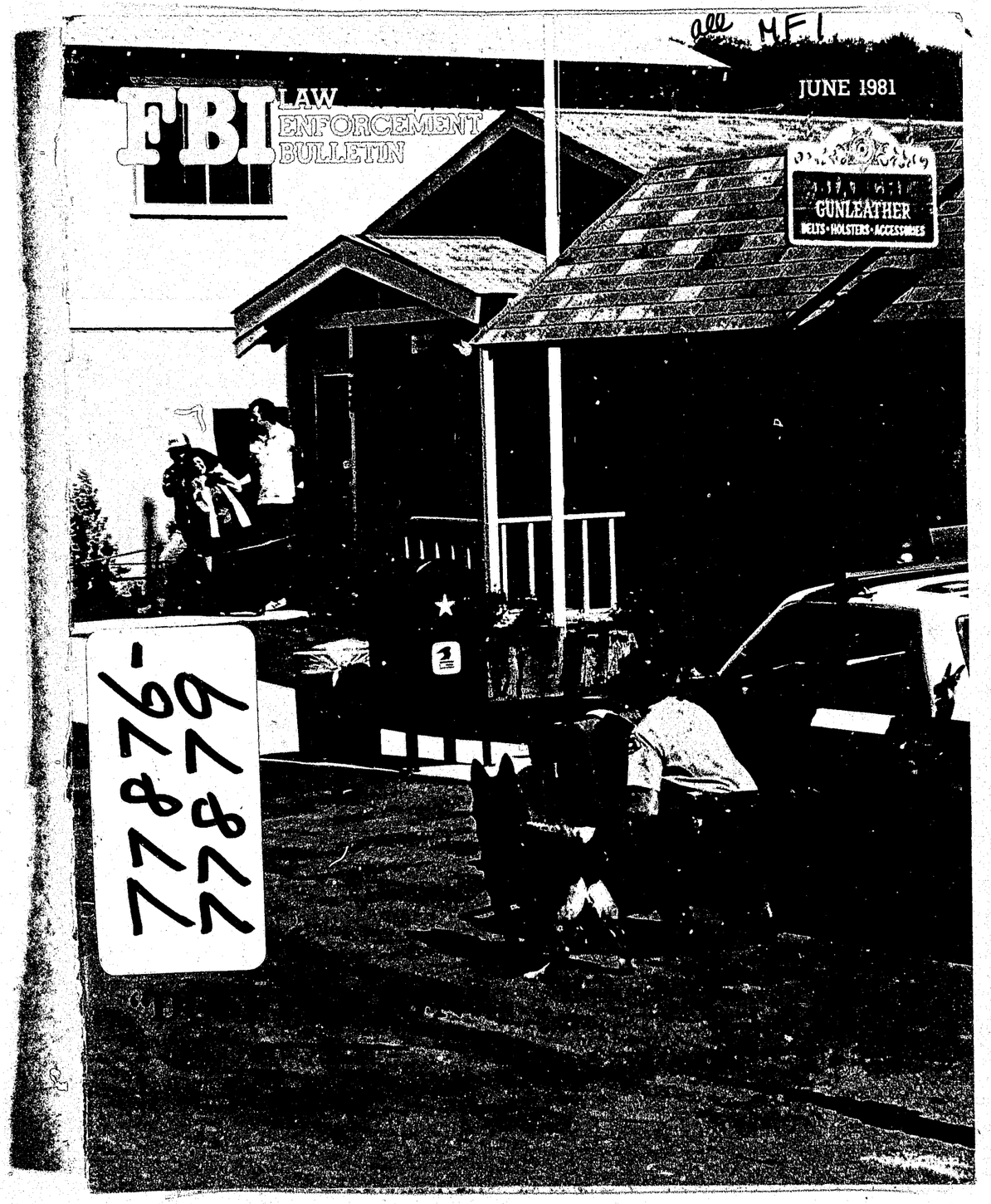

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"Duffystown" provides realistic exercises in tactical training. See story p. 16.

