“The Lady of the House” vs. a Man with a Gun: Applying Kyllo to Gun-Scanning Technology

Sean K. Driscoll

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“The Lady of the House” vs. a Man with a Gun: Applying Kyllo to Gun-Scanning Technology

Cover Page Footnote
J.D., 2013, Harvard Law School; B.A., 2004, University of Virginia; Police Officer, New York City Police Department (NYPD), 2006–2010. The author wishes to thank Emily Dempsey, Michael Klarman, and Jeannie Suk for very helpful comments on an earlier draft. The author also thanks the Catholic University Law Review for superb editing.
“THE LADY OF THE HOUSE” VS. A MAN WITH A GUN: APPLYING KYLLO TO GUN-SCANNING TECHNOLOGY

Sean K. Driscoll

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In Kyllo v. United States, Justice Antonin Scalia cautioned that without proper Fourth Amendment restraints, police officers’ use of modern surveillance technology would end the privacy of the home, exposing intimate details, such as “at what hour each night the lady of the house takes her daily sauna and bath.”1 Based on these privacy concerns, Kyllo held that police could not use “sense-enhancing technology” to obtain “information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’” at least if the technology “is not in general public use.”2

2. Id. at 34 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).
Although *Kyllo* clearly applies to the home—"‘the very core’ of the Fourth Amendment"—it remains unclear how far this rule extends. Does *Kyllo* also apply to scanning devices located on public streets? Would the Court have the same reaction if police were interested in finding not "the lady of the house" but rather persons carrying illegal guns?

The problem of illegal firearms is far more serious than Justice Scalia’s bathtub hypothetical. In 2010, 67.5% of homicides were committed using firearms in the United States. The total cost of gun violence, including medical care, policing, prisons, and social services reaches a staggering $100 billion annually. In response, police departments nationwide have taken aggressive steps to combat illegal guns by increasing their use of stop, question, and frisk tactics. These practices have raised a new set of concerns. In 2011, the New York City Police Department (NYPD) stopped 694,660 individuals—approximately 8.5% of the city’s entire 8.2 million population. Of those stopped, 86.7% were African American or Hispanic. The sheer number of stops, combined with the racial imbalance, ignited numerous protests from New York City communities and their elected officials.

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3. *Id.* at 31 (quoting Silverman, 365 U.S. at 511).


7. *Id.* at B-1.

8. *Id.* In the 2010 Census, 51.4% of New York City’s total population was identified as African American or Hispanic. *Id.* In addition, some Caucasian residents in gentrifying neighborhoods of the city, such as Williamsburg, have complained about excessive police stops, claiming that the practice discriminates based on class, not race. See Simone Weichselbaum, *Young White Men in Williamsburg, Brooklyn, Say They’re Targets of NYPD’s Stop & Frisk Tactics, Too*, N.Y. TIMES (Mar. 24, 2012, 10:20 PM), http://articles.nydailynews.com/2012-03-24/news/31235095_1_frisk-targets-white-guys-23rd-precinct (providing a Williamsburg resident’s belief that he was stereotyped).

The problem that the NYPD asserts it is addressing is also startling in its magnitude and racial disparity: 489 people were murdered in New York City in 2011, 88.1% of whom were African American or Hispanic. Similarly, in 2011, 96% of the 1,821 shooting victims in New York City and 96.4% of shooting assailants were identified as African American or Hispanic.

But what if there was a better way to do stop, question, and frisk? What if the police could obtain identical benefits without exposing thousands of citizens to the fear and resentment of being frisked, while also reducing danger for officers? Regardless of one’s opinion of the efficacy of stop-and-frisks, police and citizens alike can agree that fewer stops would be better, provided there was an equally, if not more, effective way to remove illegal guns and reduce crime.

Cutting edge technology may provide an answer. The NYPD believes that “gun scanners” now in development are one such solution. The NYPD is currently testing prototype devices that use passive imaging technology to detect the outline of weapons underneath individuals’ clothing, without revealing any anatomical details. These “gun scanners” could operate from up to eighty feet away, allowing officers to see from a safe distance whether a person is carrying a weapon, without the danger and inconvenience of a Terry stop.

2010), http://www.aclu.org/blog/racial-justice/new-york-be-black-or-latino-be-stopped-be-frisked (noting the sheer number of stops).

10. N.Y.C. POLICE DEP’T, supra note 6, at 1. Homicide statistics include both murder and non-negligent manslaughter. Id.

11. Id. at 11.


15. Id.
This technology, however, raises a new set of troubling questions. Are gun scanners a panacea for law enforcement to address illegal gun violence while reducing resentment over stop, question, and frisk practices? Or do gun scanners foreshadow an “Orwellian world,”\textsuperscript{16} where each technological advance is another step backward for privacy rights?

Commentators have previously addressed these questions in a theoretical context, when gun scanners were mere possibilities.\textsuperscript{17} However, now that the NYPD is actively testing prototypes, this Article re-evaluates the constitutionality of gun scanners. This Article approaches the issue in light of the Supreme Court’s \textit{Kyllo} jurisprudence on technology and the Fourth Amendment and the Court’s recent decision in \textit{United States v. Jones}.\textsuperscript{18} Additionally, this Article compares gun scanners to portable radiation detectors—already in widespread use by police departments—to highlight shortcomings in the Court’s rule in \textit{Kyllo} and to advocate for a new doctrine.

Part I of this Article discusses how gun scanners and radiation detectors function and what information police are able to see when using these devices. Part II examines relevant Supreme Court precedent, including decisions pertaining to the use of technology by the police and the permissibility of suspicionless checkpoint searches. Part III applies the current doctrine to gun scanners to determine whether they might be constitutionally permissible in various situations. Finally, Part IV compares the legality of gun scanners to radiation detectors—showing some uncomfortable contradictions—and highlighting the need for a new, coherent rule that can adapt sensibly to ever-advancing law enforcement technology.

\section*{I. The Technology}

Law enforcement agencies have always searched for a technological edge in combating crime and improving officer safety. From fingerprints to DNA testing to bullet-resistant vests, police departments’ demands for safety and investigative tools drive innovation in the field. New technology, however, often generates new constitutional questions.\textsuperscript{19}

\footnotesize
\begin{itemize}
\item \textsuperscript{17} See Jon S. Vernick et al., \textit{Technologies to Detect Concealed Weapons: Fourth Amendment Limits on a New Public Health and Law Enforcement Tool}, 31 J.L. MED. & ETHICS 567, 571 (2003) (providing a theoretical overview of gun scanners from a time when no devices were in production and offering a public health perspective on the costs of gun violence).
\item \textsuperscript{18} United States v. Jones, 132 S. Ct. 945, 949 (2012) (holding that the attachment of GPS tracking devices to a suspect’s vehicle without a validly executed warrant is an unconstitutional search).
\end{itemize}
A. Gun Scanners

On January 17, 2012, NYPD Police Commissioner Raymond Kelly announced that the NYPD was developing gun-scanning technology in conjunction with the U.S. Department of Defense. The NYPD gun scanners, developed in partnership with the Pentagon’s Combating Terrorism Technical Support Office (CTTSO), use “Terahertz Imaging Detection” to screen for weapons. The prototype scanner employs passive imaging technology to allow officers to see the outline of weapons concealed underneath a person’s clothing, without revealing other anatomical details.

Specifically, all persons and objects emit electromagnetic radiation (similar to thermal radiation) in the terahertz range. These emissions are particularly useful for security purposes because the rays pass through clothing but not through metal. The gun scanners detect differences in terahertz radiation emissions, producing an image that shows the outline of any concealed weapons on a suspect’s body. This imaging is accomplished passively,
without subjecting individuals to additional radiation, unlike the airport
security scanning machines operated by the Transportation Security
Administration (TSA).27

The NYPD is currently testing prototype gun scanners28 at its firearms and
tactics training facility.29 Presently, the devices are only effective from three
to four meters away, but the NYPD expects future versions to function at a
distance of twenty-five meters, allowing them to be mounted on NYPD patrol
vehicles.30 Additionally, the devices are bulky (about the size of a desktop
computer) with a separate monitor for viewing images; the NYPD anticipates
that future models will be reduced in size.31

While stressing the need to reduce the presence of illegal guns,
Commissioner Kelly has stated unequivocally that officers would only use gun
scanners in “reasonably suspicious circumstances” and not for blanket public
scans.32 Civil liberties advocates have had mixed reactions to the NYPD’s
announcement, stressing the benefits of reduced police stops while also
worrying about privacy loss.33 Donna Lieberman, Executive Director the New
York Civil Liberties Union, stated:

able to identify the specific molecular signature of materials in firearms, without the need to
contrast it with the natural terahertz radiation emanating from human bodies. Id.

27. AIT: How It Works, TRANSP. SEC. ADMIN., http://www.tsa.gov/ait-how-it-works (last
visited Mar. 10, 2013). The TSA employs two types of imaging technologies: millimeter wave
detection and backscatter x-ray. Id. Unlike passive terahertz imaging, both devices expose
passengers to low levels (considered harmless) of electromagnetic radiation or x-rays. Id.
Additionally, the TSA scanning devices reveal anatomical details of passengers. Id. When
initially implemented, these machines were the subject of considerable public disapproval and
fear. See, e.g., Deborah Kotz, Radiation Experts Concerned with TSA Airport Security Scanners,
U.S. NEWS & WORLD REP. (Nov. 18, 2010), http://health.usnews.com/health-news/family
(expressing privacy and radiation exposure concerns).

28. The NYPD did not announce which company was designing its gun scanners; however,
ThruVision, a British company, has already deployed stationary terahertz imaging devices in the
United Kingdom and Dubai. Camera ‘Looks’ Through Clothing, BBC NEWS (Mar. 10, 2008),
http://news.bbc.co.uk/2/hi/technology/7287135.stm. ThruVision claims that its passive terahertz
devices can detect weapons from up to ten meters away. TS4 Overview, supra note 24.

29. Keith Wagstaff, Police Developing Tech to Virtually Frisk People from 82 Feet Away,
TIME (Jan. 20, 2012), http://techland.time.com/2012/01/20/police-developing-tech-to-virtually-
-frisk-people-from-82-feet-away.

30. Jamie Schram, NYPD Developing New Device to Detect Guns Carried by Criminals,
_new_device_to_detect_HpGz6WUXC9Ji7qaiufCnkN (stating that, although the devices
currently only work at short distances, the NYPD hopes that they will eventually operate at much
greater distances).

31. Jamie Schram & Bill Sanderson, NYPD New ‘Wave’ of Friskless Search, N.Y. POST
_friskless_search_6w45z56yElmCnXWZiNjtN.

32. Civil Liberties Groups up in Arms, supra note 22.

33. Wagstaff, supra note 29 (discussing the costs and benefits of gun-scanning technology).
We find this proposal both intriguing and worrisome. On the one hand, if technology like this worked as it was billed, New York City should see its stop-and-frisk rate drop by a half-million people a year. On the other hand, the ability to walk down the street free from a virtual police pat-down is a matter of privacy. However, because the technology is still being tested, it is too early to assume that police officers’ use of the technology will infringe on individuals’ privacy rights.

B. Radiation Detectors

In the aftermath of the September 11, 2001 terrorist attacks, one of the most persistent fears has been the threat of nuclear terrorism using either an improvised nuclear device (IND) or a radiological dispersal device (“RDD” or “dirty bomb”). Given the devastating potential from nuclear attacks, law enforcement agencies have developed counter-measures to detect radioactive materials.

