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THE CONSTITUTIONALITY OF THE NFL PATDOWN POLICY AFTER *SHEEHAN* AND *JOHNSTON*

INTRODUCTION: THE NFL PATDOWN POLICY AND THE FOURTH AMENDMENT

In 2005, the National Football League (“NFL”) urged its franchises to institute a patdown policy to protect members of the public that attend NFL games.¹ The decision to recommend this policy was based on the NFL’s conclusion that its stadiums were attractive terrorist targets. As evidence, the NFL pointed to several examples of global terror, including the 2004 and 2005 suicide bombings in London and Madrid, a foiled plan to bomb a soccer venue in Spain, and the NFL’s understanding that certain individuals with alleged ties to terrorist organizations had already downloaded information about two NFL stadiums.²

To date, at least three sets of plaintiffs have challenged the constitutionality of this patdown policy under the Fourth Amendment or its state equivalent.³ By its terms, the Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”⁴ The “unreasonable search” at issue in these NFL patdown cases is the suspicionless patdown of every ticket holder prior to gaining stadium entry. According to the NFL, the patdown focuses on the detection of improvised explosive devices (“IEDs”).⁵ During this patdown, fans are asked to “hold their arms out to their

¹ *Johnston v. Tampa Sports Auth. (Johnston II)*, 490 F.3d 820, 822 (11th Cir. 2007).

² *Id.* at 822 n.1.

³ These cases include *Johnston II*; *Sheehan v. The San Francisco 49ers, Ltd.*, 62 Cal. Rptr. 3d 803 (Cal. Ct. App. 2007); and *The Chicago Park Dist. v. The Chicago Bears Football Club, Inc.*, 2006 U.S. Dist. LEXIS 58621 (N.D. Ill. 2006).

⁴ U.S. CONST. Amend. IV.

⁵ *Johnston II*, 490 F.3d at 822.

side, palms up” as screeners “run their hands along the sides of the torso, and down the spine.”⁶ The process involves “touching, patting, or lightly rubbing.”⁷ If the screener observes or feels any “suspicious bulges,” the screener may instruct the patron to empty his pockets.⁸ Anyone who refuses to be patted down is denied entry into the stadium.⁹

The Supreme Court has specifically held that a weapons patdown is a search within the meaning of the Fourth Amendment.¹⁰ Since the NFL has stated that the primary purpose of the patdown is to search for IEDs, the patdown policy clearly raises issues regarding the privacy rights of each ticket holder subject to the search. This Comment aims to address three of these issues.

First, what role does “consent” play in the right-of-privacy analysis as it applies to the NFL patdown policy? Anyone who has attended an NFL game has witnessed tens of thousands of fans slowly migrate through stadium security checkpoints without a hint of protest.¹¹ Does this conduct preclude fans from challenging the NFL patdown policy? Second, even if fans legally consent to the patdown, is the NFL patdown policy still an unconstitutional condition to stadium entry? And third, regardless of whether a ticket holder consents to the patdown before entering an NFL stadium, is the NFL patdown policy nevertheless constitutionally justified by a “special need” to protect public safety? As mentioned above, courts have already begun to address these very questions. This Comment first summarizes *Sheehan v. The San Francisco 49ers, Limited.* and the *Johnston* cases, then addresses whether the NFL policy violates the Fourth Amendment by answering the specific questions raised above.

⁶ *Id.* at 823.

⁷ *Sheehan*, 62 Cal. Rptr. 3d at 806.

⁸ *Johnston v. Tampa Bay Sports Auth. (Johnston I)*, 442 F. Supp. 2d 1257, 1260 (M.D. Fla. 2006), *rev'd*, 490 F.3d 820 (11th Cir. 2007).

⁹ *Id.*

¹⁰ *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968) (“[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a ‘search.’”).

¹¹ Aside from the occasional groan in annoyance from having to wait in considerably long lines.

I. THE NFL PATDOWN CASES¹²

A. Sheehan v. The San Francisco 49ers, Ltd.

Prior to the 2005 NFL season, the San Francisco 49ers (the “49ers”) agreed to institute a “patdown-inspection” policy that required each ticket holder to be inspected before entering the 49ers’ stadium, Monster Park.¹³ Although the patdowns were administered by 49ers personnel in front of the ticket gates outside the stadium, members of the San Francisco Police Department were stationed nearby.¹⁴ Among those subject to the patdowns were forty-year season-ticket holders Daniel and Kathleen Sheehan (the “Sheehans”). After attending several 49ers games, the Sheehans decided to file suit against the 49ers in state court, alleging that the patdowns breached their inalienable right to privacy, as provided by California’s “Privacy Initiative.”¹⁵ Because Monster Park was owned and operated by the San Francisco 49ers, a private entity, no Fourth Amendment claim was raised.¹⁶ The Sheehans sought declaratory and injunctive relief, requesting the court to: (1) find the patdown policy in violation of California’s Privacy Initiative; and (2) enjoin the 49ers from continuing the patdowns.¹⁷ The 49ers demurred and a hearing date was set.

At the hearing the trial court questioned whether the Sheehans’ complaint was still ripe, since the 2005 NFL season, which was in progress when the complaint was filed, had since ended.¹⁸ To address

¹² As mentioned above, this section merely summarizes the facts and analysis of the *Sheehan* and *Johnston* cases. Part II further explores the issues raised in these cases and also addresses whether or not the NFL patdown policy is constitutional.

¹³ *Sheehan*, 62 Cal. Rptr. 3d at 805–06.