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In the *Katz* Eye

Use of Binoculars and Telescopes

(Part I)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Until the landmark decision in *Katz* v. *United States*,[1] the traditional view of what constituted a "search" for purposes of the fourth amendment required a determination of whether there was a physical intrusion into an area protected by the fourth amendment.[2] The fourth amendment indicated what those areas were, namely, "persons, houses, papers, and effects." Over the years, the Supreme Court had broadly construed the term "houses" to include generally any enclosed structure in which a person had a possessory interest.[3] The term was also construed to include the "curtilage," an area immediately surrounding the house that was used for

Special Agent McGuiness

domestic pursuits (the yard).[4] The area beyond the curtilage, characterized as "open fields," was not considered to be within the meaning of the term "houses," even though legally owned by an individual, and thus was not accorded fourth amendment protection.[5]

Based upon these principles, it was understood that if law enforcement officers were in a place that they had a right to be, including the open fields of an individual, and acquired evidence from that individual's premises without any physical intrusion into those premises, such activity on the part of the law enforcement officers did not constitute a search, and hence no compliance with the fourth amendment was required.[6] Thus, in *Goldman* v. *United States,*[7] where Federal Bureau of Investigation (FBI) Agents, lawfully present in an office adjoining defendant's, placed a sensitive listening device against the wall in order to detect what was being said in defendant's office, the Court ruled that since there was no trespass into defendant's premises, there was no search for fourth amendment purposes, and therefore no warrant was required for this activity.

The Katz Decision

This traditional view was changed radically by the *Katz* case. In *Katz,* the Government, acting without a warrant or other judicial authorization, intercepted defendant's end of telephone conversations by means of two microphones attached by tape to the top of two adjoining public telephone booths from which Katz regularly made calls.[8] Katz was subsequently prosecuted for the interstate transmission of wagering information by telephone in violation of a Federal statute, and tape recordings of the intercepted telephone calls were introduced in evidence over his objection. The Government argued that since no physical intrusion was made into the booth and since it was not a "constitutionally protected area" (the defendant having no possessory interest as such in the booth), a search for fourth amendment purposes did not occur. In holding that there was a search, the Court stated that it was erroneous to resolve questions of fourth amendment law on the basis of whether a constitutionally protected area is involved, "[f]or the Fourth Amendment protects people, not places." [9] This being the case, the reach of the "Amendment [also] cannot turn upon the presence or absence of a physical intrusion into any given enclosure." [10] The Court thus concluded that the Government's activities "violated the privacy upon which [the defendant] *justifiably relied* while using the telephone" [11] (emphasis added), and hence a search within the meaning of the fourth amendment had taken place.

". . . the view emanating from the courts is that visual enhancement devices can just as effectively violate one's reasonable expectation of privacy as aural enhancement devices."

Since no prior judicial authorization for the intrusion had been obtained and no traditional exception to the warrant requirement was present, the fourth amendment was violated.

In cases following the *Katz* decision, the Court appears to have used the phrases "reasonable expectation of privacy," [12] "legitimate expectation of privacy," [13] and "justifiable expectation of privacy" [14] interchangeably in characterizing when a fourth amendment search is present, and for purposes of this article, the words "reasonable expectation of privacy" are employed.

Underlying the *Katz* decision seems to be the notion that one's privacy can be just as effectively violated through sense-enhancing devices as through an actual trespass.[15] That being the case, can it now be said that use of devices to enhance one's vision (as opposed to hearing as was done in *Katz*) constitutes a search for which a warrant is required? This article explores the treatment accorded this question in the relevant cases arising since *Katz*.

First, it might be asked if there is some significant difference, in terms of interests to be protected, between seizing aural evidence (words) and seizing visual evidence. Can it be said that observing a person's actions never infringes his reasonable expectation of privacy? An argument can be made as follows: First, binoculars and telescopes, as opposed to surreptitious bugging devices, are in rather common use today, and second, society does not expect to be free from the nontrespassing, uninvited eye, as opposed to the uninvited ear. This is reflected in the fact that while extensive legislation exists regulating wiretapping and bugging,[16] no such similar legislation exists with respect to visual enhancement devices. This approach, however, has not been explicitly adopted by any court to date, perhaps because of the notion that one should not have to live the life of a mole in order to claim fourth amendment protection.[17] There is also the realization that visual observations can, in many instances, be more intrusive on privacy than eavesdropping on conversations. While there is no assurance that what is said in a conversation will not be repeated, a person's actions may be taken in seclusion, with the expectation that they are purely private.[18]

Thus, the view emanating from the courts is that visual enhancement devices can just as effectively violate one's reasonable expectation of privacy as aural enhancement devices.[19] This raises the more difficult question of when and under what circumstances a reasonable expectation of privacy arises. Does it make a difference if the visual enhancement device is used to view something in an open, public area,[20] as opposed to private premises?[21]

Use of a Visual Enhancement Device To View Into an Open Public Area

Although by no means a settled question in view of language from *Katz* that what a person "seeks to preserve as private, even in an area accessible to the public may be constitutionally protected," [22] there has been no case decided to date which has required a warrant for a visually enhanced viewing into an unenclosed public area, such as a public street.[23]

Viewings Into Premises

When visual enhancement devices are used to view into premises though, the courts have not been in agreement in their analysis of the reasonable expectation of privacy question. This article reviews the cases in this area to date.