Unsurprisingly, New York City has been at the forefront of deploying technology to detect nuclear devices, due in large part to funding from the Department of Homeland Security’s (DHS) Securing the Cities initiative (STC). Although some of this technology is stationed at fixed points for special events, such as the U.S. Open tennis tournament or New Year’s Eve in

34. Id.
35. Id.
36. Planning Guidance for Protection and Recovery Following Radiological Dispersal Device and Improvised Nuclear Device Incidents, 73 Fed. Reg. 45,029, 45,029–48 (Aug. 1, 2008). The Department of Homeland Security (DHS) defines an IND as: “[A]n illicit nuclear weapon bought, stolen, or otherwise originating from a nuclear State, or a weapon fabricated by a terrorist group from illegally obtained fissile nuclear weapons material that produces a nuclear explosion.” Id. at 45,031. RDDs include any “device that causes the purposeful dissemination of radioactive material, across an area with the intent to cause harm, without a nuclear detonation occurring.” Id. at 45,048.
Times Square,\textsuperscript{39} the NYPD has thousands of small, portable radiation detectors deployed with officers across New York City every day. According to one NYPD commander, these “smart phone-size radiation detectors” are “the new normal” for addressing the threat of nuclear terrorism.\textsuperscript{40}

Currently, over 2,000 such “Personal Radiation Detectors” (PRDs)\textsuperscript{41} are deployed by the NYPD.\textsuperscript{42} The units resemble a beeper and are small enough to attach to a police officer’s belt.\textsuperscript{43} PRDs function by detecting gamma radiation—electromagnetic energy that radioactive substances emit constantly.\textsuperscript{44} If a PRD detects gamma radiation, it vibrates and emits an audible alarm to alert the officer.\textsuperscript{45} The device also has a digital readout to indicate the strength of the gamma radiation source.\textsuperscript{46} Currently, the device only alerts the officer carrying it, but, in the near future, the NYPD will be able to use wireless transmission devices to send all PRD alarms to a central command facility.\textsuperscript{47}


\textsuperscript{40} NYC Subway’s Anti-Terror Steps the New Normal, CBS NEWS (July 18, 2011), http://www.cbsnews.com/2100-201_162-20080279.html (quoting Inspector Scott Shanley of the NYPD’s Counterterrorism Division).


\textsuperscript{43} Id.


\textsuperscript{45} See RadEye PRD, supra note 41 (describing the device in detail).

\textsuperscript{46} Id.; Radeye Selection Guide, supra note 44 (stating that the PRD can measure gamma radiation in a variety of units, including rem per hour, sieverts per hour, Roentgens per hour, and counts per second (CPS)).

Although the PRDs are accurate in detecting gamma radiation, the device cannot discern specific materials. This is problematic because some common materials, like granite, emit harmless but still detectable levels of radiation. Even if the PRDs correctly identify a source of radiation coming from a person, some materials that contain potentially dangerous radioactive materials also have legitimate civilian uses, such as Troxler gauges for measuring soil density. The most problematic false alarms, however, come from individuals who have undergone certain medical diagnostic tests or cancer treatments that use radioactive materials. Because some law enforcement agencies have had embarrassing mishaps in dealing with these patients, the NYPD has alerted its personnel to the potential for false alarms from “medicinal sources.” Nevertheless, patients who are stopped must still explain the reason for the radiation, potentially requiring them to reveal very personal medical information to the police.

II. THE LAW

The critical Fourth Amendment questions for analyzing the permissibility of gun scanners are whether they constitute a “search,” and if so, whether a

52. See Kalyan Kumar Gangopadhyay et al., Triggering Radiation Alarms After Radioidine Treatment, 333 BRITISH MED. J. 293, 293–94 (2006), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1526947 (recounting the story of a forty-six-year-old man who set off radiation detectors at Orlando Airport and was subsequently strip-searched by the TSA because of a radioiodine diagnostic test he had undergone six weeks earlier).
54. See Keeping “Hot” Patients Cool During Holiday Travel, CARDINALHEALTH (November 2009), http://nps.cardinal.com/nps/thelink/issues/11192009.asp (recounting examples of medical patients stopped by security personnel because of their radiation levels).
warrantless search is “unreasonable” under the Constitution.\textsuperscript{55} Although the Court’s Fourth Amendment jurisprudence has wavered in its insistence for police to obtain search warrants,\textsuperscript{56} some areas in the law of searches are well defined.

\textbf{A. Arrests & Terry Stops}

Arrests and Terry stops are the most basic forms of police conduct during which a warrantless search may be deemed constitutional. Generally, as long as the arrest or stop is valid, a warrantless search for weapons will be permissible.\textsuperscript{57} During an arrest, if the police have probable cause that an individual has committed an offense, a “subsequent search . . . having been made incident to that lawful arrest [is] likewise valid.”\textsuperscript{58} Under the search “incident to a lawful arrest” exception,\textsuperscript{59} the police may frisk and search an individual for weapons, go through his or her pockets and belongings,\textsuperscript{60} and even take the clothes on the individual’s back as evidence of a crime without any particularized suspicion or warrant.\textsuperscript{61} In sum, the constitutionality of the search hinges entirely on the validity of the arrest.\textsuperscript{62}

With regard to Terry stops, the allowable police intrusion is more circumscribed than during an arrest, authorizing only a “carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault [the police officer].”\textsuperscript{63} This brief stop requires only that the

\footnotesize{\textsuperscript{55} U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); see also Kyllo v. United States, 533 U.S. 27, 31 (2001) (describing the typical Fourth Amendment analysis).


57. See infra notes 58–66 and accompanying text.


59. United States v. Robinson, 414 U.S. 218, 224 (1973) (“It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.”).

60. See, e.g., Illinois v. Lafayette, 462 U.S. 640, 641–42, 648 (1983) (upholding a search in which an arrested person was ordered to empty his pockets).


62. Robinson, 414 U.S. at 235 (reasoning that a lawful arrest, by itself, authorizes a search). There may, however, be some limits to highly intrusive searches, such as strip searches, in the case of a non-indictable arrest. See Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1522–23 (2012) (requiring reasonable suspicion for strip searches in non-indictable arrests).

63. Terry v. Ohio, 392 U.S. 1, 30 (1968) (permitting police officers to stop and temporarily detain individuals based on reasonable suspicion of criminality and subsequently frisk those}
officer “observe[] unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity is afoot.” However, Terry did not authorize “general exploratory search[es]” during such stops. Id.

64. Id.


66. Terry, 392 U.S. at 30–31 (upholding properly performed frisks as constitutional under the Fourth Amendment).

67. See Kyllo v. United States, 533 U.S. 27, 31 (2001) (calling the “antecedent” question of the Fourth Amendment whether or not a search occurred).


70. See Payton, 445 U.S. at 583 (describing emergency and dangerous situations as “exigent circumstances”).

71. Smith v. Maryland, 442 U.S. 735, 742 (1979) (holding that the police may, without a warrant, obtain records of telephone numbers dialed because the individuals knew that they were relaying this information to the telephone company, a third party).

72. Compare California v. Ciraolo, 476 U.S. 207, 213 (1986) (finding that a police helicopter flying in a public airway that discovers marijuana in defendant’s backyard does not constitute a “search”), with United States v. Knotts, 460 U.S. 276, 281, 284–85 (1983) (finding that the warrantless monitoring of an individual’s movements by a beeper was not a “search” because a person does not have a reasonable expectation of privacy in his or her movements on public thoroughfares), and Katz v. United States, 389 U.S. 347, 353 (1967) (holding that the government listening to a defendant’s phone conversation inside a telephone booth was a “search” because it violated his legitimate expectation of privacy).
sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical `intrusion into a constitutionally protected area,' constitutes a search—at least where (as here) the technology in question is not in general public use.” 73 Justice Scalia, writing for the majority, concluded that police surveillance using such enhanced imaging technology is a search and is “presumptively unreasonable without a warrant.” 74 Applying this rule to a thermal scan of the outside of a marijuana grower’s home, the Court found that the police’s actions violated the Fourth Amendment. 75

It remains unclear whether the Kyllo rule is limited to the home or whether it applies in all “core” Fourth Amendment areas, including searches of one’s person. No Supreme Court cases since Kyllo have reached this question. Although Kyllo focuses on the special constitutional protections owed to the home, 76 three considerations make it likely that Kyllo’s rule is also good law for searches of a person. 77 First, in previous cases, the Court has stated that “the security of one’s privacy against arbitrary intrusion by the police” is, like one’s home, “at the core of the Fourth Amendment.” 78 Second, the majority’s rationale in Kyllo relies heavily on the text of the Fourth Amendment and its original meaning with regard to its intended degree of privacy protection. 79 Like one’s home, security of one’s “person” is explicitly protected by the text of the Fourth Amendment. 80 Third, even the Kyllo dissent, although disagreeing with the majority’s conclusion, believed that it would be foolish to limit Kyllo’s rule to the home. 81

The determination of whether a “search” occurred in Kyllo is simply a technology-specific application of the Court’s general Fourth Amendment search test from Katz v. United States: did the person “exhibit[] an actual

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74. Id. at 40.
75. Id. at 40–41. The police’s thermal scan revealed only relative differences in hot and cold areas of the house and could not create images of people inside of the home. Id. at 41, 49 (Stevens, J., dissenting). A reproduction of the image of the defendant’s house is included in the Appendix of the decision.52; see also FLIR T-Series Infrared Cameras, FLIR, http://www.flir.com/thermography/americas/us/products/tseries/gallery (select second photo from the right) (last visited Mar. 10, 2013) (providing a sample thermal image from the company that manufactured the camera used in Kyllo).
76. Kyllo, 533 U.S. at 40 (“We have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’” (quoting Payton v. New York, 445 U.S. 573, 590 (1980))).
77. See infra text accompanying notes 78–81.
79. Kyllo, 533 U.S. at 34.
80. U.S. CONST. amend. IV.
81. Kyllo, 533 U.S. at 48–49 (Stevens, J., dissenting) (“Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to the home.”).
(subjective) expectation of privacy,” and was that expectation “one that society is prepared to recognize as ‘reasonable’?”\textsuperscript{82} Although the majority in \textit{Kyllo} cites, but does not explicitly apply, the \textit{Katz} test,\textsuperscript{83} the dissent concludes that even if police use of the thermal-imaging scanner constituted a search, society does not recognize an interest in protecting the privacy of heat emitting from one’s home.\textsuperscript{84} Therefore, \textit{Kyllo} is also important for what it reveals about the Justices’ attitudes concerning the workability of the \textit{Katz} test.\textsuperscript{85} Notably, in 2012, a majority of the Court joined Justice Scalia in \textit{United States v. Jones}, a case that explicitly disclaimed reliance on \textit{Katz} in ruling that police installation of GPS tracker devices without a properly executed warrant violated the Fourth Amendment.\textsuperscript{86}

The application of the \textit{Katz} analysis to Fourth Amendment cases is controversial,\textsuperscript{87} even among the Justices. The dissenters in \textit{Kyllo} raised several objections to the majority’s rule and proposed a holding that would only restrict “sense-enhancing technology” if “it provides its user with the functional equivalent of actual presence in the area being searched.”\textsuperscript{88} As long

\textsuperscript{82} Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In \textit{Katz}, the FBI recorded the defendant’s conversations about illegal gambling in a public phone booth, which the prosecutors introduced as evidence at trial. \textit{Id.} at 348. On appeal, the Court reframed its Fourth Amendment analysis, deciding the case not on the question of whether a phone booth was a “constitutionally protected area,” but on whether a person had a “reasonable” expectation of privacy in a closed phone booth. \textit{Id.} at 350, 352. This flexible test, as articulated in Justice John Marshall Harlan’s concurrence, is the cornerstone of the Court’s modern Fourth Amendment search and seizure jurisprudence. See David A. Skalansky, \textit{Back to the Future: Kyllo, Katz, and Common Law}, 72 MISS. L.J. 143, 157 (2002) (discussing the “lasting effects” of Justice Harlan’s concurrence on the law of search and seizure).

\textsuperscript{83} Kyllo, 533 U.S. at 34.

\textsuperscript{84} Id. at 43–44 (Stevens, J., dissenting) (arguing that a subjective expectation of privacy in heat emanating from one’s home is “implausible” and “unreasonable”).

