Katz's focus on privacy was revitalized in *Kyllo v. United States*,[44] in which the Court invalidated the warrantless use of a thermal imaging device directed at a private home from a public street. The rule devised by the Court to limit police use of new technology that can "shrink the realm of guaranteed privacy" is that "obtaining by 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." [45] Relying on *Katz*, the Court rejected as "mechanical" the Government's attempted distinction between off-the-wall and through-the-wall surveillance. Permitting all off-the-wall observations, the Court observed, "would leave the homeowner at the mercy of advancing technology—including technology that could discern all human activity in the home."

Although the sanctity of the home has been strongly reaffirmed, protection of privacy in other contexts becomes more problematic. A two-part test that Justice Harlan suggested in *Katz* often provides the starting point for analysis.[46] The first element, the "subjective expectation" of privacy, has largely dwindled as a viable standard, because, as Justice Harlan noted in a subsequent case, "our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." [47] As for the second element, whether one has a "legitimate" expectation of privacy that society finds "reasonable" to recognize, the Court has said that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." [48]

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moval of a mobile home in the course of an eviction from a mobile home park). The reasonableness of a seizure, however, is an additional issue that may still hinge on privacy interests. United States v. Jacobsen, 466 U.S. 109, 120–21 (1984) (DEA agents reasonably seized package for examination after private mail carrier had opened the damaged package for inspection, discovered presence of contraband, and informed agents).

[44] 533 U.S. 27 (2001).

[45] 533 U.S. at 34.

[46] Justice Harlan's opinion has been much relied upon. *See*, *e.g.*, Terry v. Ohio, 392 U.S. 1, 19 (1968); Rakas v. Illinois, 439 U.S. 128, 143–144 n.12 (1978); Smith v. Maryland, 442 U.S. 735, 740–41 (1979); United States v. Salvucci, 448 U.S. 83, 91–92 (1980); Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980); Bond v. United States, 529 U.S. 334, 338 (2000).

[47] United States v. White, 401 U.S. 745, 786 (1971). *See* Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (government could not condition "subjective expectations" by, say, announcing that henceforth all homes would be subject to warrantless entry, and thus destroy the "legitimate expectation of privacy").

[48] Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).