticket holder.[205] Johnston renewed his season tickets in spring of 2005 for the 2005 football season.[206] Upon renewal that spring, Johnston was not informed that he would be subjected to a pat-down search prior to entering Raymond James Stadium, home of the Buccaneers.[207]

The Tampa Sports Authority ("TSA") was created by Florida law to maintain sports facilities for the residents of Tampa and Hillsborough County, Florida.[208] Accordingly, the TSA maintains Raymond James Stadium.[209] Raymond James Stadium is a publicly owned stadium and has a capacity of 65,000.[210]

As explained above, in August of 2005, the NFL created a pat-down policy, which provided that all patrons must be physically searched before entering any NFL game.[211] The pat-down policy was designed in part to "prevent terrorists from carrying explosives into the stadiums."[212] The Buccaneers requested that the TSA adopt the NFL policy at

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201 *Id.*
202 *Id.*
203 *Id.*
204 914 So. 2d 1076 (Fla. Dist. Ct. App. 2005).
205 *Id.* at 1078.
206 *Id.*
207 *Id.*
208 *Id.*
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*

Raymond James Stadium.[213] The TSA complied and adopted the pat-down policy on September 13, 2005.[214]

When Johnston learned of the policy, he contacted the Buccaneers to complain about it.[215] The Buccaneers informed Johnston that he could not receive a refund for his season tickets.[216] He was also told that even if a refund was possible, he would be placed at the end of a "100,000-person waiting list" should he wish to purchase future season tickets.[217]

In response, Johnston filed an emergency request for a preliminary injunction in Florida state court.[218] In his motion, Johnston argued that the warrantless pat downs, without the support of any particularized suspicion, violated his right to be free from unreasonable searches and seizures.[219] Specifically, he stated in part that "NFL fans should not be forced to abandon their constitutional rights at the stadium gate under the dubious guise of security."[220]

To decide whether Johnston was entitled to an injunction, the trial court weighed four factors as required by Florida law: (1) the likelihood of irreparable harm, (2) the lack of an adequate remedy at law, (3) the substantial likelihood of success on the merits, and (4) whether the public interest would be served by granting the injunction.[221]

The trial court first found that Johnston would suffer irreparable harm in the absence of a preliminary injunction.[222] Specifically, the court noted that Johnston was not provided notice of the pat-down policy until after he paid for his season tickets.[223] When Johnston learned of the policy and complained about it, the Buccaneers refused to give him a refund.[224] Under these circumstances, the trial court found that

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[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] Johnston v. Tampa Bay Sports Auth., No. 05-09151, Emergency Motion for Preliminary Injunction and Incorporated Memorandum of Law (Hillsborough County, Fla. 2005).
[221] *See, e.g.*, Charlotte County v. Vetter, 863 So. 2d 465, 468–69 (Fla. Dist. Ct. App. 2004).
[222] *See id*. at 469.
[223] Johnston v. Tampa Sports Auth., No. 05-09151, Order Granting Plaintiff's Emergency Motion for Preliminary Injunction, at 2 (Hillsborough County, Fla. Nov. 2, 2005).
[224] *Tampa Sports Auth.*, 914 So. 2d at 1078 (describing the factual background presented in the lower court).

"Johnston will be irreparably harmed if TSA continues its policy of requiring these pat-down searches because (as explained later), he will be forced to undergo a search in violation of his Florida constitutional right to be free from unreasonable government-directed searches."[225]

The court next found that Johnston did not have an adequate remedy at law.[226] In that regard, the court summarily found that money damages could not compensate Johnston for invading his right to be free from unconstitutional searches.[227]

The court's third and most important consideration was whether Johnston had a substantial likelihood of success on the merits of his claim.[228] TSA presented a number of arguments to establish that Johnston's constitutional claim was without merit.[229] TSA initially argued that it is not a state actor and therefore not restricted by the Florida Constitution.[230] However, the court noted that TSA was a public agency, created by the Florida legislature "for the purpose of planning, developing, and maintaining a comprehensive complex of sports and recreation facilities for the use and enjoyment of the citizens of Tampa and Hillsborough County, as a public purpose."[231] Further, although a private security company performed the searches, the searches were conducted under the direction and at the behest of TSA.[232] The pat-down policy was also funded by taxpayer dollars.[233] Under these circumstances, the trial court concluded that TSA was a state actor.[234]