\textsuperscript{85} See Richard H. Seamon, \textit{Kyllo v. United States and the Partial Ascendance of Justice Scalia’s Fourth Amendment}, 79 WASHT. U. L.Q. 1013, 1015 (2001) (arguing that “\textit{Kyllo} shows that a majority of the Court shares Justice Scalia’s doubt about the usefulness of the \textit{Katz} test”).

\textsuperscript{86} United States v. Jones, 132 S. Ct. 945, 950 (2012) (“[The defendant’s] Fourth Amendment rights do not rise or fall with the \textit{Katz} formulation.”). However, \textit{Jones} did not claim to overrule \textit{Katz}; rather, the majority relied on the theory that attaching the GPS device constituted a trespass and, because the government was also looking for information, was therefore a search. \textit{Id.} at 951, 954 (noting that future cases may have to “resort” to the \textit{Katz} analysis).


\textsuperscript{88} Kyllo, 533 U.S. at 47 (Stevens, J., dissenting). Given the composition of the majority in \textit{Kyllo} and subsequent changes in the Court’s membership, the dissenters’ rationale may prevail in any future case challenging gun scanners or radiation detectors. \textit{Kyllo}, 533 U.S. at 29. Justice Antonin Scalia authored the majority opinion in \textit{Kyllo}, joined by Justices David Souter, Clarence
as the technology does not give the police the equivalent experience of being inside a protected space, then “public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions.” The dissenters asserted that detecting such “hazards to the community” was an “entirely reasonable public service.”

Furthermore, the dissent pointed out a logical flaw in the Kyllo majority’s rule for permissible law enforcement technology: it contradicts the Court’s decision in United States v. Place, which held that a narcotics dog’s sniff was not a search under the Fourth Amendment because it “discloses only the presence or absence of narcotics.” Under this logic, the dissent concluded, “it must follow that sense-enhancing equipment that identifies nothing but illegal activity is not a search either.” Yet, under the majority’s holding, a drug-detection machine would be unconstitutional—unless somehow in “general use”—while a drug-sniffing dog would remain permissible. The dissent expressed concern that the breadth of the Court’s holding in Kyllo would bar new detection devices that are limited in the same way as dog sniffs and could otherwise be deemed constitutional.

Thomas, Ruth Bader Ginsberg, and Stephen Breyer. Id. Justice John Paul Stevens dissented, joined by Chief Justice William H. Rehnquist and Justices Sandra Day O’Connor and Anthony Kennedy. Id. Interestingly, the lineup in the Court’s recent decision in Jones defied expectations, with Justice Samuel Alito, joined by Justices Ginsberg, Breyer, and Elena Kagan, concurring in judgment and strongly endorsing the Katz test. Jones, 132 S. Ct. at 957–58 (Alito, J., concurring) (arguing that the majority’s trespass-based approach counters current Fourth Amendment jurisprudence and instead favoring an expectation of privacy approach).

89. Kyllo, 533 U.S. at 45 (Stevens, J., dissenting).
90. Id. Kyllo was decided on June 11, 2001, three months before the 9/11 terrorist attacks. Since then, the Court has shown considerable deference to national security considerations. See, e.g., Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (upholding statutes broadly banning “material support” of terrorism against a First Amendment challenge). It is unclear whether the Court would be as deferential in the context of the Fourth Amendment, especially for radiation-scanning devices, even in the face of national security considerations.
91. Kyllo, 533 U.S. at 47–48 (Stevens, J., dissenting) (quoting United States v. Place, 462 U.S. 696, 707 (1983)); see also United States v. Jacobsen, 466 U.S. 109, 124 (1984) (“Here, as in Place, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.”). But see infra notes 190–92 and accompanying text (describing the Court’s recent holdings involving narcotics dog sniffs, including Justice Scalia’s majority opinion in Florida v. Jardines, which held that a trespass occurred when law enforcement brought a drug-sniffing dog onto the front porch of a home, which police suspected housed a marijuana-growing operation, and the unanimous decision in Florida v. Harris, which held that a canine sniff of a car during a traffic stop did not violate the Fourth Amendment and also provided probable cause for a subsequent search of the vehicle for narcotics).
92. Id.
93. See id. (noting that the category of sense-enhancing technology was extremely broad).
94. Id. at 48 (“Nevertheless, the use of such a device would be unconstitutional under the Court’s rule, as would the use of other new devices that might detect the odor of deadly bacteria or chemicals for making a new type of high explosive, even if the devices (like the dog sniffs) are
C. Checkpoints and the “Special Needs” Doctrine

In certain limited cases, the Court has authorized temporary seizures by the police, without a requirement for a search warrant or reasonable suspicion. In 1979, the Court noted in Brown v. Texas, albeit in dicta, that the Fourth Amendment allows for seizures “carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.”95 Three years before Brown, in United States v. Martinez-Fuerte, the Court upheld internal checkpoints for illegal immigrants on California and Texas highways located at least sixty miles from the Mexican border, as long as the checkpoints were “routinely conducted.”96

Eleven years after Brown, the Court expansively applied the Brown “neutral limitations” rule to uphold police sobriety checkpoints in Michigan Department of State Police v. Sitz.97 Citing the “slight” inconvenience of a police checkpoint and a checkpoint’s effectiveness at reducing the number of intoxicated drivers, the Court upheld the sobriety checkpoints against a Fourth Amendment challenge.98 Notably, Sitz found that the “fear and surprise” generated by a checkpoint search was less than that of a random stop—a key factor in the Court’s determination.99

In City of Indianapolis v. Edmond, however, the Court restricted the use of checkpoints, reining in the reach of Sitz by invoking the special needs doctrine.100 Although Sitz cited the special needs doctrine and proceeded to ignore it, Edmond approvingly cited cases allowing suspicionless searches only where the government could claim “special needs, beyond the normal need for

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96. Martinez-Fuerte, 428 U.S. at 566 (“[W]e hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant.”). However, Martinez-Fuerte cautioned that “our holding today is limited to the type of stops described in this opinion.” Id. at 567.
98. Id. at 451, 455 (“In sum, the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program.”).
99. Id. at 452–53.
Based on the revived special needs doctrine, the Edmond Court held that checkpoints for narcotics violated the Fourth Amendment. The Court distinguished its prior cases based on three factors. First, checkpoints may not be used “to detect evidence of ordinary criminal wrongdoing” or serve the “general interest in crime control.” Second, the threat that law enforcement is responding to must pose an “immediate hazard” and have an “obvious connection . . . [to] the law enforcement practice at issue.” Finally, the “gravity” of the problem the government is trying to address “weighed heavily” in the Court’s constitutional analysis.

Understandably, the majority in Edmond was concerned with line drawing. Without a clear limiting principle, the Court feared that “there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose.” Although the Edmond Court ruled out narcotics interdiction as a sufficient justification for a checkpoint, it did not per se foreclose other possible uses, if the justification met the three aforementioned criteria.

Since Edmond, the Court has slightly relaxed its view of checkpoints, perhaps indicating a warming to their other potential uses. In Illinois v. Lidster, the Court upheld the constitutionality of a police checkpoint that stopped motorists to ask about a fatal hit-and-run accident that occurred one week earlier. Rejecting an “Edmond-type rule of automatic unconstitutionality,” the Court cited the three-part balancing test articulated in Brown v. Texas. The Court held that that constitutionality of a checkpoint depends on “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”

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101. See Edmond, 531 U.S. at 37 (listing cases applying the special needs doctrine); see also Sitz, 496 U.S. at 450 (refusing to apply the special needs doctrine).
103. See infra text accompanying notes 104–06.
104. Edmond, 531 U.S. at 38, 41 (internal citations omitted).
105. Id. at 39 (asserting that drunk-driving checkpoints constitute protection against an “immediate” threat).
106. Id.
107. Id. at 42.
108. Id. at 44 (finding narcotics checkpoints indistinguishable from generalized crime control).
110. Id. at 421–23.
111. Id. at 424.
112. Id. at 426–27.
113. Id. at 427 (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).
III. PERMISSIBLE USES OF GUN SCANNERS?

Applying the patchwork of Fourth Amendment doctrine to a new case has proven difficult, even for the Supreme Court. Justice Scalia has said that he “just hate[s] Fourth Amendment cases” because their fact-specific nature inevitably leads to “variation 3,542” on the doctrine of unreasonable searches and seizures. Presuming, however, that the NYPD and DOD develop a deployable gun scanner, the constitutionality of this technology will be immediately challenged, with near-certain review by the Supreme Court. This Part applies the Court’s current Fourth Amendment doctrine, as outlined above, and examines several legal arguments to determine when, if ever, police may constitutionally use gun scanners. Part IV offers a unique argument for a new, clearer rule that would allow police use of gun scanners in limited circumstances while adequately protecting privacy.

A. Post-Arrest and Terry Stop Weapons Searches

The constitutional authorization for police to search an individual for weapons after an arrest or during a Terry stop is clearly defined. Thus, police use of gun scanners to detect weapons on an individual who is lawfully arrested or stopped is unobjectionable because these practices would “simply substitute a gun scan for an already legally permissible physical search.” Indeed, because the NYPD gun scanners in development use entirely passive technology and do not reveal anatomical details, they would be far less intrusive than a traditional Terry frisk. So long as the police possess the requisite probable cause to arrest or reasonable suspicion that an individual possesses a weapon to conduct a stop, replacing a frisk with a gun scanner should not raise Fourth Amendment concerns.

In the case of Terry stops, police could conduct a “virtual” Terry stop rather than physically stopping an individual. After learning information about an individual that would create reasonable suspicion, police officers could scan that person for weapons from a safe distance. Under this scenario, the


116. Vernick et al., supra note 17, at 567 (noting also that consent searches and “fixed administrative searches at high-risk places such as entrances to airports or public buildings” would be constitutionally unassailable).

117. See Baker, supra note 14 (noting that NYPD gun scanners only detect objects that block the scanner’s rays).

118. Other constitutional issues, such as Due Process and evidentiary claims about the reliability of the technology, may be relevant but are beyond the scope of this Article. See, e.g., FED. R. EVID. 702 (expert witness testimony); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (outlining rules for the admissibility of scientific evidence).
individual would not have to interact with the police, and officers would face less danger. The “virtual” Terry stop could produce a major improvement in community relations by replacing physically confrontational stop-and-frisks with scans from a passing police vehicle, resulting in nearly 700,000 fewer such “stops” in New York City alone.119 Admittedly, the ease of scanning that this technology provides could allow the police to perform more Terry stops overall—albeit virtually. Nevertheless, the actual number of physical street confrontations with the police would plummet.

Doctrinally, this conclusion seems unobjectionable. But, in practice, the use of gun scanners during arrests and Terry stops could pose serious questions about police credibility—raising the dreaded specter of “testilying,”120 in a whole new context. Dishonest police officers could claim that they used a gun scanner after developing an independent basis of probable cause or reasonable suspicion to arrest or stop someone, when, in actuality, they used the gun scanner before any existence of probable cause or reasonable suspicion.121 For arrests on an existing indictment or complaint, or based on witness identification, the likelihood of lying about gun scanner use would be minimal to non-existent.122 On the other hand, for “pick-up” arrests, which often occur after a Terry stop, only the officer operating the device and perhaps his or her partner would know if reasonable suspicion existed to stop the individual

119. Legally speaking, an officer using a gun scanner would have virtually stopped and frisked an individual. But, in terms of the public’s perception, there would be no recognition that a “stop” had occurred. This outcome may be worrisome to some, but gun scanners’ ability to reduce physical encounters with citizens is undeniable, even to civil liberties advocates. See Wagstaff, supra note 29 (quoting the Executive Director of the New York Civil Liberties Union).

120. In the wake of several corruption scandals in the NYPD in the early 1990s, an independent commission, headed by former New York State Appellate Division Judge Milton Mollen, was tasked to investigate the problem. MILTON MOLLEN ET AL., COMMISSION REPORT: COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT 36 (1994), available at http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf. The Mollen Commission determined that, although the actual number of corrupt officers was quite small, the NYPD lacked systematic safeguards to detect such corruption. Id.