¹⁴ *Id.*

¹⁵ *Id.* The “Privacy Initiative” refers to Article I, section 1 of the California Constitution. “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” CAL CONST. art. I, § 1 (2007) (emphasis added). The section replaced former Article 1, Section 1 in November 5, 1974 and explicitly established the right of privacy as an inalienable right in California. *See* Cent. Valley Chap. 7th Step Found. v. Younger, 157 Cal. Rptr. 117, 129 (Ct. App. 1979).

¹⁶ The Fourth Amendment protects citizens only from government intrusions. *See* *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (“The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action.”). Although *Sheehan* involves a state right of privacy claim, many of the legal issues that were addressed are the same issues addressed in Fourth Amendment cases. Thus, although the opinion carries limited weight as precedent in federal court, the *Sheehan* court’s reasoning and discussion seems very relevant to the Fourth Amendment debate regarding the NFL patdown policy. Incidentally, *Sheehan* is critical to this Comment’s analysis.

¹⁷ *Sheehan*, 62 Cal. Rptr. 3d at 806.

¹⁸ *Id.*

the trial court's concerns, the Sheehans amended their complaint and stipulated that, in addition to purchasing 2005 season tickets, they also purchased 2006 season tickets.¹⁹ This amendment would prove fatal. Because the Sheehans had attended 2005 football games at Monster Park, the trial court concluded that they must have had advance notice of the patdown policy before purchasing 2006 season tickets. Thus, when the Sheehans "re-upped" their season tickets for 2006, they "impliedly consented to the patdowns."²⁰ According to the court, this consent foreclosed any reasonable expectation of privacy with regard to the patdowns.²¹ Consequently, the court granted the 49ers' motion to dismiss the Sheehans' claims without leave to amend.

After undertaking an independent review of the order to sustain the 49ers' demurrer, California's First Appellate District affirmed the trial court's ruling. According to the appellate court, the Sheehans' claim was properly dismissed because it "involve[d] so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant."²² The Supreme Court of California has since granted petition for review.²³

B. The Johnston Cases

I. Johnston I

In September 2005, the Tampa Sports Authority ("TSA"), a Florida public entity that grants the Tampa Bay Buccaneers (the "Buccaneers") use of Raymond James Stadium, instituted a policy requiring patdown searches of all persons attending Buccaneers football games.²⁴ The Buccaneers, a private commercial entity, employed "outside screeners" to conduct the patdown inspections. As

¹⁹ *Id.*

²⁰ *Id.* at 808.

²¹ *Id.*

²² *Sheehan*, 62 Cal. Rptr. 3d at 807 quoting *Loder v. City of Glendale*, 927 P.2d 1200, 1230 (Cal. 1997). The appeals court used the three prong *Hill* analysis to dismiss the Sheehans' claim against the 49ers. Under the *Hill* test, a plaintiff asserting a California Privacy Initiative claim must show the existence of three threshold elements: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) conduct on the part of the defendant constituting a serious invasion of privacy. *Hill v. Nat'l Collegiate Ath. Ass'n*, 865 P.2d 633, 657 (Cal. 1994). The appeals court held that the Sheehans failed the second element. Specifically, like the trial court, the appeals court reasoned that the advance notice of the patdown policy foreclosed any reasonable expectation of privacy. *Sheehan*, 62 Cal. Rptr. 3d at 808-09.

²³ *Sheehan v. San Francisco 49ers, Ltd.*, 169 P.3d 883 (Cal. October 10, 2007).

²⁴ *Johnston II*, 490 F.3d 820, 822 (11th Cir. 2007).

in *Sheehan*, if the screeners discovered contraband during a patdown, they were supposed to alert uniformed police officers stationed nearby.²⁵ TSA and the Buccaneers shared in the expense of the screeners, and TSA oversaw how the search policy was conducted.²⁶

Before the 2005 NFL season, Gordon Johnston, a Buccaneers season-ticket holder, called the Buccaneers to discuss and object to the new patdown policy.²⁷ Not surprisingly, the phone call did not deter the Buccaneers from implementing the policy as planned. Early in the 2005 season, Johnston presented himself and his ticket at an entrance to Raymond James Stadium on three separate occasions. On each occasion, a screener advised Johnston of the patdown policy.²⁸ And, on each occasion, Johnston verbally objected to the patdown but eventually allowed the screener to conduct the search so he could attend the football game.²⁹

After attending his second Buccaneers game, Johnston sued TSA in state court, challenging the constitutionality of the patdown searches under the Florida Constitution.³⁰ After the third game a Florida state court enjoined the searches and Johnston attended subsequent games without being subjected to patdowns.³¹ Johnston then amended his complaint to allege that the patdowns also violated the Fourth Amendment of the United States Constitution.³² The case was removed to federal court and TSA sought reconsideration of the preliminary injunction.

TSA urged the court to dissolve the injunction for three reasons: (1) TSA's role in implementing the patdown policy did not constitute "state action"; (2) the patdown searches were not unreasonable because they were justified by a "special need"; and (3) Johnston had impliedly consented to the patdown search.³³ The *Johnston I* court rejected all three.

First, the *Johnston I* court dismissed TSA's claim that when it implemented the patdown policy it was not "acting in a governmental capacity" but instead as a "managing agent" pursuant to its stadium agreement with the Buccaneers.³⁴ According to the court, a public entity "cannot contract away its public status." Since there was a

²⁵ *Id.* at 823 n.2.