In these cases, the officers invariably did not have probable cause for obtaining a search warrant prior to the viewings; the observations supplied the probable cause for the issuance of warrants. Evidence was then seized pursuant to the warrants, with the defendants subsequently claiming they were invalid because based upon illegally seized evidence, namely, the warrantless viewings made with the sight enhancement devices. Since this fact situation is present in all of the cases analyzed below, it is not repeated in each case discussion.

The first post-*Katz* case to deal with visual enhancement devices was *Fullbright* v. *United States*,[24] a case decided by the U.S. Court of Appeals for the 10th Circuit. Law enforcement officers entered at night upon the open fields surrounding a farm. With the aid of binoculars, the officers were able to observe defendants operating a still located inside a shed, a place the court assumed to be within the curtilage of the house. The officers made these observations from a position 75 to 100 yards away from the shed. In holding that the warrantless observations did not violate the fourth amendment, the court stated as follows:

> "[O]bservations from outside the curtilage of activities within are not generally interdicted by the Constitution. . . . By this we do not mean to say that surveillance from outside a curtilage under no circumstances could constitute an illegal search in view of the teachings of *Katz* v. *United States*. It is our opinion, however, that on the record before us . . . the observations in question may not be deemed an unreasonable search. . . ." [25]

Fullbright was subsequently cited as authority for upholding binocular observations in another case decided 2 years later by the Fifth Circuit Court of Appeals, *United States* v. *Grimes*.[26] In this case, the officer, situated in a field belonging to another, was able to observe, with the aid of binoculars, the defendant on his property. The defendant was engaged in placing cartons of untaxed whiskey into an automobile. The facts indicated that the officer was approximately 50 yards from defendant's house at the time of making the observations. The case does not indicate whether the defendant was within the curtilage of the house at the time of the observations. The court, without discussion, merely stated that the Government's activity "did not constitute an illegal search," [27] citing *Hester*, the famous open fields doctrine case, and *Fullbright*, without any reference to, or discussion of, the *Katz* decision.

Pennsylvania was next to scrutinize the use to which binoculars were put in *Commonwealth* v. *Hernley*,[28] a more complex case in terms of privacy expectations than either *Fullbright* or *Grimes*. In *Hernley*, an FBI Agent, acting on a tip, initiated a nocturnal surveillance of a printshop to determine if football gambling forms were being printed therein. The Agent could hear the presses in operation, but could not see inside the shop due to the height of the windows from the street. To remedy this, the Agent mounted a 4-foot ladder from a position off defendants' property, 30 to 35 feet away. From this vantage point and with the aid of binoculars, the Agent was able to view into the premises, detecting football parlay sheets being printed inside.

Defendants challenged the Agent's binocular observations, contending they constituted a search for which a warrant was required. In finding that the viewings did not constitute a search, the court reasoned:

> "Our case presents the situation in which it was incumbent on the suspect to preserve his privacy from visual observation. To do that the appellees had only to curtain the windows. Absent such obvious action we cannot find that their expectation of privacy was justifiable or reasonable. The law will not shield criminal activity from visual observation when the actor shows such little regard for his privacy." [29]

In the Nebraska case of *State* v. *Thompson*,[30] the defendant did, in fact, curtain his window, but to no avail insofar as the court was concerned. Officers, validly present in an alley behind the defendant's premises, were able to view into defendant's living room with binoculars and observe a marihuana party in progress. Unlike the situation in *Hernley*, there was a sheer curtain across the window, but it was not a barrier to the binocular observations. Defendant also employed drapes on the window, but at the time of viewing, they had been drawn back. Without mention of the *Katz* case, the court held that the officers had a right to be where they were when they made the observations and that "there was nothing unlawful in their use of binoculars." [31]