121. Of course, suspicionless scanning may be perfectly acceptable. See infra Parts III.B, IV.B. However, if the Court limits the use of gun scanners to only Terry stops and arrests, it may unwittingly create a powerful incentive for lying by dishonest law enforcement officers.

122. If police have independent probable cause to arrest, there would be no incentive for officers to lie about using a gun scanner, because a full search is permissible incident to a lawful arrest. See Draper v. United States, 358 U.S. 307, 314 (1959) (holding a search incident to a lawful arrest constitutional under the Fourth Amendment).
before using the gun scanner. This may create a situation in which a dishonest officer could lie about his or her use of the gun scanner.

Concerns about police lying to justify a Terry stop are not novel. Long before gun-scanning technology was imagined, Supreme Court Justices and law review commentators debated the same issue. In Adams v. Williams, Justice William Brennan objected to expanding the Terry doctrine to cover possessory offenses largely because of the danger of fabricated evidence. In Adams, after receiving an anonymous tip, a police officer frisked an individual and recovered a firearm, Justice Brennan worried that using unnamed informers as the basis for a Terry stop was problematic because it “readily [could] have been manufactured by the officer after the event.”

Similarly, in Florida v. J.L., the Court unanimously held that an anonymous, uncorroborated 911 call cannot create reasonable suspicion to stop and frisk someone for a firearm. This holding was largely a prophylactic rule to remove incentives for false 911 calls. Although the Court never explicitly mentioned potential police misconduct in its opinion in J.L., the risk is obvious: if anonymous 911 calls could justify a stop-and-frisk, then dishonest police officers could simply call 911 and falsely report a person with a gun, then stop and frisk that individual. At oral argument for J.L., Justice Scalia raised this concern:

Indeed, we distrust policemen enough that we have the exclusionary rule in order to deter them from conducting unreasonable searches and seizures, but I guess it would be pretty neat for the tipster to be

123. See infra text accompanying notes 124–34.
124. See Adams v. Williams, 407 U.S. 143, 151 (1972) (Brennan, J., dissenting) (“To begin, I have the gravest hesitancy in extending Terry v. Ohio to crimes like the possession of narcotics . . . . There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true.” (quoting Williams v. Adams, 436 F.2d 30, 38 (2d Cir. 1970) (Friendly, J., dissenting) (citation omitted))).
125. Id. at 144–45 (majority opinion).
126. Id. at 152 (Brennan, J., dissenting).
127. Florida v. J.L., 529 U.S. 266, 274 (2000) (“[W]e hold that an anonymous tip lacking indicia of reliability of the kind contemplated in Adams and White does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.”).
128. See id. at 272 (attempting to prevent “any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target’s unlawful carriage of a gun”); see also Peter Erlinder, Florida v. J.L.—Withdrawing Permission to “Lie with Impunity”: The Demise of “Truly Anonymous” Informants and the Resurrection of the Aguilar/Spinelli Test for Probable Cause, 4 U. PA. J. CONST. L. 1, 65 (2001) (arguing that, because the Court “made] clear that ‘truly anonymous’ informants can never be found reliable, . . . any future case that is based on the use of a ‘truly anonymous’ informant . . . will run afoul of the reasoning in Florida v. J.L.”); Edward W. Krippendorf, Florida v. J.L.: To Frisk or Not to Frisk: The Supreme Court Sheds Light on the Use of Anonymous Tipsters as a Predicate for Reasonable Suspicion, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 161, 190 (2002) (“[I]t is clear that although the Court appeared to stress the predictive nature of the tip, the true concern lies with the caller’s reliability.”).
another policeman. All you have to do is allege that the person has a
gun, and it will permit a search . . . a body search, which may not
uncover a gun, but may well uncover marijuana, cocaine, or some
other unlawful contraband.129

In addition to Justice Scalia’s comments, the defendant in J.L. cited evidence
that police fabrication was “a major problem in New York, Los Angeles,
Atlanta, New Orleans, Detroit, Minneapolis and Philadelphia.”130

The Court is unlikely to address the “testilying” issue with a broad rule
prohibiting gun-scanner evidence because such a ruling would necessarily call
Terry itself into question.131 Although gun-scanning technology may tempt
officers to use the devices even when they lack reasonable suspicion to stop an
individual, the potential for lying is not greater than in any other context.132

The solution will likely be the same for gun-scanner evidence as it currently
stands for traditional police observations leading to a Terry stop: evaluation of
the officer’s credibility at an exclusionary hearing pursuant to a defense motion
in limine.133 Although many academics have castigated judges for allowing
into evidence what they regard as obviously perjured police testimony,

130. Brief for Respondent at 17 n.9, J.L., 529 U.S. 266 (No. 98-1993), 2000 WL 140926, at
*17. The defense cited several law review articles discussing police perjury generally, and one
specifically discussing fabricated tips. Id. (citing Joe Metcalfe, Anonymous Tips, Investigatory
Stops and Inarticulate Hunches—Alabama v. White, 110 S. Ct. 2412 (1990), 26 HARV. C.R.-C.L.
L. REV. 219, 237 (1991)).
131. Only in the case of police lineups conducted after formal criminal proceedings have
begun (and without a defendant’s attorney present) has the Court banned evidence obtained as
presumptively unreliable. See United States v. Wade, 388 U.S. 218, 236 (1967) (citing the “grave
potential for prejudice” by the police). Justice Byron White dissented: “I do not share this
pervasive distrust of all official investigations. None of the materials the Court relies upon
supports it.” Id. at 252 (White, J., dissenting). The holding in Wade, however, hinged on the
formalist distinction of the defendant’s Sixth Amendment right to counsel “attaching” after
formal proceedings have commenced. Id. at 223–27 (majority opinion). As such, the Court did
not extend this per se exclusionary rule to identifications of defendants before the start of formal
proceedings, in which the Sixth Amendment does not apply. See Kirby v. Illinois, 406 U.S. 682,
690 (1972) (declining to implement a per se rule).
132. Descriptions, such as observing “furtive movements,” a bulge in someone’s clothing, or
suspicious behavior, are all commonly used to articulate reasonable suspicion for a Terry stop.
also found that [the police officer’s] testimony that [the defendant] made furtive movements
towards his rear pocket was credible, and therefore concluded that the search of [the defendant’s]
person was lawful.”).
133. See J.L., 529 U.S. at 274 (Kennedy, J., concurring) (“When a police officer testifies that
a suspect aroused the officer’s suspicion, and so justifies a stop and frisk, the courts can weigh the
officer’s credibility and admit evidence seized pursuant to the frisk.”). By contrast, an
anonymous caller can “lie with impunity.” Id. at 275.
134. See Gabriel J. Chin & Scott C. Wells, The “Blue Wall of Silence” as Evidence of Bias
(quoting Prof. Alan Dershowitz’s anecdotes of hearing “bogus testimony” by police and seeing
judges in New York City, in both state and federal courts, have suppressed evidence because of officers’ disingenuous testimony. Realistically, civil liberties groups seeking a blanket prohibition on the use of gun scanners would have to lobby legislators for a statutory ban, while in individual cases, defendants can attack the arresting officers’ credibility in suppression hearings.

B. Suspicionless Scanning

Although the law surrounding the use of gun scanners for arrests and Terry stops is relatively straightforward, the constitutionality of police use of gun-scanning technology without any reasonable suspicion is unclear. On the one hand, there is potential to reduce thousands of intrusive stop-and-frisks with a non-invasive scan that would only reveal weapons—far less than what people now routinely expose themselves to at airports. Conversely, it seems to strain the English language to argue that discovering what is underneath a person’s clothing does not constitute a “search.”

Any inquiry about the permissibility of “sense-enhancing technology,” such as gun scanners, must begin with Kyllo. Although the facts of Kyllo were limited to a thermal scan of a defendant’s home, its holding may also be applicable to searches of one’s person. The four dissenters in Kyllo noted that it would be illogical not to extend Kyllo’s rule to searches of individuals, and Justice Scalia has consistently advocated greater fidelity to

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135. See Benjamin Weiser, Police in Gun Searches Face Disbelief in Court, but Few Consequences, N.Y. TIMES, May 12, 2008, http://www.nytimes.com/2008/05/12/nyregion/12guns.html (claiming that some officer testimony is “patently incredible”).

136. See supra note 117 any accompanying text.

137. Kyllo v. United States, 533 U.S. 27, 34 (2001) (“To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.”).
the text and original meaning of the Fourth Amendment. Additionally, although *Kyllo* does stress that the house is constitutionally special, the opinion never states that a lower level of Fourth Amendment protection applies to searches of one’s person.

Under *Kyllo*’s holding, suspicionless use of the NYPD’s prototype gun scanners would likely violate the Fourth Amendment because gun scanners are a “sense-enhancing technology” “not in general public use” that provides police with “information . . . that could not otherwise have been obtained without physical intrusion into a constitutionally protected area.” Thus, the use of gun scanners would constitute a “search” that is “presumptively unreasonable without a warrant.”

This application of *Kyllo* seems to foreclose any suspicionless use of gun scanners. But given the tremendous public safety benefits that such devices could provide, there will undoubtedly be pressure to find a permissible use. Although a new rule is proposed in Part IV, under the current doctrinal framework, upholding gun scanners’ constitutionality requires making one of three arguments: (1) overturn *Kyllo*; (2) limit *Kyllo* to homes and apply the general rule from *Katz* instead; or (3) find a Fourth Amendment exception for unobtrusive searches that only reveal contraband.

1. **Overturn Kyllo**

*Kyllo* has been alternately criticized as being both overinclusive and underinclusive. The most frequent criticism has been the limitation of *Kyllo*’s holding to technology that is “in general public use.” According to the dissent:

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141. U.S. CONST. amend IV; see also *Kyllo*, 533 U.S. at 40 ("[W]e must take the long view, from the original meaning of the Fourth Amendment forward.").

142. See supra notes 76–81 and accompanying text (citing language of the Supreme Court that suggests *Kyllo* is not limited to searches of a home).


144. Cf. id. at 40.

145. See supra note 4 and accompanying text (noting statistics on the number of national shooting victims).

146. See, e.g., Jeffrey W. Childers, Comment, *Kyllo v. United States*: A Temporary Reprieve from Technology-Enhanced Surveillance of the Home, 81 N.C. L. REV. 728, 731–33 (2003) (arguing that, despite hope that *Kyllo* would be applied to other types of technology, its scope has been limited to surveillance of private homes, and only when the device is “not in general public use”); Kerr, supra note 87, at 832, 835–37 (describing *Kyllo* as suggestive of “broad and even creative” interpretation of the Fourth Amendment, yet actually limited to a specific fact pattern).

147. *Kyllo*, 533 U.S. at 34; see also Childers, supra note 146, at 759–61 (criticizing *Kyllo* for allowing a gradual erosion of Fourth Amendment protection as certain technology becomes widely used).
[T]he contours of [the majority’s] new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is “in general public use.” Yet how much use is general public use is not even hinted at by the Court’s opinion, which makes the somewhat doubtful assumption that the thermal imager used in this case does not satisfy that criterion.148

This critique, however, does not address the root flaw of Kyllo. Indeed, it is logical to reduce Fourth Amendment protections if a particular sense-enhancing technology were truly in widespread use: if civilians use the technology frequently, why limit the government from using it for law enforcement purposes?149 Rather, the problem with the majority’s holding in Kyllo is its blanket prohibition on obtaining “any information” from inside a home.150 As this Article argues, certain information simply does not have Fourth Amendment value and should not be protected.