²⁶ *Id.* at 823.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Johnston II*, 490 F.3d 820, 824 (11th Cir. 2007).

³⁰ *Id.* at 823.

³¹ *Id.*

³² *Id.* at 824.

³³ *Johnston I*, 442 F. Supp. 2d 1257, 1262 (M.D. Fla. 2006).

³⁴ *Id.* at 1263.

“sufficiently close nexus” between TSA and the challenged conduct, the district court decided that “the conduct may be fairly treated as that of the TSA itself.”³⁵ As support, the court noted that TSA had voted to implement the patdown policy, hired and supervised the screeners, and paid for the patdowns with public funds.³⁶

Next, the *Johnston I* court moved to the merits of the Fourth Amendment claim and recognized the general rule that mass suspicionless searches are *per se* unconstitutional.³⁷ According to TSA, the patdown policy should be exempt from this general rule because protecting the public from terrorist attacks at NFL games fell under a “special needs” exception.³⁸ The *Johnston I* court disagreed. Although the record demonstrated that large gatherings were subject to a generalized threat of terrorism, the court held that TSA had not met its burden of establishing that a “substantial and real” risk of terrorism existed at NFL stadiums.³⁹ Finding a “special[-]need” exception here, the court reasoned, would “essentially condone mass suspicionless searches of every person attending any large event, including . . . high school graduations, indoor and outdoor concerts, and parades.”⁴⁰

Finally, the court dealt with the issue of consent. TSA argued that any privacy intrusion under the instant facts and circumstances could not be unconstitutional, since Johnston had actually consented to the patdowns at issue. In support, TSA showed that Johnston repeatedly attended games fully aware that he would be subjected to a patdown search as a condition of entry.⁴¹

Although the district court recognized “[v]alid consent legitimizes an otherwise unconstitutional search,” it held that the consent was invalid for two reasons.⁴² First, the particular type of consent at issue—“where the government conditions receipt of a benefit . . . on the waiver of a constitutional right”—was invalid as an unconstitutional condition.⁴³ Second, regardless of the unconstitutional condition TSA imposed, Johnston’s conduct fell short of legal consent because it was not “voluntarily given, free from

³⁵ *Id.*

³⁶ *Id.* at 1264.

³⁷ *Id.* at 1265.

³⁸ *Johnston I*, 442 F.Supp. 2d at 1266.

³⁹ *Id.* citing *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

⁴⁰ *Johnston I*, 442 F.Supp. 2d at 1269.

⁴¹ *Id.* at 1271.

⁴² *Id.* (citing *Lenz v. Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995)).

⁴³ *Johnston I*, 442 F.Supp. 2d at 1271 (citing *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004)).

constraint.”⁴⁴ According to the court, after voicing his concern and objections, Johnston was faced with the dubious choice of either subjecting himself to the patdown searches or losing not only his opportunity to attend the football game, but also the value of his tickets, his parking pass, and his seat deposit. Such a decision, the court reasoned, could not constitute valid consent. The *Johnston I* court denied TSA’s motion to dissolve the preliminary injunction enjoining them from administering the patdown policy.⁴⁵

2. Johnston II

In a short opinion, the U.S. Court of Appeals for the Eleventh Circuit reversed *Johnston I*.⁴⁶ For the Eleventh Circuit the issue was simple. The record was “replete with evidence of the advance notice Johnston was given of the searches including preseason notice, pregame notice, and notice of the search point itself.”⁴⁷ Coupling this notice with the fact that Johnston: (1) presented himself willingly at the search point; (2) was under no threat of physical or other retribution if he refused the search; and (3) was well aware of his right to refuse the patdown, the *Johnston II* court held that it was “clear error” for the district court to have found that Johnston had not voluntarily consented to the patdowns.⁴⁸ In response to the district court’s determination that the patdown policy was also an unconstitutional condition, the Eleventh Circuit claimed that Johnston possessed only a license for a spectator’s seat at Buccaneers football games. This license, according to the court, could be revoked at any time and for any reason, subject only to a refund.⁴⁹ Consequently, no condition could be considered unconstitutional. The case was remanded to the district court for further proceedings consistent with the Eleventh Circuit’s findings.

II. IS THE NFL PATDOWN POLICY CONSTITUTIONAL?

A. Are NFL Fans Consenting to Patdowns?

A crucial issue in the NFL patdown cases is whether fans consent to the NFL’s patdown searches. The Supreme Court has long held

⁴⁴ *Johnston I*, 442 F.Supp. 2d at 1271.

⁴⁵ *Id.* at 1271–72.

⁴⁶ *Johnston II*, 490 F.3d 820, 826 (11th Cir. 2007).

⁴⁷ *Id.* at 825.

⁴⁸ *Id.*

⁴⁹ *Id.* at 824.

that voluntary consent may validate an otherwise illegal search.⁵⁰ The *Johnston II* court and *Sheehan* majority agreed that the plaintiffs involved had clearly consented to the patdowns.⁵¹ Both decisions seem well founded, particularly in light of the specific facts and circumstances before both courts. However, should different facts arise, the issue of consent becomes less straightforward.