The court next noted that Article I, section 12 of the Florida Constitution provides the same protection against unreasonable searches and seizures as the U.S. Constitution.[235] The court easily concluded that Johnston had a reasonable expectation of privacy in avoiding the search, stating that "[e]ven if Mr. Johnston might be inadvertently jostled by

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[225] Johnston v. Tampa Sports Auth., No. 05-09151, Order Granting Plaintiff's Emergency Motion for Preliminary Injunction, at 2 (Hillsborough County, Fla. Nov. 2, 2005).
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.* at 3–7.
[230] *Id.* at 3.
[231] *Id.* (quoting Florida v. Tampa Sports Auth., 188 So. 2d 795, 796 (Fla. 1966)).
[232] Johnston v. Tampa Sports Auth., No. 05-09151, Order Granting Plaintiff's Emergency Motion for Preliminary Injunction, at 3–4 (Hillsborough County, Fla. Nov. 2, 2005).
[233] *Id.* at 4.
[234] *Id.* (citing Florida v. Iaccarino, 767 So. 2d 470 (Fla. Dist. Ct. App. 2000) (holding that off-duty officers that were hired by and for the benefit of a private party were state actors).
[235] Johnston v. Tampa Sports Auth., No. 05-09151, Order Granting Plaintiff's Emergency Motion for Preliminary Injunction, at 5 (Hillsborough County, Fla. Nov. 2, 2005).

other football fans while entering the gate, he still retains an expectation of privacy in not being forced to subject his person to unwanted intentional touching by state actors."[236]

Because the pat-down searches were unaccompanied by a warrant, TSA bore the burden of establishing that an exception to the warrant requirement applied.[237] TSA primarily argued that special circumstances justified the use of pat-down searches at Buccaneers games.[238] Nonetheless, the court found that "no special circumstances exist."[239] Specifically, the court noted the lack of a "particularized threat" to Raymond James Stadium.[240] The evidence of such a threat included a telephone call to TSA approximately two years before institution of the pat-down policy.[241] TSA did not institute a pat-down policy upon receipt of that threat, and after an investigation, the threat was deemed not credible.[242]

TSA also presented evidence that downloaded images of two stadiums, neither of which was Raymond James Stadium, were discovered on computers possibly linked to terrorists.[243] The court discounted that evidence, noting that the FBI Field Office in St. Louis, Missouri, found that the downloads were not a threat or even a potential threat.[244] The final piece of evidence presented by TSA was that terrorists would like to target NFL games because they are an "American icon."[245] Again, the court found that such evidence did not amount to a "particularized threat." [246]

Finally, the court found that the public interest would be served by preventing future unreasonable searches.[247] In that regard, the court

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236 *Id.*

237 *Id.*

238 *Id.* It appears that the court was addressing TSA's analogy between pat-down searches at stadiums and airport and courthouse exceptions. However, the court did not expressly recognize that it was addressing such an analogy.

239 *Id.*

240 Johnston v. Tampa Sports Auth., No. 05-09151, Order Granting Plaintiff's Emergency Motion for Preliminary Injunction, at 5 (Hillsborough County, Fla. Nov. 2, 2005).

241 *Id.*

242 *Id.*

243 *Id.* at 6.

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.* at 7.

stated that "September 11 is a tragedy, but it does not mean that the Constitution needs to be torn up and thrown out the door." [248]

TSA immediately appealed the trial court's decision, and under Florida law, the appeal automatically stayed the preliminary injunction.[249] On appeal, the Florida Court of Appeals refused to reverse the trial court's grant of a preliminary injunction.[250]

V. PROPERLY BALANCING THE RELEVANT FACTORS DEMONSTRATES THAT AN EXCEPTION TO THE WARRANT REQUIREMENT SHOULD BE CREATED FOR STADIUM SEARCHES

The court in *Tampa Sports Authority* erroneously failed to recognize the distinction between warrantless searches conducted before and after September 11, 2001. Unlike the *Tampa Sports Authority* court's conclusion, the balancing of public necessity, efficacy of the search, and degree and nature of the intrusion at a sporting event should look much differently today than the cases prior to September 11, 2001, discussed throughout this Article. The following examines these three factors and demonstrates that airports, courthouses, and sporting events are sufficiently similar to justify an exception to the warrant requirement at stadiums.