However, even overturning Kyllo may not permit the suspicionless use of gun scanners during police investigations.151 Although Kyllo’s rule would restrict gun scanners, the constitutionality of this technology under the dissent’s proposed holding is still unclear. The dissent would bar the warrantless use of technology that “provide[s] its user with the functional equivalent of access to a private place.”152 The issue, then, is whether the gun scanner’s output (a blurry outline of a gun on a small computer monitor, with no intimate anatomical details) qualifies as the “functional equivalent of access to a private place.”153 Literally speaking, the area under one’s clothing is certainly a “private place,” but, technologically speaking, the outline of a firearm detected by a gun scanner is based on radiation emanating from the

148. Kyllo, 533 U.S. at 47 (Stevens, J., dissenting) (internal citation omitted).

149. For example, if public use of see-through wall technology became widespread, it would seem strange to allow neighbors or total strangers to look through the walls of one’s home, yet prohibit the police from doing the same on the basis that it violates privacy. Although such a world hopefully will not come to pass, a ready (and less disturbing) historical example does exist: binoculars. If you know that strangers can see you on a rooftop using binoculars, it would be unreasonable to restrict the police from doing the same. Thus, the “in general public use” requirement of Kyllo ultimately collapses into Katz’s “reasonable expectation of privacy” test. Compare id. at 34 (majority opinion) (noting the importance of recognizing a “minimal expectation of privacy”), with Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (describing how a court must determine whether one’s expectation of privacy is reasonable).

150. Kyllo, 533 U.S. at 34 (emphasis added). The dissenters in Kyllo also critique this part of the majority’s holding, arguing that police detection of abnormal heat radiating from the walls of one’s home is not the kind of information that the Fourth Amendment protects. Id. at 43 (Stevens, J., dissenting). The dissent argues that the police could have detected this abnormal heat through non-technological means, such as observing that snow melted faster on that part of the roof. Id.

151. See infra Part IV.C (proposing such a rule to fix this shortcoming).

152. Kyllo, 533 U.S. at 49 (Stevens, J., dissenting).

153. Id.
gun itself.\textsuperscript{154} This is indistinguishable from the example of heat emanating off of the house in \textit{Kyllo}, which the dissent found unobjectionable.\textsuperscript{155} The dissenters would likely object to technology that showed intimate details of the home or rebroadcast people’s conversations, but whether that rationale would extend to gun scanners is uncertain. However, potential objections could be reduced if gun scanners simply notified officers that a gun was present via an audible alarm or generic diagram, rather than showing an image of the person scanned.\textsuperscript{156}

2. \textit{Limit Kyllo to the Home and Apply Katz}

If \textit{Kyllo} is limited to the home, then the constitutionality of suspicionless use of gun scanners would be determined under \textit{Katz}.\textsuperscript{157} Specifically, \textit{Katz} answers the question of whether a search has occurred through Justice Harlan’s two-part test.\textsuperscript{158} Applied to the hypothetical situation of an individual stopped after police detected a firearm using a gun scanner, it is likely that the individual would have “exhibited an actual (subjective) expectation of privacy” by concealing the weapon.\textsuperscript{159} However, the outcome under the second part of the \textit{Katz} test is debatable: is this expectation of privacy “one that society is prepared to recognize as reasonable?”\textsuperscript{160} As always, how this question is framed is critical, if not outcome determinative. Although it is doubtful that “society” would find an individual’s desire to carry a concealed, illegal firearm to be “reasonable,” it is more plausible that “society” would recognize an interest in being free from technology that “looks” under one’s clothes.

Attempting to resolve this question empirically, Professor Jon S. Vernick and several other researchers conducted a study of Americans’ attitudes toward

\begin{itemize}
    \item \textsuperscript{154} See supra Part I.A.
    \item \textsuperscript{155} See \textit{Kyllo}, 533 U.S. at 42–43 (Stevens, J., dissenting) (reasoning that, because the technology only measured the heat emanating from the home’s exterior, there was no unlawful gathering of details of the inside of the home).
    \item \textsuperscript{156} The TSA has realized that the less personal an image looks, the less objectionable the public will find it. \textit{AIT: Privacy}, TRANSP. SEC. ADMIN., http://www.tsa.gov/ait-privacy (last updated Feb. 26, 2013). Future airport scanners will not show anatomical details of passengers, but instead will only flag potential weapons detected on a generic computer-generated figure. \textit{Id.}
    \item \textsuperscript{157} As discussed above, some of the Justices disfavor the \textit{Katz} test. \textit{See supra notes} 82–86 and accompanying text. Nevertheless, as \textit{Jones} makes clear, \textit{Katz} is still good law: “For unlike [Justice Alito’s] concurrence, which would make \textit{Katz} the exclusive test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to \textit{Katz} analysis.” United States v. \textit{Jones}, 132 S. Ct. 945, 953 (2012). Justice Sonia Sotomayor’s concurring opinion also emphasized the need to adhere to \textit{Katz} in cases that do not involve a physical trespass. \textit{Id.} at 954–55 (Sotomayor, J., concurring).
    \item \textsuperscript{158} \textit{Katz} v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
    \item \textsuperscript{159} \textit{See id.; Vernick et al., supra note} 17, at 570 (“By choosing to carry the firearm in a concealed fashion, one is clearly evidencing a subjective expectation of privacy.”).
    \item \textsuperscript{160} \textit{Katz}, 389 U.S. at 361 (Harlan, J., concurring). The second part of the \textit{Katz} test could also overlap considerably with the “in general use” requirement stated in \textit{Kyllo}. \textit{See supra note} 149.
\end{itemize}
gun scanners and concluded that “society does not recognize a reasonable expectation of privacy regarding gun scanners.” However, the study framed the questions in a way that the Court would likely find impermissibly skewed. For example, the question garnering the most support for gun scanners was: “Overall, do you favor or oppose police using new weapon detection devices in high crime areas?” But, if one applies the Katz test based on the legality of a private action, it is hard to imagine society approving of a dangerous illegal practice.

Instead, one should look to the Court’s general advice from Oliver v. United States when applying the second phase of the Katz test: “In pursuing this inquiry, we must keep in mind that ‘[t]he test of legitimacy is not whether the individual chooses to conceal assertedly “private” activity,’ but instead ‘whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.’” Merely attempting to keep something private does not mean that the Fourth Amendment will protect the activity; rather, a particular private activity must have some “value” that the Court deems worthy of Fourth Amendment protection. At times, the Court has been generous in its protections of privacy, whereas in other cases, it has been much more circumspect in assessing whether a privacy interest is reasonable. The one consistent take-away, however, is that part two of the Katz test cannot hinge on the legality of what a person is concealing; rather, it turns on how the person concealed it and whether that privacy interest has social value.

161. Vernick et al., supra note 17, at 570 (citing “overwhelming general support” for allowing police officers to use gun scanners”).
162. Id. Eighty-six percent of the 1,232 respondents in Vernick’s study favored such police-scanning technology. Id. However, the public’s approval dropped to only forty-nine percent when questioners “prompted” study participants about the potential loss of privacy posed by the use of gun scanners. Id.
163. California v. Ciraolo, 476 U.S. 207, 212 (1986) (quoting Oliver v. United States, 466 U.S. 170, 181–83 (1984)) (applying the Oliver Court’s interpretation of the reasonable expectation test to the aerial observation of a yard). In Jacobsen, the Supreme Court noted that these expectations work in both directions: “The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities.” United States v. Jacobsen, 466 U.S. 109, 122 (1984).
164. Ciraolo, 476 U.S. at 212 (quoting Oliver, 466 U.S. at 181–83).
165. See, e.g., Minnesota v. Olson, 495 U.S. 91, 96–97 (1990) (“Olson’s status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.”).
166. Smith v. Maryland, 442 U.S. 735, 742–44 (1979) (holding that, even without a warrant, police may obtain records of the telephone numbers dialed by an individual because he or she voluntarily released that information to the phone company when making the calls).
167. See Ciraolo, 476 U.S. at 213–14 (applying the Katz test to evaluate the reasonableness of the police flying in public airspace over defendant’s home to observe marijuana plants in the defendant’s backyard, which was surrounded by a ten-foot fence). The Court’s Fourth Amendment analysis did not ask whether society approves of backyard marijuana farms, but
Gun scanners, therefore, cannot be examined under *Katz* by asking whether society approves of people concealing their illegal guns. Rather, *Katz* demands questioning whether a scan that reveals large metal objects under one’s clothes, but no anatomical details, is unreasonable. In the wake of 9/11, society has a higher tolerance for government searches. For example, the TSA’s airport scanners initially produced a strong backlash, but are now commonplace. Further, the precipitous increase in the number of *Terry* stops by the NYPD has only attracted major attention recently.

Based on the tone of the Court’s recent opinion in *Jones*, the Justices seem uneasy with the erosion of privacy caused by technology. Notably, Justice Sotomayor’s concurrence in *Jones* flagged the need for a re-evaluation of Fourth Amendment principles in light of twenty-first century technology. However, *Jones* dealt with police GPS tracking of a suspect’s non-criminal movements. Although gun scanners could target only illegal activity, it remains unclear whether this distinction, and the attendant public safety benefits, would assuage the Court’s concerns. Therefore, the outcome of whether it was reasonable to expect that no one would look into a private yard from an aircraft flying overhead. *Id.*

168. See supra note 27 and accompanying text. To be clear, the legal rationale justifying airport scans and searches is different. Although the Supreme Court has not definitively ruled on the question, circuit courts (which once viewed airport searches as based on consent) now uphold them as reasonable administrative searches. See, e.g., United States v. Aukai, 497 F.3d 955, 962 (9th Cir. 2007); United States v. Hartwell, 436 F.3d 174, 178 (3d Cir. 2006); see also Chandler v. Miller, 520 U.S. 305, 323 (1997) (noting in dicta that “blanket suspicionless searches . . . now routine at airports” would likely be acceptable under the Fourth Amendment). Nonetheless, this comparison to airport searches is mentioned because it offers insight into what people generally perceive as “reasonable,” especially when public safety may be at risk.

169. See Al Baker, Judge Grants Class-Action Status to Stop-And-Frisk Suit, N.Y. TIMES, May 17, 2012, at A2 (reporting that a lawsuit in the Southern District of New York, alleging illegal police stops, was recently granted class action status by Judge Shira Scheindlin, who called the City’s attitude towards the stops “cavalier”). The case has attracted considerable attention, including an announcement from Commissioner Kelly that NYPD officers will receive additional training on how to conduct proper *Terry* stops. See Sally Goldenberg et al., Kelly Announces Changes to ‘Stop and Frisk’ Policies, N.Y. POST (May 18, 2012, 9:01 AM), http://www.nypost.com/p/news/local/ray_stop_think_91BuU3AVd3EQFJPtYipJK.

170. See United States v. Jones, 132 S. Ct. 945, 949–51 (2012) (stressing that the facts showed that the government had “physically occupied private property for the purpose of obtaining information” and this “physical intrusion” constituted a search).

171. *Id.* at 955 (Sotomayor, J., concurring) (“[T]echnological advances . . . will also affect the *Katz* test by shaping the evolution of societal privacy expectations.”). In dicta, Justice Sotomayor also raised concern that many Fourth Amendment rules might be “ill suited to the digital age.” *Id.* at 957 (critiquing “the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties”).

172. *Id.* at 955.

173. This conclusion would only apply in jurisdictions such as New York City, where obtaining a concealed firearm permit is extremely rare. See infra note 185 and accompanying text.
suspicionsless gun-scanning under the *Katz* test is still uncertain, highlighting the need for a new rule, as proposed in Part IV.

3. Exceptions to the *Katz* Rule

Although the *Katz* test generally applies to all Fourth Amendment searches, the Court carved out one notable exception in *United States v. Place*: a “canine sniff” by a “trained narcotics detection dog” “in a public place” does not qualify as a “search” under the Fourth Amendment. In reaching this holding, the Court relied on several factors that make a canine sniff “sui generis” and, thus, constitutionally permissible. The Court reasoned that the procedure “does not require opening the luggage,” “is much less intrusive than a typical search,” does not “expose noncontraband items that otherwise would remain hidden from public view,” and “discloses only the presence or absence of narcotics, a contraband item.” Overall, the Court’s biggest concern in *Place* seemed to be with the level of intrusiveness of police practices:

> [D]espite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. . . . In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.