Schneckloth v. Bustamonte,⁵² cited by *Johnston II*, is the leading case regarding consent in Fourth-Amendment search cases. In *Bustamonte*, the Court applied a "totality of the circumstances" test to determine whether the consent at issue was voluntary. Under *Bustamonte*, after evaluating the specific facts and circumstances, consent should be deemed voluntary as long as it was not "the product of duress or coercion, express or implied."⁵³ Applying this standard, it seems both *Johnston* and the *Sheehans* consented to the patdowns. The plaintiffs clearly knew about the patdown before arriving at the game and simply elected to submit to the search rather than miss attending the football game. Moreover, coercion seems particularly unlikely at NFL football games since, as the *Sheehan* court pointed out, fans always have the choice of walking away with "no questions asked" rather than submitting to the patdown.⁵⁴

However, it is at least possible that some ticket holders that *could* walk away from the search without adverse consequence are nonetheless coerced into submission if they are *unaware* of their right to walk away.⁵⁵ The Supreme Court embraced this idea in *U.S. v. Mendenhall*, which held that a person's subjective mental state controls when answering the question of whether the consent at issue is voluntary.⁵⁶ Thus, if ticket holders personally feel coerced into submitting to patdowns because they are unaware of their right to refuse, the argument that they could simply walk away from the patdown without consequence is moot.

In *Johnston II* and *Sheehan*, this argument was clearly unsupported by the facts and circumstances of each respective case. In *Johnston II*, the court recognized that *Johnston* was "a man of heightened

⁵⁰ See *Davis v. United States*, 328 U.S. 582, 593-94 (1946).

⁵¹ This Comment's reference to the *Sheehan* case refers to the decision of California's First Appellate District, unless otherwise noted.

⁵² 412 U.S. 218 (1973). Even though *Bustamonte* actually involved "third-party consent," the third-party aspects of the search at issue were not of particular interest to the Court.

⁵³ *Id.* at 227.

⁵⁴ *Sheehan v. The San Francisco 49ers, Ltd.*, 62 Cal. Rptr. 3d 803, 811 (Cal. Ct. App. 2007).

⁵⁵ In *Bustamonte*, the Court never explicitly stated whether the test for voluntary consent was an "objective" or "subjective" one.

⁵⁶ *Mendenhall*, 446 U.S. 544, 557-58 (1980) (holding that on the issue of consent, the question was whether the consent was "in fact" voluntary).

intelligence” and seemingly “well aware of his right to refuse to submit to the patdown search.”⁵⁷ Although the *Sheehan* court did not specifically address this issue, the sheer amount of patdowns the Sheehans experienced seems to foreclose any claim of coercion. It is hard to imagine that the Sheehans felt coerced since they kept returning to the stadium to be searched.

Although *Mendenhall* was likely of no assistance to Johnston or the Sheehans, it could imply that other NFL fans are not voluntarily consenting to patdowns. However, this possibility seems slim. First, under *Bustamonte*, a consentor’s ignorance of his right to refuse consent is only one factor to be considered in ascertaining the validity of the consent.⁵⁸ Thus, proof that a ticket holder was not aware of his right to refuse a patdown is hardly determinative. Second, the patdown process itself is hardly “coercive” in the sense the Supreme Court has required to invalidate consent. Cases successfully arguing coercion typically involve an intimidating showing of lawful authority.⁵⁹ In contrast, intimidation hardly seems present during patdowns at NFL games. Not only do ticket holders wait in long lines (during which time they can easily walk away), but the patdowns are performed by private screeners, not uniformed police officers. Unless police officers are literally standing right next to a screener, there seems to be little potential for people to feel they are merely submitting to a lawful showing of authority. Consequently, it seems that—barring an unusual fact pattern—*Mendenhall* provides little assistance for fans seeking to successfully challenge the constitutionality of the NFL patdown policy.⁶⁰ Instead, it seems fans who submit to patdowns are voluntarily submitting to a search under *Bustamonte*.

Since consent normally validates even an otherwise illegal search, perhaps the only way to avoid consenting to an NFL patdown is to simply avoid submitting to the patdown. In other words, a fan could purchase NFL season tickets and, before attending a game, file for

⁵⁷ *Johnston II*, 490 F.3d 820, 825 (11th Cir. 2007).

⁵⁸ *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

⁵⁹ See e.g. *Kaupp v. Texas*, 538 U.S. 626 (2003) (finding coercion when police woke up a juvenile murder suspect at 3:00 a.m. without an arrest warrant and told him, “We need to go and talk.”); *Bumper v. North Carolina*, 391 U.S. 543 (1968) (finding coercion when an elderly woman living in isolated rural area allowed four police officers into her home after the officers falsely asserted that they had a warrant).

⁶⁰ It should be noted that a plaintiff’s subjective mental state is not always relevant in determining coercion. Some courts instead favor an objective test. See *Ohio v. Robinette*, 685 N.E.2d 762, 771 (Ohio 1997) (“[F]or [a person’s] consent to be considered an independent act of free will, the totality of the circumstances must clearly demonstrate that a *reasonable* person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave.”) (emphasis added).

declaratory relief seeking to enjoin the NFL team from administering the patdowns.

The dissenting opinion in *Sheehan* raised this scenario, and it seems to be a plausible way around *Bustamonte*.⁶¹ According to the *Sheehan* majority, the decision to purchase season tickets with knowledge of the patdown policy automatically extinguishes any reasonable expectation to be free from whatever privacy intrusions the patdown policy imposes.⁶² The dissent refused to accept this and believed that consent should not be inferred merely from the act of purchase. If the Sheehans were given leave to amend their complaint, the dissent argued, the Sheehans could argue that at the time of their season ticket purchase, they had not yet decided whether they would attend the 2006 games. This decision depended wholly on the outcome of their preliminary injunction.⁶³ In other words, if the Sheehans purchased tickets without intending to attend games, then they were not consenting to patdowns.