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[248] *Id*.

[249] Tampa Sports Auth v. Johnston., 914 So. 2d 1076, 1077 (Fla. Dist. Ct. App. 2005) (citing FLA. R. APP. P. 9.310(b)(2) (providing that a preliminary injunction is automatically stayed upon the filing of a notice of appeal)).

[250] *Id.* The Court of Appeals lifted the automatic stay on November 4, 2005, and explained its reasons in an order dated November 30, 2005. *Id.* Although a detailed analysis of the appellate court's ruling is not necessary, its opinion contains several contradictory comments that are worth noting. As with the trial court, the appellate court was troubled by the "amorphous nature of the present danger to the stadium." *Tampa Sports Auth.*, 914 So. 2d at 1080. However, the court also recognized that the pat-down policy was enacted in response to a "certainly logical, concern that public events at which large crowds gather might be targets of unidentified terrorists." *Id.* The appellate court further noted that TSA submitted expert affidavits providing that pat-down searches were the most effective way to detect suicide bombs. *Id*. at 1081. The court further recognized that "[c]onducting patdown searches may well be effective for detecting arms or explosives." *Id*. Nonetheless, because TSA did not adopt the pat-down policy until two years after a specific threat to Raymond James Stadium, the court ruled that maintaining the stay would not be detrimental to TSA. *Id*. The court bolstered that conclusion by recognizing that "the TSA has in place a number of other measures to protect against a variety of security threats . . . ." *Id*.

A. *The Pubic Necessity for Searches at Stadiums is at Least as Strong, if not Stronger, than the Public Necessity for Searches at Airports and Courthouses*

As an initial matter, it must be recognized that many cases prior to September 11, 2001, struck down stadium search policies designed to eradicate alcohol or drugs, not bombs or other explosive devices.[251] Although alcohol and drugs were often illegal at those events, they "present[ed] no public danger equivalent to that posed by a bomb or gun."[252] Thus, courts held that the "[public] necessity for the . . . searches is minimal compared to that for airport searches."[253] Under this reasoning, a stadium search conducted with the express purpose of eliminating bombs or other weapons of mass violence should be viewed in a more favorable light. Moreover, and as discussed throughout this Article, the vast majority of cases examining the constitutionality of stadium searches were decided before September 11, 2001. After that date, governmental entities have repeatedly stressed a greater need to conduct stadium searches.[254] For these reasons, modern courts should not rely heavily on stadium cases decided before September 11, 2001.

The public necessity inquiry considers the nature of the threat involved along with the likelihood that the threat will materialize.[255] The nature of the threat at airports and courthouses was a matter of life and death, and the likelihood of that threat transpiring was high. "The nature of the threat necessitating airport and courtroom searches is death or serious injury to a number of citizens caused by inherently lethal weapons or bombs."[256] In the early 1970s, when the airport exception was recognized, there had been 387 aircraft hijacking attempts.[257] With respect to courthouses, one court took judicial notice of widespread violence in courtrooms.[258]

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[251] Gaioni v. Folmar, 460 F. Supp. 10, 13 (M.D. Ala. 1978) (striking down search policy designed to uncover drugs and alcohol).

[252] *Id.* at 14.

[253] *Id.*

[254] *See* North Dakota v. Segler, 700 N.W.2d 702, 708 (N.D. 2005) (stating that the State of North Dakota argued that cases prior to September 11, 2001, are no longer persuasive with respect to stadium searches because "the country has a greater need for security now than when [those] cases were decided . . .").

[255] Collier v. Miller, 414 F. Supp. 1357, 1362 (S.D. Tex. 1976).