All of the factors on which the *Place* Court relied in upholding canine sniffs in public spaces could also apply to gun scanners, if the technology can be perfected to ensure that it reveals only the presence of guns. Gun scanners involve no physical touching, are “much less intrusive” than frisks, and are arguably less invasive than a narcotics dog sniffing one’s belongings or person. The viability of the comparison between gun scanners and dog sniffs...
sniffs depends on two factors: 1) reliability of the search process employed (i.e., gun scan versus dog sniff) and 2) the legality of what the search process detects (i.e., firearms versus narcotics).

First, if gun scanners produce false-positive results, in turn causing unnecessary stop-and-frisks, the entire Place rationale fails. The dog sniffs at issue in Place were not “searches” because they were “much less intrusive” and devoid of “the embarrassment and inconvenience” that other search processes entail.180 Similarly, to survive a Fourth Amendment challenge, gun scanners must be highly accurate in detecting firearms; otherwise more innocent people would be stopped, which would render gun scanners more intrusive than current Terry stop procedures. Because Terry stops can be just as demeaning as a search of one’s luggage, reliability of the search is essential to the Place exception.181

Second, Place requires that the procedure “does not expose noncontraband items that otherwise would remain hidden from public view.”182 For gun scanners, this is a two-part challenge: (1) the technology must alert only to firearms and (2) the firearms found must be carried illegally. The first challenge requires a technological solution: gun scanners must be able to distinguish the shape of firearms from other metal objects that people may carry, such as cellphones or keys. This technological problem, however, is of constitutional importance because of Place; thus, any operational use of the devices must wait until this problem is fixed, because gun scanners currently work from only several feet away.183 The second issue, whether guns are contraband, will vary from jurisdiction to jurisdiction.184 In places like New

180. Place, 462 U.S. at 707. Although the Place Court did not explicitly rely on the accuracy of a canine sniff, the case implicitly turns on the reliability of the search and the rate of false-positives, because if a canine sniff or gun scanner is inaccurate, then there will be more unnecessary stops.

181. See id. at 703–07. The reliability of a sniff by narcotics detection canines has been questioned recently by the media. See Radley Balko, Illinois State Police Drug Dog Unit Analysis Shows Error Rate Between 28 and 74 Percent, HUFFINGTON POST (Mar. 31, 2012), http://www.huffingtonpost.com/2012/03/31/drug-dog-illinois-state-police_n_1376091.html; see also Rebecca Leung, Does the Nose Know, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-18560_162-591477.html.

182. Place, 462 U.S. at 707.

183. See supra note 30 and accompanying text.

184. See Vernick et al., supra note 17, at 573–74 (discussing how the permissibility of gun scanners could vary depending on the permissiveness of a particular jurisdiction’s concealed firearm licensing laws and whether a state’s requirement to produce a gun permit upon request would affect the analysis). This Article focuses on jurisdictions where Terry stops for firearms are frequent, which are almost always also jurisdictions with restrictive concealed firearm laws, such as New York City. See, e.g., Second Supplemental Report of Jeffrey Fagan, Ph.D. at 9, Floyd v. City of New York, No. 08 Civ. 01034 (SAS) (S.D.N.Y. argued Mar. 18, 2013), available at http://ccrjustice.org/files/FaganSecondSupplementalReport.pdf (noting that, between 2004 and the first six months of 2012, over 4.43 million stop and frisks were conducted in New York City); Permits: Handgun Licensing Information, CITY N.Y., http://www.nyc.gov/html/nypd/html
York City, however, where it is nearly impossible for civilians to obtain concealed firearm permits, it would be reasonable for officers to conclude that a weapon detected using a gun scanner is presumptively illegal, warranting a physical *Terry* stop. Given that courts routinely uphold *Terry* stops based on reasonable suspicion that an individual is carrying a firearm in states like New York, implicit in those decisions is the assumption that handguns are presumptively illegal in places with restrictive gun laws, and their possession creates reasonable suspicion to stop an individual.

Gun scanners seem to fit the exception in *Place* for dog sniffs, because they too are “so limited both in the manner in which the information is obtained and in the content of the information revealed.” However, the dissenters in *Kyllo* believed that the holding in that case was entirely at odds with *Place*, while the majority never even mentioned *Place* in its opinion.

In the 2012 term, the Court addressed whether a canine sniff of the outside of an individual’s home—specifically, the front porch—constitutes a search in *Florida v. Jardines*. Drawing on the Court’s recent decision in *Jones*, Justice Scalia, writing for the majority, held that the case was an “easy” example of police action violative of the “Fourth Amendment’s property-rights baseline,” thus rendering the *Katz* reasonable expectation of privacy analysis unnecessary. However, in the related 2012 case of *Florida v. Harris*, the
Court unanimously held that a canine sniff of a car during a traffic stop did not violate the Fourth Amendment, and it provided probable cause for a police officer’s subsequent search of the vehicle for narcotics.\textsuperscript{192} Given the \textit{Harris} decision, it appears that—at least beyond the scope of the home and surrounding curtilage—a canine sniff does not implicate the Fourth Amendment, lending strong support for the constitutionality of gun scanners under the \textit{Place} rationale.

\section*{C. Virtual Gun “Checkpoints”}

A virtual gun checkpoint would not physically stop anyone, unless the scanner indicated that a particular individual was carrying a firearm. Rather, an effective virtual gun checkpoint would operate more like the closed circuit television (CCTV) camera networks that are already in widespread use by law enforcement.\textsuperscript{193} The police would identify an area with high levels of gun violence, potentially in conjunction with elected officials or other community leaders, and deploy gun scanners to that intersection or street.\textsuperscript{194} Proper signs would be placed on the street, warning all individuals in the vicinity that they are subject to police gun scanners.\textsuperscript{195}

The legal basis for virtual gun-scanner checkpoints would be derived from the Supreme Court’s cases on drunk-driving checkpoints.\textsuperscript{196} The Court’s comfort level with such checkpoints has varied, ranging from a general

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unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.” (quoting United States v. Jones, 132 S. Ct. 945, 952 (2012))).
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endorsement in Brown to fear of a slippery slope in Edmond. Overall, taking the Court’s holding in Edmond and its most recent case on checkpoints, Lidster, the constitutionality of a virtual gun-scanner checkpoint depends on several factors, including: “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” There must also be an “immediate hazard,” and the checkpoint may not serve a “general interest in crime control.”

In light of the Court’s more permissive tone in Lidster, an evaluation of these factors shows that virtual gun checkpoints could be constitutional. First, the “gravity of the public concerns” regarding gun violence is just as high as, if not higher than, drunk driving, for which the Court has approved police checkpoints. Second, gun scanners would “advance the public interest” by removing thousands of illegal guns (just as Terry stops do) without the inconvenience of stopping many innocent civilians. Third, the “severity of the interference with individual liberty” is far less with a gun scanner virtual checkpoint than with a DUI vehicle checkpoint. Individuals walking through a gun-scanning checkpoint would experience no delays and would not be required to speak with or see police unless the gun scanner indicated that they were carrying a firearm. Fourth, there is an “immediate hazard” from individuals carrying illegal firearms, which is similar to the imminent danger of a drunk driver (Sitz), and unlike the more attenuated harm of narcotics

197. Brown v. Texas, 443 U.S. 47, 51–52 (1979) (noting that the Fourth Amendment allows for seizures “carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers”).
198. City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000) (arguing that without a limiting principle “there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose”).
199. Illinois v. Lidster, 540 U.S. 419, 427–28 (2004) (holding a checkpoint stop constitutional because police actions only minimally interfered with Fourth Amendment liberties against unreasonable seizures, and the police contact was a simple request for information and distribution of a flyer).
200. Id. (quoting Brown, 443 U.S. at 51).
201. Edmond, 531 U.S. at 39 (pointing out that the “immediate hazard” was the danger posed by drunk drivers on highways). The prohibition against generalized crime control, the seemingly more restrictive factor, was not repeated by the Lidster Court.
202. Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 457 (1990) (Brennan, J., dissenting) (quoting Brown, 443 U.S. at 51). The Court in Sitz concluded that an annual death toll of more than 25,000 people from drunk driving was more than enough to justify police DUI checkpoints. Id. at 451 (majority opinion). In 2010, of the nearly 13,000 murders reported, over two-thirds involved firearms. FED. BUREAU OF INVESTIGATION, supra note 4, at tbl. 8.
203. In New York City, Police Commissioner Kelly credits stop, question, and frisk practices as being “one of the tactics and strategies that helped us reduce murders by 51 percent . . . from the decade before.” Joel Rose, NYPD’s Stop-And-Frisk Tactics Targeted by Critics, NPR (Apr. 5, 2012), http://www.npr.org/2012/04/05/ 150059728/lawmakers-target-the-new-york-city-stop-and-frisk. But see Lamberth, supra note 13, at 2 (stating that crediting the stop, question, and frisk tactics as being primarily responsible for the drop in that city’s murder rate is “too simple”).
traffickers (*Edmond*). Although the drug trade is undoubtedly a root cause of much violence, including gun violence,\(^{204}\) carrying narcotics creates less direct, imminent danger than carrying illegal firearms or driving under the influence. Finally, gun-scanning checkpoints—with clear signage warning individuals of the scanner’s presence—do not merely serve the “general interest in crime control,” but rather address an “immediate . . . threat to life and limb.”\(^{205}\) By placing signs to warn people that gun scanners are in use, the police may deter individuals carrying illegal firearms from entering that area.\(^{206}\) If gun scanners are used in areas with histories of violence, reducing shootings—either by arresting individuals or by deterring armed criminals from showing up—would be a victory, proving that law enforcement officials’ primary interest is in public safety and not just in making arrests or “crime control,” as *Edmond* prohibits.\(^{207}\)

A virtual gun-scanning checkpoint would address a public safety problem equally as dangerous as drunk driving, cause no inconvenience for innocent civilians, and be unbiased in its operation.\(^{208}\) Admittedly, the Court has cautioned, “the gravity of the threat alone cannot be dispositive” regarding checkpoints,\(^{209}\) and “the mere fact that law enforcement may be made more


\(^{205}\) *Edmond*, 531 U.S. at 43.

\(^{206}\) Critics might contend that law enforcement’s true motive would be to increase arrests because of the need to generate favorable statistics, rather than focusing primarily on deterring individuals from carrying guns. However, although law enforcement undoubtedly has become a statistics-driven profession, lowering shooting or murder statistics would be a far greater boon to a police commander than recording more firearm possession arrests. *See William Bratton & Peter Knobler, The Turnaround: How America’s Top Cop Reversed the Crime Epidemic* 271–72 (1998) (discussing the role of statistics in the police profession); see also James J. Willis, Stephen D. Mastrofski & David Weisburd, *Making Sense of COMPSTAT: A Theory-Based Analysis of Organizational Change in Three Police Departments*, 41 LAW & SOC’Y REV. 147, 171–72 (2007) (noting that crime is most effectively reduced through active policing).

\(^{207}\) But see Vernick et al., *supra* note 17, at 575 (arguing that courts “will likely conclude that [gun scanners’] primary purpose is to deter crime”). However, this assessment ignores the weight that *Edmond* places on the immediacy of the threat. *See Edmond*, 531 U.S. at 43 (narrowing the scope of the “immediate hazard” factor). Although the drug trade undoubtedly leads to violence, that danger is far more attenuated than illegal firearms, which create an immediate threat to public safety.

\(^{208}\) Admittedly, bias could emerge in the locations chosen for checkpoints. However, basing checkpoint locations on shooting statistics or likely terrorist targets could be an easily implemented neutral metric. *See Bernard E. Harcourt & Tracey L. Meares, Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 876 (2011) (proposing the placement of checkpoints searches based on the detection of crime achieved at a particular spot and regularly evaluated).