For the *Sheehan* majority, this argument probably made little sense. Why would a fan purchase a ticket to a sporting event that he never intended to attend? The answer may lie in the extremely long waiting lists that currently exist for NFL season tickets. In *Sheehan*, if the plaintiffs had waited until after their lawsuit was successful to purchase 2006 season tickets, they would have lost their forty-year seniority over other season-ticket holders.⁶⁴ To some, this may seem trivial. But for NFL fans, it is anything but.

To illustrate, the Green Bay Packers have a waiting list for season tickets that includes over 70,000 names.⁶⁵ Generally as few as *seventy* season tickets become available each year. Thus, in hopes of one day obtaining season tickets, it is actually a custom in Green Bay to put a baby's name on the waiting list as soon as the parents obtain his or her birth certificate.⁶⁶ Green Bay is not the only NFL city that has tremendously long season ticket waiting lists. The waiting lists for the New York Giants also includes 70,000 names, and fans wait at least ten years before earning the right to buy season tickets.⁶⁷ Moreover,

⁶¹ See *Sheehan v. The San Francisco 49ers, Ltd.*, 62 Cal. Rptr. 3d 803, 812 (Cal. Ct. App. 2007) (Rivera, J., dissenting).

⁶² *Sheehan*, 62 Cal. Rptr. 3d at 808–09.

⁶³ *Id.* at 812 (Rivera, J., dissenting).

⁶⁴ *Id.*

⁶⁵ Rick Reilly, *Be the 74,659th in Line!*, SI.COM, October 9, 2007, http://sportsillustrated.cnn.com/2007/writers/rick_reilly/10/09/reilly1015/index.html.

⁶⁶ *Id.*

⁶⁷ Lauren Sherman, *Toughest NFL Waiting Lists*, FORBES.COM, September 7, 2007, http://www.forbes.com/2007/09/07/nfl-football-tickets-forbeslife-cx_ls_0907tickets.html.

the Washington Redskins have a waiting list more than twice this size!⁶⁸

In light of these long waiting lists, it seems quite reasonable for some fans to “re-up” their season tickets even if they only plan to attend games should their challenge of the patdown policy prove successful. Although the *Sheehan* majority failed to accept this argument, a court more in touch with the importance that NFL football fans place on season tickets might feel differently. Consequently, if fans purchase tickets and file suit before attending football games, it seems they are not consenting to the patdowns.

B. Is the NFL Patdown Policy an Unconstitutional Condition?

Another issue raised in the NFL patdown cases involves the relevance of the unconstitutional-conditions doctrine. Courts use the unconstitutional-conditions doctrine to prevent state actors from conditioning the grant of government benefits on the surrender of constitutionally protected rights.⁶⁹ For example, the doctrine has been used to protect individuals from unreasonable search and seizures during rock concerts⁷⁰ and protest rallies.⁷¹

In *Sheehan* and the *Johnston* cases, the plaintiffs argued that conditioning stadium entrance on a submission to a patdown was an unconstitutional condition. The NFL patdown policy certainly puts fans in a precarious situation. They must submit to a patdown search or never attend an NFL football game. As the *Sheehan* dissent recognized, this is a classic “Hobson’s choice.”⁷² However, for different reasons both the *Sheehan* and *Johnston II* court easily rejected the unconstitutional conditions doctrine. Assuming the court’s analysis is sound, the ease in which the decisions were reached is troubling. It may indicate that courts are quite eager to condone far more significant privacy invasions, provided individuals are allowed to choose which rights they relinquish and regardless of how dubious the “choice” really is.

⁶⁸ *Id.*

⁶⁹ *Sheehan*, 62 Cal. Rptr. 3d at 810 citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

⁷⁰ *Nakamoto v. Fasi*, 635 P.2d 946, 951–52 (Haw. 1981) (holding that the search of a patron’s personal effects as a condition of entry into a public arena for a rock concert was unconstitutional).

⁷¹ *Bourgeois v. Peters*, 387 F.3d 1303, 1324–25 (11th Cir. 2004) (holding that requiring persons to submit to a magnetometer if they choose to gather in a protest area was a classic “unconstitutional condition,” in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right).

⁷² *Sheehan*, 62 Cal. Rptr. 3d at 813. (Rivera, J., dissenting).

1. *The Sheehan Case: Private Entities Prevail*

In *Sheehan*, because the 49ers were a private entity, the threshold question before the court was whether the unconstitutional-conditions doctrine applied to private actors. In California, state courts have consistently held that the state's Privacy Initiative protects citizens not just from government actors, but from private actors as well.⁷³ Thus, it seemed at least reasonable to extend this precedent to protect individuals when private entities condition benefits on unreasonable privacy intrusions. However, the *Sheehan* court did not address this corollary. Instead, with little discussion the court disregarded the issue and abruptly held that the unconstitutional-conditions doctrine did not apply to private actors.⁷⁴

The *Sheehan* court's reasoning falls in line with traditional Fourth Amendment analysis, but this bright-line rule suggests at least the possibility of rather alarming ramifications. Since the unconstitutional-conditions doctrine simply does not apply to private entities, theoretically any commercial entity may require its patrons to give up any conceivable privacy right as a condition of doing business. The severity of these intrusions, at least hypothetically, could be limitless.