[256] *Id.*

[257] United States v. Moreno, 475 F.2d 44, 48 (5th Cir. 1973).

[258] Downing v. Kunzig, 454 F.2d 1230, 1231 (6th Cir. 1972).

At sporting events, the nature of the threat is even greater than at airports or courthouses. Hundreds of individuals may be found at a particular courthouse or on a particular flight. Compare that to the tens of thousands of fans that pack sports stadiums for any given event. The number of individuals in harm's way at a sporting event simply dwarfs the number of individuals present at any particular airplane or courthouse. For example, in 2004, the Big Ten Conference averaged 69,572 patrons per football game.[259] Warrantless searches at airports and courthouses were upheld, in part, to protect a tiny fraction of the number of individuals that could be killed or injured at a sporting event. Therefore, the nature of the threat at stadiums is greater than the nature of the threat at airports and courthouses.

The similar nature of the threat at airports, courthouses, and stadiums does not end with potential death or injuries. In both contexts, an attack could be carried out with little warning or planning. For example, in recognizing an exception to the warrant requirement at airports, one court noted that "modern technology has made it possible to miniaturize to such a degree that enough plastic explosives to blow up an airplane can be concealed in a toothpaste tube."[260] Commentators have similarly recognized that "3.5 ounces of plutonium particles would be enough to kill . . . concentrations of people at sporting events."[261] The ease with which an attack could be carried out is another similarity between airports, courthouses, and stadiums.

The psychological make-up of those involved with airport and courthouse attacks is also strikingly similar to terrorists who may want to attack a sporting event. In the airport context, one court recognized that "[m]any hijackers have been psychotic or political fanatics, for whom death holds no fear and little consequence."[262] "Unlike most other crimes, hijacking is one in which secrecy is not a principal concern. Once the hijacker decides to act, he doesn't care if there are numerous witnesses."[263] These courts accurately described the terrorists who attacked on September 11, 2001, and similarly described those who would likely want to carry out an attack at a sporting event. For all these

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[259] Big 10 Home Page, *supra* note 1. In addition, an average of 5,154 fans attended each NCAA Division I basketball game. NCAA Home Page, www.ncaa.org/stats/m_basketball /attendance/2004_basketball_attend.pdf (last visited Apr. 5, 2006).

[260] *Moreno*, 475 F.2d at 49.

[261] Rothberg, *supra* note 16, at 110.

[262] United States v. Albarado, 495 F.2d 799, 803 (2d Cir. 1974).

[263] *Moreno*, 475 F.2d at 49.

reasons, the nature of the threat at stadiums is as serious, if not more serious, than the nature of the threat at airports and courthouses.

The next inquiry is the likelihood of the threat at stadiums. There has not yet been an attack at a sporting event. The *Tampa Bay Authority* trial and appellate courts relied heavily upon that fact in upholding a preliminary injunction against the NFL pat-down policy. The trial court in *Tampa Bay Authority* stressed the lack of a "particularized threat to [Raymond James Stadium],"[264] and the appellate court similarly noted the "amorphous nature of the present danger to the stadium."[265] With respect to the likelihood of the threat, the *Tampa Sports Authority* courts are misguided for at least two reasons.

First, stadium operators should not be forced to demonstrate that their specific stadium is under a specific threat. It should, at the very least, be sufficient to demonstrate a substantial threat generally exists at sporting events. By requiring greater specificity, the *Tampa Bay Authority* trial court, and others, have disregarded United States Supreme Court precedent to the contrary.

For example, in *Michigan Department of State Police v. Sitz*,[266] the United States Supreme Court upheld Michigan's warrantless sobriety checkpoint program.[267] In describing the magnitude and likelihood of the threat, the Court did not cite drunk driving statistics for the State of Michigan. Nor did it cite even more location-specific data, such as drunk driving statistics for individual counties within the state. To the contrary, the Court cited national drunk driving statistics, stating that "[d]runk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage."[268] It therefore appears unlikely that the United States Supreme Court would require a specific threat to a specific stadium as demanded by *Tampa Sports Authority*. Indeed, knowledge of a specific threat to a specific stadium may not be known until an attack has occurred or was attempted. Because the trial court in *Tampa Sports Authority* began its analysis under a faulty premise, it is not surprising that it arrived at an erroneous conclusion.