\(^{209}\) *Edmond*, 531 U.S. at 42.
efficient can never by itself justify disregard of the Fourth Amendment."\(^{210}\)

But given the Court’s direction in \textit{Lidster}, which upheld a highway checkpoint
where motorists were stopped and questioned about a week-old hit-and-run
accident, virtual gun-scanning checkpoints seem far easier to justify; the
danger to be stopped is greater, and the inconvenience is essentially
non-existent.\(^{211}\)

IV. PROBLEMS WITH \textit{KYLLO}

Many may be satisfied with the likely disposition of gun scanners under the
current \textit{Kyllo} rule, namely, that police cannot scan for guns indiscriminately on
public streets, but must only use the scanners during arrests or \textit{Terry} stops
based on independent suspicion, and perhaps also at limited checkpoints. As
the argument goes, this is the proper balance between Fourth Amendment
rights and public safety,\(^ {212}\) and the only way to avoid the “Orwellian world”
about which Justice Brennan warned.\(^ {215}\) Reasonable minds can disagree about
gun scanners, and although some believe there are strong arguments under the
existing law, the use of gun scanners in suspicionless scans or checkpoints is a
close question under \textit{Kyllo}. However, the desirability of the \textit{Kyllo} rule for gun
scanners looks far less appealing when the same analysis is applied to law
enforcement use of radiation detectors.\(^ {214}\) After making the comparison
between gun scanners and radiation detectors in Part IV.A, the shortcomings of
the \textit{Kyllo} rule will become clear. Then, Part IV.B discusses the Fourth
Amendment’s role in protecting privacy in a world of constantly evolving
technology. Finally, Part IV.C proposes a reformulated Fourth Amendment


\(^{211}\) Illinois v. Lidster, 540 U.S. 419, 427 (2004). Although some may argue that there is a
“metaphysical” harm of knowing one is under a camera, see Adam Liptak, \textit{In the Name of
Security, Privacy for Me, Not Thee}, N.Y. TIMES, Nov. 24, 2002, at C1, the death toll from gun
violence must outweigh this burden. Indeed, because CCTV cameras already constantly record
the public, most people probably would likely agree that having one’s face on video is far more
personal than the blurry outline produced by gun scanners.

\(^{212}\) See, e.g., George Dery III, \textit{Remote Frisking down to the Skin: Government Searching
Technology Powerful Enough to Locate Holes in Fourth Amendment Fundamentals}, 30
CREIGHTON L. REV. 353, 392 (1997) (warning that gun-detection technology could undermine
the warrant requirement and even the probable cause standard); David A. Harris, \textit{Superman’s X-Ray
(1996) (arguing that gun detectors should only be used when police already have “some
reasonable suspicion”); Roberto Iraola, \textit{New Detection Technologies and the Fourth Amendment},
47 S.D. L. REV. 8, 24–27 (2002) (concluding that the use of gun scanners would probably be
unconstitutional under \textit{Terry}, \textit{Place}, or the special needs doctrine); Ric Simmons, \textit{From Katz to
Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies}, 53
HASTINGS L.J. 1303, 1327 (2002) (cautioning that, as technology allows for less invasive
searches, the Court may become more permissive to their use, thereby eroding privacy rights).


\(^{214}\) See supra text accompanying notes 36–54.
doctrine that sensibly balances the evolution of law-enforcement technology with individuals’ privacy concerns.

A. Radiation Detectors Under Kyllo

Under Kyllo, the warrantless use of radiation detectors appears to be unconstitutional, except during a valid arrest or Terry stop: radiation detectors use “sense-enhancing technology” that is “not in general public use” to give police “information . . . that could not otherwise have been obtained without physical intrusion into a constitutionally protected area.”215 Thus, their use would constitute a “search” that is “presumptively unreasonable without a warrant.”216

Some may conclude that perhaps both gun scanners and radiation detectors should be unconstitutional. Although this would be a doctrinally consistent and legally plausible argument, it would likely be politically unsustainable for the Court to ban radiation detectors in a post-9/11 world. Indeed, even before the 9/11 attacks, the dissenters in Kyllo concluded that police detection of “radioactive emissions” would be “an entirely reasonable public service.”217

An initial reaction to this application of Kyllo, however, might be to distinguish radiation detectors from gun scanners on two grounds: (1) the danger of radiological weapons is far greater than the danger from guns, and (2) radiation detectors always detect illegal materials, while many guns are legally carried. Both of these objections, while intuitively appealing and seemingly valid at first glance, are incorrect.

To distinguish radiation detectors from gun scanners, one could argue that the danger of nuclear terrorism is a bona fide “special need” that would not be prohibited under Edmond.218 Admittedly, the potential death toll and damage from a nuclear attack with an IND would dwarf even the carnage illegal guns cause.219 Nevertheless, although the potential harm from an IND attack would

215. Kyllo v. United States, 533 U.S. 27, 34 (2001) (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)). As discussed in detail supra, this argument assumes that Kyllo would be applicable to radiation scans of one’s person as well as one’s home. See supra text accompanying notes 78–81. Some might disagree with this comparison and argue that radiation, unlike guns, has long been detectable without a search of one’s person. However, this argument is self-defeating. If technology sets the limits on what searches may occur, then there cannot be any objection to gun scanners (at least once they are perfected).

216. Kyllo, 533 U.S. at 40.

217. Id. at 45 (Stevens, J., dissenting) (stating an acceptance of “drawing useful conclusions” from emissions monitoring).

218. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000). Alternatively, one could argue that radiation-detection devices are equivalent to the sniff by a narcotics dog upheld in Place, because, unlike gun scanners, it always identifies contraband. United States v. Place, 462 U.S. 696, 707 (1983). However, this argument fails for the same reason as the “special needs” doctrine fails. See infra notes 222–26 and accompanying text.

be far greater, the likelihood of such an attack is much more remote. In contrast, gun violence exacts a predictable death toll of almost 10,000 citizens each year and an economic harm estimated at more than $100 billion annually. Although posing a lesser danger than that of a nuclear attack, the harm caused by gun violence could still qualify under the Court’s special needs doctrine.

Concededly, one could then draw a line between gun scanners and radiation detectors looking for INDs due to the potential for mass casualties. However, there are two problems with this distinction. First, the radiation detectors used by the NYPD and other law enforcement agencies do not distinguish between the radioactive materials used in INDs and those used in “dirty bombs” (RDDs). Second, experts in nuclear terrorism agree that RDD threats must be just as vigilantly guarded against, because they are far more likely to occur than INDs. Therefore, anyone who is serious about preventing nuclear terrorism would need to address both IND and RDD threats.

RDDs would produce a lower death toll than INDs, with most of the casualties caused by the conventional explosive at the heart of the bomb, rather than the dispersed radioactive material (known as the “dirty” components). Although the public fear of radiation from an RDD plus the cost and time involved in decontaminating the blast area still make RDDs a serious terrorist threat, there would likely be fewer lives lost than the annual death count from illegal firearms.

Alternatively, to try and maintain a distinction between the constitutionality of gun scanners and radiation detectors, one might argue that radiation detectors only reveal serious risks because any radiation alarm creates a life or death situation for an entire city or region. But, this argument is also incorrect.

Bunn, a Professor at Harvard University’s John F. Kennedy School of Government and an expert on nuclear proliferation and terrorism, who estimates that “a 10-kiloton bomb (equivalent explosive power to 10,000 tons of TNT and modestly smaller than the Hiroshima bomb) detonated in midtown Manhattan in the middle of a workday could kill half a million people and cause $1 trillion in direct economic damage”).

220. Id.
222. The Court has, however, been reluctant to delineate exactly what qualifies as a “special need.” Although it approved suspicionless testing of public high school athletes for drugs in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 664–65 (1995), the Court found suspicionless drug testing of pregnant women in public health facilities unconstitutional in *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001).
223. See *supra* notes 48–53 and accompanying text.
225. Id. (calling a dirty bomb a “weapon of mass disruption versus a weapon of mass destruction” (emphasis added)).
To date, the only people stopped because of radiation-detector alarms have been nuclear medicine patients. These individuals must explain to a law enforcement officer why they set off a radiation detector, requiring them to divulge medical information that most people would consider to be at the very core of privacy—an acknowledgement that the individual is undergoing cancer treatment, or has taken a diagnostic test for a serious, unknown ailment. Such conversations will occur on a public street, perhaps within earshot of family, employers, or total strangers. In contrast, gun scanners, if the technology can be perfected and if operated only in areas with restrictive handgun laws, will only identify illegal activity.

But, if detecting RDDs qualifies as a “special need,” then the distinction does not hinge on the total number of deaths, but rather on the public fear of a terrorist attack. Although clean-up costs might be higher with RDDs, terrorist use of gun violence could easily exact a death toll just as high and cause equal amounts of public panic. The 2008 terrorist attacks in Mumbai, India, used guns and small explosives to kill 174 people in an area of the city popular with tourists. The fear generated by these gun attacks—referred to as “Mumbai’s 9/11”—severely hurt the city’s tourist industry. Under this logic, if radiation detectors can be deployed to guard against RDDs, then gun scanners should be permissible in areas where an “active shooter” terrorist attack, like those in Mumbai, might occur.

Thus, the current Kyllo doctrine leads to a troubling outcome. Radiation detectors for INDs and RDDs seem permissible under the “special needs” doctrine, as do gun scanners, in potential terrorist target locations. This means that the Fourth Amendment would only prohibit the police from using gun scanners to prevent shootings in the not-so-nice parts of town, essentially

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226. Another group of people improperly stopped are individuals carrying legitimate industrial devices. See Hennelly, supra note 53.
227. See supra notes 50–54 and accompanying text.
229. Saikat Chatterjee, Mumbai Terror Attacks Hit India Tourism at Start of Peak Season, BLOOMBERG (Nov. 28, 2008), http://www.bloomberg.com/apps/news?pid=newsarchive &refer=home&sid=a3Ul0H1zXJM; Zoe Wood et al., India Counts the Cost of Global Terrorism, GUARDIAN (Nov. 29, 2008), http://www.guardian.co.uk/business/2008/nov/30/india -mumbai-terrorist-recovery-economics.
constitutionalizing second-class policing of neighborhoods with high gun violence. Yet *Terry* stops, which engender community disenchantment with police and government, could continue unabated. Tourists get scanned without harassment and inner-city residents get stopped and frisked. This unavoidable conclusion strikes one as a deeply uncomfortable outcome under the current doctrine, revealing the flaws in applying *Kyllo* to emerging weapons-detection technology.

**B. The Fourth Amendment’s Purpose in the Twenty-First Century**

The permissibility of gun scanners ultimately depends on one’s interpretation of the Fourth Amendment’s purpose. To the Founders, “the Fourth Amendment was designed in part, indeed perhaps primarily, to outlaw [] general warrants” that authorized blanket searches of one’s home. Yet, the Fourth Amendment is not a blanket protection of privacy, as *Jacobsen* notes: “The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities.” The text of the Fourth Amendment recognizes this inherent tension between the desire to ban “unreasonable searches,” and the need for effective law enforcement.

Compared to the home, which has more robust warrant requirements, frisks for weapons on one’s person have long been permitted on a much lower showing of reasonable suspicion. The Court accepted these privacy infringements because the danger is grave and the government could at least point to some suspicion of criminality to justify a brief *Terry* stop. But, when the police stop innocent individuals, resentment can build. After all, “[b]y the Bill of Rights the founders of this country subordinated police action to legal restraints, not in order to convenience the guilty but to protect the innocent.”