Of course in reality, the severity of any intrusion will likely be held in check by a market-like bargain that each person will strike between their own personal privacy rights and their need for whatever commercial benefit offered. But one question worth contemplating is whether this simple economic theory should dictate which privacy rights private entities may constitutionally violate. On the outer most bounds, privately owned concert venues or shopping malls could theoretically require a strip search before entry and be perfectly immune from constitutional violations under *Sheehan*. Even if requiring strip searches would be commercial suicide for any private entity, should this matter in the right-of-privacy analysis? Patdowns at NFL games may be a relatively limited intrusion on privacy rights. But the logic supporting the unconstitutional-conditions dismissal in *Sheehan* draws no line regarding the scope or severity of the

⁷³ See *Hill v. Nat'l Collegiate Ath. Ass'n*, 865 P.2d 633, 644 (Cal. 1994) ("[T]he Privacy Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as government entities."); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 1999 (Cal. App. 1989) ("California appellate courts and at least one federal court have consistently held, in varying factual contexts, that article I, section 1, protects against private conduct."); *Porten v. University of San Francisco*, 134 Cal. Rptr. 839, 842 (Cal. App. 1976) ("Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.").

⁷⁴ *Sheehan*, 62 Cal. Rptr. 3d at 810.

intrusion. Consequently, the holding seems to leave more questions than answers.

2. Johnston II: A "License" to Intrude?

Although the *Johnston II* court did not challenge the *Johnston I* court's conclusion that TSA was a public entity, it still found a way to neatly dispose of the unconstitutional-conditions doctrine. According to the *Johnston II* court, by issuing Johnston a ticket, the Buccaneers had merely *licensed* him a spectator's seat at the football game.⁷⁵ Accordingly, Johnston's right to enter the stadium could be revoked "for *any* reason at the Buccaneer's sole discretion, subject only to a refund."⁷⁶

The effect of the *Johnston II* reasoning is to actually move a step further than *Sheehan* and also exclude *public* entities from the unconstitutional-condition doctrine. In other words, if a public entity operates a venue open to the public (such as an NFL stadium, concert hall or convention center), then it may constitutionally condition the right of entry on the surrender of personal privacy rights, merely by characterizing the privilege of entry as a license.

This result raises the exact same questions posed regarding the *Sheehan* decision. Should private and public entities be constitutionally permitted to force individuals to choose between personal privacy rights and whatever benefit is being offered? Under *Sheehan* and *Johnston II* the answer is "yes." This seemingly implies that the market, not the law, should determine which individual privacy rights public and private entities may ask to violate. Without providing any limit as to scope or severity of the permitted intrusion, such an implication is a rather disturbing proposition.

C. Is the NFL Patdown Policy Justified by the "Special-Needs" Exception?

Even if NFL fans are not consenting to the suspicionless patdowns administered before football games, the search may nevertheless survive constitutional scrutiny if it falls into a recognized exception to the Fourth Amendment's probable cause requirement. Two relevant departures from this traditional probable cause requirement in search and seizure cases have emerged in the common law. One is the "stop-and-frisk" exception created by *Terry v. Ohio*.⁷⁷ *Terry* held that, in the

⁷⁵ *Johnston II*, 490 F.3d 820, 824 (11th Cir. 2007).

⁷⁶ *Id.* (emphasis added).

⁷⁷ 392 U.S. 1 (1968).

interests of crime prevention, a police officer may stop and detain a person reasonably suspected of criminal conduct without consent, for the purpose of confirming or dispelling the reasonable belief that criminal conduct is afoot.⁷⁸ If during the detainment, the officer reasonably suspects that the person is armed and dangerous the officer may administer a limited “frisk” for weapons.⁷⁹

The hallmark of the *Terry* “stop-and-frisk” is the requirement of reasonable and particularized suspicion. Although the NFL patdown is essentially a limited search for weapons, the searches at issue are suspicionless and administered to every ticket holder. Thus, they cannot be justified under *Terry*. If the NFL patdowns are constitutionally permissible, regardless of whether NFL fans are consenting to the frisk, it must be under the second relevant departure from the probable cause requirement—the “special-needs” exception.

For years the Supreme Court has approved suspicionless searches under what is presently known as the special-needs exception. This exception applies when society’s interest in conducting the search at issue outweighs the individual’s interest in resisting the intrusion.⁸⁰ If the society’s interest prevails, neither probable cause nor consent is required for the search at issue to be deemed “reasonable,” and the Fourth Amendment’s bar of “unreasonable” searches is not violated. To date, the Supreme Court has found this balance to weigh in favor of society in matters regarding airport and courthouse safety,⁸¹ national border patrol,⁸² fixed road checkpoints for driver verification and sobriety tests,⁸³ supervision of parolees and probationers,⁸⁴ and middle and high school student drug testing.⁸⁵

⁷⁸ *Id.* at 30–31.

⁷⁹ *Id.*

⁸⁰ See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (“[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 624 (1989) (“In limited circumstances, 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 by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.”).

⁸¹ See *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (“Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’—for example, searches now routine in airports and at entrances to courts . . .”).

⁸² See *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973) (holding that vehicle searches of travelers crossing an international boundary may be conducted even if officials do not have any reason to suspect that a given vehicle contains illegal aliens or smuggled objects); *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983) (holding that authorities may board any vessel that is in waters that provide “ready access to the open sea” for inspection of documents without suspicion of wrongdoing).