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[264] *See* Johnston v. Tampa Sports Auth., No. 05-09151, Order Granting Plaintiff's Emergency Motion for Preliminary Injunction, at 5 (Hillsborough County, Fla. Nov. 2, 2005).

[265] Tampa Sports Auth. v. Johnston, 914 So. 2d 1076, 1080 (Fla. Dist. Ct. App. 2005).

[266] 496 U.S. 444 (1990).

[267] *Id.* at 455.

[268] *Id.* at 451.

Second, it is true that the likelihood of the threat at stadiums is not as concrete as the threat at airports and courthouses. Unlike airports and courthouses, a sporting event has fortunately yet to be attacked. Nonetheless, at least one court has recognized the "certainly logical . . . concern that public events at which large crowds gather might be targets of unidentified terrorists."[269] Also, as stated above, commentators have similarly stressed that a sporting event would be a "very symbolic target of terrorism."[270] Al Qaida itself has expressed an interest in attacking American sporting events.[271]

Under these circumstances, the likelihood of the threat at sporting events is not simply theoretical or amorphous. It is real and substantial. However, the majority of courts would appear to require that an attack actually materialize before acknowledging the likelihood of the threat at stadiums. That approach is misguided and reckless. The substantial threat should be recognized before thousands of innocent spectators are harmed, not after. Of course, September 11, 2001, does not mean that the "Constitution needs to be torn up and thrown out the door."[272] However, our Constitution should not turn a blind eye to the threat at major sporting events. For all these reasons, the public necessity for stadium searches is at least as strong, if not stronger, than the public necessity for searches at airports and courthouses.

B. Stadium Searches Can Be as Effective as Those at Airports and Courthouses

The second prong of the balancing test considers "the likelihood that the search procedure will be effective in averting the potential harm."[273] Under United States Supreme Court precedent, the burden of establishing the efficacy of the search is not onerous. For example, in *Sitz*,[274] approximately 1.6 percent of the motorists driving through a warrantless sobriety checkpoint were arrested for driving under the influence.[275] The United States Supreme Court held that such a percentage was sufficiently effective to justify the warrantless seizure created by the checkpoint.[276]

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[269] *Tampa Sports Auth.*, 914 So. 2d at 1080.
[270] Fallon, *supra* note 19, at 366.
[271] Windrem, *supra* note 15.
[272] Johnston v. Tampa Sports Auth., No. 05-09151, Order Granting Plaintiff's Emergency Motion for Preliminary Injunction, at 7 (Hillsborough County, Fla. Nov. 2, 2005).
[273] United States v. Skipwith, 482 F.2d 1272, 1275 (5th Cir. 1973).
[274] 496 U.S. 444 (1990).
[275] *Id.* at 455.
[276] *Id.*

At stadiums, lower courts have subsequently required a much higher rate of effectiveness. For example, in *Gaioni*, the court stated that while the defendant did seize some contraband, drug and alcohol use at the stadium was "not eliminated."[277] Under *Gaioni*, a search policy is not effective unless it eliminates all weapons or other contraband. That unduly stringent standard should be rejected at stadiums for many reasons, not the least of which is that it is irreconcilable with United States Supreme Court precedent.[278]

Because the threshold for deeming a search "effective" is low, properly implemented pat-down searches at stadiums can be as effective as searches at airports and courthouses. In *Tampa Sports Authority*, the stadium operator presented affidavits from experts providing that pat-down searches are "the most effective means of detecting suicide bombs."[279] Based on those affidavits and other evidence, the appellate court recognized that "[c]onducting patdown searches may well be effective for detecting arms or explosives."[280] Accordingly, pat-down searches at stadiums should be an effective way to filter out dangerous weapons and explosives.