While the court in *Thompson* did not discuss the significance of the fact that the drapes were not drawn on the occasion of the viewings, an Illinois court in the case of *People* v. *Hicks* [32] did. There, officers were investigating possible gambling activity in the first-floor suites of a hotel in Chicago. On one occasion, an investigating officer made a warrantless 1:00 a.m. viewing into one of the suspected rooms using night binoculars and observed apparent gambling activity taking place. The court does not mention the position of the officer in making the viewings, but it was apparently a place that the officer had a right to be. The facts indicated that on some occasions the curtains in the suite were drawn; on others, they were not. The binocular observations were made when the curtains were not drawn. The court found that there was no intrusion into defendants' reasonable expectation of privacy, and in so deciding, considered it significant that the curtains were drawn on some occasions, but not on others. The court concluded: "Certainly, then, since the defendants were aware of a need to pull the curtains on two occasions, they cannot claim that they expected privacy on the other occasions." [33] In its decision, the court also noted that "we have been unable to find a single case which has extended [the *Katz*] doctrine to find a use of binoculars improper." [34]

The same reasoning was applied in *People* v. *Ferguson*,[35] another Illinois case decided the same year. A daytime surveillance was begun of a second-floor apartment after an officer observed suspicious activity outside the building. From a vacant lot approximately 60 feet from the building, the officer employed binoculars to view into the apartment 45 feet above the ground. The officer's surveillance was interrupted at one point by the curtains of the apartment being drawn. By means of the binocular observations, the officer was able to detect illegal gambling activity within the apartment. The court held that such observations did not amount to a search. "[D]efendant made no effort to block an outsider's view through the apartment window." [36] The court stated that under the *Katz* rule, "a person may not even be protected in his own home when he manifests activities to the 'plain view' of outsiders 'because no intention to keep them to himself had been exhibited.' " [37]

The Pennsylvania case of *Commonwealth* v. *Williams* [38] offered a slight factual variation from *Ferguson.* The defendant claimed that the third-floor location of his apartment gave him a reasonable expectation of privacy from government intrusion by visual enhancement devices. The officers were located on the third floor of a residence directly across from the apartment in question, 40 to 50 feet away. In order to pierce the darkness, the officers used binoculars and a "startron" [39] to view into the living room and kitchen windows. Neither window had curtains on them. In addressing defendant's fourth amendment claim, the court noted that while a third-floor apartment might have a higher increment of privacy attached to it than a street-level apartment observable from the street, the suspectibility of the apartment to observation from the apartment directly across was evident. As such, the court pointed out this was an even stronger case than the previous Pennsylvania case on point, *Commonwealth* v. *Hernley,* in which a ladder had to be mounted in order to make the viewings. Following the reasoning of *Hernley,* the court concluded that the occupants could have precluded all observations, including those made by the startron, by the simple expedient of curtaining the windows. Thus, the defendant had no reasonable expectation of privacy from observations made into the apartment.

While the defendant in *Williams* did not contend that the time of day was a factor to be considered in assessing a reasonable expectation of privacy, the U.S. Court of Appeals for the Fourth Circuit considered this as relevant in *United States* v. *Minton.*[40] In *Minton,* U.S. Treasury agents stationed themselves beyond the curtilage of defendant's house on a 12- to 14-foot high embankment overlooking a structure belonging to defendant 80 to 90 feet away. From this position, shortly after 6:00 p.m. on a November evening, the agents noted a truck's arrival on the property. By the use of binoculars, the agents were able to observe cartons containing illicit whiskey being unloaded from the truck. The court found that no reasonable expectation of privacy of defendant's was infringed by the visually enhanced observations "considering the time of day and all the surrounding circumstances." [41] The court did not describe in any greater detail what was meant by this reference to the time of day. This language suggests, however, that if the cover of darkness had been present, the court would have found a more difficult privacy question presented.

Should the area observed within the premises, and the limited use to which the binoculars are employed, have a bearing on the reasonable expectation of privacy issue? The Supreme Court of Washington answered this in the affirmative in *State* v. *Manly.*[42] The court found no intrusion into defendant's reasonable expectation of privacy when an officer made binocular observations of defendant's second-floor apartment window from a parking lot across the street from the apartment and from a public sidewalk 40 to 50 feet from the window. The officer testified that he observed vegetation resembling marihuana plants in the window with his naked eye and employed the binoculars merely to confirm this. In rejecting defendant's claim, the court held that the fact that the window was uncurtained negated any reasonable expectation of privacy claim, but also considered two additional factors as significant: (1) The observations were merely of the window and did not intrude further into the room hidden from public view, and (2) the binoculars merely confirmed earlier observations made with the naked eye.