⁸³ See *Delaware v. Prouse*, 440 U.S. 648 (1979) (stating in dicta that stops of a

In *Johnston II* and *Sheehan*, since both courts held that the plaintiffs had voluntarily consented to the patdown, both courts refused to discuss the merits of the special-needs exception. Assuming *arguendo* that a plaintiff can reach the merits of whether the NFL patdown policy justifies a special-needs exception (perhaps using one of the arguments mentioned in Part III.A), the court would be forced to undertake a constitutional-balancing test to decide if the mass suspicionless search of NFL fans is “reasonable.” Because the NFL patdown policy is primarily designed to deter terrorism, the ensuing special-needs analysis would likely be similar to the analysis that allows mass suspicionless searches at airports.

Interestingly, the Supreme Court has never directly decided an airport suspicionless search case.⁸⁶ Yet it has confirmed, albeit in dictum, the reasonableness of suspicionless searches specifically at airports since, at airports, “the risk to public safety is substantial and real.”⁸⁷ This language was the very standard that the *Johnston I* court applied to its special-needs analysis after concluding (albeit in error according to the Eleventh Circuit) that *Johnston* had not legally consented to the patdown searches.⁸⁸

According to the *Johnston I* court, the risk that terrorism poses to public safety at football stadiums was clearly “substantial.”⁸⁹ However, it did not automatically follow that this meant the threat was also “real.” The court reasoned that, unlike the evidence supporting suspicionless searches at airports, the evidence supporting suspicionless searches at NFL stadiums did not implicate a specific or

predetermined number of vehicles at a fixed checkpoint, if done for the primary purpose of verifying driver and vehicle information, would be constitutional); *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (holding that police may establish fixed checkpoints on highways to test for drunkenness and stop all drivers even though police have no particularized suspicion about any one driver).

⁸⁴ See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (holding that parolees and probationers may be subjected to warrantless searches by the officials responsible for them, without probable cause, provided the search is conducted pursuant to a valid regulation governing the parolee or probationer).

⁸⁵ In *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995), the Supreme Court allowed a public school district to require suspicionless drug tests of every student that wished to participate in an interscholastic sport. In *Bd. of Educ. of Indep. School Dist. No. 92 v. Earls*, 536 U.S. 822 (2002), the Court expanded *Vernonia* to allow random drug-testing of all middle and high school students that sought to participate in any “competitive extracurricular activity,” including band, choir, and clubs such as Academic Team, and Future Homemakers of America.

⁸⁶ Kyle P. Hanson, Note, *Suspicionless Terrorism Checkpoints Since 9/11: Searching for Uniformity*, 56 *DRAKE L. REV.* 171, 180 (2007).

⁸⁷ *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

⁸⁸ *Johnston I*, 442 F. Supp. 2d 1257, 1258 (M.D. Fla. 2006).

⁸⁹ *Id.* at 1266 (reasoning that no one could “seriously dispute” the magnitude of the risk that terrorism posed to public safety in the U.S.).

“concrete danger,” but rather a “generalized threat of terrorism to large gatherings.”⁹⁰ Incidentally, the *Johnston I* court held that the special-needs exception did not permit the NFL to constitutionally intrude on the individual privacy rights of ticket holders by administering patdowns.

There is obviously considerable tension in the special-needs analysis as it applies to the NFL patdown policy. If courts require a specific showing that NFL stadiums are indeed terrorist targets before allowing patdowns, then millions of people otherwise protected could be left vulnerable to acts of terror. Moreover, most ticket holders not only consent to the patdowns, they *welcome* them because it helps ensure a safer environment. But as both *Johnston I* and *Johnston II* recognized, the issue in the NFL patdown cases “is not about the wisdom of . . . [the] pat-down policy, whether the average Buccaneers fan supports or objects to the pat-down searches, or whether a judge believes the pat-downs are wise.”⁹¹ The issue is whether patdown searches at NFL Stadiums violate privacy rights. Comparing the *Johnston I* analysis (which was rejected because of its findings regarding consent and not the special-needs exception) to the Supreme Court case *Chandler v. Miller*, the answer to this question seems to be “yes.” Although terrorism at NFL football games clearly represents a “substantial” threat to public safety, the NFL has not yet presented evidence that this threat is also “real.”

In *Chandler*, the Supreme Court decided the state of Georgia had no special need that justified requiring candidates for public office to submit to drug tests.⁹² According to the Court, “[n]otably lacking in respondents’ presentation [was] any indication of a concrete danger demanding departure from the Fourth Amendment’s main rule.”⁹³ Specifically, the record provided no evidence of drug abuse by elected officials. Instead, the reason advanced for the special-need exception involved the general sentiment that, since public officials were vested with executive authority to make public policy, they should fully appreciate the perils of drug use.⁹⁴ This was insufficient to satisfy the requirement that the threat at issue was “real and not simply hypothetical.”⁹⁵ As support, the Court noted that in *Vernonia School District v. Acton*,⁹⁶ the random drug-testing of high-school

⁹⁰ *Id.*

⁹¹ *Johnston II*, 490 F.3d 820, 824 (11th Cir. 2007) (citing *Johnston I*, 442 F. Supp. 2d at 1258).

⁹² *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

⁹³ *Id.* at 318–19.

⁹⁴ *Id.* at 311.

⁹⁵ *Id.* at 319.