Provided that gun scanners can be improved to near-perfect accuracy, the technology does not implicate the core concerns of the Fourth Amendment because the scanners require no physical intrusion, reveal no personal details, and detect only contraband. This raises the question: what is constitutionally

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233. U.S. CONST. amend. IV (“The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated.”).
235. *Id.* at 22.
237. This accuracy requirement is critical, without which one could readily concede that the suspicionless use of gun scanners would be impermissible.
“unreasonable” about such a device? Some critics will respond with concerns about innocent individuals who are exposed to gun scanners. Is this not a modern version of the “general search” that the Framers hated? The answer is no: the effect on an individual subjected to a gun scanner is essentially non-existent because all that the police will see is a blurry outline of an individual’s body without any distinguishable anatomical details. By comparison, a search of one’s home or the use of a wiretap reveals intimate details, and a *Terry* stop leads to a physically invasive frisk. Effectively, the law-abiding citizen walking by a gun scanner is in no worse a position than the law-abiding citizen walking by a commonplace CCTV camera. Indeed, gun scanners invade individuals’ privacy to a lesser extent than surveillance cameras because they do not capture any identifying features.

Society should be far more comfortable with passive gun scanners than with the risks and resentment created by millions of *Terry* stops each year. Courts justify police stop-and-frisks at gunpoint because of “furtive movements,” issue search warrants based solely on an informant’s tip, and hold that individuals have no privacy interest in the numbers they dial on their telephones. By comparison, then, it seems strange to rule that neutral, detached gun-scanning technology would somehow be “unreasonable.” As Americans dutifully take off their shoes and subject themselves to revealing body-image scans at airports, society must ask whether an individual’s need for some kind of “metaphysical” privacy on the sidewalk is worth the cost of millions of *Terry* stops each year.

The Fourth Amendment has adjusted to advances in technology while maintaining a proper balance between society’s dual interests in law enforcement and privacy. Undoubtedly, technology changes what is acceptable under the Fourth Amendment. Even Justice Scalia, the Court’s most dedicated originalist, conceded this point in *Kyllo*:

238. See *NYPD Tests Technology*, supra note 23 (picturing a blurry outline of one’s body with a highlighted outline of the concealed weapon).

239. See, e.g., United States v. Pughe, 441 F. App’x 776, 778 (2d Cir. 2011) (holding that a federal agent’s testimony about the defendant’s “furtive movements” contributed to the agent’s probable cause to search); United States v. Paulino, 850 F.2d 93, 98 (2d Cir. 1988) (noting that “furtive movement[s] provide[] a legal basis for [a] protective search”); People v. Mundo, 780 N.E.2d 522, 523 (N.Y. 2002) (affirming the lower court’s finding that the “furtive movements of defendant prior to the stop when coupled with evasive actions of the automobile warranted a limited search of the vehicle”).


241. See *Smith v. Maryland*, 442 U.S. 735, 735–36 (1979) (holding that, even without a warrant, police may obtain records of the telephone numbers dialed by an individual because “[the defendant] assumed the risk that the company would reveal the information” that he “voluntarily conveyed . . . to the phone company” when making phone calls).

242. Vernick et al., supra note 17, at 571 (“At bottom, privacy may be about an almost metaphysical sense of vulnerability, akin to the fear in some cultures of having one’s picture [sic] taken.” (quoting Liptak, supra note 211, at C3)).
It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example, as the cases discussed above [e.g., California v. Ciraolo] make clear, the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private.243

Justice Scalia’s reference to Ciraolo is instructive because it shows how new technology appears to society when it arises, versus when it is no longer novel.244 Today, individuals know that their backyards can be seen by anyone flying overhead in a helicopter, but when airplane-surveillance technology was new, it certainly must have felt like an extremely intrusive government action. This evolution in society’s attitudes towards technology shows that gun scanners are simply a modern application of Katz—not a radical departure.

C. A New Rule

Comparing radiation detectors to gun scanners highlights the problem with Kyllo’s holding that “any information” obtained using sense-enhancing technology that “is not in general public use” is unconstitutional.245 First, Kyllo fails to meaningfully engage what privacy values the Fourth Amendment is designed to protect. It is unlikely that individuals would care about a temperature reading of the outside of their home, but, on the other hand, most people would likely be shocked to learn that the Court has found no privacy interest in the phone numbers they dial. Second, Kyllo unnecessarily freezes society’s expectations of privacy in time, when, in reality, society is constantly searching for an equilibrium with emerging technology. In 1789, it would have been horrifying to imagine flying constables inspecting the curtilage of one’s home from the air, and even in 1989, it would have been laughable to suggest that over one billion people would post intimate details about their lives on a public Internet forum for inspection.246 Thanks to airplanes and Facebook, both of these situations have come to fruition and the Fourth Amendment has adjusted appropriately.247


244. See Ciraolo, 476 U.S. at 215 (noting that “[i]n an age where private and commercial flight . . . are routine, it is unreasonable to have an expectation of privacy in airspace”).

245. Kyllo, 533 U.S. at 34 (emphasis added). Admittedly, the “at least if not in general public use” caveat in Kyllo could allow the doctrine to evolve as technology advances. See supra note 149 and accompanying text.


247. See, e.g., Ciraolo, 476 U.S. at 209, 215 (upholding police helicopter surveillance of the defendant’s backyard); State v. Altajir, 33 A.3d 193, 196–97, 205 (Conn. 2012) (allowing publicly viewable Facebook photos to be admitted in defendant’s probation revocation hearing); see also Anthony Johnson, Police Are Starting to Use Facebook to Catch Criminals, ABC 7
Just as *Katz* decoupled Fourth Amendment jurisprudence from its rigid trespass-based origins, the Court must similarly free itself from *Kyllo’s* rigid rule. Alongside technology’s ability to reveal to law enforcement more about private activities, comes the attendant benefit that such intrusions could be far more accurate and limited only to contraband. In a future case on the use of gun scanners, the Court could strike this proper balance by overturning *Kyllo* and holding: A passive device, operating in a publicly accessible area, that detects only contraband, and does so with near-perfect accuracy and without revealing other intimate, confidential, or embarrassing details, does not constitute a “search” under the Fourth Amendment.


249. For a different proposed revision of the *Katz-Kyllo* syllogism for Fourth Amendment searches, see Casey Holland, Note, *Neither Big Brother nor Dead Brother: The Need for a New Fourth Amendment Standard Applying to Emerging Technologies*, 94 KY. L.J. 393, 414 (2006) (proposing a sliding scale “merged standard” depending on how new and unexpected the police technology is).

250. The seeds of this idea come from Justice Breyer’s concurrence in *Minnesota v. Carter*, where he argued that a police officer looking in the window of a suspect’s home, although technically a “search,” was not “unreasonable.” 525 U.S. 83, 104–06 (1998) (Breyer, J., concurring). In fact, this course of action was preferable to obtaining a search warrant that, although it was based on probable cause, could easily have targeted the wrong homeowner: “But [the officer’s] chosen method . . . more likely have saved an innocent apartment dweller from a physically intrusive, though warrant-based, search if the constitutionally permissible observation revealed no illegal activity.” Id. at 105–06 (Breyer, J., concurring).

251. Other authors have agreed that technology that accurately detects only contraband alters the constitutional analysis and may be permissible. See Sam Kamin, *Law and Technology: The Case for a Smart Gun Detector*, 59 LAW & CONTEMP. PROBS. 221, 222 (1996) (“[W]hat is needed is a device that can reliably separate those carrying weapons from those who are not, without providing any other information about the individuals being screened. This hypothetical ‘smart detector’ would not constitute a search under the Fourth Amendment and could provide law enforcement with probable cause to make a more invasive search.”); see also Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association’s Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 449–50 (1997) (summarizing the ABA’s guidelines on weapons-detection technology, which recommend allowing scanning procedures “when weapons are in fact contraband (as in airports or in jurisdictions that make carrying a concealed weapon a crime”).

252. Alternatively, one could conceive of the distinction based on whether the information detected is “natural.” For example, the scent of cocaine and gamma rays from radioactive material are clearly “unnatural,” and, therefore, *should be* subject to police-detection equipment. Conversely, body heat and brainwaves are generated by everyone, are natural, and, thus, *should not be* subject to police-detection equipment, perhaps with the possible exception of unusually high body heat, which a suicide bomber, for example, might emanate. Applying this distinction, gun scanners use the terahertz radiation emitted by a firearm to detect the outline of weapons, and
This rule would also apply to detection of indirect evidence of contraband, such as the heat emissions from the house in *Kyllo*—as long as the detection occurred in a public area without compromising other privacy interests. 253 Under this proposed rule, the actual thermal scan in *Kyllo* would be permissible, as would the use of gun scanners and radiation detectors. Warrantless thermal scanning, however, showing “at what hour each night the lady of the house takes her daily sauna and bath,” 254 as well as warrantless wiretaps, voice amplification devices, hidden cameras in a suspect’s home, or a scan of the emails on individual’s cell phone in their pocket would remain unconstitutional. 255 Notably, in the case of gun scanners, this rule could only apply in jurisdictions like New York City where concealed firearms are almost always illegal. 256

Such a rule would not chill any protected activities and would not be a slippery slope to an “Orwellian world.” Instead, it draws a very clear exception for devices that can accurately detect contraband without invading other privacy interests. 257 This rule intrudes far less into individuals’ privacy rights than airport security checkpoints, backyard aerial surveillance, or collections of dialed phoned numbers. This rule remains faithful to *Katz*, yet modernizes it for the technological innovations facing law enforcement.

V. CONCLUSION

Gun scanners may provide both costs and benefits for society. Concerns, including infringement of privacy rights and the possibility of discriminatory

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253. As *Jones* demonstrates, technology is forcing a re-evaluation of Fourth Amendment concepts. *Jones* adds a new consideration to the Plain View Doctrine by barring GPS data from a suspect’s car, even though the vehicle was traveling in plain view on public roads at all times. United States v. Jones, 132 S. Ct. 945, 948–49, 954 (2012) (implementing the trespass rationale for its holding that police action was unconstitutional).


255. To be clear, “contraband” includes any substance that would form a valid basis for a *Terry* stop (or arrest) because it is typically illegal (e.g., firearms in a jurisdiction with strict laws, such as New York City). This would also include radioactive materials that, despite having some legitimate civilian uses, pose such a grave danger as to justify a *Terry* stop. In contrast, a hypothetical “Swiss Army Knife Detector” would not be valid because it would detect an object with primarily legitimate civilian uses, although such knives could also be used for criminal purposes.

256. See supra notes 184–85 and accompanying text.

257. Because gun scanners do not reveal anatomical details or facial features, they would be far less intrusive than either the ubiquitous CCTV cameras or the TSA’s airport scanners. Gun scanners only detect large metal objects carried under clothing and do not detect metal surgical implants under skin, thus, the scanners would not reveal private or potentially embarrassing possessions to the police. Understandably, seeing one’s image on a screen naturally prompts privacy concerns, but, if one looks at the actual images displayed by gun scanners, see *NYPD Tests Technology*, supra note 23, most people’s concerns would be alleviated.
uses of the technology, are valid; however, the benefits of reducing gun violence, enhancing police officer safety, and decreasing the number of *Terry* stops that cause resentment for innocent individuals far outweigh the costs. Regardless of their benefit, once gun scanners are in widespread use, their constitutionality is sure to be questioned. Current Supreme Court precedent in *Katz*, *Kyllo*, *Terry*, and *Place* create an uncertain future for gun-scanning technology. This is particularly true in instances of suspicionless use, given *Kyllo*’s holding. Because of this confusion, the Court should adopt a new rule that a passive device that only detects contraband with near-perfect accuracy and without revealing intimate details of one’s person, does not constitute a search under the Fourth Amendment.

Ultimately, society must collectively ask why it instinctively finds technology designed to stop terrorism (including airport scanners and radiation detectors) “reasonable;” while also holding onto the *Kyllo* rule that likely restricts the use of gun-scanning technology. The threat of terrorism certainly looms large in everyone’s mind, but so too should the constant toll that illegal gun violence exacts in America.