Against this backdrop of cases finding visually enhanced viewings as not constituting searches for fourth amendment purposes are several significant cases which have held otherwise. This will be developed in the conclusion of this article. **FBI**

(*Continued next month*)

Footnotes

[1] 389 U.S. 347 (1967).
[2] *Silvernan* v. *United States*, 365 U.S. 505 (1961).
[3] *See* McLaughlin, "Search by Consent," *FBI Law Enforcement Bulletin*, December 1977.
[4] *See, e.g., Rosencranz* v. *United States*, 356 F.2d 310 (1st Cir. 1966).
[5] *Hester* v. *United States*, 265 U.S. 57 (1924).
[6] *Id.*
[7] 316 U.S. 129 (1942).
[8] See the Court of Appeals decision of *Katz* for these additional facts surrounding the recording of the conversations. *Katz* v. *United States*, 369 F.2d 130 (9th Cir. 1966).
[9] *Supra* note 1, at 351.
[10] *Supra* note 1, at 353.
[11] *Id.*
[12] *Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Miller*, 425 U.S. 435 (1976).
[13] *Rakas* v. *Illinois*, 439 U.S. 128 (1978).
[14] *United States* v. *White*, 407 U.S. 745 (1971).
[15] Note, *Telescopic Surveillance as a Violation of the Fourth Amendment*, 63 Iowa L. Rev. 708, 712 (1978). However, two pre-*Katz* cases from the Supreme Court indicated, in dictum, that the use of visual enhancement devices is not constitutionally impermissible. In *United States* v. *Lee*, 274 U.S. 559 (1927), the Court, in holding that it was not a search for a Coast Guard patrol boat to shine a searchlight on a motorboat, stated that such use was "comparable to the use of a marine glass or a field glass." Similarly, in *On Lee* v. *United States*, 343 U.S. 747 (1952), the Court observed that "the use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions."
[16] *See, e.g.*, the Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. 2510-2520 (1970).
[17] *See* Note, *Katz and the Fourth Amendment*, 23 Cleveland State L. Rev. 63, 70-72 (1974).
[18] *See supra* n.15, at 711-12 for development of this idea.
[19] Two cases seem to imply, however, that the sophistication of the device bears on the reasonable expectation of privacy question. *See United States* v. *Kim*, 415 F.Supp. 1252 (D. Hawaii 1976); *State* v. *Stachler*, 570 P.2d 1323 (Hawaii 1977). It would appear to be extremely difficult in many cases, however, to assess when binoculars and telescopes transform themselves from ordinary, common items to the level of "high-powered," "sophisticated," or "special equipment not generally in use." On the same note, the use of a simple flashlight has generally been held not to change an otherwise permissible search into an impermissible one. *See* 1 W. LaFave, Search and Seizure, sec. 2.2(b) (1978).
[20] This term "open, public area" is used to distinguish such places from public areas which have privacy aspects to them and in which some courts have found a reasonable expectation of privacy. *See, e.g., People* v. *Triggs*, 8 Cal.3d 884, 506 P.2d 232 (1973) (public park restroom); *People* v. *Diaz*, 376 N.Y.S.2d 849 (1975) (department store fitting room).
[21] "Premises" is used in the context of the house and the curtilage surrounding the house.
[22] *Supra* note 1, at 351.
[23] *See, e.g., Commonwealth* v. *Ortiz*, 380 N.E.2d 669 (Mass. Sup. Jud. Ct. 1978).
[24] 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968).
[25] *Id.* at 434-35.
[26] 426 F.2d 706 (5th Cir. 1970).
[27] *Id.* at 708.
[28] 216 Pa. Super. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971).
[29] *Id.* at 907.
[30] 196 Neb. 55, 241 N.W.2d 511 (1976).
[31] *Id.* at 513.
[32] 49 Ill.App.3d 421, 364 N.E.2d 440 (1977).
[33] *Id.* at 444.
[34] *Id.*
[35] 47 Ill.App.3d 654, 365 N.E.2d 77 (1977).
[36] *Id.* at 80.
[37] *Id.* at 79.
[38] 396 A.2d 1286 (Super.Ct. 1978).
[39] "The startron is a device which enables the observer to see into areas which would appear dark to the naked eye or through conventional binoculars." *Id.* at 1290.
[40] 488 F.2d 37 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).
[41] *Id.* at 38.
[42] 85 Wash.2d 120, 530 P.2d 306 (en banc), *cert. denied*, 423 U.S. 855 (1975).

END