⁹⁶ 515 U.S. 646 (1995).

students engaged in interscholastic athletic competitions was sustained only after a finding that high-school drug use represented an “immediate crisis” caused by “a sharp increase in drug use” in the school district at issue.⁹⁷ In fact, district court findings had established that the student athletes in the school district were not only “among the drug users,” they were “leaders of the drug culture.”⁹⁸

Applying *Chandler* to the NFL patdown policy, it seems that the evidence so far offered by the NFL simply cannot justify a special-needs exception. Although individuals with known ties to terrorist organizations have downloaded images of NFL stadiums from the Internet, the FBI has investigated the incident and determined it presented “not even a perceived or implied threat.”⁹⁹ Moreover, most of the other evidence offered in *Sheehan* and the *Johnston* cases had nothing to do with sporting venues. The NFL pointed to the 2004 bombing of a commuter train in Spain and a government list of tourism sites that were potential terrorist targets. This list included not sporting venues, but mostly historical landmarks such as the Washington Monument and the Statute of Liberty.¹⁰⁰ The only evidence that involved an actual threat to a sporting venue was an arrest of a person with apparent plans to bomb a soccer stadium in Spain.¹⁰¹ But no evidence cited specific threats to sporting venues in the United States. At best, the evidence provided supports a general fear that terrorism could strike in any place where the public gathers. This is insufficient to satisfy the requirement set forth in *Chandler* that the threat at issue be “real and not simply hypothetical.”

Yet this does not imply that the NFL patdown policy can never be justified by the special-needs exception. In fact, concrete evidence that could satisfy *Chandler* may already exist. According to the NFL’s Director of Event Security, certain information was not presented in *Johnston I* because much of the NFL’s intelligence justifying the patdowns was “law-enforcement sensitive.”¹⁰² However, until NFL teams provide information that actually links the general fear of terrorism to something real and not hypothetical, they simply cannot satisfy *Chandler* regardless of whether evidence is “law-enforcement sensitive.” As the *Johnston I* court emphasized, if

⁹⁷ *Chandler*, 520 U.S. at 316 (referring to *Vernonia*, 515 U.S. at 649).

⁹⁸ *Id.*; See also *Samson v. California*, 547 U.S. 843 (2006) (allowing suspicionless searches of parolees after the state provided empirical evidence demonstrating the high rate of recidivism in its parolee population).

⁹⁹ *Johnston I*, 442 F. Supp. 2d 1257, 1258, 1268 (M.D. Fla. 2006).

¹⁰⁰ *Id.* at 1267–68.

¹⁰¹ *Id.*

¹⁰² *Johnston I*, 442 F. Supp. 2d at 1262 n.14.

intelligence supporting the special need exists but is sensitive, the evidence should still be provided to the court *in camera*.¹⁰³

CONCLUSION

Most NFL fans willingly consent to NFL patdowns before entering an NFL stadium. For those who do not, their mere submission to the actual patdown likely qualifies as legal consent since the NFL patdown process is hardly coercive. Although there is some question as to whether public and private actors *should* be permitted to constitutionally condition commercial benefits on the surrender of personal-privacy rights, a court could easily circumvent the unconstitutional-conditions doctrine argument by applying the reasoning in *Sheehan* or *Johnston II*. Under *Sheehan*, the unconstitutional-conditions doctrine has no relevance if the NFL stadium is privately owned and operated. Under *Johnston II*, if the ticket is viewed as a license, then even publicly owned and operated stadiums may constitutionally attach conditions of entry.

The only NFL ticket holders that are seemingly not consenting to the patdowns are those that purchase season tickets and subsequently file suit challenging the patdowns without ever attending any NFL games. Although the *Sheehan* majority disagreed, the mere act of purchasing a ticket should not automatically imply that a fan is consenting to a subsequent patdown, even if that fan is aware of the NFL patdown policy. The fan could simply be preserving his seniority over other season-ticket holders. If a court accepts this argument, then it would likely address whether the NFL patdown policy is nonetheless constitutionally justified by the special-needs exception to the Fourth Amendment's probable cause requirement.

In light of the *Johnston I* analysis, a plaintiff has a strong likelihood of prevailing unless the NFL is prepared to cite specific evidence that suggests United States sporting venues are potential terrorist targets. This would satisfy the requirement under *Chandler* that the threat to public safety be not only "substantial" but also "real." However, if the NFL presents only the evidence it has presented thus far, the fear of terrorism at NFL stadiums seems to be nothing more than a general fear that terrorism could strike at any time in any place where the public gathers. Consequently, the NFL patdown policy would likely not satisfy the special-needs exception and, therefore, be unconstitutional under the Fourth Amendment.

¹⁰³ *Id.* ("[If the] NFL relied on sensitive law enforcement evidence demonstrating a 'substantial and real' threat to NFL games in addition to what was presented, it was incumbent upon the TSA to present that evidence, perhaps *in camera*.")

Requiring the NFL to demonstrate that a real and concrete threat of terror exists at U.S. sporting venues in order to satisfy the special-needs exception is the right result. If mere generalized threats of potential harm satisfied the special-needs exception, then it seems there would be no stopping an increase of mass suspicionless searches in the name of terror. Not long ago, Justice Scalia warned in *California v. Acevedo* that Fourth-Amendment privacy rights were slowly disappearing.

Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable. . . . Our intricate body of law regarding "reasonable expectation of privacy" has been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment "search" and therefore not subject to the general warrant requirement.¹⁰⁴

This trend is no doubt continuing. At first glance, NFL patdowns seem minor and utterly non-intrusive. Most of us even *want* the patdowns at NFL stadiums because they offer us more protection. But allowing one minor privacy intrusion creates precedent that may support another not so minor intrusion. Thus, before we slowly migrate through stadium-security checkpoints without a hint of protest, perhaps we should turn around once in a while to see how far we have come.

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¹⁰⁴ Cal. v. Acevedo, 500 U.S. 565, 582-83 (1991) (SCALIA, J., concurring in judgment).

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