Alternatively, a magnetometer is commonly used at airports and courthouses to detect the presence of weapons, and is able to detect the "overwhelming majority of weapons . . . ."[281] In addition, magnetometer searches have effectively deterred future crimes. As one court stated, "[o]ne of the prime purposes of the search . . . is deterrence, the knowledge that such searches are conducted acting to deter potential hijackers from even attempting to bring weapons on a plane."[282]

At stadiums, a magnetometer search could be implemented in a manner similar to airports and courthouses. Indeed, the magnetometer has already been used at high-profile games after September 11, 2001.

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[277] Gaioni v. Folmar, 460 F. Supp. 10, 14 (M.D. Ala. 1978). Despite using broad language, the *Gaioni* court was probably not requiring a 100% success rate before a search policy could be deemed "effective." Yet, the case law indicates that courts are unduly critical when considering whether a search policy is effective at entertainment events. Nakamoto v. Fasi, 635 P.2d 948, 953 (Haw. 1981).

[278] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 553 (1976) (holding "effective" a permanent checkpoint designed to detect illegal aliens with a 0.5% illegal-alien detection rate).

[279] Tampa Sports Auth. v. Johnston, 914 So. 2d 1076, 1081 (Fla. Dist. Ct. App. 2005).

[280] *Id.*

[281] United States v. Albarado, 495 F.2d 799, 804 (2d Cir. 1974).

[282] *Id.*

For example, metal detectors were used at the 2002 Super Bowl.[283] If metal detectors are used at a sporting event, courts should recognize that they are as effective as at airports and courthouses. Specifically, searches by way of metal detectors would detect the "overwhelming majority of weapons . . . ."[284] They would also deter potential wrongdoers from even attempting to enter the stadium with explosives or other objects.

A metal detector search, however, may not be the ideal solution. With thousands of spectators entering a stadium, a metal detector search could be "impractical under certain circumstances . . . in terms of backing them all up in long lines . . . ."[285] More importantly, "the terrorists know, as we know from September 11th, that they do not need to bring any metal. So they [could] bring a plastic device [in the stadium]."[286] Indeed, a growing concern is that a terrorist could smuggle in "large amounts of C4 plastic strapped to their bodies."[287] Consequently, and as explained below, a pat-down search may be the most effective and efficient way to ferret out plastic explosives.

C. *Stadium Searches Must Necessarily Be More Intrusive than Searches at Airports and Courthouses*

The final factor that must be balanced is "the degree and nature of intrusion into the privacy of the person and effects of the citizen which the search entails."[288] As explained above, this factor contains an objective and subjective inquiry. The degree of "'objective' intrusion . . . [is] measured by the duration of the seizure and the intensity of the investigation."[289] The subjective inquiry considers the "fear and surprise engendered in law–abiding [individuals] by the nature of the stop."[290]

As explained throughout, stadium searches are designed to discover the same type of nefarious objects as those sought at airports and courthouses. A stadium search "entails a search of the person and his effects. In this respect [a stadium search] is similar to airport and courthouse or courtroom searches."[291] Therefore, the degree and nature

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283 Fallon, *supra* note 19, at 370.
284 *Albarado*, 495 F.2d at 804.
285 Fallon, *supra* note 19, at 398.
286 *Id.* at 396.
287 *Id.* at 397.
288 United States v. Skipwith, 482 F.2d 1272, 1275 (5th Cir. 1973).
289 Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).
290 *Id.* at 452.
291 Collier v. Miller, 414 F. Supp. 1357, 1364 (S.D. Tex. 1976).

of the intrusion of the search is similar at airports, courthouses, and stadiums.

That said, a pat-down search is more invasive than a magnetometer search. However, to detect plastic explosives and similar objects, pat-down searches at stadiums could be a necessary evil. As stated above, terrorism experts have opined that "patdown searches [are] the most effective means of detecting suicide bombs."[292] Consequently, a pat-down search policy is the best vehicle to detect the presence of explosives.

Despite the utility of pat-down searches, prior to September 11, 2001, courts repeatedly struck down such searches of patrons at stadiums.[293] At least one recent case has similarly found that pat-down policies at stadiums are too intrusive to be upheld as constitutional.[294] To help lessen the degree and nature of the intrusion of a pat-down search, the following factors should be considered when promulgating or amending a stadium search policy.

First, courts 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.[295] Accordingly, any stadium pat-down policy should be applied indiscriminately to each patron. The NFL pat-down policy is not selective; each patron must consent to the pat-down prior to admittance. Each patron can therefore "see that [other patrons are being searched], he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion."[296] The *Tampa Sports Authority* court completely ignored the indiscriminate nature of the NFL pat-down policy; other courts should not duplicate that mistake. Although potentially time-consuming,[297] a pat-down stadium search should therefore be applied indiscriminately.

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[292] Tampa Sports Auth. v. Johnston, 914 So. 2d 1076, 1081 (Fla. Dist. Ct. App. 2005).

[293] *See, e.g.*, Nakamoto v. Fasi, 635 P.2d 946, 949 (Haw. 1981) (striking down a search policy involving "actual physical inspections").

[294] State v. Seglen, 700 N.W.2d 702, 709 (N.D. 2005) (stating that a pat-down search at a University of North Dakota hockey game was "very intrusive").

[295] *See, e.g.*, Jacobsen v. City of Seattle, 658 P.2d 653, 656–57 (Wash. 1983) (en banc).

[296] *Sitz*, 496 U.S. at 452 (recognizing that subjective fear is minimal at a sobriety checkpoint because each motorist is briefly stopped).

[297] *Stadium Pat-Downs Nixed*, CINCINNATI ENQUIRER, Oct. 1, 2005, *available at* http://news.enquirer.com/apps/pbcs.dll/article?AID=2005510010361&template=printpicart (stating

Further, if a pat-down policy is struck down as too invasive, stadium operators may wish to consider a mere visual inspection.[298] Courts have upheld search policies where the patrons are "asked to move items within their containers to facilitate complete visual inspections."[299] That said, and as explained throughout, pat-down searches are one of the few ways to detect the presence of plastic explosives, especially if strapped to the body of a terrorist.

After balancing all the relevant factors, an exception to the warrant requirement should be recognized for stadium searches. The public necessity for stadium searches is as strong, if not stronger, than the public necessity for airport and courthouse searches. Further, stadium searches can be as effective as airport and courthouse searches in filtering out dangerous weapons or explosives. Finally, if appropriate measures are taken, the degree of the instrusion at stadiums can be reduced.

D. Alternatives to Warrantless Searches at Stadiums

If courts refuse to recognize an exception for stadium searches, other safety procedures could be implemented. In this regard, courts have suggested several constitutional means to achieve the desired end. All backpacks, parcels, or bundles larger than a particular size could be prohibited from the arena.[300] A checkroom could be provided for such parcels and other objects, and the stadium could charge a fee to cover the cost of operating the facility. This prohibition could deter terrorists from attempting to smuggle explosives or other dangerous weapons into a stadium. Also, more effective policing should be maintained inside the stadium.[301] Additional security guards patrolling the facility may catch perpetrators in the act, providing probable cause or particularized suspicion sufficient for a *Terry* frisk. One or more of these safeguards, although not as effective as a pat-down, could help protect spectators.

VI. CONCLUSION

When presented with the issue, courts should recognize that warrantless searches at stadiums are sufficiently analogous to

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that the application of a pat-down policy on all fans at Cincinnati Bengals football games would "create havoc" around kickoff).

[298] Jensen v. City of Pontiac, 317 N.W.2d 619, 624 (Mich. Ct. App. 1982).

[299] *Id.* at 624.

[300] Wheaton v. Hagan, 435 F. Supp. 1134, 1148 (M.D.N.C. 1977).

[301] Jacobsen v. City of Seattle, 658 P.2d 653, 657 (Wash. 1983) (en banc).

warrantless searches at airports and courthouses. Indeed, because thousands more people are at risk at stadiums than at airports or courthouses, the need for such stadium searches may be greater. Because of this need and the similarities between airports, courthouses, and stadiums, courts should create an exception to the warrant requirement for stadium searches.